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NATIONAL REPORTER SYSTEM—STATE SERIES

THE PACIFIC REPORTER

VOLUME 161

PERMANENT EDITION

COMPRISING ALL THE DECISIONS OF THE

SUPREME COURTS OF CALIFORNIA, KANSAS, OREGON
WASHINGTON, COLORADO, MONTANA, ARIZONA
NEVADA, IDAHO, WYOMING, UTAH
NEW MEXICO, OKLAHOMA

AND OF THE COURTS OF APPEAL OF CALIFORNIA
AND CRIMINAL COURT OF APPEALS
OF OKLAHOMA

WITH KEY-NUMBER ANNOTATIONS

CONTAINING A TABLE OF PACIFIC CASES IN WHICH REHEARINGS HAVE BEEN DENIED

DECEMBER 25, 1916 — FEBRUARY 5, 1917

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JUDGES

OF THE COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME

ARIZONA—Supreme Court.

HENRY D. ROSS, CHIEF JUSTICE.

JUDGES.

D. L. CUNNINGHAM.
ALFRED FRANKLIN.

CALIFORNIA—Supreme Court.

F. M. ANGELLOTTI, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

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LUCIEN SHAW.
W. G. LORIGAN.
M. C. SLOSS.
HENRY A. MELVIN.
WILLIAM P. LAWLOR.

District Courts of Appeal.

First District.

THOS. J. LENNON, PRESIDING JUSTICE.
F. H. KERRIGAN.[1]
JOHN E. RICHARDS.

Second District.

N. P. CONREY, PRESIDING JUSTICE.
VICTOR E. SHAW.
W. P. JAMES.

Third District.

N. P. CHIPMAN, PRESIDING JUSTICE.
E. C. HART.
A. G. BURNETT.

COLORADO—Supreme Court.

WILLIAM H. GABBERT, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

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WILLIAM A. HILL.
JAMES E. GARRIGUES.
TULLY SCOTT.
JAMES H. TELLER.
MORTON S. BAILEY.

IDAHO—Supreme Court.

ISAAC N. SULLIVAN, CHIEF JUSTICE.

JUSTICES.

ALFRED BUDGE.
WILLIAM M. MORGAN.

KANSAS—Supreme Court.

WILLIAM A. JOHNSTON, CHIEF JUSTICE.

JUSTICES.

ROUSSEAU A. BURCH.
HENRY F. MASON.
SILAS PORTER.
JUDSON S. WEST.
JOHN MARSHALL.
JOHN S. DAWSON.

MONTANA—Supreme Court.

THEO. BRANTLY, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

SYDNEY SANNER.
WM. L. HOLLOWAY.

NEVADA—Supreme Court.

F. H. NORCROSS, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

P. A. McCARRAN.
BEN W. COLEMAN.

NEW MEXICO—Supreme Court.

CLARENCE J. ROBERTS, CHIEF JUSTICE.

JUSTICES.

RICHARD H. HANNA.
FRANK W. PARKER.

OKLAHOMA—Supreme Court.

MATTHEW J. KANE, CHIEF JUSTICE.
J. F. SHARP, VICE CHIEF JUSTICE.

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SUMMERS HARDY.
CHAS. M. THACKER.

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NESTOR RUMMONS.
JEAN P. DAY.[2]
A. M. STEWART.[3]

Division No. 2.

C. A. GALBRAITH.
FRANK B. BURFORD.
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PRESTON S. DAVIS.
THOS. A. EDWARDS.
R. P. DE GRAFFENRIED.

Division No. 5.

W. J. CAMPBELL.
CHAM JONES.
JOHN W. HAYSON.

[1] J. D. Murphy served as judge pro tem.
[2] Resigned.
[3] Appointed October 24, 1916.

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OKLAHOMA—Supreme Court (Cont'd).

SUPREME COURT COMMISSIONERS (Cont'd).

Division No. 6.

J. C. ROBBERTS.
W. F. FREEMAN.
R. W. HIGGINS.

Criminal Court of Appeals.

THOMAS H. DOYLE, PRESIDING JUDGE.

ASSOCIATE JUDGES.

JAS. R. ARMSTRONG.
RUTHERFORD BRETT.

OREGON—Supreme Court.

FRANK A. MOORE, CHIEF JUSTICE.

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ASSOCIATE JUDGES.

THOMAS A. McBRIDE.
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Department 2.

ROBERT EAKIN, PRESIDING JUDGE.

ASSOCIATE JUDGES.

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LAWRENCE T. HARRIS.

UTAH—Supreme Court.

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JUSTICES.

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WM. M. McCARTY.

WASHINGTON—Supreme Court.

GEORGE E. MORRIS, CHIEF JUSTICE.

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O. R. HOLCOMB.
WALLACE MOUNT.

WYOMING—Supreme Court.

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ASSOCIATE JUSTICES.

CYRUS BEARD.
RICHARD H. SCOTT.

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COURT RULES

SUPREME COURT OF COLORADO

Adopted on the 22d Day of January, 1917

I. PRACTICE AND PROCEDURE IN NISI PRIUS COURTS

1. ACTIONS—HOW COMMENCED. Actions shall be commenced and summons issued and served as provided by the Code of Civil Procedure.

2. ALLEGATIONS IN ONE COUNT, ETC.—INCORPORATED IN OTHER COUNTS BY REFERENCE, ETC. Allegations appearing in any count, defense or counterclaim need not be repeated but may be incorporated in other counts, defenses or counterclaims by reference. Any written instrument may be made a part of a pleading by attaching it thereto as an exhibit.

3. DOCKETING CAUSE WHEN PLACE OF TRIAL IS CHANGED—FAILURE TO DO SO—ORDER VACATED. In case of change of place of trial of an action the party at whose instance such change is granted shall docket the cause in the court to which it was transferred within fifteen days after the receipt of the record by the clerk of such court. On failure to do so, the court ordering the change, on motion of the adverse party and notice to opposite counsel, with proof of such failure, shall set aside the order of transfer and shall thereupon be reinvested with full jurisdiction of the cause for all purposes, except where the change was ordered on account of the disqualification of the judge, in which instance a competent judge shall be secured to try the cause. The party at whose instance the place of trial was changed shall not be permitted to apply for another change upon the same ground.

4. MOTION TO QUASH PROCESS OR SERVICE—GENERAL APPEARANCE—EXEMPTIONS. A motion to quash a summons or scire facias or service of either shall, if overruled, be deemed a general appearance of the party making such motion. This rule shall not apply where the moving party claims exemption from service of process, nor to service of process on minors or persons judicially declared incapable of conducting their own affairs.

5. WHEN DISMISSAL ON NON-SUIT BARS ANOTHER ACTION. The dismissal of an action upon the ground that the testimony does not establish the cause of action involved, or a judgment of non-suit for the same reason, is a final determination of the merits of such action, and bars a new action between the same parties or their privies on the same cause of action, unless the court shall dismiss or direct judgment of non-suit without prejudice.

6. RETRIAL MAY BE LIMITED TO SPECIFIC QUESTIONS OF FACT. Upon a motion for a new trial, the court may, in its discretion, order a retrial of questions of fact with respect to which error was committed without resubmission of those concerning which there has been no error.

7. INSTRUCTIONS — OBJECTIONS — HOW MADE—REVIEW LIMITED TO SUCH OBJECTIONS. Counsel shall present to the trial court, at or prior to the close of the evidence, such instructions as they may desire. The court shall afford respective counsel a reasonable time and opportunity to examine proposed instructions, whether requested, or to be given by the court of its own motion, and to prepare and present specific objections thereto before such instructions are given to the jury. On motion for new trial, or on review by the supreme court, only the grounds so specified shall be considered.

8. MOTION FOR NEW TRIAL—NECESSITY OF —EXCEPTION. The party claiming error in the trial of any case must, unless otherwise ordered by the trial court, move that court for a new trial, and, without such order, only questions presented in such motion will be considered on review.

9. STAY OF EXECUTION—TERMS. The trial court shall stay execution until the expiration of five days from the time of entry of judgment, and upon motion within said five days, or within the time of any extension, may grant a further stay pending application to the Supreme Court for a supersedeas. Upon granting the stay of five days, or any further stay, the trial court may prescribe terms or require security, or both. (See rule 20.)

10. TRIAL COURT RECORD—ENLARGEMENT OF. The record in the trial court may be enlarged or added to as provided in the Code of Civil Procedure. (See Code of Civil Procedure, chapter 38, Revised Statutes of 1908.)

11. SERVICE OF NOTICE OF MOTION BY MAIL. Service of notice may be by mail as prescribed in the Code of Civil Procedure, and when so served the time shall be increased above that to be given where service is personal, one day for every one hundred and twenty-five miles, or fraction

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thereof, between the place of deposit and the place of address. (See chapter 37, Code of Civil Procedure, Revised Statutes of 1908.)

12. COURTS TO PROVIDE RULE FOR DISMISSAL OF ACTIONS. Nisi prius courts shall by rule provide for the dismissal of actions not prosecuted or brought to trial with due diligence.

13. TRIAL COURTS — MAKE ADDITIONAL RULES—OWN PROCEDURE. The nisi prius courts may make rules to govern their own procedure, not inconsistent with these rules or with law.

II. PRACTICE AND PROCEDURE IN THE SUPREME COURT

14. SESSIONS EN BANC AND IN DEPARTMENTS. The Chief Justice may convene the court en banc at any time, and shall do so on the written request of three Associate Justices. Subject to this provision, or as limited by the Constitution, sessions of the court in departments for the purpose of hearing oral arguments, and designation of the Justices to hear such arguments, shall be under the direction and control of the Chief Justice. In case of his absence or inability to act, such duties shall devolve upon the Justice who would next be entitled to become Chief Justice.

15. COURT—SPECIAL TERMS—NOTICE OF. Special terms of court may be held at any time upon an order signed by at least four of the Justices of the court and filed in the office of the clerk at least fifteen days prior to the day appointed for such assembling of the court. The clerk, on receipt of such order, shall forthwith enter the same at length in the records of the court, and give notice of the appointment of such special term, and the day appointed therefor, in one or more newspapers published at the seat of government.

16. WRIT OF ERROR—LIMITATION TWO YEARS—EXCEPTION. A writ of error shall not be brought after the expiration of two years from the rendition of the judgment complained of; but when a person thinking himself aggrieved by any judgment or decree that may be reviewed in the Supreme Court, shall be an infant, non compos mentis, or imprisoned when the same was rendered, the time of such disability shall be excluded from the computation of the said two years.

17. WRITS OF ERROR—SUPERSEDEAS—PROCESS ON WRITS OF ERROR. Writs of error shall be directed to the clerk or keeper of the records of the court in which the judgment or decree complained of is entered, commanding him to certify a correct transcript of the record to this court. In any case where a transcript of the record, duly certified to be full and complete, or an agreed record on error, has been filed or may be hereafter filed, in the office of the clerk of this court, before the issuance of a writ of error, it shall not be necessary, except in a case where a supersedeas may be allowed, to deliver such writ to the clerk of the inferior court; but the same may be filed in the office of the clerk of this court and such transcript or agreed record so filed with the clerk of this court shall be taken and considered to be a due return to said writ of error. In capital cases, in which a writ of error shall issue and be made to operate as a supersedeas to stay the execution of the judgment of the trial court, as provided by statute, such writ of error, and also the scire facias to hear the errors assigned, shall be made returnable forthwith. When a writ of error shall issue in a case where a supersedeas has been allowed after the filing of the record, and shall be served on the clerk of the inferior court, he shall return upon said writ that the same has been served upon him and that it appears by the endorsement thereon that a record has been filed in the office of the clerk of the Supreme Court.

18. SUMMONS TO HEAR ERRORS—SERVICE AND RETURN THEREOF—APPEARANCE. A scire facias or summons to hear errors in civil cases, and criminal cases not capital, shall require the defendant in error to appear in obedience thereto within twenty days after service thereof, and shall be returnable forty days after the issue thereof. The service thereof, when by publication, shall be complete upon the expiration of the last day of such publication. (See rule 32 infra.)

19. SCIRE FACIAS—ALIAS OR PLURIES MAY ISSUE. If a scire facias, or summons to hear errors, shall not be served, an alias or pluries may be issued without an order of court therefor.

20. STAY OF EXECUTION—REVIEW OF. If either party considers his rights have been, or will be, prejudiced by any ruling or order of the trial court in respect to any application for a stay or further stay of execution under rule 9, he may docket the case in the Supreme Court on error by filing a verified statement setting forth the nature of the cause of action, the judgment, rulings and other matters complained of, from which it appears the trial court has committed error to his prejudice, and the Supreme Court may order a stay or further stay of execution for such time and upon such terms and conditions as it may determine; and may make any order in the premises necessary to protect the rights of the parties. (See rule 9 supra.)

21. SUPERSEDEAS — APPLICATION FOR — RECORD COMPLETE. No supersedeas will be

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granted unless the record upon which the application is made be complete and duly certified by the clerk of the court below, with assignments of error appended thereto, which assignments must be supported by a succinct printed or typewritten brief. Counsel for plaintiff in error shall serve upon defendant in error or his counsel a notice of such application and copy of his brief, who may within ten days thereafter file a brief in opposition, a copy of which shall be served upon counsel for plaintiff in error, who may reply thereto within five days. The application shall then stand submitted. No application for a supersedeas will be considered by the court, or by any Justice in vacation, unless the cause shall have been docketed.

Upon the docketing of the cause, as aforesaid, the sum of ten dollars shall be paid to the clerk, and upon the allowance of the writ, or upon further prosecution of the cause, an additional sum of ten dollars shall be advanced to the clerk.

22. SUPERSEDEAS—EFFECT OF. When a writ of error shall be made a supersedeas, the clerk shall endorse upon said writ the following words: "The record in this cause having been filed in my office, with an order endorsed thereon that the writ of error herein be made a supersedeas according to law, this writ of error is therefore made a supersedeas, and shall operate accordingly;" which endorsement shall be signed by the clerk of this court.

23. WATER PRIORITIES—PROCEEDINGS ON REVIEW—ALIGNMENT OF PARTIES. Any party suing out a writ of error to review the whole or any part of a decree entered in any statutory proceedings adjudicating water priorities or the change of points of diversion thereof, shall file in this court a petition, as plaintiff in error, showing the priority and ditch rights claimed by such party, and making the assignments of error a part of the petition by reference only, and naming the ditches, reservoirs, pipe lines and other works, and the owners thereof who may be adversely affected by such proceedings in this court as defendants in error, and such alignment of parties in this court shall be according to such petition, and writ of error issued accordingly.

24. EXECUTION—RECALL OF. Whenever execution or other final process shall be issued upon a judgment at law or decree in equity, and the record of such judgment or decree shall be removed into this court by writ of error operating as a supersedeas, such writ of error may be served upon the officer in whose hands such execution may be, and thereupon all proceedings under such execution shall be discontinued, and such officer shall return the same into the court from which it was issued, together with the copy of the writ of error served on him, and shall set forth in his return to such execution what, if anything, he hath done in obedience to the command thereto.

Such service of the writ of error and supersedeas may be made by delivering to the officer having such final process for execution a copy of such writ of error and the endorsements thereon, with the certificate of the clerk of the Supreme Court, or of the clerk of the inferior court to whom the same is directed, that the same is a true and perfect copy of the original of such writ of error and the endorsements thereon.

25. BOND—POWER OF ATTORNEY FILED—EXCEPTION. Whenever a bond is executed by an attorney in fact, the original power of attorney shall be filed with the bond in the office of the clerk of this court, unless it shall appear that the power of attorney contains other powers than the mere power to execute the bond in question; in which case the original power of attorney shall be presented to the clerk, and a true copy thereof filed, certified by the clerk to be a true copy of the original.

26. TRANSCRIPT OF RECORD—BILLS OF EXCEPTIONS. Clerks of inferior courts in making up an authenticated copy of the record in civil cases shall certify to this court so much of the record, arranged in chronological order, as the plaintiff in error may, by præcipe, indicate. If the record, so certified, shall be insufficient, it shall be perfected at his cost; and, if unnecessarily voluminous, the cost of the unnecessary parts shall be taxed against him. Carbon copies shall not be used in preparing the record. Bills of exception need not be copied but the original sent up.

27. RECORD ON ERROR—PARTIES MAY AGREE. The parties to an action, after final judgment, may agree upon a record on error, which, when certified by the trial court, together with the assignment of errors, shall be certified by the clerk to the Supreme Court as the record on error.

28. TRANSCRIPT OF RECORD—ADDITIONAL—LEAVE TO FILE. When a party to any cause pending in this court asks leave, without suggesting a diminution of record, to file an additional or supplemental transcript of the record, he shall give at least twenty-four hours' notice thereof to the opposite party. At the time of giving such notice the additional or supplemental transcript shall be deposited with the clerk of this court for the inspection of the opposite party. Such motion shall be submitted under rule 11, supra, and, if leave is granted, the additional or supplemental transcript may be filed and considered in connection with the original transcript.

29. RECORD—BINDING. The transcript or agreed record shall be bound in half sheep

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or cloth, with substantial paper sides, thirteen inches in length and eight and one-quarter inches in width.

30. ASSIGNMENT OF ERRORS. Plaintiff in error shall assign errors in writing at the time of filing the record and each error shall be separately alleged and particularly specified; Provided, That when errors are assigned upon exceptions to the ruling of the court in the admission or rejection of evidence, which go to the same point, it shall be sufficient to refer to the folio numbers of the record when such rulings and exceptions appear without particularly specifying the evidence admitted or rejected.

When the error alleged is to the charge of the court, the part of the charge referred to shall be quoted totidem verbis in the specifications; Provided, Where the charge is divided into separate paragraphs or instructions, which are each duly numbered, and error is assigned as to one or more entire paragraphs or instructions, it shall be sufficient to designate the part of the charge referred to by giving the number prefixed to each paragraph or instruction so assigned for error.

The same shall be signed by an attorney of the court.

If the defendant in error desires to assign cross-errors, he shall do so at the time he files his brief, as hereinafter provided; the assignment of error shall be in writing and signed by an attorney of this court.

31. ERRORS—FAILURE TO ASSIGN—WRIT DISMISSED. If the plaintiff in error shall fail to assign error, the writ of error shall be dismissed.

32. JOINDER IN ERROR NOT REQUIRED—FILING BRIEF SUFFICIENT. No formal joinder in error shall be required, but if the defendant in error shall not in any manner appear within the time allowed for filing brief in his behalf, the cause may be heard ex parte or the judgment or decree of the court below may, in the discretion of the court, be reversed without a hearing. (See rule 18.)

33. DISCUSSION LIMITED—ERRORS STATED. Counsel will be confined to a discussion of the errors stated, but the court may, in its discretion, notice any other error appearing of record.

34. ABSTRACT OF RECORD—CONTENTS. Plaintiff in error shall within sixty days after the return day file with the clerk fifteen printed copies of an abstract of the record. Such abstract shall contain a brief statement of the contents of the pleadings, the judgment, the assignments of error relied on, and such other parts of the record as may be essential; but when for a proper understanding and determination of the questions raised it may be necessary, such matters may be stated fully or in the exact words of the record. If anything necessary to a determination of the case is omitted it may be supplied; defendant in error may, within the time allowed him for his brief, file fifteen copies of a supplemental abstract, and when the same is essential to a proper understanding of the case the cost thereof shall be charged to the plaintiff in error; otherwise, to him. The abstract shall be indexed and the folio numbers of the record shown on the margin thereof. It shall bear, on the front cover, the number and title of the case, the court to which the writ of error lies and the name of the trial judge.

35. ABSTRACTS AND BRIEFS—HOW PRINTED. Abstracts and briefs shall be printed on blue, white wove, antique finish, book paper of a weight the basis of which shall be eighty pounds to the ream, 25x38 inches in size. They shall be printed on pages 9⅛ by 7½ inches when trimmed, in small pica type, leaded, face of type page 22x40 ems pica, so printed as to leave an inside side margin of 1½ inches, and an outside side margin of 2⅜ inches, and a bottom margin of 2 inches. Extracts and quotations must be in the same type, either solid or indented, in the discretion of counsel. The number of the case in this court must be printed in large figures at the top of the outside cover.

36. BRIEFS—WHEN FILED—SERVICE ON OPPOSITE PARTY. The brief of plaintiff in error shall set forth the propositions to be argued and the authorities in support thereof, and be filed within forty days after the day fixed by rule for filing the abstract.

If it shall be filed in compliance with this rule the defendant in error shall file his brief within forty days after the expiration of the time for filing the brief of plaintiff in error.

Thirty days thereafter shall be allowed for the reply of plaintiff in error.

Fifteen copies of every brief shall be filed and two copies of every abstract and brief shall be served upon the opposing party or his counsel, if appearance shall have been entered. Proof of such service shall be filed with the clerk.

37. SUPPLEMENTAL BRIEFS—LIMITATION OF DISCUSSION—WHEN FILED. Either party may, not less than ten days prior to the submission of a cause for final determination, file a supplemental brief and the opposite party may, within five days thereafter, file a brief in answer thereto. Such briefs shall be confined solely to the citation and discussion of new authorities upon the propositions covered in the original briefs.

38. ABSTRACT OR BRIEF—FAILURE TO FILE—EFFECT OF. In case the plaintiff in error shall neglect to file an abstract and brief as required, or either of them, the opposite party may proceed ex parte or the court may dismiss the writ of error without notice.

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39. ABSTRACTS AND BRIEFS—TIME FOR FILING—EXTENDED OR ABRIDGED. No stipulation or motion shall suspend the operation of the rules, but for good cause shown the court, or a Justice thereof in vacation, may extend or abridge the time for filing the abstracts, briefs, or other papers.

40. CASES CITED—TITLE, VOLUME AND PAGE GIVEN. In citing cases from published reports, the title of the case shall be given as well as the volume and initial page and also the page whereon the matter for which the citation is made may be found. If a case is published in more than one series of reports, the citation to the official report should be given, if possible.

41. ORAL ARGUMENT — WHEN ALLOWED. Oral argument upon final hearing may be had by order of court, sua sponte, or upon written request therefor filed with the clerk at or before the filing of the first brief of the moving party. Due notice of the time set for the argument will be given by the clerk.

42. MOTIONS—HOW MADE—BRIEFS THEREON. All motions shall be in writing. After appearance the opposite party shall be entitled to notice of motions not of course.

The party filing any such motion shall have three days in which to file briefs in support thereof; the party opposing shall have five days after service of copy upon him to answer, and three days shall then be allowed after like service for reply. The motion shall then stand submitted.

All such briefs may be typewritten. Copies of the same shall be served upon the opposite party or his attorney.

43. RECORD OR PAPERS FROM FILES—WITHDRAWAL OF. No paper shall be taken from the files, without leave of court, except the record, which may be withdrawn by counsel for fifteen days and no more, for the purpose of making abstracts.

Every paper taken from the files, by leave of court or otherwise, must be retained in the custody of the party withdrawing it and must not be in any manner mutilated, taken apart, cut or marked.

44. REHEARING—APPLICATION FOR—WHEN FILED. Application for rehearing shall be by petition, signed by counsel, briefly stating the points wherein it is alleged that the court has erred. Such petition shall be filed within fifteen days after the filing of the opinion. Counsel shall present with such petition a brief of the authorities in support thereof.

A copy of such petition and brief shall be served upon the opposing counsel forthwith, who, if he desires, shall have ten days after service within which to file an answer thereto, and petitioner five days for reply. Such petition and briefs shall be printed and conform to the rules as to other printed briefs.

45. REHEARING—FILING PETITION FOR—EFFECT OF. The filing of a petition for a rehearing shall suspend proceedings under the decision until the petition is disposed of, unless the court in term time, or one of the Justices in vacation, shall otherwise order.

46. REMITTITUR — WHEN ISSUED. Upon the denial of a petition for rehearing, or if within fifteen days after final judgment, no such petition shall have been filed, the clerk shall, except in an original proceeding, issue remittitur to the court below.

47. PRINTER'S FEE—TAXED AS COSTS. The clerk, unless otherwise ordered, shall tax as costs a printer's fee of one dollar per page of one copy of any abstract, to be recovered by the party furnishing the same, if successful.

(Also see 25 Colo. 567, 56 Pac. 180.)

48. COSTS—COPIES OF RECORDS. The clerk shall be entitled to receive the fees allowed by law for copies of records before delivering the same, except in criminal cases where the defendant is unable to pay for a transcript of the record and such court shall have ordered the same to be furnished without charge.

49. COSTS—CLERICAL. Except as otherwise herein provided, there shall be paid to the clerk by the party filing any suit or proceeding, the sum of twenty dollars ($20.00), which shall be in full payment of all clerical costs of such party, except for copies of papers. The opposite party upon entering his appearance shall pay the sum of five dollars ($5.00), which shall be in full of his clerical costs. Said payments shall be taxed and recovered as costs.

50. RETRIAL OF SPECIFIED QUESTIONS OF FACT. On reversing a judgment, the court may order a retrial of specified questions of fact, and direct that specific questions of fact stand as established when it appears that neither party to the action will be prejudiced by such order.

51. JUDGMENT—AFFIRMANCE OF—WITHOUT WRITTEN OPINION. Whenever a writ of error shall be dismissed or a supersedeas denied, this court may, in its discretion, affirm the judgment of the court below. It may also affirm any judgment without filing a written opinion.

52. COPIES OF OPINION FURNISHED COUNSEL. In all cases where a written opinion is handed down, the clerk shall mail a copy to one attorney upon each side of the case.

53. ORIGINAL JURISDICTION—WRITS—APPLICATION FOR—CONTENTS. In any application made to the court for a writ of habeas corpus, mandamus, quo warranto, certiorari, injunction, or for any prerogative writ to be

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issued in the exercise of its original jurisdiction and for which an application might have been lawfully made to some other court in the first instance, the petition shall, in addition to the matter necessary to support such application, also set forth the circumstances which render it necessary or proper that the writ should issue from this court, and not from such other court.

In case any court, justice, or other officer, or any board or other tribunal, in the discharge of duties of a public character, be named in the application as respondent, the petition shall also disclose the name or names of the real party or parties, if any, in interest, or whose interest would be directly affected by the proceedings; and in such case it shall be the duty of the applicant obtaining an order for any such writ, to serve, or cause to be served, upon such party or parties in interest a true copy of the petition and of the writ issued thereon, in like manner as the same is required to be served upon the respondent named in the application and proceedings, and to produce and file in the office of the clerk of this court the like evidence of such service.

III. LIBRARY

54. The clerk shall file with the librarian of the Supreme Court library a complete set of the printed abstracts of record and briefs filed in all cases, which shall be suitably bound in volumes uniform in size, as near as practicable, with the reports of this court, which shall become a part of the library court. The clerk shall also cause one set of the printed briefs and abstracts to be bound for the files of this court.

55. No book shall be withdrawn from the library of this court, for any purpose, except by order of court in open session.

56. Silence is required in the library. Employees shall observe and enforce this rule.

IV. RULES GOVERNING ADMISSION OF ATTORNEYS TO THE BAR

57. No person shall be admitted to practice as an attorney or counselor-at-law upon evidence that he hath been admitted to the bar of another state or territory, if at the time of his admission to the bar of such state or territory he was a citizen of this state; nor shall any person be permitted to practice law in this state who shall not first have taken and subscribed an oath that he is a citizen of the United States, or has duly declared his intention of becoming such; that he will commence the practice of law in this state within three months from the date thereof, and make the same his permanent and usual occupation; that he has never been disbarred by any court of record in which he has heretofore practiced, and that he has never been convicted of felony, and whether disbarment proceedings have ever been instituted against him, and, if so, the court wherein they were instituted.

58. A Committee of Law Examiners is hereby constituted, consisting of five members of the bar of at least five years' standing, who shall be appointed from time to time by the Supreme Court, each of whom shall hold office as a member of such committee for a term of five years, and until the appointment of his successor.

59. Any person who has been admitted to practice as an attorney and counselor in the highest court of law of another state or country having power to admit to practice, and has practiced five years in its courts of record, may, in the discretion of the Supreme Court, be admitted and licensed without an examination: Provided, that the requirements for admission in said state or country are equal to those in this state.

Said proviso shall not, however, apply to a person who has been admitted to practice as an attorney and counselor in the highest court of law of said state or country having power to admit to practice, and has practiced ten years in its courts of record.

Such person shall prove, by his own affidavit or otherwise, if required, to the satisfaction of the Committee of Law Examiners: That he is a citizen of the United States, or has declared his intention of becoming such; that he is twenty-one years of age, stating his age; that he is a citizen of the state, stating his address, and stating with particularity the community or communities in which he resided and practiced covering a period of five years next preceding the date of his application.

Such person shall also produce a certificate of recommendation from one of the judges of the highest court of law of such other state or country, or furnish other satisfactory evidence of character and qualifications.

Such affidavit and recommendation or evidence shall be presented to the Committee of Law Examiners, who shall pass thereon, and, if satisfactory, shall give to the applicant for admission a certificate of recommendation for admission to the bar of this court, and said committee shall be entitled to hold said application for the period of sixty days for the purpose of making an investigation as to the character and qualifications of the applicant.

60. All other persons may be admitted and licensed upon producing and filing with the court the certificate of the Committee of Law Examiners that the applicant has satisfactorily passed the examination prescribed by these rules, and has complied with their provisions, and is a person of good moral character.

61. To entitle an applicant to an examination as an attorney and counselor, he must

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prove, by his own affidavit, and otherwise, if required, to the satisfaction of the Committee of Law Examiners:

(a) That he is a citizen of the United States, or has duly declared his intention of becoming such; twenty-one years of age, stating his age; and a resident of the state, stating his address; and that he has not been examined for admission to practice, and been refused admission and license, within six months immediately preceding, and has during said time diligently prosecuted the study of law, and that at the beginning of his study of the law he had the scholastic qualifications herein required.

(b) That he has studied law in the manner and according to the conditions hereinafter prescribed for a period of three years, and that he is the same person mentioned in his preliminary papers; except that persons who have been admitted as attorneys in the highest court of another state or country having jurisdiction to license attorneys, and have remained therein as practicing attorneys for at least two years, may be admitted to such examination after a period of law study of one year within this state.

62. Applicants for examination shall be deemed to have studied law, within the meaning of these rules, only when they have complied with the following terms and conditions, viz.:

(a) The provisions for requisite periods of study must be fulfilled, after the age of eighteen years, by serving in this state a regular clerkship in the office of an attorney of the Supreme Court who is a judge of a court of record or in the active practice of the law in this state, or by attending an incorporated law school, or a law school connected with an incorporated college or university, whose standing shall be approved by the committee, organized with competent instructors and professors, in which instruction is regularly given, or by pursuing such course of study, in part by attendance at such law school, and in part by serving such clerkship.

(b) The one year of law study prescribed by subdivision b, rule 61, for applicants who have been admitted to the bar of another state or country, shall be pursued after said practice for the period of two years in said state or country has been completed.

(c) Applicants who are not members of the bar, as above prescribed, shall satisfy said committee that they graduated from a high school or preparatory school whose standing shall be approved by the committee, or were admitted as regular students to some college or university, approved as aforesaid, or, before entering upon said clerkship or attendance at a law school, they passed an examination before the State Superintendent of Public Instruction in the following subjects: English literature, civil government, algebra to quadratic equations, plane geometry, general history, history of England, history of the United States; and the written answers to the questions in the above named subjects shall be examined as to spelling, grammar, composition, and rhetoric. The said examination shall be conducted in connection with the regular county examinations of teachers.

Attendance at a law school during a school year of not less than eight months in the year shall be deemed a year's attendance under this rule; and, in computing the period of clerkship, a vacation actually taken, not exceeding three months in each year, shall be allowed as part of such year.

It shall be the duty of attorneys with whom a clerkship shall be commenced to file a certificate of the same in the office of the clerk of the Supreme Court, which certificate shall in each case state the date of the beginning of the period of clerkship, and such period shall be deemed to commence at the time of such filing, and shall be computed by the calendar year.

63. The Committee of Law Examiners, before admitting an applicant to an examination, shall require proof that the preliminary conditions prescribed by these rules have been fulfilled; which proof shall be as follows, viz.:

(a) That he has been admitted to the bar of another state or country, by the production of his license or certificate executed by the proper authorities, and that he remained therein as a practicing attorney for at least two years, by the applicant's affidavit stating where he resided during said time.

(b) That he has served, after attaining the age of eighteen years, a regular clerkship in the office of an attorney of the Supreme Court who is a judge of a court of record or in the active practice of the law in this state, by filing with the committee a certified copy of the certificate of clerkship as filed in the office of the clerk of the Supreme Court, and filing an affidavit of the attorney with whom such clerkship was served showing the actual service of such clerkship, the continuance and end thereof, and that not more than three months' vacation was taken in any one year.

(c) The time of study allowed in a law school must be proved by the certificate of the dean or secretary of the faculty under whose instruction the person has studied, under the seal of the school, if such there be, in addition to the affidavit of the applicant, which must also state the age at which the applicant began his attendance at such law school; which proof must be satisfactory to the committee of examiners.

(d) The fact of graduation from a university, college, high school, or preparatory school, or of admission to a college or university, may be proved by a diploma or cer-

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tificate signed by some officer or instructor of the school, college, or university.

(e) The fact of having passed the examination before the Superintendent of Public Instruction may be proved by the certificate of that officer.

(f) That the applicant is of good moral character, by the certificate of the attorney with whom he has passed his clerkship, or of some attorney in the town or city where he resides; but such certificate shall not be conclusive, and the committee may make further examination and inquiry.

(g) When it satisfactorily appears that any diploma, affidavit, or certificate required to be produced has been lost or destroyed, without the fault of the applicant, or has been unjustly refused or withheld, or, by the death or absence of the person or officer who should have made it, cannot be obtained, the Committee of Law Examiners may accept such other proof of the requisite facts as they may deem sufficient.

64. As soon as possible after each examination, the committee shall furnish to the clerk of the Supreme Court the names and addresses of all persons taking the examination. The clerk shall immediately post said names and addresses in a conspicuous place in his office, and keep them so posted for a period of thirty days. The clerk shall also furnish said names and addresses to such newspapers as desire to publish them. Any person may during said period send to the committee any information indicating that the applicant is not of good moral character, and if they are satisfied that the claim is true, they shall refuse to certify the name of the applicant to the Supreme Court. Such information shall be deemed to be confidential. Otherwise, and if he shall pass the examination herein provided for, his name shall be so certified, and thereupon license will be issued.

65. The Committee of Law Examiners shall hold two examinations in each year. Such examinations shall be held in the months of June and December at the Supreme Court in the Capitol Building at Denver, Colorado. It shall also be the duty of the committee to pass upon the qualifications of applicants presenting themselves under the provisions of Rule 59, either at special meetings called by the chairman of the committee, when such applications may be presented, or by individual recommendation evidenced by a certificate signed by the members of the committee or the majority thereof.

V. CONTESTED ELECTIONS.

66. Any qualified elector wishing to contest the election of any person to the office of presidential elector, supreme, district, or county judge, shall, within thirty days after the canvass of the State Board of Canvassers, in case of a presidential elector, supreme, or district judge, file in the office of the Secretary of State a written statement of his intention to contest; and where the contest is for the office of county judge, such statement shall be filed in the office of the county clerk of the county in which the person whose election to the office of county judge is contested, resides, within thirty days after the canvass by the county board of canvassers, which statement shall set forth:

First—The name of the contestor.

Second—The name of the contestee.

Third—The office.

Fourth—The time of the election.

Fifth—The particular cause of contest.

The statement shall be verified by the affidavit of the contesting party that the causes set forth are true, as he verily believes.

67. It shall be the duty of the Secretary of State and the county clerk to safely keep and preserve all such statements in their respective offices.

68. If the contest is to be further prosecuted, the contestor, or some one in his behalf, or in behalf of the person for whose benefit the contest is made, shall, within thirty days after the filing of such statement of contest, file in the office of the clerk of the Supreme Court, if the contest relates to a presidential elector or supreme judge, or in the office of the clerk of the District Court in the proper county of the judicial district, if the contest relates to a district or county judge, a petition setting forth the filing of the statement of contest and the particular grounds therefor; which petition shall be verified by the oath of some credible person. Upon the filing of such petition, if the contest relates to a presidential elector or supreme judge, the clerk of the Supreme Court shall issue a summons, or if the contest relates to the office of district or county judge, then the clerk of the proper District Court shall issue a summons, directed to the sheriff of the county where the respondent resides, under the seal of the court; which summons, if issued out of the Supreme Court, shall bear teste in the name of the Chief Justice, and if issued out of the District Court, then in the name of the district judge, or of the presiding judge of said court, and be returnable in not less than ten nor more than thirty days; the same may be served by the sheriff of the county in the same manner that like writs are served from the District Court, and shall command the respondent to be and appear before the court from which the writ issues by a day to be named therein, and answer the petition of the petitioner in that behalf; such summons may be issued to any county in this state where the respondent may be found. Alias

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and pluries writs may issue in case service is not had under the original.

69. Upon the return day of the writ, if it shall appear that due service has been had, and the respondent fails to plead, default may be entered, and in that case, if the proceeding is pending in the Supreme Court, the court, or any four or more judges thereof in vacation, or if the proceeding is pending in the District Court, then the District Court, or any judge thereof in vacation, may grant the relief demanded, either with or without proof, as in the judgment of said court or the judges, or judge, thereof it may seem proper. The respondent's answer shall be under oath, and shall contain a general or specific denial of each material allegation in the petition intended to be controverted, and may contain a statement of new matter, showing in ordinary and concise language the right or title of the respondent to the office in question. The sufficiency of the petition or answer may be questioned by demurrer or motion. If a pleading be found defective, it may be amended on such terms as the court, or the judges or judge thereof, may deem proper.

Every material allegation of the petition not controverted by the answer will be taken as true; the statement of any new matter in the answer will, at the hearing, be deemed controverted by the petitioner. The petition, answer, and demurrer or motion shall constitute the pleadings in the case.

70. When the case is at issue, the court, or, as the case may be, the judges, or judge, thereof in vacation, shall hear and determine the same in a summary manner, without the intervention of a jury. Unless otherwise ordered, no witness will be examined in open court, or before, or in the presence of, the judges, or judge, thereof in vacation.

Either party, after the issues are formed, may have the deposition of any witness taken before any officer authorized by law to administer oaths, which deposition shall be taken and returned in the manner prescribed by the civil code for the taking and returning of depositions in ordinary civil actions.

71. The finding and judgment of the court, or the judges, or judge, thereof in vacation, as the case may be, shall be entered at length upon the record of the court. The court, or, as the case may be, the judges, or judge, thereof in vacation, shall award costs to the successful party, and execution shall issue therefor, the same as in other cases. Witnesses and officers shall receive like compensation as prescribed by law for like duties and services in cases in the District Court.

72. These rules shall take effect January 22, A. D. 1917, but any case in which final judgment is rendered at nisi prius before March 1, A. D. 1917, may be brought to this court under the previous rules or under these rules, at the option of the party seeking relief.

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THE

PACIFIC REPORTER

VOLUME 161

(173 Cal. 638)

In re STOUGH'S ESTATE. (L. A. 4925.)

(Supreme Court of California. Nov. 10, 1916.)

1. EXECUTORS AND ADMINISTRATORS ⟸20(10) —STAY OF PROCEEDINGS—UNDERTAKING.

An appeal from an order appointing an executor or administrator, not being one falling within Code Civ. Proc. §§ 942, 945, requiring in specified cases an undertaking to stay execution, will stay the appointment without any such undertaking.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 102–104; Dec. Dig. ⟸20(10).]

2. EXECUTORS AND ADMINISTRATORS ⟸20(10) —STAY OF PROCEEDINGS—MODE OF APPEAL.

Code Civ. Proc. §§ 941a, 941b, and 941c, authorize the taking of an appeal in a new and alternative method, by filing with the clerk of the court a notice of appeal. Section 941c declares that appeals perfected in such manner shall have the same force as appeals taken pursuant to sections 939, 940, and 941. Under the latter section an appeal was ineffective unless within five days after service of notice an undertaking in the sum of $300 was filed, or a deposit of that amount made with the clerk, or such undertaking was waived. Section 949 provides that in cases not covered by sections 942 and 945, the perfecting of an appeal by giving of the undertaking or making the deposit mentioned in section 941 stays proceedings in the court below. *Held*, that as an order appointing an executor or administrator is one of such character that proceedings will be stayed by the perfecting of an appeal without the giving of an undertaking required by sections 942 and 945, and as the new and alternative method of appeal is intended to provide a complete method different from the old, an appeal in accordance with sections 941a, 941b, and 941c will stay proceedings on an order appointing an executor or administrator, though no undertaking of any sort was filed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 102–104; Dec. Dig. ⟸20(10).]

Department 1. Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

In the matter of the estate of Florance A. Stough, deceased. Over objections by Oliver J. Stough and others, J. E. Fishburn was appointed executor, and the objectors appeal. On motion to stay proceedings. Motion for stay granted during pendency of appeal.

Wheaton A. Gray, of Los Angeles, and John H. McCorkle and Arthur J. Casebeer, both of San Diego, for appellant Stough. Ward, Ward & Ward, of San Diego, for appellant Southern Trust & Savings Bank. Ralph E. Jenney, for appellant Bank of Commerce & Trust Co. Fredericks & Hanna, of Los Angeles, for respondent.

SLOSS, J. Florance A. Stough died testate in the county of San Diego. J. E. Fishburn, one of the persons named in the will as executor, filed a petition for the admission of the will to probate, and for the issuance to himself of letters testamentary. Objections to the appointment of Fishburn were filed by Oliver J. Stough, who asked that letters of administration with the will annexed be issued to either Southern Trust & Savings Bank, or Bank of Commerce & Trust Company, and each of said corporations filed a petition, asking that such letters be issued to it. The court below made its order, appointing Fishburn executor of the will, overruling the objections of Stough, and denying the petitions of the respective banks for appointment as administrator. This order was made on the 2d day of August, 1916, and Oliver J. Stough and the two banks filed a notice of appeal therefrom on August 4, 1916. Notwithstanding the taking of the appeal, the respondent J. E. Fishburn has proceeded with the administration of the estate under said order of appointment. On September 5, 1916, his bond as executor was approved by the court, on September 19, 1916, he took and filed his oath as executor, and on September 21, 1916, letters testamentary were issued to him. On September 28, 1916, he commenced an action, as executor, against Oliver J. Stough and others, seeking to quiet the title of the estate to certain real property.

The matter now before us is an application for a stay of proceedings, restraining the court below from taking any further steps in the matter of the appointment of an executor, and restraining Fishburn from acting as such executor until the determination of the appeal.

[1, 2] The appeal in question was taken under the new and alternative method provided by sections 941a, 941b, and 941c of the Code of Civil Procedure, enacted in 1907. These sections authorize the taking of an appeal by the filing, with the clerk of the court,

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of a notice stating that "the person giving the same does thereby appeal to the Supreme Court or District Court of Appeal, as the case may be, from the judgment, order or decree," or from a specific part thereof. To an appeal taken under this method neither a service of the notice nor an undertaking is necessary. Under the law existing theretofore an appeal was "ineffectual for any purpose" unless within five days after service of notice of appeal an undertaking in the sum of $300 were filed, or a deposit of that amount made with the clerk, or such undertaking were waived. Code Civ. Proc. §§ 940, 941.

Sections 942 and 945 prescribe the various cases in which an undertaking must be given to stay execution of judgment. Section 949 provides that in cases not covered by the sections just referred to, "the perfecting of an appeal by giving the undertaking or making the deposit mentioned in section 941 stays proceedings in the court below upon the judgment or order appealed from."

An order appointing an executor or administrator is one of such character that its effect would have been stayed by the taking of an appeal and the filing of a $300 bond under sections 940 and 941 of the Code of Civil Procedure. In re Woods, 94 Cal. 567, 29 Pac. 1108. No stay bond would have been required. After the perfecting of the appeal and the filing of the $300 undertaking, the executor or administrator would have had no authority, during the pendency of the appeal, to take any steps by virtue of his appointment. In re Woods, supra.

The filing of a notice of appeal under the alternative method, in cases where a stay bond is not required by sections 942 to 945, is operative to the same extent as the filing and service of notice, followed by the giving of the $300 undertaking, under the old method. Section 941c provides that appeals perfected pursuant to the provisions of the foregoing section (941b) "shall have the same force and effect as appeals taken pursuant to the provisions of sections 939, 940, and 941 of this Code." It is argued by the respondents that the "taking" of an appeal, under the old method, was accomplished by the filing and service of a notice of appeal (section 940), and that the "perfecting" of the appeal, by the subsequent giving of an undertaking, is the act that works a stay of proceedings. Section 941c gives to appeals under the new method the force and effect of appeals taken under the old. This language, it is claimed, does not carry into the new appeals the effect of the undertaking which was given to "perfect" an appeal already "taken." But this, we think, is an unduly narrow interpretation of the later enactments, and one out of harmony with their true purpose. Section 941c imports into appeals taken under the preceding section (941b) the force and effect of appeals taken "pursuant to sections 939, 940, and 941 of this Code." Under section 940, the appeal is not effectual without the undertaking. Section 941 deals with the undertaking (or deposit in lieu of it) and with that subject alone. When, therefore, section 941c speaks of appeals taken pursuant to the provisions of sections 939, 940, and 941, it refers to appeals supported by the necessary undertaking. It is the "force and effect" of such appeals that is imported into appeals taken by the new method. The purpose of the provisions creating the alternative method was to simplify the procedure on appeal, and to do away with the difficulties and uncertainties that had frequently arisen over questions of the proper service of notice of appeal and the sufficiency of the undertaking required by sections 940 and 941. Experience had shown that the $300 undertaking exacted of an appellant was of little or no real benefit to the respondent. The new method was designed to enable appellants to dispense with this undertaking altogether. It was never contemplated that an appeal perfected under the new method should be less effectual or operative for any purpose than the appeal for which it was an alternative.

The question just discussed has, on several occasions, come before the court in bank, and the ruling has uniformly been the one here made. In each instance, however, the decision was made informally, from the bench, and we take this opportunity of expressing the views of the court in writing.

It follows that all of the proceedings had in the court below after the filing of the notice of appeal, and looking to the conferring of the powers of an executor upon Fishburn, and all steps taken by said Fishburn as executor were without authority and void.

The motion for a stay of proceedings is granted, and the respondent Fishburn is restrained from doing any act as executor of the will of said decedent during the pendency of the appeal.

We concur: SHAW, J.; LAWLOR, J.

(173 Cal. 642)

LONDON & LANCASHIRE GUARANTEE & ACCIDENT CO. OF CANADA v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (S. F. 7675.)

(Supreme Court of California. Nov. 10, 1916.)

1. MASTER AND SERVANT ⟸375(1) — WORKMEN'S COMPENSATION ACTS—RELATION OF PARTIES.

Where the manager of a ranch applied to the foreman of a railroad section gang for assistance in putting out a fire, an injury to one of the men before he returned to his work for the railroad was not received while in the employ of the railway, within the Workmen's Compensation Act (St. 1913, p. 279).

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⟸375(1).]

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2. MASTER AND SERVANT ⟸362—WORKMEN'S COMPENSATION ACTS—"USUAL COURSE OF BUSINESS."

A railway section hand, procured in an emergency by the manager of a ranch to assist in putting out a fire, was not engaged in the "usual course of business" of the ranch within Workmen's Compensation Act, § 14, excluding from its benefits any person whose employment is both casual and not in the usual course of the business of his employer.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⟸362.

For other definitions, see Words and Phrases, First and Second Series, Usual Course of Business.]

3. MASTER AND SERVANT ⟸373—WORKMEN'S COMPENSATION ACTS—"OUT OF AND IN THE COURSE OF EMPLOYMENT."

Where one was employed to fight fire on a ranch in an emergency, and after the work had ended stopped with the other men for a brief period, and was injured by stepping into a squirrel hole, his injuries did not arise "out of and in the course of his employment" within Workmen's Compensation Act, § 12a, providing for compensation in such cases.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⟸373.

For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

In Bank. Application by the London & Lancashire Guarantee & Accident Company of Canada for writ of review to the Industrial Accident Commission of California and others to review an award of the commission. Award annulled.

R. P. Wisecarver, of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

SLOSS, J. Certiorari to review an award of the accident commission. The estate of Luigi Marre, deceased, was the owner of a ranch, containing some 8,000 acres, in San Luis Obispo county, and was operating it through G. O. Marre, the administrator of the estate. The line of the Pacific Coast Railway Company runs along one side of the property. On November 23, 1914, a fire started on the Marre ranch, and was spreading through the brush and grass growing thereon. G. O. Marre, the administrator, gathered a group of men to fight the fire. He applied for help to the foreman of a section gang working on the Pacific Coast Railway, and the foreman sent a number of the section hands. Among these was the applicant Elia Mazzini. Mazzini went to work under Marre's direction, and was engaged in fighting the fire from 6 o'clock p. m. until midnight, by which time the fire was under control. The work had ended, and the men collected in a group preparatory to walking to their homes. They stopped for a brief period, and partook of drinks furnished by Marre. They were, at the time, still upon the Marre ranch. During this stop, Mazzini walked backward a short distance, and in so doing fell, breaking his leg. The commission found that his fall was due to his stepping into a squirrel hole.

Mazzini was paid at the rate of $1 an hour for the six hours during which he had worked. This payment was made by the estate of Marre.

[1] Mazzini filed his application for compensation, bringing in both the railway company and the Marre estate as parties defendant. The commission concluded that Mazzini's injury was not received while he was in the employ of the railway company, and dismissed the proceedings as to that company and its insurance carrier. In this the commission was clearly right. It did, however, find the facts necessary to impose a liability upon the estate of Marre, and made an award against the petitioner herein, the insurance carrier for said estate. It may be added that the estate of Marre had elected, in accordance with section 87 of the Workmen's Compensation Act (St. 1913, p. 279), to come under the compensation provisions of the act, which, by reason of the agricultural character of the industry, would not otherwise have affected it. The petitioner attacks the award on two grounds. Both, we think, are well taken.

[2] 1. The statute excludes from its benefits "any person whose employment is both casual and not in the usual course of the trade, business, profession or occupation of his employer." Section 14. Plainly Mazzini's employment was casual, and the commission so found. Was it in the "usual course of the business" of the employer? The estate of Marre is conducting a ranch. Its "business" is that of farming. A fire on the ranch would endanger the property used in the business, and hamper the prosecution of that business. The owner would, of course, be interested in preventing the spread of fire on his property. But we do not think that it can fairly be said that the stopping of fires is, for this reason within the usual course of the business of a farmer. A man conducting any business is concerned about the preservation and protection of the property employed in the business. It would hardly be said, however, that the fighting of a fire which threatens the place in which a commercial or manufacturing enterprise is conducted is within the usual course of said business. The phrase "course of business of the employer" is found in the English Compensation Act. In cases arising under that act the expression is held to cover the normal operations which form part of the ordinary business carried on, and not to include incidental and occasional operations having for their purpose the preservation of the premises or the appliances used in the business. Thus in Spiers v. Eldersile Steamship Co., Ltd. (2 Brit. Workmen's Comp. Cases, 205), it was held that scaling the boiler of a ship was not within the course of the trade or business of the shipowner. The same prin-

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ciple was applied in Hayes v. S. J. Thompson Co., 6 B. W. C. C. 130, where the overhauling of a barge was held not to be in the course of the business of the barge owner. The English statute defines the term "workman" as one employed "in the course of or for the purposes of the trade or business." Another section of the same act uses the words "for the purposes of the employer's trade or business." Certain English Cases, relied on by the respondents, are based upon this form of expression, which is not found in our act. But even under the broader language just quoted, one of the learned judges who decided the case of Hill v. Begg, 1 B. W. C. C. 320, said:

"I am not prepared to extend the burden of the act to householders who simply call in a man, not part of their regular establishments, to do a particular job as and when necessity arises."

Similarly, in Rennie v. Reed, 1 B. W. C. C. 324, where the workman claiming compensation has been called in about once a month to clean the windows of a doctor's home, in which he had his office, it was held that he was not employed for the purposes of the employer's trade or business.

Beyond all this, the employment must, under our statute, not only be in the course of the business of the employer, but in the usual course of such business. To say that the fighting of an accidental fire, which may occur only at intervals of years, is within the definition of the statute is to take all meaning and effect from the word "usual." The occasion calling for the employment of the applicant was accidental and unforeseen. It was not necessarily incidental to the conduct of the business. The employment was the product of an emergency, and its every characteristic marked it as the direct opposite of an employment in the usual course of the employer's business. See Maryland Cas. Co. v. Pillsbury, 158 Pac. 1031.

[3] 2. We also agree with petitioner's contention that Mazzini's injuries did not arise out of and in the course of his employment. Section 12a, Workmen's Compensation Act. Mazzini was employed to fight the fire. He worked at this employment for six hours at the rate of $1 per hour, and was paid for this time. He was injured after his work had ended, when he had left the precise place of his labors and was ready to go to his home. As a general rule, it may be stated that:

"There are excluded from the benefits of the act all those accidental injuries which occur while the employé is going to or returning from his work." Ocean Accident & Guarantee Co. v. Industrial Accident Com. (S. F. No. 7575), 159 Pac. 1041, decided September 8, 1916.

There is nothing to take the present case out of the principle just stated. The respondent suggests that there is some evidence that the men fighting the fire had been directed to "watch the fire in case it get away again." But the commission did not accept this testimony; its finding being "that the said accident happened a few minutes after the actual work of fighting said fire had been concluded." The fact that Mazzini was still upon the premises of the Marre estate does not, in and of itself, justify a different conclusion. Hills v. Blair, 182 Mich. 20, 148 N. W. 243; Gilmour v. Dorman, Long & Co., Ltd., 4 B. W. C. C. 279.

The award is annulled.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

(173 Cal. 625)

BURIAN v. LOS ANGELES CAFÉ CO.

(L. A. 3714.)

(Supreme Court of California. Nov. 9, 1916.)

1. MASTER AND SERVANT ⟸260(1) — ACTION FOR INJURY—CONSTRUCTION OF COMPLAINT—INJURY IN "COURSE OF EMPLOYMENT" — "LINE OF DUTY."

In a waiter's action for injury from carrying a heavy box of silverware, based on his employer's negligence, the complaint, alleging that such work was outside the scope of his employment, in view of Code Civ. Proc. § 452, requiring pleadings to be liberally construed, would be construed as alleging that he was given a task not within the legitimate range of his duties but imposed upon him under circumstances moving him to undertake it, so as to bring the case within Roseberry Act (St. 1911, p. 796) § 1 (1), excluding defense of assumption of risk as to injuries to a servant while engaged in the "line of his duty" or the "course of his employment."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 844; Dec. Dig. ⟸ 260(1).

For other definitions, see Words and Phrases, First and Second Series, Course of Employment; Line of Duty.]

2. MASTER AND SERVANT ⟸204(1) — INJURY IN "COURSE OF EMPLOYMENT"—"LINE OF DUTY."

Roseberry Act, § 1(1), abolishing the defense of assumption of risk as to a servant injured while engaged in the line of his duties or the course of his employment, only denies the right to invoke the act to one who during the hours of his employment is engaged in some undertaking not a part of his duty under his employment, so that, notwithstanding the carriage of a heavy box of silverware was outside of a waiter's duties, still in performing it he was engaged in the "line of his duty" and an injury therefrom was an injury in the "course of his employment."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 544; Dec. Dig. ⟸ 204(1).]

3. MASTER AND SERVANT ⟸204(1)—INJURY IN COURSE OF EMPLOYMENT—STATUTE.

Under the Roseberry Act, providing that where a recovery is sought upon the ground of want of ordinary care the servant's assumption of risk shall be no defense, assumption of the risk presupposes a failure on the part of the employer to perform some duty which he owes to the employé, some negligence of the employer, and the employer is not liable for every risk arising from the employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 544; Dec. Dig. ⟸204(1).]

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4. MASTER AND SERVANT ⊂⊃206—INJURY TO SERVANT—ASSUMPTION OF RISK—LIFTING.
A waiter about 20 years of age, injured while carrying a box of silverware weighing 150 pounds from a café to a mercantile establishment, was not entitled to recover damages from his employer for an injury received in consequence thereof, since he was the best judge of his strength and lifting capacity, and the risk of overtaxing it rested upon him.

[Ed. Note.—For other cases, see Master and Servant. Cent. Dig. § 550; Dec. Dig. ⊂⊃206.]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Max Burian, an infant, by Adele Tuschi, his guardian, against the Los Angeles Café Company. Judgment for defendant upon general demurrer to the complaint, and, from the judgment and from an order denying a new trial, plaintiff appeals. Judgment and order affirmed.

Olin Wellborn, Jr., and Alfred H. McAdoo, both of Los Angeles, for appellant. Davis & Rush, of Los Angeles, for respondent.

HENSHAW, J. Plaintiff, by his guardian ad litem, sued defendant to recover damages for injuries which he sustained while in defendant's employ. He charged that he was a waiter in the Bristol Café in Los Angeles, owned and operated by defendant. As such waiter he was earning, and was capable of earning, $200 a month. He was directed by his employer to carry a box containing silver dinner knives to a mercantile establishment known as Hamburger's. The package weighed about 150 pounds. The taking and carrying of this box from the Bristol Café to Hamburger's "was outside of the scope of the employment of plaintiff, but that plaintiff did not refuse to obey such order and direction for fear of losing his said position as a waiter in the employ of defendant; that plaintiff was wholly inexperienced in the carrying of heavy weights, and, while apprehensive as to his ability to carry safely the said box and its contents, nevertheless obeyed said negligent order given by defendant as above set forth. Plaintiff further alleges that defendant's officers, agents, and servants negligently failed to warn plaintiff of the danger or of any danger in carrying or attempting to carry the said box and its contents." While so carrying this box, by reason of its great weight plaintiff's left knee gave way under it and was dislocated. As a result of this injury, plaintiff "has and will have for the balance of his life a permanently weakened right knee and right knee joint." It has "wholly incapacitated him from engaging in his said business or trade of waiter and from engaging in any trade or business that would require the carrying by him of objects of much weight." Plaintiff was a minor "inexperienced in the carrying of heavy weights," and defendant was negligent in failing to warn him of the danger attendant upon carrying this box and in failing to furnish him "adequate or any help or assistance in the carrying of said box."

[1, 2] To this complaint a general demurrer was interposed and sustained. Upon behalf of plaintiff it was in his argument stated that the action is based on the negligence or want of ordinary care of the employer, and that notwithstanding that the employé, under the directions of the employer, undertook to carry the box, there is not open to the employer the defense of the assumption of risk, by virtue of section 1 of the Roseberry Act which was then in force. Stats. 1911, p. 796. That statute declares in terms that where a recovery is sought "upon the ground of want of ordinary or reasonable care of the employer * * * it shall not be a defense: (1) That the employé either expressly or impliedly assumed the risk of the hazard complained of." The trial court in sustaining the demurrer adopted and expressed the view that plaintiff by his own complaint put himself without the protection of this act, the court's reasoning here adopted by respondent being that the act applies only to an employé "while engaged in the line of his duty or the course of his employment as such," and that the complaint herein explicitly and repeatedly declares that the task upon which appellant was engaged at the time that he met with injury "was outside of the scope of the employment of plaintiff"; consequently that plaintiff having pleaded that he was employed as a waiter, and having pleaded that he met with injury in the performance of a task outside of that employment, he had debarred himself from the protection of the act. In this, however, the court adopted too narrow a view. Pleadings are no longer to be strictly construed against the pleader, but are to be liberally construed with a view to promoting justice. Code Civ. Proc. 452. Manifestly what the pleader meant to declare was that he was set to a task not within the legitimate range of his duties as a waiter, but still a task the performance of which was imposed upon him by his employer under circumstances moving him to the undertaking of it. Nor yet does the Roseberry Act by its language deny the right to invoke its remedial provisions under such a state of facts. When that act limits its protection to an employé who shall sustain injury "while engaged in the line of his duty or the course of his employment as such," it means no more than to deny the right to invoke the act to one who, during the hours of his employment, is engaged in some undertaking which is not a part of his duty under his employment, as where an employé is occupied in affairs of his own, or as where he undertakes to do something not within the course of his duty, and thus becomes a mere volunteer. Such

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cases are numerous and of varied character. It is sufficient to cite Georgia Pac. Ry. Co. v. Propst, 85 Ala. 203, 4 South. 711; Southern Ry. Co. v. Guyton, 122 Ala. 231, 25 South. 34; Mellor v. Manufacturing Co., 150 Mass. 362, 23 N. E. 100, 5 L. R. A. 792. Therefore we hold that, notwithstanding the task which appellant was called upon to perform was outside of the duties of his vocation and employment as a waiter, nevertheless in performing it he was engaged in the line of his duty and was injured in the course of his employment.

[3] This, however, but brings us to the fundamental question in the case. The assumption of a risk necessarily presupposes a failure upon the part of the employer to perform some duty which he owes to his employé. In other words, it presupposes, and to be of avail must be based on, the negligence of the employer. For it is not every risk against injury arising from which the employer is liable to his employé. Every human being lives under ceaseless risk, under perpetual peril to life and limb. Accidents of astounding character are ever occurring. It is not against all of these that an employer is an insurer of his employé. Many of them form in no real sense a risk of the employment. To render an employer liable for the resultant injury occasioned by any one of them, he must have failed in some duty to the employé. This is indicated by the language of the Roseberry Act where provisions are applicable to cases charging the employer with "want of ordinary or reasonable care." If he has not so failed, the injury falls into one of two categories, for neither class of which is the employer responsible. The injury will have resulted either from the fault of the employé alone, or will have been the result of inevitable casualty arising through no fault of either employer or employé.

[4] The negligence here charged consists of this: That the employer asked this minor to carry a box weighing about 150 pounds, without giving him assistance, or without warning him of the danger of attempting so to do. If this is a sufficient charge of negligence, the demurrer was improperly sustained. If there be one thing that every male human being from boyhood up knows himself better than does any one else, it is his physical strength and the limits thereof. Nature herself sets her danger signals whenever that physical strength is in danger of being overtaxed. So it is the general rule that:

"A servant is not entitled to recover damages from his master for injuries received in consequence of straining and overtaxing himself in lifting heavy objects in his master's service, since the servant is the best judge of his own lifting capacity, and the risk of not overtaxing it rests upon him." 4 Thomp. Comm. on Negligence, p. 860, § 4; Ferguson v. Phœnix Mills, 106 Tenn. 236, 61 S. W. 53; Stenvog v. Minn. Trans. Co., 108 Minn. 199, 121 N. W. 903, 25 L. R. A. (N. S.) 362, 17 Ann. Cas. 240; Worlds v. Georgia Ry. Co., 99 Ga. 283, 25 S. E. 646.

Nor does this principle suffer modification where the injury is sustained by a minor; for, as has been said, it will be an exceptional case where a minor is so young, so unintelligent, and so incompetent as not to appreciate his own physical limitations and the dangers of overstraining them. Such are the adjudications, as in Texas & N. O. Ry. Co. v. Sherman (Tex. Civ. App.) 87 S. W. 887, where it is said:

"It is not contended that an adult could have recovered under like circumstances, but appellee contends that, because the injured party was a minor and ignorant of the weight of the iron, the duty was imposed on defendant to advise him of its weight, and to warn him of the danger of trying to lift something that was too heavy for his strength. It seems to us that there can be no difference between the duty of a company to an adult who did not know the weight of the iron, and a minor who lacked such knowledge. For surely the most prudent man would presume that a 17 year old minor, doing a man's work and getting a man's wages, would have sense enough not to injure himself by his own exertions, and acting on that presumption, would not think to warn him of such danger."

See, also, Leitner v. Grieb, 104 Mo. App. 173, 77 S. W. 764.

It is true that in these cases, and the many others which could be cited, the question has been discussed after proof establishing the age of the minor; whereas, in this case the question is raised upon demurrer and the pleading is merely of minority. But aside from the declaration of the respondent that the proof was unquestioned that at the time of the injury the minor was over 20 years of age, there are facts pleaded in the complaint and equally conclusive upon the proposition that he had reached years and had attained experience fully sufficient to justify in this particular his being placed in the category of an adult. Thus by the pleading he was a waiter, earning and capable of earning $200 a month. No immature child can do this. A waiter's work is a man's work and of itself necessarily involves the lifting and carrying of burdens and the moving of weights. As to this particular weight it is pleaded that plaintiff was "apprehensive" of his ability to carry it. Enough, therefore, is established by the complaint to show that the things, which it is charged that the defendant did and failed to do, no more amounted to negligence in the case of this minor than in the case of an adult. This case, therefore, is in no essential similar to Foley v. Cal. Horseshoe Co., 115 Cal. 184, 47 Pac. 42, 56 Am. Rep. 87, relied on by appellant. There the minor was set to an unusual task in and about machinery, and it was held that his conduct was not to be measured by the rules applicable to the conduct of an adult under such circumstances, both because of the minor's tender years, of his inexperience in the particular task to which he was set, and of the doubtful proposition to be resolved by the jury as to whether he had a full appreciation of the increased dangers and risks

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of the strange employment. In the case at bar this plaintiff, touching the task which was set before him, under the circumstances of the case and under all the authorities, is chargeable with the knowledge of an adult.

The judgment and ordered appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(173 Cal. 631)

CRANE v. STANSBURY et al. (L. A. 3789.)

(Supreme Court of California. Nov. 9, 1916.)

1. ATTORNEY AND CLIENT ⟸166(3)—ACTION FOR FEES—SUFFICIENCY OF EVIDENCE.

In an action to recover an attorney's fees for services to defendants, wherein the complaint sought a recovery of a certain amount upon an account stated, upon an express contract and upon a quantum meruit, evidence *held* to sustain a verdict for plaintiff for the amount sought to be recovered, with interest.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 370; Dec. Dig. ⟸166(3).]

2. INTEREST ⟸18(3)—ACCOUNT STATED.

Upon establishing an account stated, interest would follow the principal sum.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 34; Dec. Dig. ⟸18(3); Account Stated, Cent. Dig. §§ 58–60.]

3. INTEREST ⟸45—EXPRESS CONTRACT.

On establishing a count upon an express contract for the payment of attorney's fees, where the amount became due and payable when the controversies were settled by compromise, the sum from that date would bear interest.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 94; Dec. Dig. ⟸45.]

4. ACCOUNT STATED ⟸1—CONTRACT FOR SERVICES OF ATTORNEY.

Where the relations between attorney and client under an express contract covered several years, and the attorney made disbursements and received payments on account, so that there was in fact an open account subject to adjustment and settlement, or where the attorney was entitled to recover only upon a quantum meruit, the matter is a proper subject of an account rendered and stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 1–8; Dec. Dig. ⟸1.]

5. ACCOUNT STATED ⟸7—EFFECT—QUANTUM MERUIT.

In such case, and even if the attorney was entitled to recover only under a count in quantum meruit, the amount of his recovery thereunder became fixed when the account became a stated account, so that he might recover upon an account rendered and stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 41–49; Dec. Dig. ⟸7.]

6. ACCOUNT STATED ⟸1—EXPRESS CONTRACT.

Under a special contract for the express payment of a sum named, or under a specialty, the mere rendering of a statement of the amount due, even when acquiescence in the correctness of the statement is shown, will not justify an action upon an account stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 1–8; Dec. Dig. ⟸1.]

7. ACCOUNT STATED ⟸6(4)—RENDERING OF ACCOUNT—DELAY.

Where an account was rendered, the recipient was bound to make his objections thereto within a reasonable time, and, if he did not do so within six months without satisfactory excuse therefor, there was an unreasonable delay, and his acquiescence would be presumed, and the account would become an account stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. § 39; Dec. Dig. ⟸6(4).]

8. ACCOUNT STATED ⟸20(1)—QUESTION FOR JURY—FRAUD AND MISTAKE.

Questions of fraud and mistake in combating the force of an account stated are for the jury, and, where assent is based upon acquiescence arising from a failure to object, the length of time which must pass before an account rendered becomes an account stated is a question of law.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 9, 98; Dec. Dig. ⟸20(1).]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Burton B. Crane against Charles Stansbury and another. Judgment for plaintiff, new trial denied, and defendants appeal. Judgment and order affirmed.

Thos. O. Toland, Lewis W. Andrews, and Andrews, Toland & Andrews, all of Los Angeles, for appellants. Ward Chapman, E. B. Drake, and John E. Biby, all of Los Angeles, for respondent.

HENSHAW, J. This action was brought to recover attorney's fees for services rendered by Oscar A. Trippet, plaintiff's assignor, to defendants. The complaint charged in several counts and sought a recovery for $2,160.40, with interest from the 11th day of July, 1911. One count charged upon an account stated, another upon an express contract, a third in quantum meruit. Trial was had before a jury, which rendered its verdict in a sum totaling the amount sued for with interest. From the judgment and order refusing them a new trial, defendants appeal.

[1-3] It is made to appear that in 1904 the city of Los Angeles let a contract to one Edwards for the construction of an outfall sewer from the city to the Pacific ocean many miles distant. The contract price exceeded half a million dollars. As security for its performance, Edwards was required to give and gave a bond in the sum of $282,500. He immediately assigned his contract to Stansbury and Powell, who assumed its obligations and undertook the work. In 1906 they encountered difficulties and ceased work, leaving a large part uncompleted. This abandonment of the contract at once raised serious and difficult questions. The city, in August, 1906, served notice of the rescission of the contract and of its intention to complete the work itself. The city did proceed with the work and completed it in November, 1907. Immediately upon the abandonment and in contemplation of the legal questions which had arisen and the legal actions which might arise, defendants consulted their attorney, Mr. McCutcheon. He in turn suggested the employment of Mr. Trippet to assist him in the consideration of the legal questions, to

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advise with him as to the course of action to be pursued, and to aid in the prosecution or defense of any actions which might be necessary. Some of the legal propositions thus requiring consideration went to the legality and validity of the contract between the city and the contractors, the justification of the contractors for their abandonment upon the ground of the impracticability of construction by reason of defective or impossible specifications, the right of the city to complete the contract when the contractors were insisting that the city should modify its specifications and permit them to do it, the liability of defendants' sureties upon their undertaking, and the defendants' liability over. The investigation of these matters necessitated great research in the law, and this was very largely done by Mr. Trippet. Actions were instituted, demurrers interposed and argued. The preparation of the litigation for trial it has been sufficiently made to appear rested in comparatively small degree upon the testimony of witnesses. Nine-tenths of the work of this preparation, as one of the attorneys testified, was professional work on legal questions. A very large part of this work Mr. Trippet personally performed. Indeed, there is no conflicting testimony against plaintiff's evidence that the value of Mr. Trippet's services was at least $2,500. This $2,500, less certain small payments made by defendants, was the amount sued for under these different counts.

The testimony of Mr. Trippet was to the effect that after Mr. McCutcheon's death defendants sought to employ him to take charge of these matters. He expressed an unwillingness to do so, but consented to join as counsel with some other reputable attorney or firm of attorneys. Defendant then employed the firm of O'Melveny, Millikin & Stevens. Millikin and Stevens of this firm took personal charge of the matter. Their testimony goes to the continued services of Mr. Trippet and the value of those services throughout the litigation. Messrs. Millikin and Stevens sought a compromise of the controversy and took charge of these negotiations. A compromise was effected. Thereafter, on July 11th, Mr. Trippet presented his account and bill to both Stansbury and Powell. This account contained some 10 or 12 items charged against defendants, payments to other people on account of fees, and other matters, and two specific items, one for $500 retainer fee, and the other for $2,000, the balance of the fee of $2,500 agreed by defendants to be paid. Upon the credit side of this account appeared certain items of cash paid by defendants to Mr. Trippet, some of which covered disbursements made by him, the rest of which was receipted for as on account of his fee, leaving a balance, as has been said, of $2,160.40. This account was unquestionably rendered and received by defendants at the time it bears date. Their own admissions establish this fact. Thereafter, in September, 1911, having heard no word from them, he sent them another statement "of balance due on account as per statement rendered," and he received no response to this. Again in December, 1911, he addressed to them a letter stating that in July he had presented to them his account and had received no remittance; "the balance due is $2,160.40, and I wish you would remit all or a part of it at once." On February 8, 1912, he wrote them another letter to like effect, therein stating that they had paid no attention to any of his letters or statements, and that he therefore requested their immediate attention to it. Following this, upon February 17, 1912, a reply came from these defendants to this effect:

"You surely have forgotten that some time before a compromise was talked of in the outfall sewer matter you voluntarily withdrew from the case and accepted what you had already received as compensation in full and agreed with us that no further demand for attorney's fees would be made on us."

In this letter is outlined the defense to this action. The jury, with the evidence before it of the character and volume of labor which Mr. Trippet had performed, of the value of that labor fixed by disinterested attorneys in varying sums from $5,000 to $10,000, having before it also the testimony of Mr. Trippet's associates that they were never advised of his withdrawal and never understood that he had withdrawn, and Mr. Trippet's own testimony that he had not withdrawn, and finally confronted with the improbability that an attorney would render services of such value, covering so long a period of time, and then without reason, and after the work had been done, withdraw from the employment after having received but a paltry $350, most naturally decided in favor of plaintiff's contention.

The main defense having thus been disposed of by the jury, appellants fall back upon certain minor contentions, most of which do not merit notice, some of which call for passing consideration. Thus the principal sum sued for, as has been said, was $2,160.40. The jury's award was for $2,441.85. This, by mathematical calculation, is found to include interest upon the principal sum. It is said that the demand was not a liquidated demand, that one of the counts charged in quantum meruit, that the value of the services was thus to be determined, and that an allowance of interest was therefore improper. Of course, all this presupposes a failure to establish either the count charging upon an account stated, or the count charging upon an express contract. In the former of these cases, if the account stated were established interest would, of course, follow the principal sum. In the second count upon an express contract it is not to be denied that, if that count were established, the $2,160.40 became due and payable when the controver-

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sies were settled by a compromise, and that from that date this sum would bear interest.

The evidence was amply sufficient to sustain the verdict either upon the count of an account stated or upon the count of an express contract. We have heretofore sufficiently indicated the evidence supporting the latter of these counts, Mr. Trippet himself testifying to the express contract under which his minimum fee was to be $2,500, and to be a larger sum than that in certain contingencies.

[4-6] So far as concerns the account stated, appellants are in error in their position that the fees of an attorney, under the circumstances here shown, even where the contract is found to be an express contract, may not be the subject-matter of an account rendered and stated. True it is that in the generality of cases, where the contract is a specific contract for the express payment of a named sum, where, in short, it is a specialty, the mere rendering of a statement of an amount due, even when acquiescence or consent is shown to the correctness of the statement, will not justify an action brought upon an account stated and thus set aside the specialty contract. A typical case of this is Jaspar Trust Co. v. Lamkin, 162 Ala. 388, 50 South. 337, 24 L. R. A. (N. S.) 1237, 126 Am. St. Rep. 33. There, the defendant being bound by his promissory notes, the holder of the notes calculated the principal and interest due, and the maker consented to the correctness of the amount, and the court, holding that the specific contract was not superseded, declared:

"The promisor is as firmly bound to pay the amount which is definitely fixed by the note as he could be by any implied promise; also there is no account for them to settle together. Each one with his pencil can ascertain at any moment just what is due, and the mere affirmation of what they both know and are already bound to cannot form a new contract."

But such is not the case here presented. True, by this action plaintiff seeks to recover only for the value of legal services, and it may be conceded that the sum to be paid, under the testimony of Mr. Trippet, was fixed by special contract. Nevertheless the transactions between the attorney and his clients, as is shown, covered a period of years. There were disbursements made by Mr. Trippet on behalf of his clients; there were receipts of moneys from those clients. It was a matter of adjustment—the correctness of the disbursements and the amount and application of the moneys received by Mr. Trippet from his clients. There was in a very real sense an open account, subject to adjustment and settlement. And finally, if it be said that there was no express contract for the payment of a fee, but that Mr. Trippet was entitled to recover only under the count in quantum meruit, nevertheless the amount of his recovery under this count became fixed when the account became a stated account and bore interest from that date. The bill of an attorney for services, like any other bill, may under proper circumstances and conditions be the subject of an account stated. Lane & Bodly Co. v. Taylor, 80 Ark. 469, 97 S. W. 441, 7 L. R. A. (N. S.) 924; Case v. Hotchkiss, *42 N. Y. 334; Gruby v. Smith, 13 Ill. App. 43.

[7, 8] The court instructed the jury that when an account was rendered it became the duty of the recipient to make his objections thereto within a reasonable time, and that if he did not do so the account became an account stated and the foundation of an independent cause of action based upon the account stated; also, that silence and nonobjection under the circumstances of this case for six months would constitute an unreasonable time. Exception is taken to these instructions. But the complaints made against them are not well founded. They are unimpeachable in point of law. Defendants were not denied the opportunity to explain their silence. Their explanation has been outlined. It was that they paid no attention to this account, that they thought it was rendered through a bookkeeper's error, and that they relied upon the parol agreement which they had had with Mr. Trippet, whereunder he had withdrawn from the case, accepting what he had received as full compensation for his services. All that need be said upon this proposition is that it is established by the verdict of the jury that it was not believed. All that is left, then, to the case, is that the account was rendered in July, that the defendants were repeatedly reminded of it and took no action upon it, and not until Mr. Trippet's demand took on a peremptory tone did they pay any attention to it. While all questions of fraud and mistake in combating the force of an account stated are questions of fact for the jury, where assent is based upon acquiescence arising from a failure to object, the length of time which must pass before an account rendered becomes, by virtue of the recipient's failure to object, an account stated, is one of law for the court. There is here no controversy over the date of the reception of the account, the determination of which controversy would be a matter for the jury; nor yet over the date when defendants first objected to it, which also would be a matter for the jury; nor finally over the defendants' explanation of its delay, which likewise is a matter for the jury. What the court told the jury in effect was that this delay of six months, if unsatisfactorily explained, was as matter of law unreasonable, and that because of it acquiescence would be presumed and the account would become an account stated. Such, we repeat, is the law. Cusick v. Boyne, 1 Cal. App. 643, 82 Pac. 985; Hendy v. March, 75 Cal. 567, 17 Pac. 702; Standard Oil Co. v. Van Etten, 107 U. S. 325, 1 Sup. Ct. 178, 27 L. Ed. 319; Fleischner v. Kubli, 20 Or. 328,

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25 Pac. 1086; Wiggins v. Burkham, 77 U. S. (10 Wall.) 129, 19 L. Ed. 884.

Numerous other objections are made. They have all been considered. For the most part they revolve around the legal principles which we have considered and passed on, and they do not merit specific notice. Certain others are unfairly presented. To illustrate: Testimony was being taken of attorneys Mr. Millikin, Mr. Morton, and Mr. Pruitt. The examination threatened to become unduly prolonged. The following then took place: The court said:

"We are taking up a lot of time. If you want me to testify, I will testify that Mr. Millikin, Mr. Morton, and Mr. Pruitt, the only ones I have seen, are prominent lawyers here; that they have had a great deal of business of different kinds; and that they are leading lawyers of the bar. Shall I be sworn, or will you consider that I have so testified?"

Appellants in their brief complain of this as an error and irregularity which prevented them from having a fair trial. Just how nor why is not shown. Presumptively it could only have been because the court made this statement not under oath. Yet appellants omit to point out that in answer to the question of the court their attorney declared: "I will consider that the witness would so testify if on the stand." Again, complaint is made because the court instructed the jury that but one payment of $250 had been made to Mr. Trippet, for which payment credit was given in his account. Yet by the very admissions of the answer and by the testimony of the defendants themselves no pretense is made that there was ever more than one payment of $250 made to Mr. Trippet.

These are exemplars of numerous like complaints made by appellants. It would serve no profitable purpose to consider them all.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(31 Cal. App. 576)

ROSENBAUM ESTATE CO. v. ROBERT DOLLAR CO. (Civ. 1764.)

(District Court of Appeal, First District, California. Sept. 29, 1916.)

1. LANDLORD AND TENANT ⟸202(3)—LEASE—CONSTRUCTION—"AT THE SAME RENTAL."

In view of Civ. Code, § 1945, providing that, if a lessee of real property remains in possession after expiration of the hiring, the parties are presumed to have renewed the hiring on the same terms, an agreement at the expiration of a lease that the lessee should remain in possession from month to month "at the same rental" does not imply that the rent was thereafter to be payable at the end of each month instead of in advance, as required by the lease, though section 1947 provides, in the absence of contract, that rent is payable at the termination of the respective rent periods.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 806; Dec. Dig. ⟸202(3).]

2. CONTRACTS ⟸170(1) — CONSTRUCTION — PRACTICAL CONSTRUCTION BY PARTIES.

Where the meaning of a contract is doubtful, the acts of the parties done under it afford one of the most reliable means of arriving at their intention.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. ⟸170(1).]

3. LANDLORD AND TENANT ⟸196 — RENT — LIABILITY OF LESSEE.

Where the rent of premises was due monthly in advance, and the lessee remained in possession after the end of the month for which it had paid rent, it was liable for rent for the following month, unless warranted in removing by Civ. Code, §§ 1941, 1942, providing that the lessor of a building intended for occupation by human beings must, in the absence of agreement, keep it in a condition for such occupation, and if repairs are necessary, and are not made after reasonable notice, the lessee may vacate the premises and shall be discharged from further payment of rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 737–740; Dec. Dig. ⟸196.]

4. LANDLORD AND TENANT ⟸188(1)—RENT—LIABILITY OF LESSEE.

Where leased premises in which the lessee's bookkeeping department was conducted by ten employés were very damp during the last two years of the tenancy, but the lessee gave no definite notice to repair, it is not relieved from liability for the current month's rent on removing from the premises on two day's notice; the rent having become due at the beginning of the month.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 782, 784, 786; Dec. Dig. ⟸188(1).]

Appeal from Superior Court, City and County of San Francisco; Marcel E. Cerf and E. P. Shortall, Judges.

Action by the Rosenbaum Estate Company against the Robert Dollar Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Nathan H. Frank and Irving H. Frank, both of San Francisco, for appellant. Heller, Powers & Ehrman, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of the plaintiff and from an order denying the defendant's motion for a new trial in an action to recover rent.

The defendant had been in possession of certain premises belonging to the plaintiff for five years under a written lease which, among other things, provided that the rent should be $300 a month to be paid in advance on the 1st day of every month. Just prior to the expiration of the written lease the parties orally agreed that the defendant might remain a tenant of the premises "from month to month at the same rental" provided for in the written lease. The defendant accordingly remained in possession of the premises for six months under this new arrangement, paying the rent in advance on the 1st day of each month up to December 31, 1913.

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and on January 5, 1914, upon two days' notice to the plaintiff that it would vacate the premises, it removed therefrom.

The first contention of the appellant is that the rent during the period that it occupied the premises from month to month was not payable in advance, but at the end of the month, and that this action, having been begun on the 19th of January, 1914, for the rent of the premises for that month, was prematurely brought, and that the finding of the court that the rent was payable in advance is without support in the evidence.

[1-3] We are unable to agree with this view. From the record it appears that the defendant was to remain in possession of the premises from month to month and to pay the same monthly rental as was provided for in the written lease. We think the arrangement contemplated the payment of the rent in advance. An important incident of the rent is the time of its payment; and the phrase "at the same rental," as employed by the parties in this instance, was undoubtedly, in view of their subsequent conduct, intended to cover both the amount of the rent and the time of its payment. Under section 1945 of the Civil Code, if the tenant had simply remained in possession of the premises after the expiration of the written lease, and nothing had been said between the parties, and the landlord had accepted rent, the law would have conclusively presumed that the hiring was on the same terms as the expired lease; and we think it can hardly be said that, where there is an express agreement that the tenant shall remain in possession from month to month at the same rental, the parties contemplated any change in the time of payment of the rent from that which had previously prevailed. Had there been no previous hiring, the appellant's position would be very strong that the time of payment would be as provided for in section 1947 of the Civil Code, viz. at the end of the period of the hiring; but the circumstances of the verbal renting in this case, and the course thereafter pursued, sufficiently attest the understanding of the parties that the tenant was to continue to pay the rent in advance. Where the meaning of a contract is doubtful, the acts of the parties done under it afford one of the most reliable means of arriving at the intention of the parties. Mayberry v. Alhambra, etc., Co., 125 Cal. 446, 54 Pac. 530, 58 Pac. 68; Keith v. Electrical Engineering Co., 136 Cal. 178, 181, 68 Pac. 598. In our opinion, therefore, having remained in possession of the premises after the 31st day of December, 1913, the tenant was liable for rent for the month of January, 1914, unless it was warranted in removing therefrom under the terms of sections 1941 and 1942 of the Civil Code, which provides that the lessor of a building intended for occupation by human beings must, in the absence of an agreement to the contrary, put and keep it in a condition for such occupation, and that, if repairs to the premises are necessary, and are not made after reasonable notice, the lessee may vacate the premises, and shall be discharged from further payment of rent, which brings us to the second contention of the appellant, viz. that the neglect of the landlord to make repairs of the character indicated justified the appellant in summarily vacating the premises, and relieved it from the obligation to pay any further rent.

[4] The evidence shows that the basement of the premises (in which was conducted the bookkeeping department of the defendant's business, giving employment to ten persons) was very damp during the greater part of the last two years of the tenancy. It does not appear, however, that the defendant gave to the plaintiff any definite notice to repair. True, according to the evidence introduced by the defendant, the attention of the plaintiff was called to the condition of the basement, and on one occasion repairs were made; but apparently the defendant, realizing that the building stood on filled land over which the waters of San Francisco Bay formerly flowed, and which was subject to seepage, and expecting in the near future to move into a new building, concluded to tolerate the condition of the basement. This view is borne out by an examination of all the evidence in the case, and especially by the circumstance that the defendant, at the termination of the written lease, entered into the present oral lease after it had known for 18 months the condition of the premises about which it now complains. It is true that one of the witnesses for the defendant testified that three days before the vacation of the premises the condition of the basement on account of accumulated seepage had become acute, and could no longer be tolerated; but there was no attempt to show that the condition could not be remedied, or that any notice was given to the plaintiff to repair the defect and make the premises habitable. The only notice then given by the defendant was a letter written on January 3d to the effect that on the 5th day of that month the defendant would vacate, which letter the plaintiff received on the day the defendant moved out.

Complaint is made that the defendant was not permitted to introduce evidence as to the effect upon the health of the defendant's employés of the condition of the basement; but the court permitted proof of such condition, and stated that it would itself draw its conclusion as to its effect upon the health of the occupants. We see no error in this ruling.

Judgment and order affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

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(31 Cal. App. 539)

KNORP v. BOARD OF POLICE COM'RS OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 1915.)

(District Court of Appeal, First District, California. Sept. 28, 1916. Rehearing Denied by Supreme Court Nov. 27, 1916.)

1. LIMITATION OF ACTIONS ⟸74(1)—LACHES—APPLICATION FOR REINSTATEMENT TO POLICE FORCE—STATUTES.

Under Code Civ. Proc. § 338, specifying what actions must be brought within three years, section 343, providing that an action for relief not before provided for must be commenced within four years, and section 352, providing that the time of disability by insanity, etc., is not a part of the time limited for the commencement of an action, where a police officer collapsed on account of mental strain, later becoming insane, obtained three months' leave of absence without pay, and tendered his resignation as a member of the force to take effect at a time not specified, which was accepted on the theory that it took effect immediately, so that he was ousted from his position, but did not institute his action for reinstatement for seven years and eight months after the date of the certificate of the medical superintendent of the state hospital discharging him as recovered, limitation of the officer's cause of action began to run on the date of his discharge, and was barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 413; Dec. Dig. ⟸ 74(1).]

2. INSANE PERSONS ⟸29—RESTORATION TO CAPACITY—JURISDICTION—STATUTES.

Jurisdiction to determine the question of an insane person's mental capacity, in the absence of guardianship proceedings under Code Civ. Proc. §§ 1763, 1764, was vested exclusively in the officers of the state hospital for the insane, and plaintiff's discharge from the hospital on the ground of his recovery was an adjudication by competent authority that he was sane at his discharge, and the superior court had no jurisdiction to determine the question of his mental capacity.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 42, 140, 150; Dec. Dig. ⟸ 29.]

3. INSANE PERSONS ⟸29—RESTORATION TO CAPACITY—JURISDICTION OF HOSPITAL OFFICER—CONFINEMENT.

Where a patient in the state hospital for the insane was granted leave of absence under the care of his brother, he was constructively in the custody and under the control of the state, and it was not essential to the medical superintendent's jurisdiction to discharge him as cured that he should have been actually confined in the hospital when the certificate of discharge was applied for and granted.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 42, 140, 150; Dec. Dig. ⟸ 29.]

4. INSANE PERSONS ⟸29—RESTORATION TO CAPACITY—PRIMA FACIE PROOF—CERTIFICATE OF HOSPITAL OFFICER.

The certificate of the medical superintendent of the state hospital for the insane, discharging plaintiff therefrom as recovered, was at least prima facie proof of plaintiff's restoration to capacity upon that date, and, nothing to the contrary appearing, the presumption must prevail that he was then, and since has been sane.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 42, 140, 150; Dec. Dig. ⟸ 29.]

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Application for writ of mandate by Edward L. Knorp against the Board of Police Commissioners of the City and County of San Francisco and others. From a judgment for defendants, and an order denying plaintiff new trial, he appeals. Judgment and order affirmed.

Von Schrader & Cadwalader, of San Francisco, for appellant. Percy V. Long, City Atty., and D. S. O'Brien, Asst. City Atty., both of San Francisco, for respondents.

LENNON, P. J. In this proceeding the plaintiff sought a writ of mandate against the defendants, sitting as the board of police commissioners of the city and county of San Francisco, commanding them to reinstate the plaintiff as a member of the police department of said city and county. The appeal is from a judgment entered in favor of the defendants, and from an order denying the plaintiff a new trial.

The facts of the case are practically undisputed and, in so far as they are pertinent to a discussion of the paramount point in the case, are, substantially stated, these: On the 6th day of November, 1899, the plaintiff became a member of the police department of said city and county, and was thereafter an active member of the department until June, 1901, when he "collapsed on account of mental strain." The records of the police commission show that on July 2, 1901, the plaintiff's application for leave of absence for three months without pay was granted by the board, and that on September 24, 1901, he tendered his resignation as a member of the police department, which was accepted "to take effect from ———." On November 22, 1901, the plaintiff was adjudged to be insane by the superior court of said city and county, and committed to the care of the Napa state hospital, where he remained as a patient and an inmate until November 16, 1902, when he was released on leave of absence in care of his brother, George H. Knorp. Thereupon plaintiff returned to San Francisco, where he resided with his brother until May 24, 1904, when he in person applied for and procured from the medical superintendent of the Napa state hospital a certificate discharging him from the custody and control of said institution upon the ground of his mental recovery. Thereafter, on October 24, 1911, he petitioned the superior court of the city and county of San Francisco for an order restoring him to capacity pursuant to the provisions of section 1766 of the Code of Civil Procedure, and the court made the order. The trial court in its findings of fact, among other things, found that plaintiff's resignation as a member of the police department was tendered by him and accepted by the

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board of police commissioners on September 24, 1901, and that his cause of action for reinstatement was, as pleaded in the answer of the defendants, barred by the provisions of sections 338 and 343, Code of Civil Procedure, and the laches of the plaintiff.

[1-4] The latter we think is fully sustained by the evidence. The action was not instituted until March 27, 1912, some seven years and eight months after the date of the medical superintendent's certificate finally discharging the plaintiff from the custody and control of the state as recovered. That date in our opinion must be taken as the time when the plaintiff was restored to capacity, rather than March 26, 1912, the date of the decree of the superior court which purported to judicially determine his restoration to capacity. The plaintiff's petition to be restored to capacity, which was the basis of the decree of the superior court, did not aver that he had been under guardianship by virtue of the provisions of sections 1763 and 1764, Code of Civil Procedure, at the time of his commitment for insanity to the state hospital; and consequently the superior court had no jurisdiction to hear and determine the question of the plaintiff's mental capacity. Such jurisdiction, in the absence of guardianship proceedings, was vested exclusively in the officers of the state hospital (Kellogg v. Cochran, 87 Cal. 192, 25 Pac. 677, 12 L. R. A. 104); and therefore the plaintiff's discharge from the hospital upon the ground of his recovery was an adjudication by competent authority that he was sane on the day and date of his discharge (Kellogg v. Cochran, supra). The case of Aldrich v. Barton, 153 Cal. 488, 95 Pac. 900, has no application to the facts of the present case. There the patient had been away from the state hospital for many years, claiming all the while, without opposition from the officers of the hospital, to have been discharged and at liberty under a purported order of discharge; and the Supreme Court held that under those circumstances the officers of the state hospital lost the custody and control of the patient, and were therefore ousted of jurisdiction to make a second certificate of discharge. That case recognizes the right of the medical superintendent of a state hospital to release a patient on parole; and that is precisely what was done in the present case. During his leave of absence the plaintiff was constructively in the custody and under the control of the state; and it was not essential to the exercise of jurisdiction to discharge the plaintiff that he should have been actually confined in the state hospital at the time the certificate of discharge was applied for and granted. People v. Geiger, 116 Cal. 440, 48 Pac. 389. The certificate of discharge dated May 24, 1904, was at least prima facie proof of the plaintiff's restoration to capacity upon that date (Aldrich v. Barton, supra); and, nothing appearing to the contrary, the presumption must prevail that he was then and ever since has been sane.

It is not disputed that the plaintiff's purported resignation as a member of the police department was accepted and dealt with by the board of police commissioners upon the theory that it took effect immediately, notwithstanding the fact that the records of the commission show that it was to take effect at a time not specified. In short, it is not disputed that the plaintiff was ousted from his position as a police officer by the board on September 24, 1901, the date of his purported resignation; that being so, his cause of action for reinstatement accrued upon that date; and giving him credit for the time during which he was under the disability of insanity the statute in our opinion commenced to run against his cause of action upon May 24, 1904, the date of his restoration to capacity as shown prima facie by the medical superintendent's certificate of discharge, and consequently his cause of action was barred by the statute of limitations. Sections 352, 338, 343, Code Civ. Proc.; Farrell v. Board, etc., 1 Cal. App. 5, 81 Pac. 674; Jones v. Board, etc., 141 Cal. 96, 74 Pac. 696; Dodge v. Board, 1 Cal. App. 608, 82 Pac. 699.

It was not contended upon behalf of the plaintiff in the court below, nor is it contended here, that he did not have knowledge of the fact that his purported resignation was accepted and treated as having gone into effect as of the date of its tender; and his only excuse for not sooner instituting his action is that he could not do so until he had been restored to capacity by the decree of the superior court. But such decree, as has been pointed out, was, under the facts of the present case, neither a necessary nor a valid adjudication of his competency, and consequently will not avail to toll the statute of limitations, nor relieve him from the penalty of his undoubted laches in instituting the action.

We need not concern ourselves with the question as to whether or not the evidence sustains the finding that the plaintiff did in fact tender his resignation, and that the same was accepted and took effect immediately, for the fact still remains that the plaintiff, under and by virtue of his purported resignation and its acceptance, ceased to be a member of the department from the date thereof; and even if it be conceded that he was thereby wrongfully deprived of his office, the finding upon the statute of limitations and the laches of the plaintiff being supported by the evidence, it alone will suffice to support the judgment.

This disposes of all of the points presented in the appeal which we deem worthy of discussion.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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(31 Cal. App. 549)

NEWHALL LAND & FARMING CO. v. BURNS et al. (Civ. 1990.)

(District Court of Appeal, Second District, California. Sept. 28, 1916.)

1. CONTRACTS ⟸246 — CONSTRUCTION—TIME AS ESSENCE OF CONTRACT.

Where parties enter into a contract making time of its essence, and thereafter in consideration of payment of a sum of money the time for performance is extended subject to all of the terms and conditions of the former agreement, the provision making time of the essence of the contract is continued in the new agreement.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1131-1138; Dec. Dig. ⟸246.]

2. VENDOR AND PURCHASER ⟸101—FORFEITURE OF CONTRACT—NOTICE.

Under an agreement whereby a deed was placed in escrow to be delivered on payment of a sum of money by defendants, and making time of the essence of the contract, no notice was required to terminate defendants' rights on their default in making the payment within the time prescribed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 170-174; Dec. Dig. ⟸101.]

3. VENDOR AND PURCHASER ⟸187 — PERFORMANCE OF CONTRACT — WAIVER OF DEFAULT.

Under an agreement whereby a deed placed in escrow was to be delivered to defendants on payment of a sum of money before a certain date, efforts made by defendants after the date fixed to sell the land and the making of surveys, neither of which were required by the contract, though permitted by plaintiff, did not amount to a waiver of the default in performance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 121, 374, 375; Dec. Dig. ⟸187.]

4. VENDOR AND PURCHASER ⟸97—PERFORMANCE OF CONTRACT — FORFEITURE — CONDITION PRECEDENT.

The deposit of a deed in escrow according to the terms of the contract, under which it was to be delivered on payment to the depositary of the sum required, rendered a tender of the deed unnecessary as a condition precedent to forfeiture on failure to pay the money.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 161, 162, 166; Dec. Dig. ⟸97.]

5. VENDOR AND PURCHASER ⟸25, 340—REMEDIES OF PURCHASER—RECOVERY OF MONEY PAID.

Where a contract for the sale of land and a deed to the land were placed in escrow to be delivered on payment of a sum of money to the depositary, the fact that the contract was never delivered is fatal to the claim of the purchasers not only to any interest in the land but also to recover the sum of money paid when the writings were placed in escrow.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 30, 1003-1007; Dec. Dig. ⟸25, 340.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by the Newhall Land & Farming Company against Juliette A. Burns and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

John C. Miles, of Los Angeles, for appellants. Campbell & Moore, of Los Angeles, for respondent.

SHAW, J. Defendants prosecute this appeal from a judgment entered in favor of plaintiff quieting its title to certain lands described in the complaint, and likewise appeal from an order of court denying their motion for a new trial of said action.

Defendants base their claim to an interest in the lands upon two contracts alleged to have been executed by plaintiff, the first of which was dated January 31, 1912, whereby plaintiff, for a consideration of $750,000, to be paid as therein stipulated, agreed to sell and defendant Burns and one R. E. Muncy agreed to purchase the property in question. At the time of the making of this contract there was paid to the plaintiff the sum of $5,000, and the agreement was placed in escrow with the Citizens' National Bank of Los Angeles, "to be delivered only in the event of the payment of the sum of forty-five thousand dollars ($45,000) on or before May 1, 1912." Burns and Muncy failed to pay this $45,000, and on April 29, 1912, they, with plaintiff, executed an agreement reciting the fact that the contract was not to be delivered except upon the payment of $45,000 on or before May 1, 1912, which payment they were unable to make, and agreed in writing that such contract should be canceled and annulled, and that Burns and Muncy waived all claims to or interest in said agreement and consented to the forfeiture of said sum of $5,000 paid by them to plaintiff.

As found by the court upon ample evidence, no fraud or duress entered into the execution of this latter agreement for the cancellation of the contract and forfeiture of the $5,000 paid thereon; and hence this contract may be eliminated from further consideration.

Thereafter, on May 2, 1912, a contract similar in terms and conditions, between plaintiff and defendant Burns alone, was prepared, wherein plaintiff agreed to sell, and Burns agreed to purchase, the property in question for the sum of $745,000, payable as follows: "Forty-five thousand dollars ($45,000) on or before June 1, 1912, at the Citizens' National Bank of Los Angeles, with which this agreement is deposited in escrow, to be by said bank delivered to the party of the second part upon receipt of said payment"—the contract further specifying the time for the payment of other stipulated installments of the purchase price covering the whole thereof. This contract provided:

"That time is hereby made the essence of this agreement, and of each and every one of the covenants, terms and conditions hereof. * * * That any neglect, failure, or default in making any one or more of the payments of principal or interest hereinbefore provided for, or in complying with any of the other covenants, terms, or conditions of this agreement, at the time or times and in the manner hereinbefore specified,

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or at the expiration of any extension thereof in writing made by the party of the first part, or any violation of any of such covenants, terms, or conditions, upon the part of the said party of the second part, shall, at the option of the party of the first part, cause a forfeiture of all of the rights, privileges and interests of the said party of the second part under this agreement."

Burns made default in the payment of the $45,000 so stipulated to be paid on or before June 1, 1912, and upon payment of which the escrow holder was to deliver said contract to her. Whereupon, on June 1, 1912, in consideration of the payment of $750, plaintiff in writing agreed:

"To extend the time for the payment of the sum of forty-five thousand dollars ($45,000) due and payable on this day to July 1, 1912, subject to all of the terms, covenants and conditions of the agreement between the parties hereto bearing date of 2d day of May, 1912, a copy of which is deposited with the Citizens' National Bank of Los Angeles in escrow to be delivered to the party of the second part upon the payment of said sum of forty-five thousand dollars ($45,000)."

Defendant again made default in the payment of the $45,000, time for the making of which was so extended to July 1, 1912. It appears that after July 1, 1912, there were some negotiations between plaintiff and defendant Burns, as a result of which defendants claim a verbal extension of time to July 15, 1912, was given within which to pay the $45,000. As to this claim, however, upon sufficient evidence, the court found adversely to defendants. Not only does the claim rest upon an oral alteration of the terms of a written contract (if there was one), but there was no consideration for such alleged extension.

[1, 2] The chief contention of appellants is that the written instrument whereby defendants were given until July 1st within which to pay the $45,000 so stipulated in the contract to be paid June 1st, and upon the making of which the contract was to be delivered to defendant Burns, did not in express terms provide that time should be made the essence of said agreement for the extension of time of payment. The original contract, dated May 2, 1912, did in the strongest terms provide that time should be the essence thereof, and the agreement providing for the extension expressly provided that such agreement was "subject to all of the terms, covenants and conditions of the agreement between the parties hereto bearing date of 2d day of May, 1912." The sole purpose of the latter agreement was to extend the time as stated for the payment of the sum of $45,000, and to this extent only was the contract modified. Clearly the effect of the language last quoted was to carry into the agreement for the extension all of the terms and provisions of the contract to which it related. When defendants failed to make the payment within the time so extended, the position of the parties was identically the same as though such contract providing for the extension had never been executed. This being true, and conceding that instead of the contract being placed in escrow to be delivered to Burns only upon payment of $45,000 by July 1st it had been actually delivered to her, a case is presented as to which the language used by the Supreme Court in Glock v. Howard, etc., Co., 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, is applicable. Defendants' right to an interest in the land was only such as the contract gave, and it gave no right save and except upon compliance with the conditions contained therein. No notice was required to terminate defendants' rights under the contract (see Commercial Bank v. Weldon, 148 Cal. 601, 84 Pac. 171), but their default on July 1, 1912, in making the payment of $45,000, unexcused and not waived, ipso facto terminated all rights they might have acquired by compliance with such provision (Champion Gold Min. Co. v. Champion Mines, 164 Cal. 205, 128 Pac. 315).

[3] Appellants, however, claim that plaintiff in allowing the defendants to proceed under the contract after the 15th day of July, 1912, made the conditions of the original contract mutual and dependent, by reason of which fact plaintiff waived its right to declare time of the essence of the contract. In support of this contention, appellants cite authorities to the effect that where the contract requires a party to do certain acts in the performance of which he has made default but afterwards performs the acts, which performance is accepted by the other party, such acceptance constitutes a waiver as to time. Howard v. Thompson Lumber Co., 106 Ky. 566, 50 S. W. 1092; Smith v. Sanitary District, 108 Ill. App. 69. The acts done by defendants and as to which plaintiff entered no protest were efforts to sell the land and the alleged making of surveys, acts not called for by the contract, and in the doing of which plaintiff had no interest, since there was no provision in the contract requiring them to sell the land or make surveys. The only acts pursuant to the terms of the contract the performance of which, if accepted by plaintiff, would have constituted a waiver as to time, would have been the performance of the covenants contained in the contract, none of which, as shown by the evidence, was performed by defendants. If after making default defendants had tendered the $45,000 and plaintiff had accepted the same, clearly it would have constituted a waiver under which, notwithstanding the fact said sum had not been paid as stipulated, defendants would have been entitled to delivery of the contract, and the performance of other covenants therein as stipulated would have entitled them to performance on the part of the plaintiff.

[4] It is further claimed that plaintiff, in order to have placed the defendants in default, should have tendered a deed before declaring a forfeiture, in support of which Cleary v. Folger, 84 Cal. 316, 24 Pac. 280, 18

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Am. St. Rep. 187, is cited. It appears from the contract that as payments were made to the Citizens' National Bank deeds to specified parts of the property were to be delivered to defendants, one of which deeds, as provided in the contract, to a piece of land designated as "tract A," was to be delivered, together with the contract, upon the payment of the $45,000. This deed was deposited with the Citizens' National Bank in escrow to be delivered by said bank to defendant Burns with the contract upon payment of said sum. Since the deed was signed and left with the bank to be delivered to defendants upon payment of the amount, no further tender was necessary. Hence, assuming a fact not true, that the contract was at the time of its date delivered to defendant Burns, and assuming further that there was a consideration for its execution, nevertheless, since any rights thereunder depended upon her paying the sum of $45,000 on or before July 1st, she, by making default in said payment, lost all right to enforce the contract against plaintiff. Glock v. Howard, etc., Co., and Champion Gold Min. Co. v. Champion Mines, supra.

[5] Moreover, the fact that the contract was never delivered is fatal to the assertion, not only of any claim of interest in the land on the part of defendants, but as well to any right to recover the $5,000 so paid at the time of the making of the first contract January 31, 1912, or the recovery of the $750 paid for an extension of time within which, as provided in the second contract, to pay the $45,000. Defendants allege in their answer that the contract was executed, and this is true in the sense only that it was signed by the plaintiff; but according to its express terms it was not to be delivered, but deposited in escrow until July 1st, when, if Burns paid the $45,000, the escrow holder was instructed to deliver it to defendant. In other words, the effect of the transaction was, at most, for a consideration of $5,000 to give defendants an option to acquire a contract for the purchase of the land upon the terms and conditions contained therein, upon payment of $45,000 by July 1, 1912. They neglected and failed to exercise such option by paying the $45,000 by July 1, 1912, and hence the contract was never delivered.

The appeal is without merit, and the judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

(31 Cal. App. 592)

MARTZ et al. v. PACIFIC ELECTRIC RY. CO. (Civ. 2008.)

(District Court of Appeal, Second District, California. Oct. 2, 1916. Rehearing Denied by Supreme Court Dec. 1, 1916.)

1. RAILROADS ⟸350(22) — ACCIDENTS AT CROSSINGS—QUESTION FOR JURY.
In an action for damages for death at a railroad crossing, whether deceased could have seen defendant's car if he had used reasonable care in observing before he reached point where a building obstructed his view *held* for the jury.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1177, 1178; Dec. Dig. ⟸350(22).]

2. APPEAL AND ERROR ⟸1002 — REVIEW — FINDINGS OF FACTS.
Express and implied findings of fact made by a jury upon conflicting evidence are conclusive on appeal.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. ⟸1002.]

3. RAILROADS ⟸324(1) — ACCIDENTS AT CROSSINGS—CARE REQUIRED.
Where a railroad track at the point of crossing and a signboard of warning were in plain view in front of deceased as he came down the road, it was his duty to approach the crossing with reasonable care and have his automobile under control.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1020, 1022, 1023; Dec. Dig. ⟸324(1).]

4. RAILROADS ⟸327(13) — ACCIDENTS AT CROSSINGS—CARE REQUIRED.
The rule that a traveler on a highway must look and listen for approaching trains applies to an electric railroad which is operated on the company's private right of way except at street crossings.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1056; Dec. Dig. ⟸327(13).]

5. RAILROADS ⟸327(1), 333(1) — ACCIDENTS AT CROSSING—CONTRIBUTORY NEGLIGENCE.
Where the physical facts shown by evidence raise the inevitable inference that the deceased, on approaching defendant's railroad crossing in his automobile, did not look or listen, or, having looked and listened, he endeavored to cross immediately in front of a rapidly approaching car that was plainly open to his view, which would cause a reasonable apprehension of danger, he was as a matter of law guilty of contributory negligence.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043, 1045, 1080, 1083; Dec. Dig. ⟸327(1), 333(1).]

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by Frank Martz and others against the Pacific Electric Railway Company. From a judgment for plaintiffs and an order denying a motion for new trial, defendant appeals. Judgment and order reversed.

Frank Karr and A. W. Ashburn, both of Los Angeles, for appellant. Joseph Scott, A. G. Ritter, and J. B. Joujon-Roche, all of Los Angeles, for respondents.

CONREY, P. J. This action was brought by the widow and three minor children of Frank Martz to recover damages on account of the death of Martz, alleged to have been caused by the negligence of the defendant company. The defendant denied the charges of negligence, and set up the defense of contributory negligence on the part of the deceased. The defendant appeals from the judgment and from the order denying its motion for a new trial.

At about 2 o'clock in the afternoon of the 1st day of February, 1912, Frank Martz was

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traveling in his automobile in a southerly direction on Santa Anita avenue, in the county of Los Angeles, and was approaching a point where that highway is crossed by the tracks of defendant company. At the crossing a collision took place between the automobile and a car of the defendant. Immediately east and west of Santa Anita avenue the railroad occupies a private right of way. It is a double-track railroad which runs east and west across the avenue, but curves toward the south at a point beginning about 100 yards west of the avenue. The curve is such as that at a distance of 1,000 feet west of Santa Anita avenue cars beyond that point are not visible from the avenue. Appellant claims that the evidence is such as to compel the conclusion that no negligence was established on the part of the defendant, and also very earnestly contends that contributory negligence on the part of the deceased was conclusively established. For these reasons it is claimed that the court erred in refusing to instruct the jury to render a verdict for the defendant.

[1, 2] At the same time when Mr. Martz coming from the north was approaching the railroad, an express car of the defendant was traveling in an easterly direction on defendant's southerly track. Santa Anita avenue is constructed in two roadways separated by a row of eucalyptus trees down the center. On the westerly side of the west roadway of Santa Anita avenue and north of the defendant's right of way there was at the time of the collision a small white building about 82½ feet long, located about 47 feet west of the westerly line of the highway and about 43 feet north of the south track. Along the westerly side of the west roadway was a row of tall eucalyptus trees, about 10 feet apart. A signboard marked, "Railroad Crossing—Look Out for the Cars," had been placed at the intersection of the right of way with the westerly roadway, and the railroad tracks were raised slightly above the level of the roadway upon which Martz was traveling, thereby rendering the tracks plainly visible to one occupying his position. No persons but the motorman and conductor of defendant's car (so far as the evidence shows) saw the deceased at the time of the accident, and they saw him only for an instant immediately preceding the collision. There is no testimony from any observer as to whether the deceased looked or listened for the approach of the car. The motorman testified that his car was traveling 18 or 20 miles an hour, and that the deceased was traveling "as fast as I was going, maybe a little faster." In addition to the foregoing undisputed facts, appellant claims that the evidence shows that the branches of the eucalyptus trees were high above the traveler's head, and did not materially obstruct the traveler's view in looking to the west, and that the tracks with poles and wires were plainly visible to the traveler, and that it is also certain that Martz "made no effort to avoid the approaching train, for the marks of his automobile on the ground showed that he was headed due south and had not swerved in either direction." Appellant admits that there was conflict in the evidence as to whether warning was given by blowing of the whistle on defendant's car, but claims that the negative testimony of plaintiff's witnesses that they heard no whistle blown is not entitled to credit as against the positive testimony of other witnesses who said that they heard the whistle. Appellant further admits that the evidence as to the rate of speed at which defendant's car was traveling varies from 18 to 30 miles an hour. There is evidence tending to show that the branches of the eucalyptus trees were above the traveler's head, but there is also testimony that there was an undergrowth extending upward from the ground, and that the limbs of the trees came down and met this undergrowth; that there were sprouts growing up from the trees which were as much as 5 feet long; that these were suckers from the roots of the trees, and grew out like a bush. Under these conditions it is likely that there would be spaces through which one traveling along the road, as the deceased was traveling before he came to the small building, possibly could have seen an approaching car, and that a large part of the space so occupied by the trees was so obstructed that through the space thus occupied it was impossible to have seen the cars. The question presented to the jury was whether or not a person so traveling and using reasonable care in observing would have seen the approaching car, notwithstanding the obstructions of trees and brush along the highway, and notwithstanding the further obstruction made by poles erected at intervals between the railroad tracks and carrying the power wires. We are not warranted in saying that, as a matter of law, under these conditions, the deceased would have seen the car if he had made a reasonable effort to use his powers of observation before he reached the point where the building entirely obstructed his view in that direction. Therefore as to this fact we must accept the conclusion of the jury. And we are likewise bound by their implied finding that no warning whistle was sounded by the motorman.

Assuming, then, that Martz was not negligent in failing to observe the approaching car while he was farther north than the above-mentioned building, or while he was traveling along the road opposite that building, we must now consider the situation as it existed between the point in the avenue where the building no longer obstructed his view to the west and the south track of the railroad where the collision occurred. The testimony of the witnesses is aided by certain photographs shown in the record. As

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above stated, the building was 43 feet north of the south railroad track and about 47 feet west of the westerly line of the highway, which would be probably about 60 feet west of that part of the highway in which the automobile was traveling. Under these conditions the railroad tracks west of Santa Anita avenue along which the electric car would approach the crossing would be plainly visible from the automobile during at least the last 60 feet of its approach to the south track. And, as shown by the photographs, the curve of the railroad is such that the approaching railroad car would have been plainly visible if it was anywhere within 1,000 feet of the crossing.

[3-5] The evidence shows that Mr. Martz was 52 years old, in good health, and had been using this automobile nearly a year. On the day of the accident he was driving alone. It appears that he had never driven over this railroad crossing until that day. But, as above shown, the railroad track at the point of crossing and a signboard of warning were in plain view in front of the deceased as he came down the road. This being so, even if (as we must assume to be the fact) he had not seen any approaching car before coming opposite the white building, it was his duty to approach the crossing with reasonable care to have his automobile under control. If we assume that he did this, then, when he came within 60 feet of the southerly railroad track, he was in a safe situation at all events. If there was no approaching car within a distance of 1,000 feet, he would have ample time to cross. For at the rate of 30 miles per hour the railroad car would require at least 23 seconds to reach the point of intersection; whereas the automobile, even at a five-mile rate, would be across in 8 seconds. On the other hand, if the approaching railway car was anywhere within the distance of 1,000 feet, Mr. Martz must have seen it if he made the most ordinary use of his faculties, and this at least he was bound to do. Griffin v. San Pedro, etc., R. R. Co., 170 Cal. 772, 151 Pac. 282, L. R. A. 1916A, 842. The rule is applicable to electric railroads operated under conditions similar to the operation of steam railroads. Loftus v. Pacific Elec. Ry. Co., 166 Cal. 464, 137 Pac. 34. And if the car thus observed by the deceased was approaching at such speed and was then within such distance as to cause reasonable apprehension of danger, it was negligence on the part of the automobile driver to attempt such a crossing. Such attempt would be the voluntary assumption of a risk, and for injuries resulting therefrom, and which the defendant then had no further opportunity to avoid, the law does not intend to provide compensation.

The only other alternative state of facts which seems possible under the evidence is that Mr. Martz came down the avenue and into the zone of danger at a rate of speed which was reckless under the circumstances, and thus heedlessly placed himself where the concurrent negligence of the defendant caused his death. In this case also there is no right of recovery. Where the physical facts shown by undisputed evidence raise the inevitable inference that the person approaching a railroad crossing did not look or listen, or that, having looked and listened, he endeavored to cross immediately in front of a rapidly approaching train that is plainly open to his view, he is as matter of law guilty of contributory negligence.

It seems clear that there is no situation shown upon any possible state of facts consistent with the evidence which can authorize a verdict such as was rendered in this case. The defendant was clearly entitled to a verdict in its favor. Having reached this conclusion, we deem it unnecessary to discuss alleged errors in the instructions given to the jury. With respect to the objections urged against those instructions, we express no opinion.

The judgment and order are reversed.

We concur: JAMES, J.; SHAW, J.

(31 Cal. App. 543)

COPP v. GUARANTY OIL CO. (Civ. 2006.)

(District Court of Appeal, Second District, California. Sept. 28, 1916. Rehearing Denied Oct. 27, 1916; Denied by Supreme Court Nov. 27, 1916.)

1. APPEAL AND ERROR ⇐1011(1) — SCOPE — CONFLICTING EVIDENCE.

In the presence of a material and direct conflict in the testimony, the findings of the trial court wherein they are adverse to the appellant's contentions must be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⇐ 1011(1).]

2. APPEAL AND ERROR ⇐1071(1) — SCOPE — HARMLESS ERROR—FINDINGS.

Though the trial court erroneously held that, at the time of an alleged tender of the amount of interest due on a note, the assignee of the payee had already elected to declare the entire amount due in accordance with his right under the contract, such error was harmless, where the court thereafter correctly held that there was in any event no tender.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4234; Dec. Dig. ⇐1071(1).]

3. BILLS AND NOTES ⇐315—NONNEGOTIABLE INSTRUMENTS—EFFECT OF ASSIGNMENT.

Any defenses which the makers of a nonnegotiable note might have urged against its payee are equally available as against his assignee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 751; Dec. Dig. ⇐315.]

4. BILLS AND NOTES ⇐310—NONNEGOTIABLE INSTRUMENTS—AGREEMENT NOT TO TRANSFER—CONSTRUCTION.

Although the payee may have agreed not to negotiate or sell a nonnegotiable instrument, such agreement would not hinder him from

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transferring it after default had been made in the payment of interest.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 742, 743; Dec. Dig. ⟸ 310.]

5. BILLS AND NOTES ⟸103(1)—NONNEGOTIABLE INSTRUMENTS — WARRANTIES—FUTURE PROMISES.

It is no defense against a nonnegotiable instrument, issued in payment of shares of oil stock purchased to secure control of the company, that the payee said no more treasury stock could be issued and that more was issued, where it did not appear that his statement was more than a statement of opinion.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 233–238; Dec. Dig. ⟸ 103(1).]

6. CORPORATIONS ⟸182 — STOCKHOLDERS — NOTICE OF CORPORATE ACTS — PRESUMPTIONS.

Presumptively a stockholder has knowledge or means of learning the facts as to the condition of any stock remaining in the corporation treasury.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 686–690; Dec. Dig. ⟸182.]

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by F. F. Copp against the Guaranty Oil Company. From judgment for plaintiff, and order denying motion for new trial, defendant appeals. Affirmed.

Weaver, McCracken & McKee, of Los Angeles, for appellant. Clair S. Tappan, of Los Angeles, for respondent.

JAMES, J. This action was brought upon a promissory note executed by the defendant. Plaintiff had judgment, and a motion made by the defendant for a new trial was denied. The appeal is taken from the judgment and also from the order denying the motion.

The promissory note, which evidenced an indebtedness of $14,100, was dated at Los Angeles, June 14, 1911, and made payable "on or before two years after date." It contained a provision that, if interest payments were not made when due, "then the whole sum of principal and interest shall become immediately due and payable at the option of the holder." In December, 1911, an installment of interest became due, and it was because of default in the payment of this interest that the plaintiff declared an option to mature the full amount of the note. On the 29th of January, 1912, written notice was given to the defendant company of this election on the part of the plaintiff, and this action was shortly thereafter brought. The payee of the note was W. H. Fuller, who, after the December interest payment became due, indorsed the note to this plaintiff. As collateral security there was delivered to the payee with the note and afterwards transferred to his indorsee 30,000 shares of the Lucky Boy Oil Company stock. In the answer of the defendant issue was raised as to the matter of the note being indorsed to this plaintiff, and it was denied that any default had been committed in the matter of the payment of interest at the time of the alleged election of the plaintiff to declare the whole amount of principal and interest due. In the separate defense, more particular reference to which will be hereinafter made, one of the allegations was that, before the original payee had indorsed the note to plaintiff, tender had been made to such payee of the amount of interest due on the note, together with compound interest, all of which the payee refused to accept. It appeared in evidence that, prior to the time this action was brought, the representative of defendant called upon the attorney for this plaintiff and made request to be allowed to pay the interest, both simple and compound, which had then accrued; that the attorney for plaintiff informed such representative of defendant that he had no authority to accept anything except the full amount of principal and interest. There was a conflict in the testimony as to when this conversation was had. Two witnesses for the defendant testified that it occurred on the 12th day of January, 1912 (this action having been commenced early in March of the same year). There was no dispute in the evidence showing that on the 29th day of January, 1912, a letter was written by the attorney for this plaintiff to the defendant, notifying defendant of the election of the plaintiff to declare the whole amount of the note, both principal and interest, due on account of the default in the payment of the installment of interest which had become due in December, 1911. The attorney for the plaintiff testified that the conversation had with the representatives of defendant, wherein an offer was made to pay overdue interest, occurred after the dispatch and receipt by them of the letter wherein the option was exercised to mature the note.

[1, 2] In the presence of this conflict in the testimony, the findings of the trial court wherein they are adverse to the appellant's contention as to that matter must be sustained. We find in the transcript the record of statements made by the learned trial judge wherein it was suggested as the view of the court that it was immaterial as to whether any tender of interest was made before or after the receipt of the written notice of election to mature the note because, as stated by the judge, when the parties appeared at the office of plaintiff's attorney they were told that the attorney had no authority except to collect the full amount of the note. The trial judge declared that such a statement, made under such circumstances, was sufficient to mature the note and to show an election on the part of the plaintiff so to do, and that any offer then made by the defendant to pay the interest then owing was ineffectual. We are hardly prepared to agree with the trial judge in this view, but we cannot disturb the judgment because of such

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erroneous conclusion for the reason that the findings as made cover the issues presented and declared that no tender as alleged was ever made. The trial court received all of the evidence touching the matter of this tender, so there was no ruling adverse to appellant by which it was prevented from showing the facts according to its contention. It may have been that, with all of the evidence before him, the trial judge in making up the findings reconsidered the passing conclusion made by him in the course of the trial and determined that the tender, if made, was made as the testimony introduced on the part of plaintiff showed, to wit, after the receipt by the appellant of the letter of January 29th notifying it of the election of plaintiff to collect the entire amount of principal and interest.

There are other matters alleged in the special defense set up in the answer as to all of which the trial judge refused to hear any testimony. Appellant very earnestly contends that such special matters constituted good defenses and that it should have been allowed to make proof of them. We quote the material portion of the answer setting up the matters adverted to:

"That at the time of the making and delivering of said promissory note by the defendant, the said W. H. Fuller agreed as a part of the consideration thereof that he would not negotiate or sell or allow said note to go out of his possession other than to deposit it in the First National Bank of Los Angeles until the same became due and that he would keep the said certificates of stock for the 30,000 shares of stock in the Lucky Boy Oil Company at all times available so that the defendant could use or vote them in any stockholders' meeting of the Lucky Boy Oil Company. That at the time of the making and executing of said note, the said defendant was the owner of a certain large portion of the capital stock of said Lucky Boy Oil Company. That the stock owned by the defendant and the said 30,000 shares owned by the said W. H. Fuller constituted more than a majority of the issued stock of said Lucky Boy Oil Company, and that the defendant purchased said 30,000 shares of stock from said W. H. Fuller for the purpose of giving to it, the defendant, the stock control of said Lucky Boy Oil Company. That at the time of said contract, the said W. H. Fuller well knew such fact and then and there well knew that the said Guaranty Oil Company was purchasing said 30,000 shares of stock for the sole purpose of acquiring a majority of the stock of said Lucky Boy Oil Company. That said Lucky Boy Oil Company is a corporation organized and existing under and by virtue of the laws of the territory (now state) of Arizona, and that said W. H. Fuller had been for many years the attorney of said company. That at the time of the making and executing of the note mentioned in the complaint of the plaintiff, the said W. H. Fuller was a member of the board of directors of the defendant company. That at the time the defendant executed and delivered said note and acquired said 30,000 shares of stock, the said W. H. Fuller represented and stated to the defendant that no more stock could be issued from the treasury of the Lucky Boy Oil Company. That said Guaranty Oil Company believed said statement of said W. H. Fuller and relied upon the same, and would not have purchased said stock if it had not believed that said statement was true and correct, and the said representation of the said W. H. Fuller was the inducement which caused said Guaranty Oil Company to purchase said stock and to give said note. That after the said W. H. Fuller had made said representations, this defendant discovered that the same were false and untrue, and that said Lucky Boy Oil Company did have the right and authority to issue and sell other stock out of its treasury other than the issued and outstanding stock at the time of the execution and delivery of said note. That said Guaranty Oil Company did not know that it did not have such right until long after the execution and delivery of said note. That after said transaction, said Lucky Boy Oil Company did issue and sell other stock out of its treasury, whereby the defendant was deprived of the control, or the right to control, the corporate affairs of said Lucky Boy Oil Company. That said defendant attempted by a legal proceeding to have the issue of stock by said Lucky Boy Oil Company canceled and set aside but was unable to procure the same. That thereafter the said W. H. Fuller, in violation of his agreement not to negotiate or sell or allow said note or said stock of said Lucky Boy Oil Company to go out of his hands, as the defendant is informed and believes, and on such information and belief alleges, to make it appear that the said F. F. Copp was a bona fide holder of said note for value, caused said pretended indorsement to be made thereon, assigning and negotiating said note to the said plaintiff, whereas, in truth and in fact, as the defendant is informed and believes, and on such information and belief alleges, to make it appear that the said F. F. Copp was a bona fide holder of said note for value, caused said pretended indorsement to be made thereon, assigning and negotiating said note to the said plaintiff, whereas, in truth and in fact, as the defendant is informed and believes, and on such information and belief alleges, said indorsement was made without any consideration whatever. That it appears on the face of said note that the same is nonnegotiable, and that thereupon the said plaintiff, if she ever acquired any interest or any right to sue upon said note, took it subject to the aforesaid defenses existing between the defendant and said W. H. Fuller."

[3-6] It may be conceded, in discussing the propositions to follow, that any defenses which the maker of the note might have urged against its payee were equally available as against this plaintiff. The note was nonnegotiable in form. Smiley v. Watson et al., 23 Cal. App. 409, 138 Pac. 367. We think, however, that none of the special matters set up in the answer, as we have quoted them, would constitute a defense in this action. As to the alleged agreement on Fuller's part not to negotiate or sell the note or allow it to go out of his possession, and that he would keep the certificates of stock available for use, this should not be construed as an agreement which would hinder him from transferring it after default had been made in the payment of interest. There is no allegation that the 30,000 shares of stock of the Lucky Boy Oil Company were not at all times available for the defendant's use in the stockholders' meetings. As to the alleged representation by Fuller that no more stock could be issued from the treasury of the Lucky Boy Oil Company, it does not appear from the allegations that such statement was more than an opinion of the said Fuller, or that he made the statement with intent to deceive or with the knowledge that it was untrue. It appears in

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the same allegations of the answer that the defendant itself was the holder of a large number of shares in the Lucky Boy Oil Company, and presumptively as such stockholder it would have knowledge or the means of readily ascertaining the fact as to the condition of any stock that remained in the treasury of the corporation. All of the alleged errors predicated upon the refusal of the court to hear testimony offered by the defendant related to the special matters set up in this answer and, in the view we take of the case, were without prejudice to the appellant. The findings in their general form cover the issues presented, and there is some evidence to be found in the record to sustain the determination of the trial judge as to the facts.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

(31 Cal. App. 590)

HANDY v. HANDY. (Civ. 1935.)

(District Court of Appeal, First District, California. Oct. 2, 1916. Rehearing Denied by Supreme Court Dec. 1, 1916.)

TRIAL ⟹6(1)—NOTICE OF TRIAL—STATUTE.

Code Civ. Proc. § 594, providing that if an issue of fact is to be tried proof must be made that the adverse party has had five days' notice, has no application where defendant was present by counsel when the case was called for trial, and where defendant made no legal showing that notice which he received, although not formal, was insufficient, and with one possible exception the answer filed was frivolous, it was not error to proceed with the trial, where the only reasons given for continuance were that counsel could not find defendant or subpœna a witness living outside the county.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 13–16; Dec. Dig. ⟹6(1).]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Action by Maude E. Handy against Rozelvin B. Handy. Judgment for plaintiff, and defendant appeals. Affirmed.

W. C. Cavitt, of San Francisco, for appellant. F. A. Berlin, of Oakland, for respondent.

KERRIGAN, J. This is an appeal from a judgment in an action to foreclose a mortgage on real property given to secure a promissory note for $400, the attack upon the judgment being based upon the fact that the trial court denied a motion of the appealing defendant to postpone the trial of the action.

At the time set for the trial of the action, the appellant, by his counsel, appeared in court, and moved for a continuance of the trial, stating that he had not received the five days' notice prescribed by law; that he had not had time to find the appellant nor subpœna a witness who lived out of the city and county of San Francisco, where the action was pending. No showing for a continuance was made under the provisions of section 595 of the Code of Civil Procedure, and it is clear that the motion was based entirely upon the fact that the appellant had not received a full five days' notice of the time fixed for the trial.

Section 594 of the Code of Civil Procedure provides:

"Either party may bring an issue to trial or to a hearing, and in the absence of the adverse party * * * may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require; provided, however, if the issue to be tried is an issue of fact, proof must first be made to the satisfaction of the court that the adverse party has had five days' notice of such trial."

The Supreme Court, in the case of Sheldon v. Landwehr, 159 Cal. 778, 116 Pac. 44, construing that section, held that it had reference only to proceedings taken against a party in his absence, and that it had no application to a case like the one here, in which both parties were represented and present when the case was called for trial. "Where," says the court, "the party has actually known that the case was set for a certain time, and appears at that time, he is not entitled to a continuance in the absence of a claim showing that he has not had such knowledge long enough to enable him to properly prepare. It is in each case a question for the discretion of the trial court."

In the present case the appellant had filed his answer, he was present in court when the case was called for trial, and he made no legal showing to the effect that the notice which he had received was insufficient to enable him to prepare for trial. In other words, he filed no affidavit setting forth the reasons why he was unable to proceed to trial, or why his witnesses were not present in court, or who they were, or what they would testify to if present. Moreover, with one possible exception the answer of the defendant raised no substantial issue and was frivolous. All the circumstances of the case cast a suspicion on the good faith of the application and induce the belief that it was intended only for delay. We think therefore that the defendant was not entitled to the postponement demanded.

The judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

(31 Cal. App. 567)

THOMPSON v. SOUTHERN PAC. CO. et al. (Civ. 1570.)

(District Court of Appeal, Third District, California. Sept. 28, 1916.)

1. RAILROADS ⟹328(3)—CROSSING ACCIDENT — CONTRIBUTORY NEGLIGENCE — DUTY TO STOP.

Obstructions making it impossible to see, one driving his automobile onto a railroad crossing, without stopping to listen, and if necessary

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get out and look, is barred by contributory negligence from recovering for collision of a train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1059; Dec. Dig. ⟸328(3).]

2. RAILROADS ⟸330(3)—CROSSING ACCIDENT —CONTRIBUTORY NEGLIGENCE—ASSUMPTION.

One approaching a railroad crossing may not assume that any approaching train will be operated without negligence, and therefore that the bell and whistle will be sounded.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1073; Dec. Dig. ⟸330(3).]

3. TRIAL ⟸194(17) — INSTRUCTION — INVADING JURY'S PROVINCE.

Statement in an instruction, in a railroad crossing accident case, that there was no sound of an engine, bell, or whistle, as to which the evidence was in conflict, was an invasion of the province of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 466; Dec. Dig. ⟸194(17).]

4. MASTER AND SERVANT ⟸332(5)—VERDICT FOR SERVANT—CONCLUSIVENESS.

Any negligence proximately causing collision of a train with an auto, being in running it at high speed without warning signal, verdict for the trainmen, sued jointly with the railroad, is an acquittal of their principal of negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⟸332(5).]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by J. H. Thompson against the Southern Pacific Company and others. From an adverse judgment and order, the named defendant appeals. Reversed.

Power & McFadzean, of Visalia, for appellant. Alfred Daggett and Lamberson, Burke & Lamberson, all of Visalia, and J. A. Chase, of Dinuba, for respondent.

BURNETT, J. It is conceded by respondent that appellant has made a fair statement of the facts, and we may, therefore, substantially adopt the same. The action is for personal injuries to plaintiff, resulting from a collision between an automobile driven by him and a freight train of appellant. The collision occurred July 18, 1912, about 4 o'clock p. m., at a grade crossing of a public highway. The crossing is located about one mile south of Dinuba in the county of Tulare, and the train was, at the time of the accident, in charge of defendant Keith, as engineer, and defendant Rhone, as conductor. Defendant Waller was the fireman. Appellant and its trainmen were jointly charged with negligence.

The amended complaint in substance alleges that bordering the public highway on which the accident occurred on the south, and adjoining the railroad right of way on the west, there was at the time of the accident, and for a long time prior thereto had been, an orchard belonging to one Weddle; that the defendants had negligently permitted to grow up and mature on said right of way where the same crosses the public highway a dense growth of sunflowers and weeds; that the vegetation had grown to such height that a person traveling in a vehicle in an easterly direction along the highway across the railroad right of way could not see the railroad track or a locomotive engine or a train of cars upon it for any distance when looking in a southeasterly direction, until he reached a point near and almost immediately upon the railroad track; that the train of cars which collided with plaintiff's automobile was traveling upon its track from the southeast to the northwest; that at the time of the accident, the plaintiff, who was traveling along said highway in an easterly direction, brought his machine down to a slow gait at a point about 120 yards west of the crossing, moved slowly towards the crossing and looked for an approaching train; that because of the presence of the fruit trees in the Weddle orchard, and the sunflowers and weeds on appellant's right of way, he did not see any engine or cars on the track until he was practically upon the track; that before he got near the track he listened, but could not hear any train approaching the crossing; that when he reached the crossing, defendant and appellant which was operating the train, by and through its codefendants, Keith, Waller, and Rhone, at a high rate of speed and in a careless, reckless, and negligent manner, ran into said automobile and seriously injured plaintiff.

It is alleged that the defendants Keith, Waller, and Rhone did not have control over the train; that they omitted to ring any bell, sound any whistle, or give any warning whatever as the train approached the crossing; that if defendants had sounded the whistle at a distance of 80 rods from the crossing, and had continued to ring the bell or sound the whistle from that point until they reached the crossing, the plaintiff would have known of the approach of the train, and would not have gone upon the track and been injured.

The answer denied all the allegations of the complaint except those in reference to the corporate capacity of appellant and the existence of said orchard, and affirmatively alleged that the train was carefully and properly run; that plaintiff was driving his automobile at a speed of about 30 miles per hour; that the whistle was blown and the bell sounded; that plaintiff, as he approached the crossing, did not look or listen for an approaching train; that if he had done so, he would have known that the train was approaching the crossing and that he was guilty of contributory negligence which directly and proximately caused the injuries. The jury rendered a verdict in favor of plaintiff against the Southern Pacific Company for $17,946.55, but against plaintiff as to said trainmen, Keith, Waller, and Rhone.

It appears that plaintiff in company with one West Lee left Dinuba about 4 o'clock in the afternoon of the day of the accident. In leaving the town, they crossed the railroad

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approximately one-half or three-fourths of a mile northwest of the crossing where the accident happened, and proceeded in a southerly direction until they came to a county road leading in an easterly direction toward the railway. They traveled along this roadway and in an easterly direction until the automobile collided with the train. As they crossed the railway in leaving the town of Dinuba, the witness Lee looked down along the railroad track in a southeasterly direction toward the town of Monson and saw the smoke of a train beyond the crossing at which the accident occurred. Lee and the plaintiff say that there was a rough place in the county road upon which they were traveling, about 150 yards west of the crossing, near a stone culvert, and that plaintiff brought his automobile down to a slow gait, and thereafter moved slowly toward the railroad crossing. They and their witnesses testified that there was one row of tall sunflowers extending along the south side of the county road and into the railroad right of way, to within a few feet of the railroad track, and that there was another row of tall sunflowers extending southeasterly from the south side of the county road along the fence which separates the railroad right of way from the Weddle orchard. Lee's estimate of the height of these sunflowers was 6 or 7 feet.

The westerly or southwesterly boundary of the railroad right of way from the center line of the railroad track, measured along the center line of the highway, is about 70 feet. Plaintiff testified that as he approached the crossing he looked in a southeasterly direction, and that he listened for the purpose of ascertaining whether or not there was a train approaching the crossing, but that he did not see or hear one. As to his knowledge of conditions at the crossing, he testified as follows:

"I knew that trains were passing up and down the road frequently, and I was somewhat familiar with the road. I do not know how often I have been over that road, but I believe I had been over it once that day, and I had had occasion to be over it many times previous to that time, but I went usually another way and didn't go over this crossing. I noticed the sunflowers, or other weeds or wild oats there about ten days before the accident. At that time I particularly noticed the sunflowers and wild oats, and this other vegetation, and that is the reason I approached as cautiously as I could—and I knew they were there on the occasion of making this approach to the railroad track on the 18th day of July."

As to his automobile he testified:

"My automobile was in good condition and repair, both as to brakes and otherwise, and I could stop it within a distance of 3 or 4 feet by applying the brakes. I could have stopped it by the emergency brake, or the foot brake, or by shifting my gearing across to the other side of the disc. I could have set it back so that it would not have moved a foot after that."

[1] As to his conduct while within the railroad's right of way, he was asked this question:

"Now, when you were approaching the crossing, and while you were within the lines of the right of way of the railroad company—still on the county road, of course—did you stop your machine, or look or listen for an approaching train?"

And he answered:

"I did not. I could not have seen it if I did, unless I got out of the machine and walked up to the track."

By this answer he showed very clearly, under the decisions, that he was chargeable with such contributory negligence as to preclude recovery. In other words, he did not exercise that due care for his own safety which the law demanded of him. It was his duty to stop and look and listen, at some point where such conduct would be effective. According to his own testimony, he knew of the obstructions to his view. But if he had not known of them before, he certainly observed them that day when he attempted to see if any train was approaching. Common prudence under such circumstances would dictate that he bring his machine to a full stop before attempting to cross the track. If he had done so, he would undoubtedly have heard the train approaching. But to exercise due care, under the situation as revealed by him, the consensus of the opinion of prudent men would require him, if necessary to ascertain whether his life was in danger, to get out of his machine and go forward a few feet on foot in order that the matter might be placed beyond peradventure. We may say, in passing, that the testimony of plaintiff as to the obstruction of the view seems almost incredible in the light of the whole record, but, accepting his statement as true, his misfortune is attributable to his own carelessness.

In Herbert v. Southern Pacific Co., 121 Cal. 227, 53 Pac. 651, it was said:

"But the cases arising from injuries suffered at railroad crossings have been so numerous, and upon certain points there has been such absolute accord, that what will constitute ordinary care in such a case has been precisely defined, and, if any element is wanting, the courts will hold as matter of law that the plaintiff has been guilty of negligence."

The rule of conduct at railroad crossings is therein stated, and it has been recognized and enforced in all the subsequent decisions of the Supreme Court.

In Green v. Southern Cal. Ry. Co., 138 Cal. 1, 70 Pac. 926, it was held that:

"As a general rule, one approaching a railroad track must stop and listen, and the only exception to such rule is that there may be particular instances where the circumstances would not call for such precaution."

And in the consideration of the facts of that case, it was said:

"The fact that they looked to the east as they passed the gate, or opening, farther up the street, as above noted, which was of little benefit to them, is no excuse for not looking or listening at points near the track, where such looking or listening would have been effective."

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In Chrissinger v. Southern Pacific Co., 169 Cal. 619, 149 Pac. 175, the rule is stated as follows:

"A person approaching a railroad track, which is itself a warning of danger, must take advantage of every reasonable opportunity to look and listen. Undoubtedly the question of contributory negligence or freedom from it is ordinarily one for the jury, but where, as here, the standard of conduct is so obvious as to be applicable to all persons, and the plaintiff has failed to measure up to that standard under the circumstances shown, he is not entitled to have his case go to the jury."

In Griffin v. San Pedro, L. A. & S. L. R. R. Co., 170 Cal. 772, 151 Pac. 282, L. R. A. 1916A, 842, after reciting the facts, the Supreme Court said:

"From these facts it is clear that Mr. Griffin neglected the simplest and plainest precautions for the safety of himself and the others in the automobile. It is the duty of a traveler on a highway approaching a railroad crossing to use ordinary care in selecting a time and place to look and listen for coming trains. He should stop for the purpose of making such observations when necessary. It is his duty to use all his faculties, and it is not enough if he merely listens, believing that the people in charge of any approaching engine will ring a bell or sound a whistle. * * * He (Mr. Griffin) had his car under perfect control. The brakes had been tightened that day. He was running at a very low rate of speed, and it would have been easy for him to stop a short distance beyond the fence corner at a place of complete safety and one well suited to observation. Failing to do this amounts to contributory negligence on his part."

It may be said that Mr. Griffin's negligence in that case was no more manifest than that of plaintiff in the case at bar.

It is true, as declared in the opinions, that the rule requiring the traveler to stop is not an absolute one. If the view is entirely unobstructed, the traveler, while going toward a crossing, may see whether a train is approaching in dangerous proximity. Of course, in a case like that it would be idle to require the traveler to stop to find out something that he can ascertain just as well without stopping. He must, however, avail himself of the vision, and if he is exercising ordinary care, he need not stop except to allow an approaching train to pass so as to avoid a collision. But where the view is obstructed, he must place himself in a position where he can use his faculties of observation to advantage. In such case he stops—not primarily to avoid a collision—but to ascertain whether a collision is threatened. Whereas, if the view is unobstructed, if he stops, it is to allow the approaching train to pass.

It appears entirely clear to us that the foregoing is decisive of the controversy, and that it is really unnecessary to notice other points. However, we may briefly call attention to two other grounds of criticism that would demand a reversal of the judgment.

[2] Among the instructions given by the court was the following:

"The plaintiff, in approaching the railroad crossing on the public highway, referred to in the pleadings in this case, had a right to rely upon the performance by those on the locomotive of every act imposed by the law upon them when approaching a crossing. In the legal sense, he was innocent of negligence, unless there was a want of ordinary care and prudence on his part. * * * The degree of caution required is relative to the risk; but no person is bound to assume that another will abandon any reasonable precaution, or violate the obligation imposed upon him by the laws of the land. Plaintiff was authorized to assume that all other persons using the public highway would do so with due care, and it cannot be imputed as negligence that he did not anticipate that the servants or agents in charge of a railroad train on said highway would not perform their duty of ringing a bell or sounding a whistle as the law required. He had the right to assume, until he reached a point where he could look up and down the track, that no train was approaching the crossing, because there was no sound of an engine, bell, or of a whistle."

If the traveler had the right to assume that defendant's employés would observe the law requiring them to ring the bell and sound the whistle when approaching the crossing, he would, of course, have a right to rely upon receiving such information of approaching danger, and would be entirely excusable for neglecting to avail himself of any other source of knowledge. Again, if he had a right to so assume, if no bell as a matter of fact was rung or whistle sounded, he would have a right to assume that no train was in fact approaching, and he would not be chargeable with negligence if he acted upon that assumption and proceeded to cross the track.

In Huston v. Southern California Ry. Co., 150 Cal. 703, 89 Pac. 1093, it is said:

"It is not the law of this state that a person approaching a railroad crossing is authorized to assume that the persons operating a train will not in any way be negligent in that operation. This doctrine has been asserted in some of the states, but is opposed to the law as laid down in the decisions of this state and of the Supreme Court of the United States. Such a rule would abrogate the doctrine of contributory negligence in all such cases."

[3] There is manifestly another fatal error lurking in the last clause of the instruction. Therein the court plainly invaded the province of the jury in a matter of vital importance. It was probably an inadvertence to declare that "there was no sound of an engine, bell, or of a whistle," but the effect was the same, whether the statement was intentionally made or not. If the evidence had all been in favor of respondent's contention, it might be said that such declaration was without prejudice, but on this point there was a sharp conflict in the testimony. The engineer, the two brakemen, and the firemen testified that the whistle was sounded, and that the bell was rung up to the crossing and had been ringing constantly for about two miles, back from the crossing, it is plain therefore, that the question should have been left to the jury without any suggestion or statement as to the fact by the court.

[4] Again, it is plain that the negligence of appellant, if any, which was the proximate cause of the injury, consisted in run-

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ning the train at a high rate of speed without sounding any warning of its approach. But these acts of commission and omission were the acts of appellant's agents whom we have already mentioned. Appellant did not, of course, actually participate in running the train, but it is liable, if at all, upon the theory that it is responsible for the want of care on the part of its servants. The jury found, however, that said servants were not guilty of any negligence. It would follow that appellant was acquitted of any dereliction in running the train. In Bradley v. Rosenthal, 154 Cal. 425, 97 Pac. 875, 129 Am. St. Rep. 171, it is held that where recovery is sought, based upon the act or omission of an agent, which the principal did not direct, and in which he did not participate, an acquittal of the agent of negligence is an acquittal of the principal because the principal's responsibility is cast upon him by law because of his relationship to his agent.

There is some contention that appellant did actually participate in the accident by reason of permitting the growth of weeds so as to obstruct the view of the track. But from respondent's standpoint upon the assumption that he was exercising ordinary care, it is quite clear from the record that he would have been apprised of the danger if the bell had been properly rung and the whistle sounded. He can justify his cause of action only upon the theory that these precautions were omitted. If he had conceded that these usual warnings were sounded, he would have had no cause with which to go to the jury, as he showed no reason why he would or could not have heard them in time to avoid the collision. Indeed, he alleges in his complaint that he would have heard the warning if it had been given. The presence of the weeds simply emphasized the importance and duty of great care on the part of those in charge of the train, and we repeat that since they were acquitted of negligence, the jury, to be consistent, should have gone a step further and exonerated the appellant.

The judgment and order are reversed.

We concur: CHIPMAN, P. J.; HART, J.

(31 Cal. App. 555)

SLAMA TIRE PROTECTOR CO. v. RITCHIE et al. (Civ. 1574.)

(District Court of Appeal, Third District, California. Sept. 28, 1916.)

1. APPEAL AND ERROR ⟸1008(1)—REVIEW—CONSTRUCTION OF AMBIGUOUS CONTRACT.

In the absence of extrinsic evidence, there can be no disturbance on appeal of construction by the trial court of a contract so characterized by ambiguity and uncertainty as to the nature of the relation which the parties intended thereby to create between themselves that either of its two constructions urged by the respective parties might on reasons equally cogent be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3955; Dec. Dig. ⟸1008(1).]

2. SALES ⟸52(5)—CONTRACT—EVIDENCE.

Extrinsic evidence *held* to warrant a finding that the ambiguous contract was intended as one of agency, and not of sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 136, 137, 139; Dec. Dig. ⟸52(5).]

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by the Slama Tire Protector Company against G. A. Ritchie and another, partners as Ritchie & Heriot. From an adverse judgment and order, plaintiff appeals. Affirmed.

Miller & Miller, of Hanford, for appellant. H. Scott Jacobs, of Hanford, and H. P. Brown, of Fresno, for respondents.

HART, J. This appeal is by the plaintiff from the judgment and the order denying it a new trial.

The controversy arises out of a contract entered into between the plaintiff and the defendants, as copartners, at Kansas City, Mo., on the 8th day of October, 1910. Said contract is made a part of the complaint. The plaintiff is a corporation organized under the laws of the state of Nebraska. The defendants, at the time of the making of the contract mentioned, were copartners, doing business in the city of Sacramento under the firm name of Ritchie & Heriot.

The single question presented by this appeal is whether the contract upon which the action is founded was one whereby the plaintiff agreed to sell and the defendants agreed to purchase the tire protectors at the prices and upon the conditions therein specified, or was one whereby the plaintiff agreed to ship or make consignments of the tire protectors to the defendants upon the understanding or condition that the protectors to be so shipped or consigned should be paid for only when they were sold by the defendants, or, to put the proposition in another form, it is whether the parties to the contract intended it to operate only to create between them the relation of principal and agents or that of creditor and debtor, or, in other words, whether the delivery of the goods to the defendants was intended by the agreement to constitute an absolute sale thereof. The proposition thus stated calls for a construction of said contract, or, what practically amounts to the same thing, involves the question whether the court's findings, which necessarily involve and exemplify its construction of the contract, derive sufficient support from the evidence. The contract in full reads as follows:

"Agreements made this 8th day of October, 1910, by and between Slama Tire Protector Company, Kansas City, Mo., known as the party of the first part, and Ritchie and Heriot of Sacramento, Cal., known as party of the second part, witnesseth:

"That whereas, party of the first part is engaged in selling tire protectors, known as Slama

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tire protector, which product is protected by various letters patent of the United States of America; and

"Whereas, the party of the second part is desirous of purchasing and selling said protectors in the states of Washington, Oregon, California, Arizona, and Nevada.

"Whereas, the party of the first part is willing to permit party of the second part to sell said protectors in accordance with terms mentioned herein:

"Now, therefore, in consideration of the premises and of one dollar by each of the parties hereto, the other in hand paid, receipt whereof is hereby acknowledged, said parties do covenant and agree to and with each other as follows:

"(1) The parties of the second part agree to purchase from said first party a total of five hundred pair of above-referred protectors for each year of this contract to be taken either on or before expiration of each year of contract, and such quantity that is purchased over the stipulated amount can be applied toward total purchases of next succeeding year's purchases.

"(2) Said second party agrees that they will not sell any of said protectors at less than the established list prices attached herewith, marked Exhibit A, when selling to the consumer, nor allow any of their subagents to violate this agreement.

"(3) The second party agrees to spend the sum of two thousand dollars ($2,000.00) annually during the life of contract towards advertising said protectors in manner they see fit for the benefit of the sale of such protectors, and all expenditures for such advertising to be reported by verified statements to said first party. It is also understood that any amount spent over and above this sum can be applied toward making total of the amount to be spent during the life of this contract.

"(4) The party of the first part agrees to furnish party of the second part such quantities of circular matter with the said second party's name printed thereon at any time they are requested to do so and in such quantities as will be necessary for the second party to properly circularize the territory covered and allotted to said second party.

"(5) The said party of the first part agrees to turn over all inquiries, orders, and business coming from the territory or states specified herein.

"(6) Said first party agrees to supply a sufficient stock of said protectors to meet all reasonable demand to said second party, and a report of stock on hand is to be made the 1st day of each month to said first party by said second party. All goods taken from such stock to be paid for as provided hereinafter. New and unused protectors are only to be considered as stock on hand. All stock on hand to be kept fully insured, and all freight and storage charges to be paid by second party, and in the event of any of said goods being returned for any reason, freight is to be prepaid back to the factory.

"(7) The price to be paid to first party for such protectors as they shall purchase will be list price as per Exhibit A attached herewith, less discount of 30 per cent. therefrom with an additional discount of 5 per cent. for cash, payable the 10th of each month of net cash, if paid at the end of each month. If the said second party shall comply with all the terms and conditions of this contract, and as soon as the total purchases paid for amount to two hundred fifty (250) pair, then the said first party will allow an additional discount of 5 per cent. from all protectors purchased. Should these same conditions be complied with, and the total paid-for purchases amount to five hundred (500) pair, then another 5 per cent. will be allowed, thus making a total discount from the list price in that event amount to 30—5—5 per cent. and the extra 5 per cent. for cash. In the event of the maximum discount being reached, permission is given as a matter of convenience to figure a total net discount of 40 per cent.

"(8) Privilege is given to said second party to call and advertise our product under the name of 'the armour plate tire protector.'

"(9) The life of this contract shall be for a term of five (5) years, but shall not be assignable by the party of the second part."

Annexed to the contract is a schedule containing a list of the prices which the defendants were to pay for the goods consigned to them by the plaintiff under the terms of the agreement, and for not less than which they were to sell them to the public.

The complaint avers:

"That under and pursuant to said contract plaintiff shipped to defendants at Sacramento, Cal., at defendants' instance and request, between the 8th day of October, 1910, and the 1st day of May, 1911, tire protectors of the value $18,700.45, estimated at the price provided for in said contract; that, as plaintiff is informed and believes, and on such information and belief alleges, all of said tire protectors so delivered to defendants as aforesaid have been sold by defendants."

It is alleged that of the sum above mentioned there has been paid by the defendants to the plaintiff the sum of $2,741.75 only, and that there is consequently due the latter from the former the sum of $15,958.70.

A general demurrer to the complaint having been overruled, the defendant Ritchie answered.

The answer admits the making of the contract mentioned in the complaint, admits the shipment to the defendants by the plaintiff of a certain quantity of the protectors, but denies that they were of the value of $18,700.45, averring, however, that they were of the value of $28,333.45, denies that said fire protectors so delivered to the defendants have been sold by said defendants, but admits that of the protectors so delivered to the defendants the latter have sold "about $6,275 worth only," which amount it is alleged has been paid to the plaintiff.

The answer sets up a number of special defenses and counterclaims growing out of alleged breaches of the agreement by the plaintiff, said counterclaims amounting in the aggregate to the sum of $42,000. As to these, however, it may here be remarked that the court found, and appears to have been justified in so finding, that the defendant was entitled to nothing on the counterclaims pleaded by him. They therefore need not be further noticed.

It is further alleged in the answer that, after the contract in question was made, the partnership existing between Ritchie & Heriot at the time of the execution of said instrument was, by the mutual consent of said partners, dissolved, and that the said contract was thereupon assumed by the said Ritchie, "who continued to transact the business theretofore conducted by the said copartnership."

The court found that the pleaded contract

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was entered into between the parties as alleged in the complaint; that the plaintiff shipped to the defendants at Sacramento tire protectors of the value of $18,700.45; that the defendants did not sell all the protectors so shipped, but did sell a portion thereof, amounting in value to the sum of $2,741.75; that all of said goods were shipped to and received by the defendants to be paid for when sold, and not otherwise; that no part of the said sum of $18,700.75, the value of the protectors shipped to the defendants, has been paid by the said defendants, except the sum of $2,741.75; "but the court finds that it is not true that there is a balance due from the said defendants to plaintiff in the sum of $15,958.70, or any other sum."

It must be conceded that the contract, upon its face, is rather ambiguous and uncertain as to the nature of the relation which the parties thereto intended thereby to establish between themselves. That the construction placed upon it by the trial court, as evidenced by its findings, is reasonable and sustainable by certain language of the instrument, no one reading the writing will for an instant doubt. On the other hand, language is used from which the conclusion might justly be justified that the intention was that, while the defendants were to enjoy the exclusive right and privilege of selling the tire protectors within the territory designated in the contract, they were nevertheless to be required to purchase the goods outright from the plaintiff on the terms and conditions of the agreement, and that each order or shipment was to constitute an absolute sale.

The preamble to the contract contains the declaration that:

"The party of the first part is willing to permit party of second part to sell said protectors in accordance with the terms mentioned herein."

Among the terms of the contract is a provision that the prices at which the defendants are to sell the article must not be less than the established prices indicated in the schedule attached to the contract exhibiting a list of prices, "nor allow any of their subagents to violate this agreement." This language, viewed by the light of that of the preamble, above referred to, appears to make it very clear that the intention was that the defendants were by the contract to act as mere selling agents of the plaintiff. As counsel for the defendant well suggest:

"The idea of subagents must presuppose an agent. * * * There could be no reason for the expression 'subagent' unless the parties had in mind that the second parties were the agent of the first party in the matter of the distribution of these protectors."

Again, the third paragraph of the contract binds the defendants to the obligation of expending the sum of $2,000 each year during the life of the contract for the purpose of advertising the protectors and to render to the plaintiff a verified statement of expenditures for such purpose. Such a provision is a most unusual one in a contract providing for the absolute or unconditional sale of a commodity. If the contract was intended as one for the absolute sale of the article at the prices specified therein, is it reasonable to suppose that the defendants would have bound themselves for a period of five years to the expenditure of such a large sum each year of the five for such a purpose? Indeed, if it had been intended as such a contract, is it reasonably to be supposed that the plaintiff, having received its price for its goods, would have exacted such an agreement from the purchaser? The burden imposed by said provision as a condition upon which a party might acquire the rights and authority of a selling agent for another would not be per se an unreasonable one; for, as counsel for the defendant suggest, the clause may the more reasonably be construed as involving an agreement on the part of the defendants to expend the amount required for advertising as a bonus for the right and privilege of acting as the selling or distributing agents of the plaintiff within the designated territory. Then there is the clause whereby it is covenanted that the plaintiff will supply the defendants with a sufficient "stock of said protectors to meet all reasonable demands," the defendants to report to the plaintiff on the first day of each month the amount of stock on hand. Said clause further provides that the defendants were to keep the stock on hand fully insured. Such conditions as these are rarely to be found in a contract of sale, but are peculiarly appropriate to a bailment or some other transaction by which it is not intended that the consignee of the goods shall acquire title thereto.

Thus we could proceed and point out other language of the contract which, taken alone or viewed in connection with the provisions of the instrument above referred to, clearly implies that the contract was intended to establish the relation of principal and agents between the parties, and not intended as a contract for the sale of the goods; but it is unnecessary to further examine the contract for this purpose. The instrument is presented herein in full, and there can be no difficulty in observing from its language that the conclusion arrived at by the court below as to its legal nature, scope, and effect involves a reasonable view of the language of the writing.

We do not say that the provisions of the contract above specifically adverted to are wholly inconsistent with the theory that the transaction was intended as a contract of sale. What we do say is that the provisions are perfectly consistent with a contract creating an agency. Indeed, as declared, some of them are very rarely to be found incorporated into a contract for the absolute or unconditional sale of goods. And it should fur-

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ther be noted that the plaintiff appears to have proceeded in this action upon the theory that the transaction involved only a conditional sale of the protectors to the defendants. The complaint alleges, upon the information and belief of the plaintiff, that all of the protectors shipped to the defendants had been sold by the latter. If the transaction was in fact an absolute sale of the goods, why such an allegation in the complaint? What material difference could it make to the plaintiff whether the goods were or were not sold by the defendants, if, in truth, the sale was absolute, and title to the goods passed to the defendants? The averment is obviously wholly inconsistent with the theory of an absolute or unconditional sale.

[1] As suggested, however, it must be admitted that the contract contains some language which, if considered by itself or without reference to or consideration of other language of the instrument, might warrant the construction to which the writing is subjected by the plaintiff, viz. that it involves an agreement for the absolute sale of the tire protectors to the defendants. Indeed, it may justly be assumed to be true that the instrument is so characterized by ambiguity and uncertainty as to the nature of the relation which the parties intended thereby to create between themselves that either of the two constructions of the contract urged by the respective parties might upon reasons equally cogent be sustained. The question therefore then arises, assuming, of course, that no competent testimony extrinsic to the writing itself reflecting light upon the real intention of the parties has been received: Is it, in such a situation, within the proper or legal functions of a court of review to declare that the construction given the writing by the trial court should be rejected and supplanted by the other construction of which the instrument is susceptible? Manifestly no reason can be conceived which would support an affirmative reply to that question. The appeal court could not adopt such a course in such a case without resorting to the exercise of arbitrary power. So, if there were no other evidence in this record but the instrument itself which throws or tends to throw any light on the relation which the parties by the contract intended to establish between themselves, we would feel constrained—indeed, it would be our duty—to uphold the construction given the contract by the trial court, as evidenced by its findings.

[2] But there was introduced and received in the case some evidence extrinsic to the instrument itself which we think tends to support the trial court's construction. After the contract was made and a large stock of protectors had been shipped to the defendants, considerable correspondence by mail was carried on between the parties. Some of these letters were introduced in evidence. Excerpts from a few will be sufficient to indicate that the plaintiff understood the contract to call for a payment for the goods shipped to the defendants only when the latter sold the same. In one of the plaintiff's letters to the defendants the following language was used:

"It is also much to be regretted to note the exceptional dry weather California is experiencing, especially this being your first year with the protectors, and as you say, so much depends upon the weather in your section of the country. No doubt, however, when the rains do start, you will make up for lost time, which is surely hoped for, as you know by my previous letters that this amount of stock we have with you has put us in rather tight financial circumstances and caused us to borrow money from the banks in order to meet our own obligations, which were necessarily increased on account of the anticipated business from you. We really realize your condition on account of the weather, and have enough faith in you to know that, if the business is to be had, you will get it. All we want is that you play the game square, and you will find us easy people to get along with."

In the same letter reference is made to a proposition by the defendants to sell a portion of their territory to a Mr. Kaar for the sum of $1,000, and the plaintiff wrote:

"We were very much interested, however, in noting your proposition to Mr. Kaar, and would like to know just what territory you intended turning over to him for this amount, and also your reason for making a proposition of this kind. We were wondering if you are getting dissatisfied with the proposition, or thought that Salt Lake City was a little out of your territory."

Again, the following letter, under date of February 24, 1911, was addressed by the plaintiff to the defendants:

"We hardly know how to express ourselves in replying to your telegram in which you inform us that you have not sold any protectors for two months, and in this telegram you say there is none to make this month. We, of course, realize the dry weather had something to do with the sales falling off, but when they are reduced from what they were to absolutely nothing we cannot help but think something is wrong. and you in our position would, of course, think likewise. We have treated you absolutely square in all of our dealings with you, and expect the same from you. If it is your intention to discontinue handling our protectors, we wish you would say so at once and return what new unused stock you have on hand by prepaid freight and remit for the balance due us as per our agreement. Stock that has been put to use is not returnable."

It is not necessary to enter herein upon an analytical examination of the above letters to show that their language clearly implies the relation of principal and agent between the parties. The letters sufficiently speak for themselves in that respect.

Other letters passing between the parties were introduced in evidence. In the place of presenting herein extracts therefrom, it is sufficient to say that said letters contained language clearly indicating that both parties to the contract understood the agreement to have been intended, not as a contract for the absolute sale of the goods, but merely to vest

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in the defendants the authority of agents in the sale of said goods within the several states named.

Many other significant considerations revealed by the correspondence between the parties might be mentioned, all tending to support the theory that the contract was intended as and in fact was a contract of agency, or, at the most, a conditional sale, the protectors consigned to the defendants to be paid for only when the goods consigned to the defendants were sold by them.

In addition to the foregoing considerations, the statements rendered to the defendants by the plaintiff of protectors shipped to the former may be referred to as indicating the view the plaintiff had of the character or nature of the contract. These statements were uniformly marked "consignment," and from this fact it is reasonably inferable that the plaintiff regarded the shipments under the contract as mere consignments and not as a delivery on the sale of the goods.

Our conclusion is from all the facts and circumstances of the transaction involved here, as disclosed by the contract itself and other documentary proofs, that the court's findings are sufficiently supported; that, under the terms of the contract, as it is warrantably construed by the court, there could not be a completed sale until the defendants sold the goods to third parties. Until that occurred, the consignee was under no obligation to pay the listed prices therefor, and could have been compelled to surrender the goods to the consignor upon demand. Vermont Marble Co. v. Brow, 109 Cal. 236, 41 Pac. 1031, 50 Am. St. Rep. 37.

It is true, as the authorities declare:

"The distinction between agency contracts creating bailments and contracts of sale is not always clear, * * * and in some cases a contract may be construed as creating merely an agency as between the parties where, as between the parties and a third person, it might be given the effect of a sale." 6 Corpus Juris, p. 1091.

There is no question of the rights of third persons involved in the transaction with which we are presently concerned.

After all, however, where the contract is uncertain or not clear as to its purpose and effect, the question whether the transaction of which it purports to be the evidence is a sale or a bailment is to be determined from all the circumstances giving rise to it, and on conflicting evidence a question of fact is presented for the jury's determination. 6 Corpus Juris, p. 1087.

But counsel for the plaintiff contend that the "terms of selling these goods were to be determined by the defendant, and that he agreed to pay a fixed price for the goods," and declare that therefore the case here comes within the rule that where the consignee or factor is to sell upon terms fixed by himself, and is bound to pay to the consignor a fixed price, the contract is one of sale. 21 Am. & Eng. Ency. of Law, p. 520. The contract here, however, expressly provides, as will be observed from a perusal of it, that the "second party agrees that they will not sell any of said protectors at less than the established list prices attached herewith, marked Exhibit A, when selling to the consumer, nor allow any of their subagents to violate this agreement." Thus it is plainly manifest that the defendants were not at liberty under the contract to fix their own minimum prices in selling the goods, but were to be governed in that respect entirely by the prices fixed by the consignor—the plaintiff itself.

We have neither been shown nor found a substantial reason for declaring that the trial court's construction of the contract is erroneous, and the judgment and the order are accordingly affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(81 Cal. App. 597)

CATLIN v. UNION OIL CO. OF CALIFORNIA et al. (Civ. 1993, 2017.)

(District Court of Appeal, Second District, California. Oct. 2, 1916.)

1. NEGLIGENCE ⟸56(1)—"PROXIMATE CAUSE"—WHAT CONSTITUTES.

"Proximate cause" is that cause arising out of a breach of duty which in a natural and continuous sequence produces the damage complained of.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 69; Dec. Dig. ⟸56(1).

For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.]

2. EXPLOSIVES ⟸9—LIABILITY FOR INJURIES—PROXIMATE CAUSE.

When there is no privity of contract between the first wrongdoer and persons suffering damage, and the negligent act relates to articles which carry no menace, the liability of the first party will go no further than to his immediate co-contractor, although the rule is otherwise as to explosives and poisons, in which case a vendor who misbrands them may be held liable though they pass through a number of intermediate hands.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 6; Dec. Dig. ⟸9.]

3. EXPLOSIVES ⟸9 — INFLAMMABLE OILS — NEGLIGENCE.

Through the negligence of defendant's driver, gasoline and coal oil mixed were delivered to a grocer in place of pure coal oil. The grocer discovered that some of the coal oil was mixed with gasoline, but from tests of smell and evaporation decided that two of the cans filled were free from gasoline. He notified defendant, and the driver agreed to remove the oil on the following business day. In the meantime, the grocer disposed of a can, which he believed was pure coal oil, to deceased. In filling a lamp, the oil exploded and deceased was killed. *Held*, that while, in the case of inflammable oils and poisons, the vendor who misbranded them is liable, though they pass through a number of hands, defendant was not liable, for the negligence of the grocer, who was familiar with the danger from gasoline, in disposing of the oil as coal oil though he knew some of that delivered was mixed with gasoline, was

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an intervening cause which defendant could not be charged with anticipating.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 6; Dec. Dig. ⊂⊃9.]

4. NEGLIGENCE ⊂⊃62(3)—PROXIMATE CAUSE—WHAT CONSTITUTES.

One, but for whose negligence an injury would not have occurred, is liable despite the negligent acts of others, where such subsequent intervening acts might have been anticipated.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 79; Dec. Dig. ⊂⊃62(3).]

5. NEGLIGENCE ⊂⊃136(8) — ACTIONS — JURY QUESTION.

While, ordinarily, the question of negligence is a mixed one of law and fact and should go to the jury, the rule is otherwise where the facts are undisputed and reasonable men could not differ as to the matter.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 290–292; Dec. Dig. ⊂⊃136(8).]

6. EVIDENCE ⊂⊃126(1)—ADMISSIBILITY—RES GESTÆ.

In an action for the death of one killed by an explosion of illuminating oil, testimony that deceased, after explaining the way he was burned, stated that there must have been gasoline in the coal oil, is not admissible as part of the res gestæ, being a mere statement of deceased's belief, and not relating to the cause of the accident.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 372; Dec. Dig. ⊂⊃126(1).]

7. EXPLOSIVES ⊂⊃10—ACTIONS — CONTRIBUTORY NEGLIGENCE.

Deceased, who attempted to fill a lamp with coal oil while a flame was near by, cannot, in view of the standard of inflammability of lamp coal oil, be *held* guilty of contributory negligence as a matter of law, but the question is one for the jury.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 7; Dec. Dig. ⊂⊃10.]

8. TRIAL ⊂⊃260(2)—INSTRUCTIONS—REFUSAL.

Where the charges given covered the issues correctly, additional charges are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 652; Dec. Dig. ⊂⊃260(2).]

9. DEATH ⊂⊃99(1) — DAMAGES — EXCESSIVENESS.

An award of $17,000 damages for the death of plaintiff's intestate, a strong man 44 years old, who had an expectancy of 25 years and earned nearly $3 a day, cannot be *held* excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125, 126; Dec. Dig. ⊂⊃99(1).]

Appeal from Superior Court, Los Angeles County; Willis I. Morrison, Judge.

Action by May Catlin, administratrix of the estate of John Catlin, deceased, against the Union Oil Company of California and William M. Riley and wife. From a judgment against the first-named defendant, and an order denying its motion for new trial, it appeals. Reversed and remanded.

Lewis W. Andrews, Thos. O. Toland, A. V. Andrews, and Andrews, Toland & Andrews, all of Los Angeles, for appellant. J. W. Whitworth and R. T. Lightfoot and E. B. Drake, both of Los Angeles, for respondents.

JAMES, J. This action was brought to recover damages for the death of John Catlin, alleged to have been caused by the negligent acts of the defendant Union Oil Company and William M. Riley. Mary E. Riley, the wife of William M. Riley, was also sued; but the action was dismissed as to her in the course of the trial. The jury returned a verdict in favor of the plaintiff and against the defendant Union Oil Company for the sum of $17,000, on which judgment was entered. By the verdict it was found that William M. Riley was not liable for damages in any sum. The defendant Union Oil Company appealed from the judgment and from an order denying its motion for a new trial.

In November, 1912, William M. Riley was conducting a grocery store at the town of Sawtelle in Los Angeles county. Among other classes of merchandise, he dealt regularly in fuel oils, including gasoline and kerosene. The oils he stored in a little outbuilding some 30 feet or more away from the store proper. In this outbuilding he had a tank for gasoline and one for coal oil, or kerosene. On about the 15th of November, that being Friday of the week, he gave an order to the Union Oil Company to deliver to him 60 gallons of kerosene. The tank wagon belonging to the oil company made delivery. The kerosene tank had a capacity of 60 gallons. The tank was not empty, but contained 20 gallons of the fluid before the quantity delivered that day was added to it. Hence the driver of the oil wagon was only able to put into the tank 40 gallons of the 60 gallons ordered. There were four or five empty 5-gallon cans inside of the oil room, and into these cans was poured the remaining 20 gallons, which completely filled both the tank and the other receptacles mentioned. Almost immediately after the tank wagon had left his place, Riley, according to his testimony, took one of the 5-gallon cans which had been filled as described, and delivered it to a customer; for another customer, either that evening or the following morning, he drew a gallon from the tank which had been filled; and for a third customer he made delivery of another gallon, evidently from the same supply. Complaint was very soon made by the patron who had received the 5-gallon can that there was something the matter with the oil, and also complaint came from one of the persons who had received a single gallon. On Saturday morning, being the next day after the delivery of the oil, Riley got back all of the oil about which complaint had been made that he was able to secure, including the 5-gallon can which he had delivered to the first customer. He testified that one of the single gallons of oil returned he poured back into the large tank; that he then had the four 5-gallon cans of oil which had been filled by the tank wagon, and of the contents of these he proceeded to make tests. Riley had for a number of years, both in

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the East and in California, had experience in the handling of both kerosene and gasoline as a dealer. He testified that in making his tests he dipped splinters of wood into the cans, noted the smell of the fluid, and also the rapidity with which it evaporated from the sticks; that by this means, and also by noting the odor of the fluid, he made up his mind that two of the 5-gallon cans contained gasoline and two contained coal oil; that he made a further test of the fluid in the two cans which he had concluded was gasoline by taking a small quantity thereof and placing it upon a stove where, when it was subjected to heat, it flashed up quickly. He made no further tests of the contents of the other two cans, being satisfied that these cans contained coal oil. On cross-examination he testified that had the oil been mixed he did not know whether he would have been able to determine from the tests he made if it was gasoline or kerosene. He testified further that he took the two cans which he had determined contained gasoline, labeled them with a label showing their true contents, and placed them upon the large gasoline tank. Then, as he testified, he delivered one of the 5-gallon cans believed to be coal oil to the patron by whom the five gallons of gasoline had been returned; that there then remained on the floor of the oil room one 5-gallon can of coal oil which had been a part of the delivery made on the preceding day; that the same evening (Saturday), at about dark or dusk, one of the children of Catlin came and wanted kerosene oil; that he (Riley) informed the child that because of insurance regulations he could not handle illuminating oil after dark, and that, as the child insisted that the family had no oil, he told her if she would bring a small can the following morning (Sunday), as he made no deliveries on that day, he would give her sufficient to last until Monday, when he would deliver the remainder of the five gallons; that on Sunday morning one of the Catlin children returned with a gallon can which he (Riley) filled from the 5-gallon can sitting on the floor of the oil room; and that the next morning he delivered the four gallons remaining in the can at the Catlin home, where he poured the oil into an empty can customarily used for that purpose.

John Catlin, the deceased, at the time of his death was 44 years of age, in good health, weighing about 185 pounds. As his wife testified, he was a "strong" man and had had no illness or needed the attention of a physician. He had been married to the plaintiff, his wife, for 23 years, and there survived him besides the widow, four children, aged, respectively: Bessie, 19; Pauline, 17; Howard, 13; Fred, 11. He had been a miner, but at the date of the accident his regular employment was that of a carpenter's helper, at which work he earned $2.75 per day. His life expectancy was 25 years. On Tuesday evening following the receipt of the oil delivered by Riley, being at work laying some cement in his cellar, he had occasion to make use of an oil lamp. He was already carrying in a miner's cap on his head a small lamp such as miners customarily use. This small lamp was lighted and remained so until after the explosion which produced the injuries from which Catlin later died. Catlin went to the rear of the house in or about a screen porch in order to fill the larger oil lamp which he intended to use, and apparently started to pour what he assumed was coal oil or kerosene from the large can into the lamp, when the explosion occurred. Mrs. Catlin, as she testified, heard the noise of an explosion, and almost immediately her husband ran to the front of the house, covered with fire, and rolled in the grass, calling for help. She tried to smother the flames with bedclothing and, with the help of a neighbor, the fire was finally extinguished. One witness, a Mr. Tucker, who assisted in extinguishing the fire burning on the person of Catlin, testified that when he reached Catlin the latter said:

"Oh, Mr. Tucker! Put this fire out on me. I am burning up. Do something for me quick. I was filling the lamp and it exploded, and before I could throw the can it exploded also. Put the fire out. I am burning up. I have handled gasoline and coal oil all my life. I am an old miner. Why should anything of this kind happen to me? I am sure that it was gasoline."

On cross-examination this witness added that while on the way to the hospital the injured man had said that he had filled lamps before "when they were lit" and had never had one act that way. Catlin in his injured condition was removed immediately to a hospital, where he died two days later. It appeared without dispute that the driver of the appellant company, instead of delivering 60 gallons of coal oil as directed, delivered in part coal oil and in part gasoline, and that the mistake came about in this way: The tank wagon from which deliveries were made was divided into three compartments, one in front, one in the middle, and one at the rear. These compartments were entirely separated one from the other, and connected with each at the rear of the wagon was a stopcock or faucet. That customarily gasoline was carried in the forward tank and kerosene in the two rear ones; that on the day when the delivery to Riley was made the driver started to load his wagon and had commenced to fill the forward tank with gasoline. That, desiring to attend to his team, he asked one of the other employés, an agent of appellant, to complete the filling of the forward tank and to put kerosene into the two rear ones. These latter he knew to be empty at the time. That this employé, after completing the filling of the forward tank with gasoline, filled the middle one with kerosene as directed, but, through some error of understanding or judgment, put gasoline into the rear compartment. The driver testified that, in delivering oil in quantities as large as that

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ordered by Riley, he customarily used two 5-gallon measures having handles on them, and drew from two faucets at the same time; that he followed this custom in making the delivery to Riley and drew from the faucets connecting with the two rear compartments, filling his two measures thus at the same time, emptying them and refilling them until the desired quantity had been secured. Riley, the grocer, testified that he was familiar with this practice and noted that the driver followed it on the Friday when he received the delivery of the oil. The driver explained that in consequence of this practice of drawing two measures at a time, and as each measure when filled would completely fill a 5-gallon can, the four cans filled with the last 20 gallons of oil desired by Riley should have contained unmixed fluid; that is, two should have contained gasoline and two kerosene. This conclusion would be in accordance with the tests made by Riley.

There is some discrepancy between the testimony of Riley and the testimony of the driver of the wagon, wherein the driver stated that, when he returned on Monday to take away the oil, he found one 5-gallon can full of coal oil still standing near the door of the oil house. Riley had testified that he had placed two of the 5-gallon cans on top of the gasoline tank and marked them with the word "gasoline," and that, of the two remaining which he had determined to be kerosene, he had delivered one to the first patron who had returned the gasoline, and had taken the other to fill the Catlin order. Riley testified that there was in another portion of the oil room at that time perhaps 5 gallons of coal oil which he had received at a prior date and which was not included in the Friday delivery of mixed oil. Fred Catlin, the 11 year old son of the deceased, who had obtained the gallon of oil from Riley on Sunday morning, testified that when he called for the oil Riley first went to the 50-gallon tank and said, "I think this is mixed"; that Riley then went to a 5-gallon can and drew therefrom the gallon of oil and handed it to him, saying, "I guess this is coal oil." The lamps used by the Catlins were ordinary glass lamps with no aperture separate from the wick holder through which oil might be introduced into the bowl. To complete the narrative of facts it is necessary to refer to an occurrence which took place on Saturday before any of the oil tested by Riley was resold. When the first oil put out by Riley on Friday and Saturday morning had come back to him with the report that something was wrong with it, he made his tests of the oil in the 5-gallon cans as has been hereinbefore described. He then phoned to the branch office of the Union Oil Company through which he did business, and, after getting the ear of the driver who had delivered to him the oil, told this driver that a mistake had been made, that his oil had been mixed on him. Riley testified that he told the driver to come and take back the oil Sunday morning. He testified: "They told me they would come on Sunday, but did not come until Monday." The driver of the wagon admitted receiving notification from Riley that the oil was mixed; that at the time of the conversation over the telephone he had stated to Riley that it was impossible that a mistake had been made, but that if such was the case the wagon had been loaded up "wrong" on him. He testified that he believed he said he would take the oil back; further, that he was not convinced that a mistake had been made until he went for the oil on Monday morning. He denied having promised to return on Sunday morning, and said that he could not have done so because Riley did not keep his store open on Sunday. There was testimony from which the jury was authorized to draw the conclusion that, had the oil delivered to Catlin been kerosene and not gasoline, the ignition of the oil and vapor and consequent explosion would not have occurred. In short, there was sufficient proof, in a circumstantial way at least, upon which the jury was authorized to make the deduction which is implied from the verdict, to wit, that the oil delivered to Catlin was much more inflammable and explosive in its character than kerosene, and that it was in fact gasoline.

[1-4] Appellant first urges that there is a defect in the foundation of plaintiff's case which requires that the judgment be reversed. This contention is referred to the evidence which, it is urged, fails to show that the negligence of appellant was the proximate cause which produced the death of plaintiff's intestate. No contention is made but that the mistake of appellant's agents in delivering both gasoline and kerosene in the place of kerosene to Riley, the grocer, was negligence for which the corporation might in some circumstances be held responsible in damages. It is, however, insisted that, whatever negligence was first committed by appellant in delivering mixed oil, this negligence ceased to be of active effect in the line of causation when Riley, the grocer, discovered that he had received gasoline and kerosene mixed. It is argued that, when Riley notified the driver that the oil was mixed and it was understood that the driver would return and take it back, all responsibility of appellant ended; that the subsequent acts of Riley in selling the oil were the acts of an independent, responsible person which interrupted the chain of causation and furnished in law the last efficient cause of the damage. "Proximate cause" has been defined many times in the decisions and by text-writers to be that cause arising out of a breach of duty which in a natural and continuous sequence produces the damage complained of. The original negligent act may be separated from the untoward event by great periods of time and many other connecting acts, negligent

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or nonnegligent. The latter may be acts of third persons not in any representative sense the agents of the first wrongdoer. There is a qualification, however, to the last-named condition, and that is this: When there is no privity of contract between the first wrongdoer and the person suffering damage and the negligent act falls within the class concerning things which carry no menace or threat of probable damage to third persons, the liability of the first party will extend no further than to his immediate co-contractor. This rule applies generally to cases where breach of contract has been committed in the furnishing of merchandise, or building of tools, machines, et cetera, which in their very nature are not calculated to produce damage when of imperfect construction or composition. The mislabeling of poisons, inflammable oils, explosives, and like dangerous substances is so fraught with possibilities of danger to purchasers as to charge the first vendor with a responsibility for damages, even though the mismarked substance has passed through the hands of a number of intermediate vendors. Elkins, Bly & Co. v. McKean, 79 Pa. 493; Riggs v. Standard Oil Co. (C. C.) 130 Fed. 199; Wellington v. Downer Kerosene Oil Co., 104 Mass. 64; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455. The interrupting event which will disturb the train of causation may be the negligent act of a responsible person.

"If the negligent acts of two or more persons, all being culpable and responsible in law for their acts, do not occur in point of time, and the negligence of one only exposes the injured person to risk of injury in case the other should also be negligent, the liability of the person first in fault will depend upon the question whether the negligent act of the other was one which a man of ordinary experience and sagacity, acquainted with all of the circumstances, could reasonably anticipate or not. If such a person could have anticipated that the intervening act of negligence might, in a natural and ordinary sequence, follow the original act of negligence, the person first in fault is not released from liability by reason of the intervening negligence of another. If it could not have been thus anticipated, then the intervening negligent person alone is responsible." 1 Shearman and Redfield on Negligence (6th Ed.) § 34.

Thus it has been held that where a defendant had negligently constructed a fence and, some panels having fallen out, these panels were picked up by a third party and placed against the fence in an insecure position from which they again fell, injuring a child, the defendant was held to have furnished the proximate cause of the injury, notwithstanding that had the panels been allowed to remain where they had first fallen no injury would likely have resulted; the court saying:

"When there is danger of a particular injury which actually occurs, we must surely say that it is the usual, ordinary, natural, and probable result of the act of exposing the person or thing injured to the danger." Fishburn v. Burlington & N. W. Ry. Co., 127 Iowa, 483, 103 N. W. 481.

The case last cited contains a collection of authorities treating of proximate cause and its relation to other acts intervening before the injury and contributing to the cause. No difficulty is encountered in giving a definition to the phrase "proximate cause." The difficulty in many cases is to determine which among several concurring causes is the active, efficient, and producing agency in working the damage. In following the train of causation to the end of a prolonged chain of acts involving perhaps negligence on the part of third persons, the test as to the original wrongdoer's liability depends upon whether as a reasonable man in all the circumstances of the case he could or should have anticipated that the damage complained of might probably occur. As said by Justice Strong in Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256:

"The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft cited case of the squib thrown in the market place. * * * The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? * * * The inquiry must therefore always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury."

In some of the cases first cited in this opinion, where oils and medicines had been sold in a manner not indicating their true character or bearing some mistake in label, it seems to be intimated that the original vendor who caused the mistake to be first made will be held liable, unless some of the intermediate sellers have been guilty on their part of negligence in dispensing the oil or drug. Such is the court's intimation in Wellington v. Downer Kerosene Oil Co., Elkins, Bly & Co. v. McKean, and Thomas v. Winchester, supra. The facts in this case show that Riley, the grocer, had had long experience in the handling of kerosene and gasoline, and that he was a dealer in such merchandise. Appellant suggests and insists that the legal situation illustrated by the evidence here is no different than had appellant's driver, immediately after delivering the oil to Riley, notified him that a mistake had been made and that gasoline and kerosene had been mixed and that the company would take back the oil. In the latter case it is argued, and the conclusion suggested seems logical, that had Riley determined then to dispose of some of the mixed oil, relying upon his own judgment or knowledge in the matter of determining its true character, the responsibility for any damage which might result would not attach to the appellant corporation, but that, for any mis-

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take made by the groceryman which might result in damage to his patrons, Riley alone could be held accountable. There is no doubt at all but that Riley would have had the right to depend upon the implied representation made by the company that the oil was of the particular kind ordered by him, where he was not put upon notice of the fact that kerosene had been mixed with the more inflammable liquid. On Saturday, after the several lots of oil had been returned to Riley and had been found to contain gasoline and Riley had proceeded to make his own tests, he then had the conversation with the agent of appellant, and the agreement clearly implied from what is admitted to have been then stated was that the company would take the oil back. Riley, as an experienced handler of oils, knew of the highly inflammable quality of gasoline, and it could hardly be said that the appellant, in order to absolve itself from liability, should have specifically advised him not to sell any of the liquid. Riley himself admitted that he would not have been sure in his own mind from the tests made of the two 5-gallon cans which he supposed contained coal oil, of the exact character of that oil providing it had been mixed with gasoline and had not been entirely one or the other. He testified that he made fire tests of the liquid from the two cans which he concluded contained gasoline, but that he contented himself with noticing the odor and the rapidity with which the liquid from the other two cans evaporated.

We cannot on the admitted facts distinguish this case from a case where the oil had been sold as claimed and upon notification from Riley to the company of the state of affairs the company had immediately dispatched their wagon to take the oil back, and that while the wagon was waiting outside for that purpose Riley tested up some of the oil and sold it with the same disastrous consequences which did ensue. It was not incumbent upon appellant to have taken more steps than it did to prevent the independent action of Riley. Its responsible duty to third persons had ended. We have already pointed out that Riley was a dealer in both gasoline and coal oil and he had had many years' experience in handling those commodities. He himself testified that he had received and sold gasoline and kerosene for about ten years. In the view we take of the case, the intervening act of Riley was that of a culpable, responsible person, and that it interrupted the chain of causation and furnished the direct and proximate cause of the damage. In the case where poison was mislabeled as a harmless drug (Thomas v. Winchester, supra), it seems quite clear that, had the retail druggist who received from the defendant and later dispensed the poison had notice of the fact that the drug had been mislabeled and notice of its true character, his act in dispensing it, even though after the making of some tests, would be an act for which the original vendor would not be liable. As the court there said:

"The wrong done by the defendant was in putting the poison, mislabeled, into the hands of Aspinwall, as an article of merchandise, to be sold and afterwards used as the extract of dandelion, by some person then unknown."

[5] But it is said by respondent that, under the facts and circumstances shown in evidence, it became a question solely for the jury to resolve as to whether there had been any negligence on the part of the plaintiff. It is true that questions, involving alleged negligent action which turn upon the proposition as to what should be expected of an ordinarily reasonable man under the circumstances, present mixed questions of law and fact which generally should go to the jury under proper instructions as to the law, leaving the deductions of fact to be made by the verdict. This is always the case where the evidence is conflicting. However, it has been uniformly held that, where the facts are undisputed and clearly settled and the dictates of common prudence point to only one reasonable conclusion, the question is then one of law for the court, and a verdict may be either directed or a nonsuit granted. 1 Shearman and Redfield on Negligence (6th Ed.) § 56. Our Supreme Court has repeatedly applied this rule. Glascock v. Central Pacific R. R. Co., 73 Cal. 137, 14 Pac. 518; Baddeley v. Shea, 114 Cal. 1, 45 Pac. 990, 33 L. R. A. 747, 55 Am. St. Rep. 56; and a number of other cases which it is unnecessary to cite. We think in this case that it must be said that there should be no difference of opinion in the mind of any reasonable man, but that the appellant was shown to have exercised reasonable caution, when its driver informed Riley, the dealer, that he would take the oil back upon being informed by Riley that the fluid was mixed. No assurances were made to Riley designed to dissuade him from his conviction that the oil had been mixed, but the transaction or sale to him was agreed in effect to be rescinded. Riley himself had had abundant proof that the fluid delivered was not unmixed kerosene.

[6] It is contended that prejudicial error was committed by the trial court in refusing to strike out portions of statements made by the deceased Catlin. As has been narrated, Catlin immediately after the explosion, and while he was upon the grass in front of his house covered with fire, made a statement to the witness Tucker as to how the accident occurred, and then said, "I am sure that it was gasoline." He made another statement to which attention has not heretofore been called, to witness Siemsen, who arrived on the ground a few moments after Tucker came. In that statement, after some words had passed between the two men, the deceased said to Siemsen that "there must have been something in that coal oil." Both

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of these statements appellant moved the court to strike out on the ground that they were not a part of the res gestæ, that they were self-serving and expressive of the opinion and conclusion of the witness. It may be assumed that the statements made by the deceased were sufficiently contemporaneous with the occurrence as to admit them in proof as part of the res gestæ (Elkins, Bly & Co. v. McKean, supra), but it does seem quite clear that the particular sentences objected to could not have been competent in any case; they were not statements expressive of how the accident occurred, for the witness had already described what had happened, but presented purely the opinion and conclusion of the deceased as to the fluid which he was using being gasoline. The matter of the establishment of the fact as to the character of the fluid involved was one of the crucial issues in the case and one as to which there was a conflict in the evidence. This statement coming from the deceased may have had deciding weight in settling the important question, and that consideration therefore clearly illustrates the prejudice suffered by appellant. For a discussion of what constitutes proper testimony where statements of the actors are claimed to be a part of the res gestæ, we refer to Heckle v. Southern Pacific Co., 123 Cal. 441, 56 Pac. 56; Williams v. Southern Pacific Co., 133 Cal. 550, 65 Pac. 1100.

[7] As to the claim made that Catlin, as a matter of law under the facts shown in evidence, was guilty of contributory negligence, we think that contention should not be sustained. While it may appear to the ordinary mind as a heedless act for a man to fill a lamp with an open flame on his cap, at the same time it must be borne in mind that there was evidence given by a witness who was shown to have some expert knowledge on the subject that such a thing might be done with reasonable safety and without great danger of the oil or vapor being ignited, if the fluid used was coal oil of ordinary lamp quality. Under this state of the evidence, it was for the jury to settle the question as to whether the deceased acted with reasonable caution in the circumstances. The case of Riggs v. Standard Oil Co. (C. C.) 130 Fed. 199, cited by appellant, presented different facts. In the decision the district judge held that the pouring of oil by the person injured into a fire box of a stove in which were live coals was contributory negligence which would prevent a recovery, even though the oil furnished was not of the high flash test required. The injured person in that case actually brought the oil in contact with fire. Hence it was clear that, of whatever higher test the oil might have been, nothing could have prevented its ignition; the conclusion of negligence was irresistible. It is contended that the court erred in refusing to give certain instructions offered on the part of appellant. It was error not to instruct the jury in accordance with the conclusions expressed in the foregoing as to the conditions under which the first negligence of the appellant ceased to be of contributing influence in the chain of causation. Appellant was entitled to an instruction, as we view the case, that as a matter of law, under the facts shown, responsibility, if any, was that of Riley, the immediate vendor of Catlin.

[8] In other respects the charge as given by the trial judge appears to have contained in the main a correct exposition of the law. Those instructions furnishing more explicit advice on the subject of contributory negligence might well have been given, but we think it was not error to have refused them.

[9] As to the alleged excessive amount of the verdict, we would not feel justified in reversing the cause for that reason. Morgan v. Southern Pacific Co., 95 Cal. 508, 30 Pac. 601; McGrory v. Pacific Electric Co., 22 Cal. App. 671, 136 Pac. 303.

The judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

(31 Cal. App. 579)

COVEY v. NATIONAL UNION FIRE INS. CO. OF PITTSBURGH. (Civ. 1490.)

(District Court of Appeal, Third District, California. Sept. 30, 1916. Rehearing Denied by Supreme Court Nov. 27, 1916.)

1. INSURANCE ⟸323(3)—FIRE INSURANCE—VACANCY OF PREMISES—HOW DETERMINED.
In determining whether premises become vacant so as to avoid the policy of insurance, consideration is given to their character and use to which they are being put.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 769, 772–775, 778; Dec. Dig. ⟸323(3).]

2. INSURANCE ⟸323(3)—FIRE INSURANCE—VACANCY OF PREMISES—HOW DETERMINED.
In cases of tenancy, it is reasonable to assume that the assured and insurer contemplated that some space of time might necessarily elapse after the tenant's family had moved from the premises before the tenant could remove all his household goods or possession could be given to the landlord or to another tenant.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 769, 772–775, 778; Dec. Dig. ⟸323(3).]

3. INSURANCE ⟸323(3)—FIRE INSURANCE—VACANCY OF PREMISES—HOW DETERMINED—"UNOCCUPIED"—"VACANT."
Since the circumstances existing at the time must necessarily be factors in determining whether the insured building is "unoccupied" or "vacant," such terms may be treated as synonymous.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 769, 772–775, 778; Dec. Dig. ⟸323(3).

For other definitions, see Words and Phrases, First and Second Series, Unoccupied; Vacant.]

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4. INSURANCE ⊂=323(3)—FIRE INSURANCE—VACANCY OF PREMISES—EVIDENCE.

While no fixed and unbending rule exists as to whether an insured building is vacant so as to avoid the policy, yet where a tenant had removed all but a few of his articles, which he intended to return and get, and still held the key, such facts were not conclusive against his occupancy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 769, 772–775, 778; Dec. Dig. ⊂=323(3).]

5. INSURANCE ⊂=555—LOSS—PROOF—NOTICE OF DISAGREEMENT—TIME FOR MAILING.

Under a fire policy requiring the insurer to give notice to the insured within 20 days after filing proof of loss of its disagreement as to the amount claimed, the mailing of such notice on the twentieth day is too late, but it must have been received by the insured within 20 days.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1367–1373, 1382–1390; Dec. Dig. ⊂=555.]

6. INSURANCE ⊂=568—FIRE INSURANCE—NOTICE OF DISAGREEMENT—TIME FOR MAILING—DEMAND FOR APPRAISEMENT.

Under a fire policy requiring demand for appraisement to be made by the insurer within 90 days after submission of proof of loss, a notice mailed within 90 days but received by the insured on the ninety-first day is too late.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1424; Dec. Dig. ⊂=568.]

7. INSURANCE ⊂=576(3)—FIRE INSURANCE—APPRAISEMENT OF LOSS—TIME OF DEMAND.

Where an insurer failed to give timely notice demanding appraisement and the insured then sued on the policy, the existence of which insurer recognized by again demanding appraisement, the insured was not estopped from claiming that the demand was not made in time.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1438; Dec. Dig. ⊂=576(3).]

Appeal from Superior Court, Shasta County; James G. Estep, Judge.

Action by David E. Covey against the National Union Fire Insurance Company of Pittsburgh. Judgment for plaintiff, and defendant appeals by the alternative method. Affirmed.

Sterling Carr, of San Francisco, for appellant. Braynard & Kimball, of Redding, for respondent.

CHIPMAN, P. J. The cause was tried by the court without a jury, and plaintiff had judgment for $800 as damages for loss by fire against which defendant had issued its policy of insurance. Defendant appeals from the judgment under the alternative method.

The following were stipulated as facts in the case: The policy took effect July 13, 1913, and was for one year. The insured building was destroyed by fire October 1, 1913, about the hour of 2 a. m. Notice of the fire was received by defendant October 21, 1913, and on November 19, 1913, proof of loss was filed with defendant. By letter dated December 8, 1913, defendant wrote plaintiff notifying him of its "total disagreement of the amount claimed" by plaintiff and that defendant "admits a loss of $290.91 on the property described in above-mentioned policy." This letter was mailed at San Francisco on December 9, 1913, and was received by plaintiff on December 12, 1913. On December 31, 1913, plaintiff brought an action on said policy for $800, in all respects the same as the present action. The first action was dismissed April 4, 1914, and the present action was commenced on April 8, 1914. On February 16, 1914, defendant mailed to plaintiff "a demand for arbitration" by letter dated at San Francisco, on that day and directed to plaintiff at "Millville, Shasta county, California," notifying him that defendant "failed to agree as to the amount of loss caused by fire of October 1, 1913, to the building described in * * * Policy No. 5116 * * * as admitted in our notice to you dated December 8, 1913," and stated that "this company demands an appraisement of the loss * * * and names L. N. Bursen a competent and disinterested appraiser," and calls upon plaintiff to appoint an appraiser and so notify defendant:

"This notice was received at Millville by Mr. Covey February 20, 1914. No appraiser was ever appointed by Mr. Covey, and no notice was ever taken of this demand."

The policy in question was what is known as the standard California form. Certain of its provisions are more or less applicable to the case in hand and will be given in the order found in the policy, omitting intermediate provisions, as follows:

"$800. On the two-story frame building and its adjoining and connecting additions * * * and all permanent fixtures therein and attached thereto, property of assured, while occupied only as a private dwelling, situate (as per diagram) on the north side of Main street in Whitmore, Shasta county, California. * * *

"This policy is made and accepted subject to the foregoing stipulations and conditions and those hereinafter stated, which are hereby specifically referred to, and made part of this policy, together with such provisions, agreements or conditions as may be indorsed thereon or added thereto, etc. * * *

"Unless otherwise provided by agreement indorsed hereon or added hereto, this company shall not be liable for loss or damage occurring * * * (f) while a building herein described whether intended for occupation by owner or tenant, is vacant or unoccupied beyond the period of ten consecutive days.

"This company shall be deemed to have assented to the amount of the loss claimed by the insured in his preliminary proof of loss, unless within twenty days after the receipt thereof * * * the company shall notify the insured in writing of its partial or total disagreement with the amount of loss claimed by him and shall notify him in writing of the amount of the loss, if any, the company admits on each of the different articles or properties set forth in the preliminary proof or amendments thereto.

"If the insured and this company fail to agree, in whole or in part, as to the amount of loss within ten days after such notification, this company shall forthwith demand in writing an appraisement of the loss or part of loss as to which there is a disagreement and shall name a competent and disinterested appraiser, and the insured within five days after the receipt of

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such demand and name, shall appoint a disinterested appraiser and notify the company thereof in writing, and the two so chosen shall, before commencing the appraisement, select a competent and disinterested umpire. * * *

"A loss hereunder shall be payable in thirty days after the amount thereof has been ascertained either by agreement or by appraisement, but if such ascertainment is not had or made within sixty days after the receipt by the company of the preliminary proof of loss, then the loss shall be payable in ninety days after such receipt."

1. It is contended by appellant that the findings, to the effect that the insured building was totally destroyed by fire "while occupied as a private dwelling," is not supported by the evidence. The premises were under lease by plaintiff to one Moses C. Tribble, who testified that he had been living in the house with his family for "something over a year" as a "dwelling house"; that on September 28, 1913, he commenced to move his family and household effects; that he did not "move all his household effects or personal property from the house before it was destroyed by fire"; that he did not sleep in the house after the night of September 27th. He was asked what remained at the place after he removed his wife and was there on the night of the 30th of September.

"A. I know there was stuff there left in my care. The stuff didn't belong to me, left in my care. Had some household things, junk there that would naturally accumulate with farming, and so it was there, and what there was I could not say. I would not confine myself down. Q. Was there any furniture there? A. No, sir. * * * Q. And then all there was left there was some chickens running around the yard and this accumulation of things? A. Yes, sir."

He testified that he was at the premises about 4 o'clock in the evening of September 30th.

"I had some chickens there, and I was trying to catch these chickens and get them and take them and move them up to the place where I was moving to. Q. Did you at any time notify Mr. Covey that you were about to move from the premises? A. Well, I think, yes. I think I told Mr. Covey that I intended to move, but as to the exact day that I told Mr. Covey, I could not say. Q. As to the time when you would move? A. Yes, because it was on account of the health of my wife. She was down with rheumatism, and I didn't know really when I could move. Q. Yes. Who had the key to the dwelling at the time of the fire? A. The key was in my possession."

Plaintiff testified that he was at the premises on September 30th the day before the fire.

"Q. Was there anybody upon the premises at that time? A. Yes, sir, Mr. Tribble was there. * * * Q. Was he a tenant of the property? A. Yes, sir. Q. Your tenant? A. Yes, sir. Q. And what were the conditions there with reference to whether or not the property was occupied at the time that you were there? A. It was occupied, yes; the man had his stuff there, was hauling some of his stuff off, and catching his chickens and one thing and another. His poultry was there. * * * Q. Do you know whether any of his household goods were still upon the property? A. Yes, we went through the house and seen some boxes and household things there. Don't know what he had boxed up, something another. * * * Q. Had Mr. Tribble at that time turned over the key to the premises? A. No, sir."

On cross-examination he testified that Tribble told him he was moving off.

"Q. But Mr. Tribble told you, did he not, that he was going to move out that day? A. No, sir; didn't say he was going to move that day. Q. Never said so? A. He said he was moving out. Q. As a matter of fact, he did move out that day? A. I don't know. No, sir; I don't think so."

He testified that Tribble had been in possession of the premises for "something over a year"; that he was paying $75 per year and had paid his rent in full; that he learned that Tribble was going to move away "somewhere near the 30th, about that day I think is the first I can remember." It was admitted that the "building was totally destroyed."

We think the situation at the time the fire occurred, to wit, 2 a. m., October 1st, briefly stated was as follows: Plaintiff's tenant was not in actual physical possession of the premises, but had the right of possession and was still in the act of moving his effects therefrom; that he was the recognized tenant and retained possession of the keys to the building and that he had not surrendered possession to his landlord; that his intention was to reside elsewhere and to that end had removed his family and most of his household goods, but his intention was to return to get what remained of his personal property.

[1] The court found:

"It is not true that at the time of the destruction by fire of said premises, to wit, on the 1st day of October, 1913, said premises described therein and so insured by said policy of fire insurance, were not occupied only as a private dwelling and it is not true that said premises" at said time were, "wholly or at all vacant and unoccupied, or vacant or unoccupied."

The contention of appellant is that this finding is unsupported by the evidence. The cases are numerous in which the terms "occupied," "vacant," "occupied and vacant," "occupied or vacant," are defined and are by no means harmonious. All agree that existing conditions when the policy is issued have much to do with arriving at the intention of the parties. A different construction is given to these terms in case of loss by fire where the premises were by the insurer known to have been occupied by a tenant when insured, as was the case here, from that given where the insured was the owner and the occupant. Also, consideration is given to the character of the premises and the use to which they are being put. In the case of Omaha Fire Ins. Co. v. Sinnott, 54 Neb. 522, 74 N. W. 955, the policy provided that the insured house was and should continue to be occupied, and it was claimed that this warranty was broken by reason of the house becoming unoccupied and continuing to be vacant before the fire. Said the court:

"The evidence most favorable to this contention was, in effect, that while the policy was

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in force, to wit, about July 11, 1894, the owner of the insured property notified her tenant to vacate it; that immediately thereafter the tenant began to remove his furniture to another house, to which he went with his family. When the fire took place, however, he had not yet removed his cook stove and some other personal property. Under these conditions, we cannot say that the jury improperly concluded, from a consideration of the evidence, that the house was not unoccupied at the time of the fire."

[2] In cases of tenancy, it is reasonable to assume that the parties contemplated that some space of time might necessarily elapse after the tenant's family had moved from the premises before the tenant could remove all his household goods or possession could be given to the landlord or to another tenant. In the case of Norman v. Insurance Co., 74 Mo. App. 456, a distinction is drawn between the terms "vacant" and "unoccupied." In that case the tenant had, on the evening of October 5th, taken his family to a neighborhood house and had removed a part of his furniture, leaving a part in the building, but retaining the keys and possession until he should have time the next day to remove the remainder of his household effects. During the night of the 5th and 6th at about 1 o'clock in the morning, the building and contents were destroyed by fire. The court held the company liable notwithstanding the provision of the policy that "as soon as buildings become vacant the insurance shall be void," and that the building was not vacant.

Weidert v. State Insurance Co., 19 Or. 261, 24 Pac. 242, 20 Am. St. Rep. 809, was a case where one McNett, a tenant, moved into the premises in April and lived there until June 15th or 20th, when he moved away, but a hired man or some member of the family "was there at the house every day to see if things were all right; * * * that they * * * went down there to see that nothing was destroyed." The fire occurred on the night of July 9th. The court held that, conceding to the fullest extent all the facts that this evidence tends to prove, no occupancy of the premises was shown after McNett moved out. The provision of the policy involved was as follows: "* * * Or if any change shall take place in the title, possession, or occupancy" without immediate notice to the company and its consent obtained, "this policy shall * * * be null and void." Several cases are cited in the opinion supporting the view there taken, but, as in the principal case, the occupant seems to have moved away from the premises and was using the former dwelling as a sort of place of storage for some portion of his household effects.

In Norman v. Insurance Co., supra, the court said:

"Removal was in fieri, not complete. If the tenant had, on the evening of October 5th, taken his family to a neighbor's house, leaving his household goods packed and ready for moving the next day, could it with any show of reason be said that the building was vacant? Surely not. Neither could it be said to be vacant if the tenant had taken away a portion and left a portion for removal the following day. The house would not in either event be vacant, though unoccupied."

The court seems to have held to the strict meaning of "vacant," a distinction which we do not think is unbending or may be arbitrarily applied.

[3] The circumstances existing at the time must necessarily be factors in determining whether or not the building is unoccupied or vacant. These terms may therefore be treated as synonymous in their meaning. This was shown in Herrman v. Adriatic Ins. Co., 85 N. Y. 162, 39 Am. Rep. 644, a case in which it was held as a general proposition that:

"For a dwelling house to be in a state of occupation, there must be in it the presence of human beings as at their customary place of abode, not absolutely and uninterruptedly continuous, but that must be the place of usual return and habitual stoppage."

Cummins v. Agricultural Ins. Co., 5 Hun (N. Y.) 554, was a case where the policy provided that, if the dwelling house became vacated by the removal of the owner or occupant, the "policy shall be null and void, until the written consent of the company at the home office is obtained." It was held that the provision "'vacated by the removal of the owner or occupant,' means an abandonment of the house as an actual place of residence, permanently or temporarily. A mere temporary absence of the family from the house for a night or a day would not be such a removal."

In Bennett v. Agricultural Ins. Co., 50 Conn. 426, the insured building was occupied by a tenant, and the policy provided that, if the dwelling should "cease to be occupied as such, * * * the policy shall cease and be of no effect." The proof showed that the house was occupied about a month and a half in the spring of 1880, that it was thereafter again occupied, and that the tenant moved out about 6 o'clock in the evening on the day preceding the fire, and the house remained unoccupied until it was destroyed by fire about 2 o'clock the next morning. "This," said the court, "was clearly a violation of this condition of the policy." That case is easily distinguishable from the present case. There was a complete abandonment of the dwelling, the tenant leaving nothing in the house and having surrendered possession completely and having no occasion to return for any purpose. It was not a temporary absence, but an actual giving up of the premises. The length of time the building was unoccupied was therefore an immaterial factor.

A tenant moved out of an insured dwelling on Tuesday, and on Wednesday morning the owner took possession, and, with his servants, began cleaning it and moving in goods, and were continuously so engaged during the working hours of each day until Friday evening; intending that the family should be

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fully domiciled there Saturday, but meanwhile lodging and taking their meals elsewhere. On Friday night the house was burned; and it was held that the policy had not become void on the ground of vacancy or nonoccupancy. Eddy v. Hawkeye Ins. Co., 70 Iowa, 472, 30 N. W. 808, 59 Am. Rep. 444. "There is no case to which our attention has been called," said the court, "which holds that a house is vacant or unoccupied by the mere fact of the physical absence of the occupants for a day or night." The case of Shackleton v. Sun Fire Office, 55 Mich. 288, 21 N. W. 343, 54 Am. Rep. 379, is cited in the opinion. In that case the tenant vacated the house June 19th, and the owner took possession, put her furniture in the building, but, for what seemed to be good reasons, she did not take her meals nor lodge in the house and it was destroyed by fire on July 4th. It was held that the house was not vacant or unoccupied, within the meaning of the contract. Said the court:

"Nothing, apparently, was wanting to complete personal possession, except that she lodged and took her meals at her father's, a few rods off. Those facts were not conclusive against her occupancy."

[4] We can see no reason why the rule should be different where a tenant is moving into a house than where he is moving out. In both cases he is in possession of the house and has some or all of his goods there, but for sufficient reasons he finds it necessary temporarily to lodge elsewhere while moving in or moving out, as the case may be. No fixed and unbending rule seems to be deducible from the adjudicated cases. The courts take into consideration all the circumstances and attribute such intention to the parties in entering into the contract as would appear consonant with reason. As was said in the Michigan case last above referred to, the facts in this case "are not conclusive against the tenant's occupancy."

[5] 2. The court found that defendant did not serve its notice of disagreement or demand for appraisement within the time required by the policy and that plaintiff complied with and performed all of its terms on his part. This finding is challenged. The policy provided that the company "shall be deemed to have waived assent to the amount of the loss claimed by the insured in his preliminary proof of loss, unless within twenty days after the receipt thereof * * * the company shall notify the insured in writing," etc. (see provision supra). Defendant at San Francisco mailed a letter to plaintiff residing at Whitmore, Shasta county, on the twentieth day after the receipt of proof of loss, which letter was received by plaintiff two days later. Defendant contends that:

"The mailing of the notice of disagreement within the 20 days is sufficient under the terms of the policy even though it is not received until after the expiration of the twenty days."

Respondent contends that where, as here, the loss was total and so conceded, there was no occasion for arbitration and appellant was not prejudiced by the ruling of the court. However this may be, we think defendant failed to give the notice contemplated by the policy. In Winchester v. North British, etc., Co., 160 Cal. 1, 116 Pac. 63, 35 L. R. A. (N. S.) 404, the defendant made demand for the appointment of appraisers, but the notice did not reach plaintiff's attorney in fact until after the expiration of sixty days. It was held that "the failure to serve such notice upon the insured within 60 days after service of proof of loss amounted to a waiver." The policy read: "The sum for which the company is liable pursuant to the policy shall be payable sixty days after due notice," etc. The question there was as to the time when the action could be brought. The language of the present policy is "unless within twenty days after the receipt" of proofs of loss, the company "shall notify the insured," etc.

It appears from the transcript in the Winchester Case that due proof of loss was made on May 14, 1908, and on July 8th, within 60 days after proof of loss, defendant duly posted a letter addressed to plaintiff's attorney in fact, giving notice of its disagreement, etc. The court found that said demand "was received by plaintiff's attorney in fact on the 18th day of July, 1908, and more than 60 days after the service of said proof of loss." In the present case the notice was received two days too late; in the Winchester Case four days too late. We think the Winchester Case decisive of the point.

[6, 7] 3. Defendant was equally in default in sending its demand for an appraisement. Proof of loss was filed with defendant on November 19, 1913. On February 16, 1914, defendant mailed a letter at San Francisco, directed to plaintiff at Millville, Shasta county, notifying plaintiff that it demanded an appraisement of the loss. This notice was received by plaintiff on February 20, 1914, which the court found "was more than ninety days after the said preliminary proof of loss was received by said defendant." The policy provided:

"If for any reason not attributable to the insured or to the appraiser appointed by him, an appraisement is not had and completed within ninety days after said preliminary proof of loss is received by this company, the insured is not to be prejudiced by the failure to make an appraisement and may prove the amount of his loss in an action brought without such appraisement."

Not having received notice in time, plaintiff was not compelled to submit to an appraisement of the loss, and the case stands as though no appraisement was had. Defendant recognized the policy as still in force after the action was first commenced by demanding an appraisement, and we do not think plaintiff is now estopped from claiming that the demand for arbitration was not made in time.

Defendant admitted a liability of $290.91 in its letter of December 8, 1913, and also

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in its answer. The principal question of fact was as to the actual loss, defendant claiming that it did not exceed the above amount. Other questions are matters largely of technical law. The loss was total and there was evidence sufficient to support the finding that:

"The actual cash of plaintiff's interest in said dwelling house was at the time of said loss on the 1st day of October, 1913, more than the said sum of $800."

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

(48 Utah, 551)

PREECE v. OREGON SHORT LINE R. CO.
(No. 2816.)

(Supreme Court of Utah. Aug. 30, 1916. Rehearing Denied Nov. 23, 1916.)

1. LIMITATION OF ACTIONS ⟸34(6)—"LIABILITY CREATED BY STATUTE" — RAILROAD FENCE LAW—ANIMALS ON RIGHT OF WAY.

An action against a railroad for cattle killed on its right of way, where predicated on negligence in operating the train, etc., as well as on defective cattle guards and wing fences, within Comp. Laws 1907, § 456x, requiring railroad companies to maintain cattle guards, and to pay damages for such killing or injuries of domestic animals as results from failure to do so, was not barred by Comp. Laws 1907, § 2877, subd. 1, barring after one year "an action for liability created by statute."

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 156; Dec. Dig. ⟸34(6).

For other definitions, see Words and Phrases, First and Second Series, Liability Created by Law.]

2. RAILROADS ⟸412(1)—ANIMALS KILLED ON TRACK — LIABILITY — NEGLIGENT MAINTENANCE OF FENCES.

If cattle get on the right of way because of defective condition of cattle guards or connecting fences because of the negligent maintenance thereof by the railroad company and without fault of the owner, the company ordinarily is liable for their being killed or injured.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1451, 1452; Dec. Dig. ⟸412(1).]

3. RAILROADS ⟸443(7) — INJURIES TO ANIMALS—ACTION—EVIDENCE.

In action against railroad for mare killed at a highway crossing by train going 35 miles an hour, evidence that there was an unobstructed view of the right of way and crossing for a distance of 2,145 feet from the crossing, and that animals at or near the crossing could be seen from an approaching train, *held* to sustain a finding of negligence of the railroad; it not appearing that the owner of the mare was negligent.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1618; Dec. Dig. ⟸443(7).]

4. RAILROADS ⟸441(8)—INJURIES TO ANIMALS—ACTION—EVIDENCE—PRESUMPTIONS.

In such action, it being admitted that the mare was hit while the train was going 35 miles an hour, the only inference permissible was that the mare was on, in close proximity to, or was going toward, the track, and was but a short distance from it when the train was in stopping distance of the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1589-1591; Dec. Dig. ⟸441(8).]

5. RAILROADS ⟸441(4) — INJURIES TO ANIMALS—ACTION—EVIDENCE.

In such action, the mere fact that a colt was found "crippled in the thigh" in the vicinity of a crossing the morning after its mother was killed there by a train, did not justify the inference that it was struck by the train, where plaintiff's evidence tended to show that soon after the mare was killed the colt was seen running back and forth.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1580; Dec. Dig. ⟸441(4).]

6. RAILROADS ⟸422—INJURIES TO ANIMALS ON TRACKS—PRIVATE CROSSINGS—GATES—LIABILITY FOR DEFECTS.

Where a mare got onto the right of way from the owner's field because the gate to a private crossing on his land was imperfectly hung and the fastenings thereof were defective, the owner was not thereby barred from recovery for the resulting killing of the mare by a train, since, although the gate was erected and maintained by the railroad for the use and convenience of the owner, it was nevertheless the railroad company's gate, and the owner was not responsible for such defects.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1512-1515; Dec. Dig. ⟸422.]

7. RAILROADS ⟸415(3)—INJURIES TO ANIMALS—DUTY TO LOOK OUT—PRIVATE CROSSINGS.

In approaching private or farm crossings, trainmen must keep a lookout to avoid injury to animals which may be lawfully on the crossing, and the company is liable if their failure to do so results in injury to such animals, but they need not slow up or stop the train to ascertain if animals are upon or near the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1478; Dec. Dig. ⟸415(3).]

8. EVIDENCE ⟸17—JUDICIAL NOTICE.

The court will take judicial notice of when the sun sets on a given day in the latitude of the forum, and that twilight follows immediately, and continues until the sun is 18 degrees below the horizon, and that the sun sinks below the horizon at the rate of one degree of longitude for every four minutes of time.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 21; Dec. Dig. ⟸17.]

Frick, J., dissenting in part.

Appeal from District Court, Davis County; N. J. Harris, Judge.

Action by John Preece against the Oregon Short Line Railroad Company. From a judgment, both parties appeal; the plaintiff also appealing from directed verdict for defendant. Affirmed on defendant's appeal, and on plaintiff's appeal affirmed in part, and in part reversed, and new trial granted.

Oscar W. Moyle, of Salt Lake City, for plaintiff. Geo. H. Smith, Benj. S. Crow, J. V. Lyle, and A. B. Robertson, all of Salt Lake City, for defendant.

FRICK, J. The plaintiff brought this action against the defendant to recover the value of certain horses and cattle which the plaintiff alleged were negligently killed on defendant's railroad in Davis county, Utah, at different times and dates.

There were seven causes of action stated in the complaint. In the first cause of action plaintiff sought to recover the value of a mare that was killed and for the injury of her colt which thereafter died. The mare was killed at a public crossing called Burke Lane. The second cause of action was dismissed by the plaintiff at the trial. In the

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third cause of action plaintiff sought to recover the value of a cow and heifer which were killed on defendant's right of way about 300 feet north of the crossing aforesaid. It seems the cow and heifer went on the right of way over the cattle guards or between the cattle guards and the wing fence leading therefrom to the right of way fence; the right of way being fenced in with a wire fence. The fourth cause of action was for the killing of a cow at the same crossing at which the mare was killed. In the fifth cause of action plaintiff sought to recover the value of a young Percheron mare which was killed on defendant's right of way, she having gone onto the right of way through a private farm gate which was put in and maintained by the defendant on the land of the owner for the convenience of such owner. With the other two causes of action I am not concerned on this appeal. The mare and colt mentioned in the first cause of action belonged to the plaintiff, while all of the other animals were owned by different persons and were killed at different times and dates, and the several claims were assigned to the plaintiff by the different owners for the purpose of bringing this action.

The plaintiff recovered judgment on the first cause of action for the mare. The court, it seems, did not submit to the jury the question of whether the plaintiff should recover for the colt. The plaintiff also recovered judgment on the third and fourth causes of action. The court directed the jury to return a verdict on the fifth cause of action in favor of the defendant.

The defendant appeals from the judgment in favor of the plaintiff on the first, third, and fourth causes of action, and the plaintiff appeals on the first cause of action in so far as the colt is concerned, and also from the directed verdict and judgment in favor of the defendant on the fifth cause of action.

With regard to the first cause of action the plaintiff alleged the following acts of negligence:

"That the said animals were killed by the carelessness and negligence of defendant in that the defendant failed to use any means to ascertain whether or not said animals were upon the track of said defendant or in a place of danger near its track at said crossing, and failed to use any means to prevent said animals from going upon or remaining upon its track, and in that it carelessly and negligently operated its train at said crossing at a high rate of speed, and failed to stop or lessen the speed of its train as it approached said animals after they were known to be, or in the use of reasonable diligence by defendant's servants in charge of said train should have been known to be, in a place of danger, said animals being visible to the servants of defendant in charge of said approaching train for a long distance, to wit, for about one mile from the place where they were killed."

I remark that while it is alleged that "animals" were killed, the evidence is conclusive that only one was killed by the train at the time alleged in the first cause of action.

Both parties have filed printed abstracts of the evidence, and each contends that the evidence in such abstracts, in some particulars, is stated too favorably for the party making the abstract. In view of that fact I have carefully read the evidence upon the causes of action in question as the same is certified up by the trial judge in the original bill of exceptions.

The evidence relating to the first cause of action is substantially as follows: The plaintiff, in June, 1908, was the owner of a mare of the alleged value of $200, and a colt about 2 months old, which, he alleged, was of the value of $50; that he kept said mare and colt, with other horses, in a fenced pasture belonging to a neighbor; that on or about the 19th day of June, 1908, said mare and colt escaped from the pasture, and on the evening of said day, or perhaps a day or two later, the mare was found dead at a public crossing called Burke Lane. With respect to the time when the mare was killed the plaintiff testified that on the evening in question "the sun goes down—to get right down to cases—I think about 3 minutes past 8. I don't know whether that is just exactly correct." From observations made, and from other sources of information, the plaintiff also testified that it was about "24 minutes past 8" when the mare was killed, and that on a clear evening like the one on which the mare was killed, he, at half past 8 o'clock, could see "a horse or a dog for a mile." He also testified that no one, except perhaps the engineer and fireman, saw the accident; that the mare was found dead at the crossing after a passenger train had passed south over the crossing; that the crossing in question was in an open country and a little more than a mile north of Farmington station; that the railroad track coursed in a northwesterly direction and was practically without grade, except perhaps a little upgrade north of the crossing; that the track was straight for about three-fourths of a mile south of the crossing and for about one-half mile north of the crossing, from which direction the train in question approached; that a person standing on the track half a mile north of the crossing could see it plainly and could, if he looked, see animals, if there were any, on or near it; that one could see east and west of the crossing for some distance. The witness also testified to the condition of the crossing, but this is best told by his son who said that he, immediately after the accident, had made special observations respecting the physical conditions at and surrounding the crossing. The young man said that the track at the crossing was raised above the natural surface of the earth approximately 3 or 4 feet (other witnesses testified from 2½ to 3 feet, perhaps a little more); that

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Burke Lane was a public highway of approximately 4 rods in width, and that the driveway or wagon track was graded so as to raise it level with the railroad grade or track; that the raising of the driveway as aforesaid caused a depression or "hole," as he called it, on either side of the crossing, which, he said, "would be maybe 3 or 4 feet from the roadbed to the bottom of the place" or depression. The witness further testified that there were cattle guards on both sides of the crossing; that the cattle guards were connected with wing fences, which led down from the cattle guards about 35 feet to the right of way fences, the track being fenced on both sides and on both sides of the crossing; that the wing fences, he said, were made out of "6-inch stuff, I think. * * * I think they were 6 feet. I didn't measure them, but just judged they [the pickets] were about 6 feet tall, about 6 inches wide, and about an inch thick." There was other evidence that the pickets were about 5 feet high, or perhaps a little higher. He also said, "I don't think they [the engineer] could (have seen the mare) if she had been behind the fence," the picket fence; that is, "if a horse would get down into that hole as I call it (the depression) it would hide itself." The pickets were fastened about 4 or 5 or 6 inches apart, and they were painted white or "whitewashed." Some of the other witnesses testified that the picket fence would not conceal the horse or cattle from the view of those operating a train. The young man said he first saw the mare on the morning after it was killed; that she was lying about 60 feet south of the crossing on the east side of the track, and about 15 feet from the rails. Another witness, who lived some distance from the crossing, testified that on the evening of the day the mare was killed he saw the mare and colt about 6 o'clock, or thereabouts, feeding in the lane; that "after sundown and not yet dark" he was told by two men who looked like "hoboes" or tramps that the mare had been killed at the crossing; that it was just before dark; that after he had finished his supper he went to see the dead mare at the crossing; that at the time the mare was killed, as nearly as he could get at the time, an animal could be seen "possibly between a quarter and a half mile." There was no evidence of any kind or character that the mare had actually gone onto the track, or, if she did, when she did so with respect to the time she was struck. The only evidence that she was on or near the track is that she was struck and killed by a passing train. It was shown, however, that a train like the one in question could have been stopped in a distance of from 1,000 to 1,200 feet; a distance much less than the evidence showed an animal could be seen at the crossing by those operating an approaching train.

Upon substantially the foregoing evidence relating to the accident the defendant moved the court to direct the jury to return a verdict in its favor on the first cause of action. The court denied the motion and submitted the case, in so far as the claim for the mare was concerned, to the jury upon the evidence aforesaid. The defendant excepted to the ruling of the court, and now insists that the court erred in submitting the first cause of action to the jury, for the reason that the evidence is insufficient to authorize a verdict and judgment against the defendant.

The defendant has cited a number of cases wherein it is held that the mere fact that an animal is found dead by the side of a railroad track which is being operated by the defendant in the action is not sufficient to authorize a finding of negligent killing against such defendant. Among other cases the following are cited: International & G. N. R. Co. v. Holley (Tex. Civ. App.) 160 S. W. 990; International & G. N. R. Co. v. Bandy (Tex. Civ. App.) 163 S. W. 341; International & G. N. R. Co. v. Leuschner (Tex. Civ. App.) 166 S. W. 416; Atchison, T. & S. F. R. Co. v. Adcock, 38 Colo. 369, 88 Pac. 180; Robinson v. D. & R. G. R. R. Co., 24 Colo. 98, 49 Pac. 37; Decker v. Chicago, B. & Q. R. Co., 187 Mo. App. 207, 172 S. W. 1168. None of the foregoing cases is in point here, for the reason that in this case the plaintiff went farther than merely showing that the mare was found dead by the side of the track. Of course he proved that he found the mare dead, but he also proved that the place where she was struck was in an open country and could be seen for a long distance both ways along the track, and also from all other directions. He also proved just what the physical conditions surrounding the crossing were at the time, and that while the mare was struck after sunset, yet that she was struck before dark. He further showed that the train could have been stopped within a much less distance than the mare could have been seen by the engineer. From these facts and circumstances plaintiff contends the jury were authorized to infer that if the engineer had kept a proper lookout—that is, if he had exercised ordinary care in doing so, as he should have done—he could have seen the mare in time to have avoided the collision; that if he did not look, or if he did and saw the mare and did not check the speed of the train, or stop it if necessary, he, under the circumstances, was guilty of negligence.

The question is not entirely free from difficulty, nor, in view of some of the cases, is it free from doubt. In 33 Cyc. 1297, the rule applicable to public crossings is stated thus:

"Where the ground of recovery relied on is a failure to maintain a proper lookout or to exercise proper care to avoid injury to animals seen on or near the track, there must be some

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evidence reasonably tending to show such negligence; but a finding of negligence in failing to maintain a proper lookout may be sustained where it is shown that the animal could have been seen for a sufficient distance within which to stop the train."

The following cases are cited in support of the text, namely: Colorado, etc., R. Co. v. Charles, 36 Colo. 221, 84 Pac. 67, also cited by plaintiff; Kansas City, Ft. S. & G. R. Co. v. Hines, 32 Kan. 619, 5 Pac. 172; Louisville & N. R. Co. v. Jones (Ky.) 52 S. W. 938; Stading v. Chicago, etc., R. Co., 78 Neb. 566, 111 N. W. 460, also cited by plaintiff; Toledo, etc., R. Co. v. Ingraham, 58 Ill. 120; Railroad v. Abernathey, 106 Tenn. 722, 64 S. W. 3. In addition to the foregoing plaintiff's counsel also cites San Antonio & A. P. Co. v. Yeager (Tex. Civ. App.) 43 S. W. 25, and Kelly v. Oregon S. L. & U. N. R. Co., 4 Idaho, 190, 38 Pac. 404. In the first three cases cited above the evidence was that the animals were actually upon the track where they might have been seen in time to have avoided the collision. Indeed, in Toledo, etc., R. Co. v. Ingraham, the Supreme Court of Illinois, in the course of the opinion, said:

"The evidence offered by the appellee (the owner of the animal) tended to and did prove facts from which the jury might properly infer that the servants of the company recklessly and willfully destroyed the property of the appellee."

The case from Tennessee is apparently partly based upon the fact that the animal was on the track, and partly upon the Tennessee statute. The Yeager Case and the Kelly Case were both based upon the fact that the evidence showed that the animals were actually upon the track so that they could have and should have been seen by the engineer before they were struck by the train. In the Stading Case from Nebraska the evidence showed that a large number of cattle were on the track which could, and therefore should, have been seen by the engineer in time to have avoided the collision. Counsel for the plaintiff has not cited a single case, and I have found none, where the facts from which the negligence in question was inferred were as meager as they are in the case at bar. It is true that statements are found in some of the cases which are broad enough, perhaps, to cover the case at bar, but when the facts are looked into they are all stronger against the defendant than is the case here. I entirely agree with the author of Elliott on Railroads, where, in referring to certain cases, in volume 3, § 1205, it is said that they "state the doctrine entirely too strong." In Kansas City, L. & S. K. R. Co. v. Bolson, 36 Kan. 534, 14 Pac. 5, it is squarely held that merely to prove that an animal could have been seen near the track for a sufficient distance to have stopped the train when there is no evidence that the animal went onto the track ahead of the advancing train is not sufficient to authorize a finding of negligence. The question then is: What was the duty of the engineer who operated the engine and train which struck and killed the mare in question in view of the evidence?

[8] The evidence is not disputed in so far as the time of day when the accident occurred is concerned. Upon that point the evidence is undisputed that the accident occurred after sunset and before dark on or about June 21, 1908. Independently of plaintiff's evidence we take judicial notice of when the sun sets on any given day in this latitude and what system of measuring time is in general use. In this latitude on June 21st the sun sets, according to standard time, at 3 minutes past 8 o'clock p. m. The plaintiff's testimony in that regard is therefore practically correct. We also take judicial notice of the fact that what is termed twilight follows immediately after sunset and continues until the sun has passed 18 degrees below the horizon. We further judicially know that the sun sinks below the horizon at the rate of one degree of longitude for every four minutes of time, and that a degree of longitude in this latitude is slightly in excess of 52 miles. If the accident occurred, therefore, as plaintiff testified, namely, at 24 minutes past 8 o'clock in the evening, the sun had passed below the horizon a distance of approximately 275 miles, and if the accident occurred, as defendant contends, namely, at 8:30 p. m., the sun had passed below the horizon a distance of about 341 miles. If the evening was clear, therefore, as the evidence shows it was, it must have been twilight when the train was approaching the crossing, and no doubt the crossing could have been seen by the engineer in approaching it for at least some considerable distance. The evidence is likewise undisputed respecting the physical conditions surrounding the crossing. That there were wing fences 5 or 6 feet in height leading down from the track to the right of way fence there is no dispute; that the right of way was about 50 feet in width on either side of the center of the track is also shown by the evidence. It is also undisputed that the mare and colt were seen feeding in the lane some 2 hours before the accident, and that no one observed them thereafter until after the accident. As I have already pointed out, there is no evidence whatever that the mare was on the track at any time before being struck by the train. Nor is there any evidence of any character with regard to whether she was near the track for any length of time before being struck. Nor are there any presumptions with respect to her movements; that is, one may not presume that because an animal which is free to go from place to place at will was at any particular place for any particular length of time merely because it is found at a particular place dead at a particular moment of time. Can negligence be inferred on the part of the engineer merely because the conditions were such that he could have

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seen the crossing for a distance greater than was necessary for him to stop his train when there is no evidence whatever that the mare was either on the track or at a point so near it that she was in danger of being struck or injured by a passing engine or train? Under such circumstances is the presumption that the engineer was not guilty of negligence, that is, that he was exercising all due care, overcome? No doubt if it was the legal duty of the engineer to see the mare at all hazards, and if he failed in that duty, then he may be found guilty of negligence. As I understand the law, however, such a duty was not imposed upon the engineer, unless the mare was actually on the track or was so near to it that a passing engine would probably have injured her, or that she showed unmistakable signs of going onto the track or into a place of danger. It is not the law that because an animal may be on a public highway and in proximity of a railroad crossing, but not on or dangerously near the track, an engineer is guilty of negligence if he does not slacken the speed of his train in approaching the crossing or because he does not stop it before reaching it, although he may actually see the animal in the highway. In a recent case the Supreme Court of Idaho states the doctrine in the following words:

"In Peoria, P. & J. R. R. Co. v. Champ, 75 Ill. 577, the court held that the law imposes no obligation upon those in charge of a train of cars to stop the same upon discovering animals grazing near the railway track in anticipation that they may go upon the track and be injured, and the failure to do so is not negligence."

The court then proceeds:

"We think that the correct rule; and if an engineer observes an animal on the right of way and not on the track, and there are no indications that the animal will go upon the track before the train passes it, the failure to check the speed of the train or stop it is not negligence." Wallace v. O. S. L. R. Co., 16 Idaho, 103, 100 Pac. 904.

The court cites the following cases in support of the doctrine: Yazoo & M. V. R. Co. v. Wright, 78 Miss. 125, 28 South. 806; Yazoo & M. V. R. Co. v. Whittington, 74 Miss. 410, 21 South. 249; Louisville & N. R. Co. v. Bowen (Ky.) 39 S. W. 31; Western Ry. Co. v. Lazarus, 88 Ala. 453, 6 South. 877. The same doctrine is held in a recent case by the Supreme Court of Nebraska in White v. Chicago, B. & Q. R. Co., 93 Neb. 736, 141 N. W. 1038, where a horse was killed at a public crossing, which crossing was in plain view and without obstruction for a mile or more. Indeed, this court has laid down the same doctrine in Bunnell v. Railway Co., 13 Utah, 314, 44 Pac. 927, where the law is stated in the third headnote thus:

"When cattle are in a highway near a railroad track, and appear quiet, an engineer is not bound to presume that they will suddenly run upon the track, but he must observe the track ahead of the train as constantly as his other duties will permit, and use every precaution to avoid injury to stock which is consistent with the safety of the passengers and train."

Any other rule would make it impracticable to operate passenger trains in the country with any considerable speed.

There are, no doubt, cases in which it is held that the evidence produced by the plaintiff in the case at bar is sufficient to authorize a finding of negligence. Most, if not all, of that class of cases, however, emanate from jurisdictions where there are statutes in force which make the mere killing or injuring of livestock by moving trains prima facie evidence of negligence, which prima facie case can be overcome only by affirmative evidence that the servants of the company exercised ordinary care in operating the train, or that the accident was unavoidable. Such statutes are in force in Florida, Georgia, North Carolina, Kentucky, Mississippi, North Dakota, South Dakota, Iowa, Washington, and now in Colorado, and perhaps in a few other states. See 2 Shearman & Redfield on the Law of Negligence (6th Ed. 1913) § 432. The Mississippi statute went into effect after the decisions cited by the Supreme Court of Idaho from that state were referred to. In citing cases, therefore, some heed should be given to local statutes. In South Carolina the rule of presumptive negligence is enforced independently of the statute, but that state, so far as I am aware, is the only one in which courts enforce the rule in the absence of a statute. In case there is evidence, however, that animals were on or dangerously near the track, or that they showed unmistakable signs of attempting to pass onto or over it, and they, under such facts and circumstances are injured or killed by a passing train, then there arises an inference or presumption of negligence on the part of the engineer which must be overcome by affirmative proof that the injuring or killing of the animals could not, by the exercise of ordinary care, have been avoided. Such presumption now prevails in most of the United States. See authors and section last above cited.

The duty imposed upon the engineer in charge of a moving train in approaching a public crossing, or at a place where animals have the right to pass on or over the track, therefore, is to exercise ordinary care in keeping a lookout so as to avoid injuring animals that may be on or so near the track that their safety may be endangered by the passing train. Moreover, if animals are moving towards the track indicating a disposition to go onto or dangerously near it, the engineer cannot assume that they will not pass onto it, but he must timely check the speed of his train so as to avoid injuring them if that can be done by the exercise of ordinary care and without endangering the safety of the passengers. Nor can the engineer assume that animals, like reasoning beings, will assume a position of safety on the approach of the train, but in case such animals are on the track or so near to it as to be in danger of being injured, or if they

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show a disposition to pass onto or over it, the engineer must exercise ordinary care in operating and managing his train so that injury to the animals may be avoided; and if there is substantial evidence to the effect that the animals were injured or killed under the circumstances just outlined, the jury may infer or presume negligence on the part of the engineer. There must, however, be some substantial evidence to that effect, or the presumption which always prevails against negligence and in favor of the exercise of ordinary care by all persons must prevail. In my judgment the evidence in this case relating to the first cause of action is insufficient to overcome the presumption aforesaid. As before pointed out, there is absolutely no evidence, nor any established fact or facts, from which it can legitimately be inferred that the mare was either on the track or so near it as to be in danger, nor that she manifested any signs that she was about to go onto or pass over the track at any time when the engineer could have stopped the train and avoided the collision. Whether such was or was not the case is left to mere conjecture. That is not enough. It may well be the fact that the engineer saw the mare feeding in the lane some distance from the track when he still was the required distance or more from her to have stopped the train, but in view that she was not on the track or so near to it as to be in danger, nor showed any indications of going onto the track, he did not check the speed of the train. But under the evidence he was not required to do so as I read the authorities; and his not having done so, therefore, did not constitute negligence. If the failure to check the speed of the train, or the failure to stop it, in case the engineer actually saw the mare under the circumstances stated above, did not constitute negligence on his part, then it necessarily follows that his failure to check the speed of or to stop the train because he did not look and hence did not see the mare, as is assumed by counsel for plaintiff, likewise did not constitute negligence.

Nor is the fact important in this court that the defendant offered no explanation regarding the engineer's conduct. If the plaintiff made out a prima facie case the jury were not required to believe or to accept any explanation the defendant might have offered. The defendant did offer proof on several of the other causes of action, which, if true, or if believed by the jury, constituted a complete defense. The jury apparently refused to believe defendant's witnesses as they had a right to do. If the defendant, therefore, thought the plaintiff had not made out a prima facie case, it could not affect either it or its rights by refraining to present any evidence explanatory of the engineer's conduct. Whether a prima facie case had been made out or not was matter wholly for the judgment of defendant's counsel. If they erred in their judgment, and the evidence would justify a finding against them, they must take the consequences. What fact or circumstance is there in this case from which it may be inferred that the mare went on the track, or in a place of danger, at any time when the engineer could have avoided the collision by the exercise of ordinary care? Of course, if it be assumed, as counsel assumes, that all that it is necessary to show is that the mare could have been seen in a public road somewhere near the crossing by the engineer while the train was still a half mile or more from the crossing, and that from that fact alone it may be inferred that he could have avoided the collision, but failed to do so, then I am wrong in my conclusion, and the verdict and judgment are right. In my judgment, however, such is not a legitimate or permissible inference from the evidence, and hence I think the evidence is insufficient to justify a finding of negligence upon the part of the engineer, and hence I think the judgment and verdict on the first cause of action should not prevail. In the foregoing conclusion, however, my Associates do not agree. In their judgment the evidence, that is, the facts and circumstances in evidence are sufficient to authorize a finding that the engineer was negligent in operating and managing the train which struck and killed the mare in question. While I am unable to yield assent to the judgment of my Associates, yet, in view that they constitute a majority of this court, their judgment must control. It follows, therefore, that the district court did not err in refusing to direct a verdict in favor of the defendant on the first cause of action.

[1] Neither can defendant's counsel prevail with respect to the third cause of action. That cause of action was for the killing of a cow and heifer on the defendant's right of way immediately north of and about 300 feet from the crossing at which the mare was killed, on a different date, however, and subsequent to the killing of the mare. Defendant insists that inasmuch as it is claimed by the plaintiff that the cattle guards and wing fences were defective, and for that reason the cow and heifer passed from the crossing onto the defendant's right of way, and that the action was not commenced within a year from the date of the accident, therefore the action was barred by the provisions of Comp. Laws 1907, § 2877, subdv. 1, which reads:

"An action for liability created by the statute of a foreign state or by the state of this state other than a penalty or forfeiture under the laws of this state shall be begun within one year."

The foregoing contention is based upon Comp. Laws 1907, § 456x, which, in substance, provides that every railroad company which operates a railroad through lands owned by private owners must construct and maintain a sufficient fence along each side of the track, which fence must, at all public

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crossings, be connected with cattle guards. In case of failure to comply with the provisions of the statute, such company is required to pay all damages for the killing or injuring of domestic animals which are killed or injured because the fences or cattle guards are not constructed and maintained. Assuming, without deciding, that if the third cause of action were predicated entirely upon the provisions of the foregoing section, it would be barred by its provisions, yet the statutory ground was not the only one upon which the plaintiff sought to recover damages for the killing of the cow and heifer. In addition to the statutory ground the plaintiff also alleged negligence in operating the train, and in failing to keep a proper lookout, and in negligently failing to avoid killing the cow and heifer, and further alleged that the defendant was negligent in failing to maintain the cattle guards and the "approaches" thereto in proper repair, by reason of which failure and negligence the cow and heifer went onto the defendant's right of way and were killed. The right of action upon the ground of negligence in the particulars aforesaid was not barred.

[2] Nor can defendant's contention prevail that no recovery can be had because the cow and heifer were wrongfully on defendant's right of way, and for that reason it owed no duty except to refrain from willfully and wantonly injuring or killing them. There would be merit to that contention if the cow and heifer had not come onto the right of way through defendant's wrong; that is, through its negligence in failing to keep the cattle guards and wing fences in proper repair, and condition, or if not otherwise negligent. If, however, cattle get onto the right of way by reason of the defective condition of the cattle guards or the connecting fences, and without the fault of the owner, the company, ordinarily, is liable. Shearman & Redfield on the Law of Negligence (6th Ed. 1913) § 424. Such a rule, however, merely reflects common sense. There was sufficient evidence to justify a finding that the connection between the cattle guards and wing fences was defective and out of repair, and that the defendant should have known of that fact, and that the cow and heifer went onto the right of way by passing through the defect existing between the cattle guards and the wing fences. There is also evidence of negligence in operating the train at the time in question. The contention, therefore, that the verdict and judgment in favor of the plaintiff on the third cause of action is erroneous cannot prevail.

The same result must also follow with regard to the fourth cause of action. There is at least some substantial evidence that the killing of the cow, which was killed at the same crossing where the mare was killed but a year later, resulted by reason of defendant's negligence. There is some substantial evidence that the cow was actually killed upon the track, and that she was discovered by the engineer before she was struck. It is quite true that the engineer testified to a state of facts which, if believed by the jury, would have completely exonerated him from all culpability, and would have been a complete defense. The jury, however, did not believe the defendant's witnesses in that regard, and found that the accident could have been avoided by the exercise of ordinary care. The evidence in support of that cause of action, therefore, differs from that produced on the first cause of action, in that there is some substantial evidence that the cow was actually upon the track; that she was seen by the engineer before she was struck; and the jury refused to believe the testimony of the engineer that he was unable to avoid the accident. In view of that feature, which is controlling here, the judgment upon that cause of action must be affirmed.

This brings me to the plaintiff's appeal. It is contended that the court erred in not submitting to the jury the question of damages for the death of the colt. There is absolutely no evidence that the colt was ever near the railroad track at any time. The only evidence with respect to where the colt was on the evening the mare was killed is hearsay, but it is plaintiff's own evidence which was admitted without objection. It is as follows: The witness who testified for the plaintiff with respect to when he was informed that plaintiff's mare was killed by the train testified that the two tramps or hoboes who informed him that the mare was killed told him that:

"There was a mare killed over there on the right of way, and the colt would be apt to get killed, as it was running back and forth."

The witness said that after finishing his supper he went to where the mare was lying dead, but, he says, he did not see the colt. Plaintiff's son testified that he did not see the colt until the next morning when it was with two horses some distance from where the mare was killed, and was crippled; that they took it home and nursed it, but that it died in about 10 days. This evidence is wholly insufficient to authorize a finding that the colt was injured by the train, or that it was otherwise injured by the defendant. The court, therefore, committed no error in not submitting the question respecting the injury to and death of the colt to the jury.

The court directed a verdict for the defendant on the fifth cause of action, and plaintiff insists that the ruling constitutes error. The animal in question, a horse, was killed at a private crossing, at which gates were maintained for the convenience of the landowner to pass from one side of the track to the other; his farm lying on both sides of the track. The evidence shows that the horse was killed early one Sunday morning on the right of way of the defendant near where the gate was maintained. From the evidence it

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also appears that the farm gate was open on the morning in question; it having been opened by some one, or as contended by plaintiff, by reason of the defective condition of the fastenings, that it might have been opened by the horse that was killed. At all events the horse, it seems, passed through the gate onto the right of way. If the gate fastenings were defective there is no evidence with respect to how long they were so, or that the defendant had notice of the defect. If they were defective the defendant would be entitled to notice, or, at least, to a reasonable time within which to discover the defect and to repair the gate before it would be liable for animals passing through it. 2 Shearman & Redfield on the Law of Negligence (6th Ed. 1913) § 424a. Plaintiff's counsel, however, contends that it was defendant's duty to see that the gate was kept closed, and that in failing to discharge that duty it was guilty of negligence. Such, however, is not the law in this jurisdiction. Comp. Laws 1907, § 456x1, provides that where gates are placed by a railroad company for the convenience of the landowner, "such owner shall keep such gates closed at all times when not in actual use," and if by reason of his failure animals are injured or killed, he cannot recover any damages. The plaintiff's counsel further insists that the track was straight and level for a long distance, and that the engineer, by the exercise of ordinary care, ought to have seen the horse in time to have slackened the speed of his train, and, if necessary, to have stopped it to prevent the killing of the horse; and, further, that it was the duty of the engineer to maintain a proper lookout to discover the horse or some other animals which might be on the crossing or right of way. Such, however, is not the law with respect to private farm crossings at which gates are maintained. The engineer, under such circumstances, was not bound to anticipate that the gate would be left open or that it would be opened by any one, and that the owner's stock would stray upon the right of way. He, therefore, was not required to maintain a strict or constant lookout for stray animals on the right of way. He was required to exercise ordinary care to avoid injuring any such animals if there were any on the right of way after he discovered them. The evidence is wholly insufficient to authorize a finding that the engineer willfully or wantonly killed the horse in question, or that he failed to exercise ordinary care to prevent injuring it after he had discovered it on the right of way. In view that the undisputed evidence is all to that effect I cannot see how the plaintiff can recover upon that cause of action, and am of the opinion that the court committed no error in directing a verdict in favor of the defendant upon the same.

What has been said above also disposes of the exceptions to some of the instructions given, and to the refusal to give certain requests.

Since writing the foregoing opinion my Associates, for the reasons stated by them, have reached the conclusion that the judgment of the district court on the first, third, and fourth causes of action should be affirmed, and that, as to the fifth cause of action, the judgment should be reversed, and as to that cause a new trial should be granted. As to all other matters the judgment should be affirmed. Let such be the order and judgment. Plaintiff to recover costs.

McCARTY, J. I concur in the affirmance of the judgment based on the first, third, and fourth causes of action. I am of the opinion, however, that the court erred in taking from the jury the fifth cause of action.

The record shows that the animals described in the first, third, and fourth causes of action were killed in the daytime by defendant's trains at and near where its track intersects and crosses a public highway known as Burke Lane. The evidence, without conflict, shows that operatives of trains approaching Burke Lane from either direction in the daytime have, when they are within one-half or three-fourths of a mile of Burke Lane, a clear and unobstructed view of the crossing. And the undisputed evidence also shows that the distance required in which to stop a passenger train approaching the crossing from either direction at the rate of 35 or 40 miles per hour is from 1,000 to 1,320 feet. The facts relating to the killing of the animal described in the first cause of action are about as follows: N. V. Ellis, a witness for the plaintiff, testified—and his testimony is not disputed in any particular—that at the time the mare in question was killed he resided within 200 or 300 yards of the railroad crossing at Burke Lane; that he was returning home from work one afternoon at about 6 o'clock, and saw a mare and colt belonging to plaintiff grazing in Burke Lane east of and a short distance from the railroad crossing; that soon after he arrived home on that occasion he was informed that a mare had been killed on defendant's right of way; that he ate his supper and "after sundown, but before dark, I went to Burke Lane crossing, and there saw the carcass of the mare I had seen feeding in Burke Lane about 6 o'clock p. m., lying on defendant's right of way near the railroad track a short distance south of the crossing." John Preece, the plaintiff, referring to the mare in question, testified:

"I had a horse killed and a colt damaged to the extent that it died. * * * I first knew of it the next morning. * * * I sent my son John down to see which mare it was. * * * When my son came home he brought the colt. * * * We tried every way to save him, but he died from the result of the accident."

John W. Preece, the plaintiff's son, testified that he saw the carcass of the mare

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herein referred to lying on defendant's right of way near the railroad track and about 60 feet south of the crossing; that he recognized it as his father's animal; that after the mare was struck by the train she was carried or thrown through the picket fence extending from the cattle guards at the crossing to the boundary line of the right of way; that "she had been thrown clean through that [the fence]—that was torn away, pickets and all;" that "the train that hit her was going south, if a train did hit her"; that the "colt was outside of the right of way in Burke Lane—it showed evidence of injury, acted like it was crippled in the thigh." The record shows that the train which collided with the mare was going at the rate of 35 miles an hour.

While defendant alleged in its answer that the mare was killed because of the negligence of plaintiff "in permitting it to run at large at a point on a public highway near the railroad of defendant," etc., no evidence was introduced tending to support the allegation. The evidence, however, does show that the mare and colt, on the occasion in question, had, unknown to plaintiff, escaped from an inclosure in which they were being pastured by a third party for hire, and were grazing along the highway in the direction of plaintiff's home. The only question of fact over which there appears to be any controversy is whether or no the trainmen who were operating the train that collided with the mare saw, or, by the exercise of ordinary care could have seen, the mare in time to have avoided the accident.

Counsel for defendant, in their printed brief, say, referring to the picket fence extending from the cattle guards to the boundary line of the right of way, "an animal standing behind this picket fence could not have been seen by the engineer approaching the crossing." And further:

"On both sides of the crossing approached there were hollows from 3 to 4 feet in depth which were deep enough to conceal a horse from view should it walk through them."

John W. Preece, plaintiff's son, made certain statements on cross-examination, which, considered separate and apart from the balance of his testimony, seem to support counsel's version respecting the inability of trainmen approaching the crossing to see animals standing behind the wing picket fences at the crossing or in the "hollows" beside the wagon road where the approaches intersect defendant's right of way. By an examination of his evidence in its entirety on this point it will be observed that he first described somewhat in detail the physical conditions of the crossing and approaches of the highway thereto, the height and kind of a fence extending from the cattle guards to the boundary line of the right of way, the lay of the ground on either side of the approaches to the crossing, and then, as a conclusion, stated that an animal on the opposite side of the fence from the approaching train or standing in the "hollow" or depression on either side of the wagon road at the crossing could not be seen by the trainmen. I here remark parenthetically that the greater weight, the overwhelming preponderance, of the evidence tends to show that trainmen on trains approaching Burke Lane highway from either direction have an unobstructed view of the crossing and the approaches thereto, and by keeping a lookout they can see cattle or horses that may be on the crossing or in the immediate vicinity thereof from the time their trains are within one-half mile of the crossing. In fact, it is the only conclusion permissible from the evidence when considered in its entirety. On redirect examination this witness testified:

"There was nothing to make a hole except the road crossing. The country was generally level. Nothing to obstruct the view of a horse there at that time, or any other time—nothing outside of that little fence; that is all the obstruction there would be. I think a man could see a horse along there."

Plaintiff testified:

"There were no fences, or buildings, or trees, or any obstructions of any kind coming from the north that would obstruct the view of this Burke Lane crossing within three-quarters of a mile—not one bush. An animal could be seen that distance."

Arthur Hess, a witness for plaintiff, testified in part as follows:

"I stepped from Burke Lane crossing north to the cut along the railroad track. To my best recollection it is about 700 steps to the first cut—approximately 3 feet to the step. * * * Coming south after leaving the second cut Burke Lane is in view nearly a mile, between half and three-quarters. * * * The railway track was 2 or 3 feet higher than the surrounding country at the crossing, and guard fences run from the railroad back, sloped down of course. They would not obstruct the view of animals anywhere on that Burke Lane crossing. East and west of Burke Lane crossing you could see as you approached out of this second cut coming south about a half a mile."

George Spackman, another witness for plaintiff, testified:

"There was no obstruction between this point three-quarters of a mile south of Burke's Lane. An engineer, or any one else, would have perfect view of anything on the track or on the right of way in the vicinity approaching, all through the country. Nothing to obstruct the view east and west either side of the railway tracks for half a mile anyway—no trees or anything, just pasture land. An animal anywhere in that vicinity would be in evidence from that point along the railway track; and likewise in Burke Lane crossing, east and west of the crossing. That condition exists there for a good half mile. * * * The grade of the railway track at Burke Lane crossing is about two feet and a half high. * * * There were no barrow pits that would obstruct the view of a cow anywhere in that vicinity; nothing at all. * * * It [the fence] was about five feet high. It wouldn't obstruct the view of an animal on the road there."

On cross-examination:

"I understand trains go anywhere from 30 to 50 miles an hour down there, and I say that an engineer would have a view of Burke Lane from

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cut two, which is over three-quarters of a mile from Burke Lane. * * * I don't think that if a horse was in behind the fence * * * that the fence would be an obstruction."

George Hess, another of plaintiff's witnesses, testified:

"As near as I can describe the condition of Burke Lane crossing in 1908 and 1909, the view was plain all south of the crossing for three-quarters of a mile, * * * and from the north it is about half a mile. * * * I don't think it [the fence] would obstruct the view of any animal along the street there, coming from the north. * * * There would be nothing to prevent an engineer from seeing east and west of Burke Lane crossing if he were looking out that way."

Walter Read, a witness for defendant, testified:

That he is, and in 1908 (the year in which the accident occurred) was, a section foreman of defendant; that the railroad track and right of way where the animals involved in this action were killed is and was within his jurisdiction; that "there were some willows down there by Burke Lane on the north side and west of the track; * * * in 1908 there were just a few on our right of way; * * * there wasn't enough on the right of way to obstruct the view—most of them were on Mr. Preece's field, unless an animal was right in direct line with them there wasn't enough on the outside to obstruct the view."

[3] Counsel for the defendant, in their brief, say:

"The evidence is undisputed that after passing this second cut going toward Farmington the view of the crossing is unobstructed for a distance of about 2,145 feet, save by obstructions on and near the crossing."

They also concede that the mare involved in the first cause of action was killed by one of defendant's trains. They also say:

"At no time, however, has it been argued by appellant that the mare was not killed by the train. On the contrary our argument * * * in our brief admits it."

They also concede that the train at the time it struck the mare was going at the rate of 35 miles an hour. We therefore have a case in which it is conceded that one of the defendant's trains, while going at the rate of 35 miles an hour, collided with and killed plaintiff's mare at a point where the railroad track intersects and crosses a public highway, and at a time when the trainmen, if they kept a lookout, had an unobstructed view of the right of way and the crossing for a distance of 2,145 feet before the train arrived at the crossing; and where the evidence is all but conclusive, when weighed and considered in its entirety, that animals on the crossing, or in the immediate vicinity thereof, could be seen by the trainmen, provided they kept a lookout as they approached the crossing; and where there is no evidence tending to show negligence on the part of the owner of the animal killed. To hold under these circumstances that defendant is, as a matter of law, not liable would in effect make railroad companies in most cases immune from liability for the killing of stock at public crossings, regardless of how negligent or careless their trainmen may be on such occasions in the running of the trains.

[4] It is suggested that there is no evidence that the mare was on or in close proximity of the track for any appreciable length of time before she was struck by the train, and hence negligence on the part of the trainmen ought not be inferred. It is admitted that the mare was struck by the train; hence it necessarily follows that she was at least partially on the track. It is also admitted that the train was going at the rate of 35 miles an hour when it collided with the mare. A train going at that rate of speed would traverse the distance in which it could be stopped in less than 26 seconds. Therefore the only inference permissible is that the mare was on, in close proximity to, or was going toward the track, and was but a short distance from it when the train was in stopping distance of the crossing, and that the trainmen could and would have seen her in time to have stopped the train and avoided the accident if they had kept a proper lookout. Under the admitted facts and others established by the great preponderance of the evidence herein referred to the writer is clearly of the opinion that the jury were justified in finding that the operatives of the train on the occasion in question were negligent, and that such negligence was the proximate cause of the accident.

[5] The court was right in refusing to permit a recovery for the injury to the colt. There is no evidence tending to show that the colt was struck by the train. The mere fact that it was found in the vicinity of the crossing the morning after its mother was killed, "crippled in the thigh," as shown by plaintiff's evidence, is not sufficient to justify an inference that it was struck by the train. Evidence introduced by plaintiff tended to show that soon after the mare was killed the colt was seen "running back and forth" on the highway. This would seem to indicate that the colt, at that time, was not crippled or otherwise seriously injured.

Regarding the third and fourth cause of action I agree with Mr. Justice FRICK in his statement of the facts and the conclusions deduced therefrom by him.

[6] In the fifth cause of action the animal, a mare, was killed by defendant's train of cars on defendant's right of way where the railroad track crosses the premises of a Mr. Spackman, who was the owner of the animal killed. There is evidence tending to show that the gate through which the mare got onto the right of way from the field in which she was being pastured was imperfectly hung, and that the fastenings thereon were defective. It seems from the evidence, what there is on that point, that these defects were due to the mechanism of the gate and its fastenings and the faulty way in which the

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gate was hung—fastened to the gate post. While the gate was erected and maintained by the defendant for the use and convenience of Spackman, it nevertheless was defendant's gate, and Spackman was in no sense responsible for the defects mentioned. Spackman testified that he "saw the animal in the field west of the track the day before she was killed. She had been in there 3 or 4 days. * * * The gate was closed the night before (the accident) when I saw the animal." Walter Read, a section foreman, was called as a witness by defendant, and he testified in part that:

"The pasture was closed the night before the animal was killed and the fences were not down. * * * It was daylight when the animal was killed. * * * The mare was lying probably 150 or 200 feet from the gate."

The evidence without conflict shows that the track where it passes through Spackman's premises is straight, and that "no obstructions were in view of the engineer coming south towards the animal," and that "an animal could have been seen a mile or so." It is not shown that the presence of the animal on the right of way was due to any negligence of Spackman.

[7] Regarding the duty of those in charge of a train approaching a farm crossing the rule, which we think is a wholesome one, is stated in 33 Cyc. 1213, as follows:

"In approaching private or farm crossings those in charge of the train must keep a lookout to avoid injury to animals which might be lawfully upon the crossing; but the company is not required to subordinate the operation of its road to the landowner's privilege of a crossing, and is not required to slow up or to stop its trains in order to ascertain if animals are upon or near the crossing." Atchison, etc., R. Co. v. Conlon, 9 Kan. App. 116, 57 Pac. 1063.

And again, on page 1215 of the same volume, it is said:

"Except where animals are wrongfully upon the right of way, it is as much the duty of the railway company to exercise ordinary care in discovering their presence as in avoiding injury after they are discovered. Those in charge of the train must keep a lookout for stock on or near the track, and if they fail to do so and animals are injured which could have been discovered in time to avoid the injury the company will be liable."

Many cases are cited in the footnotes which support this doctrine. The evidence shows, as the record now stands, that the operatives of the train could have seen the mare in question at a distance of a "mile or so" before the train arrived at the place of the accident if they had used ordinary care in keeping a lookout as the train approached and passed through the Spackman premises. The undisputed facts, I think, establish a prima facie case of negligence against the defendant.

For the reasons stated, I am of the opinion that the judgment as to the first, third, and fourth causes of action should be affirmed; and that as to the fifth cause of action it should be reversed, with directions to the lower court to grant a new trial as to that cause of action, and that plaintiff should recover his taxable costs on this appeal.

STRAUP, C. J. I concur in the opinion of Mr. Justice McCARTY.

(48 Utah, 606)

VAN DYKE v. OGDEN SAVINGS BANK.
(No. 2924.)

(Supreme Court of Utah. Sept. 11, 1916. Rehearing Denied Nov. 23, 1916.)

1. NEW TRIAL ⇐104(3)—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.
New trial may be granted for newly discovered cumulative evidence which renders clear and positive that which was before indefinite and uncertain.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 220; Dec. Dig. ⇐104(3).]

2. NEW TRIAL ⇐104(3)—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.
Photographic enlargements of alleged forged checks, which clearly reveal differences not discernible from the originals, though cumulative, are demonstrative and different from expert opinion as to identity of signatures, so that new trial may be granted on the ground of such evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 220; Dec. Dig. ⇐104(3).]

3. BANKS AND BANKING ⇐138—DUTIES OF BANK—RETURN OF PAID CHECKS.
It is the common-law duty of the bank to return to the depositor his paid checks, as evidence of payment of debt to the named payees.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 398–405; Dec. Dig. ⇐138.]

4. BANKS AND BANKING ⇐150—DUTIES OF BANK—RETURN OF PAID CHECKS.
Such rule does not apply if the checks represent an overdraft.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 455–464½; Dec. Dig. ⇐150.]

5. NEW TRIAL ⇐102(6)—NEWLY DISCOVERED EVIDENCE—DILIGENCE.
Since a depositor has an absolute right to his paid checks unless they represent an overdraft, a depositor, seeking recovery of deposits on the ground that checks charged against her were forged, is not lacking in diligence, after demand for the checks, and refusal of possession or inspection, in failing to secure court order for production.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 212; Dec. Dig. ⇐102(6).]

6. NEW TRIAL ⇐102(8)—NEWLY DISCOVERED EVIDENCE—DILIGENCE.
While counsel cannot be required to furnish evidence to the adversary, yet a court cannot uphold counsel in withholding material evidence from the court or from the adverse party, and if counsel have withheld relevant and material evidence, or denied him access to such evidence before trial, they are not to be heard to say that in addition to making timely demand, he should also have applied to the court for an order compelling production.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. ⇐102(8).]

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7. NEW TRIAL ⊂⇒102(8)—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

Where defendant bank refused possession or inspection of paid checks to depositor, who alleged they were forged, and the court then ordered inspection only in the presence of the court stenographer, failure to move for continuance to secure such evidence did not show acquiescence or lack of diligence, since continuance would have been useless.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. ⊂⇒102(8).]

8. NEW TRIAL ⊂⇒102(6)—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

The mere fact that demand for paid checks by depositor suing to recover deposits on the ground that the checks were forged was oral does not render it of no avail, the depositor being entitled to the checks, so that no demand was legally necessary, especially in view of the fact that the oral demand apprised the bank of its purpose.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 212; Dec. Dig. ⊂⇒102(6).]

9. APPEAL AND ERROR ⊂⇒981—DISCRETION OF COURT—REVIEW.

The rule that granting new trial for newly discovered cumulative evidence is left wholly to discretion of trial court is not without exception; an abuse of discretion being subject to review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3876; Dec. Dig. ⊂⇒981.]

Appeal from District Court, Weber County; J. A. Howell, Judge.

Action by Louise Van Dyke (née Louise Turner) against the Ogden Savings Bank. Judgment for defendant, and order denying new trial, and plaintiff appeals. Reversed and remanded, with directions.

V. Gideon, J. N. Kimball, and Wade M. Johnson, all of Ogden, for appellant. Boyd, De Vine & Eccles, of Ogden, for respondent.

FRICK, J. The plaintiff alleged in her complaint that the defendant was "engaged in the business of a savings bank at Ogden, Utah"; that plaintiff formerly was the wife of one J. J. Turner and that she then "bore the name of Louise Turner"; that on December 29, 1908, in the name of Louise Turner, she deposited with the defendant bank the sum of $4,400, upon which sum the defendant agreed to pay interest at the rate of 4 per cent. per annum, compounded semiannually; that on the 13th, and again on the 25th of October, 1913, she demanded said sum with the accrued interest thereon from the defendant, and that it then refused, and still refuses, to pay the same; that the amount deposited as aforesaid, with the accrued interest thereon, aggregated the sum of $5,531.83, for which she prayed judgment. The defendant answered the complaint, and denied "that the plaintiff deposited in the name of Louise Turner in said defendant bank the sum of $4,400 as alleged, but admits that certain moneys were, on said day, deposited to the credit of said plaintiff under said name." Defendant also admits that it agreed to pay interest as alleged on said deposit. The defendant further admitted a demand and refusal to pay and as an affirmative defense averred that all the moneys that were deposited as aforesaid "have been fully withdrawn by or upon the order of, and paid to, or upon the order of, plaintiff." The defendant further denied all indebtedness. A trial to a jury resulted in a verdict for the defendant. The court entered judgment upon the verdict, denied plaintiff's motion for a new trial, and she appeals.

We have set forth the substance of the pleadings to show both the nature of the action and the character of the defense. The plaintiff thus alleged that she had deposited a certain sum of money with the defendant bank, which it refused to pay to her. The defendant, while not admitting that plaintiff had deposited the amount alleged, and while not admitting any specific amount, nevertheless admitted that "certain moneys" had been deposited for the credit of the plaintiff. Defendant, however, averred that all the money that was deposited had, "upon the order of plaintiff," been withdrawn from the bank. The issues were thus quite narrow.

At the trial practically the whole question hinged upon the genuineness of plaintiff's signatures to the checks that were drawn against the deposit, and the authority of her husband to withdraw her money from the bank. It was made to appear that a large portion of the money that was deposited by the plaintiff had been withdrawn upon checks purporting to have been drawn and signed by plaintiff. The plaintiff, however, contended at the trial, and here insists, that all the checks, with the exception of one or two small ones, were drawn by J. J. Turner; that he signed her name thereto without her knowledge or consent, and she insisted at the trial, and now insists, that her signatures to the checks were forged. A part of the deposited money was paid to J. J. Turner upon drafts drawn by him, which drafts, plaintiff insists, he not only had no authority to make, but that they were drawn and paid without her knowledge or consent. The real contest, therefore, arose over the genuineness of the signatures to the checks in question. The plaintiff denied signing the checks, denied the authority of her husband to sign her name thereto, and she also denied all knowledge respecting the making and paying of the checks and drafts aforesaid. For the reasons hereinafter appearing it is not necessary to set forth the evidence of the several witnesses, except to state that the plaintiff, in addition to her own statements, also produced evidence of experts in handwriting, and other evidence, tending to show that the signatures to the checks were forgeries. Upon the other hand the defendant produced plaintiff's former husband, J. J. Turner, who testified that she did sign the checks in question. The defendant also produced several

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experts in handwriting who testified that in their opinions the disputed signatures were in the handwriting of the plaintiff. If it were not for the matters now to be stated the judgment would have to be affirmed.

As before stated, however, the principal question for determination at the trial was whether the signatures to the checks were genuine or were forgeries. Both sides having presented their evidence upon that question, the court submitted the case to the jury upon instructions as to the law, of which no complaint is made. The plaintiff, however, vigorously contends that the court failed to exercise, or had abused, its discretion in refusing to grant her a new trial upon the ground of newly discovered evidence. Upon the other hand, the defendant insists that the court's rulings were right for the reasons: (1) That the alleged newly discovered evidence was merely cumulative; and (2) that plaintiff did not exercise due, or any, diligence to obtain and produce said alleged newly discovered evidence at the trial.

The nature or character of the alleged newly discovered evidence, and the undisputed facts, as they are made to appear by the affidavits filed in support of the motion for a new trial, relating to plaintiff's conduct and the efforts that were made to produce said evidence, are as follows: Plaintiff's counsel, Mr. Kimball, deposed that not less than 60 days before the case was called for trial he spoke to one of defendant's counsel, and demanded that the checks, or orders, relied on in the action by the defendant be produced for inspection; that defendant's counsel, at that time, neither granted nor denied the request, but did ask for time to consult with his partner and associate counsel; that about two weeks before the trial defendant's said counsel refused to produce said checks, and refused plaintiff's counsel inspection thereof; that one Douglas Swan, an expert in handwriting, was requested by plaintiff and her counsel to procure inspection of said checks for the purpose of making comparisons of the signatures thereon with plaintiff's genuine signatures and to better qualify himself to testify as an expert at the trial of said case; that said Swan, prior to the trial of said case, also demanded inspection of said checks from defendant's counsel for the purpose aforesaid, but was refused inspection, and was by said counsel informed that he could not obtain such inspection from the defendant. The plaintiff also deposed in her affidavit in support of her motion for a new trial that she had requested her said counsel, Mr. Kimball, and the witness, Mr. Swan, to procure said checks for inspection for the purpose aforesaid. It is also made to appear from the affidavits filed in support of the motion for a new trial that, in order to make a proper comparison of the signatures to the said checks with the genuine signatures of the plaintiff, and to demonstrate the difference between the genuine and the alleged forged signatures to the checks, it was necessary to make photographic enlargements of said signatures; that said Swan demanded said checks for the purpose of making such photographic enlargements and that he intended to and would have made such photographs before the trial, had his request been granted. It is also made to appear that when the case was on trial and defendant's counsel had produced the checks and papers relied on by the defendant to establish its defense in court, plaintiff's counsel again, in open court, demanded possession and inspection of said checks and papers; that defendant's counsel objected to plaintiff's counsel being given possession of said checks and papers, but suggested that they should have the right of inspection only in presence of the court stenographer and while the checks were in her possession and under her control; that that was the first and only inspection plaintiff, or plaintiff's counsel, obtained of said checks and papers. It further appears from the record that after the jury had returned a verdict, and within the time plaintiff was required to file her motion for a new trial, the prosecuting attorney, in the name of the state of Utah, obtained inspection and possession of said checks for the purpose of making enlarged photographs of the signatures thereto; that said prosecuting attorney, on behalf of the state of Utah, did procure an expert in handwriting and signatures, and one skilled in making photographic enlargements of signatures, to make photographic enlargements of the signatures and writings relied on by the defendant in this action; that said enlarged signatures, properly authenticated, were made a part of plaintiff's motion for a new trial in connection with the affidavit of said expert, and such enlargements, 32 in number, are made a part of the record on appeal to this court. Both the expert aforesaid and said Swan also deposed in their respective affidavits that the signatures relied on by the defendant, in their opinions, are forgeries; that the photographic enlargements clearly show, and in their judgments will demonstrate, the peculiarities and characteristics of plaintiff's handwriting and also that of her husband, and will demonstrate the difference between the two handwritings; that said difference can only be shown and demonstrated to the minds of ordinary jurors, who are laymen, by the photographic enlargements of said signatures.

While the facts in the several affidavits in support of the motion for a new trial are stated with much greater particularity and detail, and while there are certain affidavits filed by some of the jurors, showing that they deliberated at least 24 hours, and which show some facts in impeachment of their verdict, which later cannot be considered here, and while there were one or two counter-affidavits filed on behalf of the defendant,

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yet, in our judgment, the foregoing statement fairly reflects the controlling facts that were adduced both in behalf of and against the motion for a new trial.

The ground or grounds upon which the district court based its ruling in denying the motion does not appear. Defendant's counsel, however, defend the ruling upon the grounds that the alleged newly discovered evidence is cumulative merely, and that plaintiff's counsel have failed to show that they exercised due or any diligence to procure said evidence at the trial. Plaintiff's counsel, at least tacitly, concede that the alleged newly discovered evidence is, in one sense, merely cumulative. They, however, insist that it is of such a demonstrative character that a mere examination or inspection thereof produces a very strong conviction in the minds of the expert and layman alike, and especially in the mind of a layman, that a different result in all probability will be reached in case a jury of laymen are permitted to consider and pass upon said evidence. They further contend that in the modern decisions a more liberal rule has been adopted in granting new trials upon the ground of cumulative evidence of a particular type or character, in case there is no lack of diligence on the part of the party producing such evidence, than in the older cases.

[1] It is quite true that under what may be termed "the old rule" new trials were very rarely, if at all, granted upon the ground of newly discovered cumulative evidence, although it was shown that the same could not have been discovered or produced at the trial with any degree of diligence. Sometimes, however, and under special conditions, a new trial was granted, although the evidence was cumulative merely. The old rule in that regard is perhaps as well stated as it is anywhere in 3 Graham and Waterman on New Trials, 1064, in the following words:

"The rule that newly discovered evidence must not be cumulative, though well settled, has an occasional exception. Where, by admitting it, what was before mysterious and doubtful becomes *plain and certain, so that, if received, the most obvious justice, and, if rejected, the most palpable injustice, will be done*, courts do not hesitate to adopt the former alternative." (Italics ours.)

See, also, Wall v. Trainor, 16 Nev. 131, where the foregoing language is quoted. As we shall see from the quotations which follow many of the courts have adopted a somewhat less stringent rule. In 8 Enc. Ev. 944, it is said:

"In a few cases it has been distinctly announced that a new trial will never be granted for newly discovered cumulative evidence. But if such was ever the general rule (the facts of very few cases requiring the application of so stringent a rule), it may be said that the general trend of modern authority is favorable to the granting of new trials where the newly discovered cumulative evidence is of a controlling or decisive character, or even where it is such as to render a change in the result fairly probable."

In Waller v. Graves, 20 Conn. 310, Mr. Chief Justice Church states the exception to the general rule that a new trial will not be granted upon cumulative evidence thus:

"So, if the evidence now claimed to be newly discovered, is merely cumulative evidence, we cannot grant a new trial, *unless the effect of it will be to render clear and positive that which was before equivocal and uncertain.*" (Italics ours.)

In 29 Cyc. 916, 917, after stating the old rule that new trials were seldom, if ever, granted on cumulative evidence, it is said:

"A new trial may now be allowed, in some jurisdictions, for newly discovered cumulative evidence which, taken in connection with the evidence adduced at the trial, is sufficient to render a different verdict necessary, or highly probable, or probable, as the general rule for newly discovered evidence may be in the particular jurisdiction, or which will render clear what was doubtful at the trial; the character of the evidence affecting its weight only."

The rule just stated is the one adopted in Oberlander v. Fixen & Co., 129 Cal. 690, 62 Pac. 254, and in Keeler v. Jacobs, 87 Wis. 551, 58 N. W. 1107, and cases cited in the two cases just referred to.

[2] The photographic enlargements of the signatures to the checks, as before stated, are before us. While it would perhaps not be proper for us to state the impression those enlargements has made upon our minds, yet it is proper for us to state that it requires no argument to convince a disinterested mind that the enlarged signatures make much clearer the characteristics and peculiarities of the signatures that are in dispute, and therefore make clear that which, without them, was obscure and extremely doubtful. Moreover, the alleged newly discovered evidence is of the character which, in one sense, is direct, and is certainly more positive than would be the opinions of experts because it is naturally and essentially what may be termed "demonstrative evidence." If it be conceded, however, that the alleged newly discovered evidence, for the reasons stated, may be received and considered, notwithstanding its character, yet the question of whether plaintiff and her counsel exercised due and reasonable diligence in the premises still remains to be answered.

If it were not for the conceded conduct of the defendant and its counsel in refusing plaintiff, her counsel and witness possession and inspection of the checks in question, it would be clearly our duty to approve the ruling and judgment of the court below. When we come to consider the conduct of the defendant and its counsel in the premises, however, plaintiff's case assumes a different aspect.

[3] For obvious reasons we need not dwell upon the duties of a banker to his depositor. We shall, however, for a moment pause to inquire into the actual condition of things as they are made to appear from the record. The record shows that on December 29, 1908, there was deposited under plaintiff's former

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name of Louise Turner in the defendant bank the sum of $4,208.40; on May 1, 1909, the additional sum of $101.50, and on June 1st, following, the further sum of $120, making in the aggregate a deposit of $4,429.90. The first withdrawal of $100 was made on June 15, 1909. During that and the following year, and the year 1911, withdrawals were made in various amounts and at different dates, and on December 5, 1911, the final balance, amounting to $7.30, was withdrawn from the bank. All the amounts withdrawn, with the exception of one or two small amounts which were drawn by plaintiff herself, were withdrawn by J. J. Turner, either upon checks to which it is claimed plaintiff's name was signed by her, or by drafts drawn by him. Plaintiff's deposits were therefore withdrawn within a period of about 2½ years, and during all of the time, and for a long time thereafter, she had no knowledge of that fact, but supposed her money was safely in the defendant bank, drawing interest. Neither did she, during all that time, at least not personally, receive any statement of her account, nor were any of her paid and canceled checks returned to her by the bank. Indeed, when she, through her counsel, finally demanded possession of what the bank claims were her personal orders or checks upon the bank, they were refused, not only possession, but were also refused inspection thereof, and all this in the very teeth of her right to have possession of and control over her own paid checks as evidence showing to whom she had paid money and for what purpose she had paid it. In speaking of the custom that is practically universal respecting the depositor's right to the possession of his paid checks as between himself and the bank, the author, in 2 Morse on Banks and Banking, § 460, says:

"But further than this, there is ground for holding that it is also a duty of the bank at common law to return his paid checks to the depositor. He is considered to have the better right to them, for they are regarded as his evidence of payment of his debt to the payee named in them. The bank is said to hold them only as his agent."

[4] The foregoing rule, of course, has no application in case the check represents an overdraft. In such event the bank, as a matter of course, has a right to retain the check as evidence of the drawer's order to pay, and that it has paid, the amount subject to his order. There may be other circumstances under which the bank, for a time at least, may have the right to retain the depositor's checks as evidence, but no bank can successfully dispute the depositor's right to the possession of his paid checks, much less his right to inspection. Of course the bank may obtain the checks from the depositor as evidence in the ordinary way if they are material in any controversy between it and a depositor or otherwise. In this case, however, both the bank and its counsel not only invaded, but wholly disregarded, the legal rights of both plaintiff and her counsel without any legal excuse or justification whatever. We do not mean to be understood (indeed, we think the contrary is the fact) that either the officers of the bank or its counsel intended any wrong. Constructively, however, their acts and conduct had precisely the same effect upon plaintiff's case and her rights as though counsel had entertained bad motives.

[5, 6] It is, however, contended that the plaintiff had an adequate remedy by going into court and obtaining an order to obtain possession and inspection of the checks for the purposes alleged by her and her counsel, and hence it is contended that neither counsel nor plaintiff had exercised due or reasonable diligence in the premises. The foregoing contention and the character of the alleged newly discovered evidence present the only real difficulty in this case. After much reflection, and with considerable hesitation, if not with reluctance, we have been forced to the conclusion, which, however, has become firmly fixed, that the present case is an exception to the general rule. If in order to obtain possession of the checks it had required legal action of any kind, we would say that plaintiff's counsel were derelict in not taking that action. Where, however, as here, defendant's counsel had no right whatever to deny either possession or inspection of the checks, and where, as here, it was the defendant's duty to return plaintiff's checks to her, they, by reason of their conduct, obtained an undue advantage for their client over plaintiff. For the reasons stated it does not lie in the mouth of either the defendant or its counsel to say to plaintiff:

"You were not diligent. You should have gone into court and coerced us to grant you possession and inspection of your checks."

To hold that counsel may successfully take and defend such a position upon an application of this kind is tantamount to placing a premium upon efforts to withhold evidence from the adversary to which he is clearly entitled. While counsel in no case and under no circumstances can be required to point out or to furnish evidence to the adversary, yet in no event and under no circumstances can a court uphold counsel in any act which is calculated to bring the administration of justice into reproach, or which tends to conceal or withhold proper and material evidence from the court or from the adverse party, and in case counsel have benefited their client by their conduct in withholding from the opposite party relevant and material evidence, or in denying him access to such evidence before trial, they are not to be heard to say to him, in case after the trial he discovers that in refusing him possession or inspection he has been greatly prejudiced, while his adversary has been

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benefited, that in addition to making timely demand he should also have brought an action in court. Under such circumstances no injury can come, nor can any legal prejudice result, from requiring the offending party to submit to a full and fair trial of the case. Moreover, to sustain counsel's contention would result in making the trial of cases a mere game of strategy.

[7] Defendant's counsel, however, also urge that, when the district court ruled that plaintiff's counsel should not have possession of the checks and should inspect them only in the presence of the stenographer, they acquiesced in the ruling. What else could they have done? They obtained a ruling which, no doubt, reflected the court's best judgment, and that was all they were entitled to. It is, however, said that plaintiff's counsel should then have applied for a continuance of the case. To make such an application, no doubt, ordinarily is the proper course to pursue. Under the circumstances of this case, however, and especially in view of the court's ruling that plaintiff's counsel should be given possession of the checks and should have the right of inspection only in the presence of the court stenographer, such an application would have been a mere waste of time. Without possession of the checks a continuance would have been useless. The law does not require useless things. All that plaintiff's counsel waived or lost in not excepting to the court's ruling or in failing to apply for a continuance at the time was the right to review the court's action in that regard. They lost nothing else.

[8] Defendant's counsel, however, also contend that the demand for possession and inspection of the checks was insufficient because not in writing, and that it is therefore of no avail. We have already seen that the defendant should have delivered possession of the checks to the plaintiff as a matter of duty; hence no demand was legally necessary. But entirely apart from that, the demand was sufficient. Defendant's counsel were clearly apprised of what the demand was for, and they denied it, not because it was not in writing, but for other reasons. In view of that fact, even though they had such a right they waived it.

[9] Finally, it is insisted that the question of granting a new trial upon the ground of newly discovered evidence, and especially where such evidence is, in its nature, cumulative, and the further question of whether the party applying for the new trial has exercised due and reasonable diligence in the premises, are questions that always are, largely if not entirely, left to the sound discretion of the trial courts. We need not refer to the numerous authorities which support those propositions. The rule that those questions must be left to the sound legal discretion of the trial court, and that appellate courts can grant relief only in case where it is made to appear, with at least reasonable clearness, that the trial court has abused its discretion, or has refused to exercise it, has practically become universal. This court, in common with many other courts, has frequently so held, and we have no desire to, nor do we by anything we have said, relax that wholesome rule. Upon the contrary, we thoroughly approve of it and reaffirm it. Without entering into further argument, however, it must suffice to say that in view of the peculiar circumstances of this case, as before stated, we feel constrained to hold, and do hold, that it must be considered as an exception to the general rule. It is quite clear that the district court did not take that view, but in all respects treated this case as falling within the general rules which govern the granting or denying of new trials, and hence we think that the court failed to pass on, or to exercise its discretion upon, the actual case before it, which, for the purposes of this case, in effect amounted to what is ordinarily termed, "an abuse of discretion" in refusing to grant a new trial.

The judgment is therefore reversed, and the cause is remanded to the district court of Weber county, with directions to grant a new trial. Costs to appellant.

STRAUP, C. J., concurs.

McCARTY, J. I concur in the order reversing the judgment.

(48 Utah, 619)

YERRICK v. DISTRICT COURT IN AND FOR SALT LAKE COUNTY. (No. 2894.)

(Supreme Court of Utah. July 25, 1916. Rehearing Denied Nov. 23, 1916.)

NEW TRIAL ⊜138—TIME FOR NOTICE OF MOTION.

Comp. Laws 1907, § 3294, requiring one intending to move for new trial to serve and file notice thereof within five days after verdict, does not apply where the trial court sets aside the verdict and himself makes findings and enters judgment thereon; it being sufficient if the notice is served and filed within the statutory time after judgment has been entered on the original verdict in obedience to mandate of the appellate court reversing the first judgment.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 280, 281; Dec. Dig. ⊜138.]

Frick, J., dissenting.

Prohibition by Carrie A. Yerrick against the District Court in and for Salt Lake County, State of Utah. Writ denied, and proceedings dismissed.

A. T. Sanford, of Salt Lake City, for plaintiff. Howat, Macmillan & Nebeker and Stephens & Smith, all of Salt Lake City, for defendant.

STRAUP, C. J. We are asked by prohibition to restrain the district court from pro-

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ceeding to hear a motion for a new trial in the case of the Houston Real Estate Investment Company, Plaintiff, v. Hechler, Defendant, and Yerrick, Intervener. Upon a trial to the court and a jury a verdict was rendered against the investment company and in favor of Yerrick for $4,682. The case to the rendition of the verdict was treated by the parties as triable by jury. Then the investment company claimed the case one in equity, urged the court to regard the verdict as merely advisory, and proposed and requested findings on all the issues. The court, so regarding the verdict, refused to recognize it, made findings at variance with it, and upon the findings rendered and entered judgment in favor of the investment company. From that judgment Yerrick appealed. The ruling of the court so disregarding the verdict and so making findings was the only point presented by the appeal. On the record nothing further could have been reviewed. We held the court erred in such particular and remanded the cause, with directions to enter a judgment on the verdict. 152 Pac. 726. On remittitur judgment accordingly was so entered. Within five days thereafter the investment company served and filed a notice of motion for a new trial. Yerrick moved to strike the notice. That motion was overruled. This proceeding then was instituted by Yerrick to restrain the court from further proceeding with the motion for a new trial.

The contention is, that the court then was without jurisdiction to entertain such a motion. This is because of the statute (C. L. 1907, § 3294), requiring a party intending to move for a new trial to serve and file a notice thereof within five days after verdict. The notice, of course, was long after the rendition of the verdict. Ordinarily a party intending to move for a new trial is required to serve and file a notice within five days after verdict. But that is on the assumption of an operative verdict and one recognized as such and acted upon. Here the court wholly disregarded the verdict, and set it aside, and himself made findings. There was no longer any verdict left to move against. Judgment was entered on the findings, not the verdict. Those were in favor of the investment company. It was content with that. Vain indeed would it have been had the investment company moved against a verdict already annihilated and set aside, and had asked for a new trial of the cause against findings made and judgment entered in its favor. Until the verdict was restored the investment company had no grievance and nothing to move against. All we did on the appeal was to restore the verdict and to direct judgment to be entered upon it. The cause thus was left just where it would have been had the court at the first instance done what we, on the appeal, directed to be done. To deny the investment company thereafter to move against the verdict and to apply for a new trial is in effect to deny it such right altogether. Under the circumstances we think the district court has jurisdiction to entertain the motion. Severy v. Chicago, R. I. & P. Ry. Co., 6 Okl. 153, 50 Pac. 162; Kansas, Ft. S. & M. R. Co. v. Berry, 55 Kan. 186, 40 Pac. 288. The situation in the Kansas case is very similar to the situation here. There a general and special verdict was rendered in favor of the plaintiff Berry for $5,000. The trial court refused to receive or recognize the verdicts, but permitted them to be filed (52 Kan. 762, 34 Pac. 805, 39 Am. St. Rep. 371), and then, on the defendant's motion, notwithstanding the general and special verdicts in favor of the plaintiff, directed a verdict in favor of the defendant, the railway company, upon which judgment was rendered and entered. Here the court, notwithstanding the verdict determining the whole of the issue in favor of Yerrick, treated it merely as advisory, refused to recognize it or act upon it, made findings at variance with it, and entered judgment upon them in favor of the investment company. There, as here, the appellate court directed judgment to be entered on the verdict as rendered. There, as here, a motion for a new trial was made within the statutory period, not after the rendition of the verdict, but after the entry of the judgment in obedience to the mandate of the appellate court. There, as here, the claim was made that the motion came too late, and that the court was without jurisdiction to entertain it. Said that court:

"The defendant, having a verdict in its favor, and a judgment thereon, not only was not called on to file a motion for a new trial, but that there was absolutely no foundation for any such motion. It is further insisted that vitality was first given to the verdict by the order and judgment of this court, and that not until its mandate was presented to the district court did the verdict of the jury have any force as a verdict; that the defendant was then, for the first time, called upon to challenge its correctness or the proceedings of the court at the trial. These views impress us as sound. The defendant was under no obligation to recognize a verdict as valid which the court refused to receive or act upon. This court held that the district court erred in refusing to receive the special findings and the general verdict in favor of defendant (plaintiff), and in refusing to treat them as verdicts, and directed that they should be so received and treated. We think the defendant then had a right to file a motion for a new trial within the statutory time after the mandate of this court was presented; that it was then the duty of the court to pass on the motion for a new trial; and that, on such motion being overruled, the defendant had a right to make a case, and present to this court any errors occurring at the trial. If this were not so, the defendant would be utterly without remedy, no matter how many or serious the errors of law occurring at the trial might have been."

These reasons and conclusions, we think, are applicable here. Let the writ therefore be denied, and the proceedings dismissed at petitioner's costs. Such is the order.

McCARTY, J., concurs.

FRICK, J. (dissenting). I am unable to assent to the conclusion reached by the Chief

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Justice. I shall therefore, as briefly as possible, state the reasons that have impelled me to arrive at a contrary conclusion.

This case has already been before us twice. Investment Co. v. Hechler, 44 Utah, 64, 138 Pac. 1159, and again under the same title in 152 Pac. 726. The questions in controversy in this proceeding, however, all arose with respect to the proceedings at the last trial of the case. As stated by the Chief Justice, the parties tried the case as a law case, but upon the verdict being returned against the plaintiff in the former action, hereafter called company, it moved the district court to treat the action as purely equitable and to declare the verdict as advisory merely, and that the court make its own findings of fact, conclusions of law, and enter judgment in accordance therewith, notwithstanding the verdict of the jury. The district court entertained the motion and made findings of fact and conclusions of law in many respects contrary to the verdict of the jury, and entered judgment thereon in favor of the company. The defendant in that action, being the plaintiff here, and who hereafter will be styled plaintiff, brought the case to this court on appeal (152 Pac. 726), where we held that the parties having tried the case as a law case up to the time the verdict was returned neither one could thereafter insist that it was not bound by the verdict of the jury upon questions of fact to the same extent that such would be the case in law cases generally, subject only to the remedies applicable to such cases. We therefore reversed the rulings and judgment of the district court, and directed that court to enter judgment upon the verdict of the jury in favor of the plaintiff, which was accordingly done. After judgment, pursuant to the remittitur from this court, had been entered, however, the company, within the five days allowed by our statute, filed a motion for a new trial upon the usual grounds provided by Comp. Laws 1907, § 3292. The plaintiff objected to the motion and moved to strike it upon various grounds, including the one that it was filed too late, and that the court was without jurisdiction to entertain such a motion after the judgment had been reversed. The district court overruled plaintiff's motion to strike, and hence this proceeding.

The Chief Justice has arrived at the conclusion that the motion for a new trial, under the circumstances of this case, was filed within proper time, and that, therefore, the district court has the power to pass upon it and to dispose of it in the ordinary way. In my judgment that conclusion is erroneous. In some jurisdictions motions for new trials are required to be filed after judgment, and in such jurisdictions such motions assail the judgment as well as the regularity of the proceeding, including the decision or verdict. Under our statute, however, as well as under the statutes of other states, notably, California, Indiana, and Kentucky, the motion for a new trial does not assail the judgment, but is directed against the verdict or decision and other proceedings occurring during the trial which are claimed to be irregular or erroneous. The motion for a new trial, under our statute, does not concern itself with the judgment, and it must be filed before judgment if the entry thereof is delayed until after the time has elapsed within which to file such a motion. In other words, a motion for a new trial may not be delayed merely because the judgment has not been entered in the action or proceeding. 29 Cyc. 934–935; Fisher v. Emerson, 15 Utah, 522, 50 Pac. 619. Under a statute like ours the time within which a motion for a new trial must be filed begins to run from the return of the verdict or the filing of the decision, and not from the entry of judgment. It is only in those jurisdictions where the motion for a new trial need not be filed until after judgment that a party may delay the filing of the motion until after the judgment is actually entered. 29 Cyc. 931; 14 Ency. Pl. & Pr. 858–863.

The Chief Justice cites two cases, namely, Severy v. Chicago, R. I. & P. Ry., 6 Okl. 153, 50 Pac. 162, and Kansas, Ft. S. & M. R. Co. v. Berry, 55 Kan. 186, 40 Pac. 288, in support of the conclusion reached by him. It seems clear to me, however, from the statements contained in the Severy Case, that whatever the Oklahoma statute may be, the court, nevertheless, based its ruling upon the theory that a motion for a new trial need not be filed in that jurisdiction until after judgment. In passing upon the point the court said:

"The statute providing for motions for new trial has reference to final judgment or orders, and a motion for a new trial is a useless proceeding until there is a judgment to set aside or vacate."

The trial court in the Oklahoma Case, therefore, permitted a motion to be filed after the appellate court had directed a judgment to be entered upon the verdict and after the remittitur had gone down and after a judgment had in fact been entered pursuant thereto. That case, in my judgment, can, however, not be regarded as a precedent under a statute like ours, since under our statute, as I have pointed out, the motion for a new trial may not be delayed until after judgment, unless the judgment is in fact entered within the time that a motion for a new trial must be filed.

It is, however, suggested that the company had no occasion to file a motion for a new trial in view that the district court had granted its motion for judgment notwithstanding the verdict of the jury. But it was not the judgment that the company was required to assail by filing a motion for a new trial, nor was it the judgment it did assail by its motion which was passed on by us in 152 Pac. 726, but it assailed the verdict of the jury and asked that the trial court disregard

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that verdict and decide the case in accordance with its own views of the evidence. That is just what was done by the court, and we held that in doing so it committed error. The case is one, therefore, where a party has led the court into committing an error of practice by asking it to grant certain relief by pursuing the wrong remedy. If we were right in holding in our former decision that in view that the case was tried as a law case the parties must pursue legal as contradistinguished from equitable remedies, then it necessarily follows that the only motion that the district court could entertain on the part of the company was a motion for a new trial. That question was settled in this jurisdiction in the case of Kirk v. Salt Lake City, 32 Utah, 143, 89 Pac. 458, 12 L. R. A. (N. S.) 1021, where we held that a motion for judgment non obstante veredicto could not be entertained, but the only motion by which a verdict could be assailed in a law case was a motion for a new trial filed as provided by our statute. In view of our former decision, therefore, the case must be treated as a law case, and hence a motion for a new trial was the company's only remedy. Having failed to pursue that remedy as required by statute the courts may not substitute another, or the proper remedy at a later time. Such is the holding of the courts generally I think. At any rate it has many times been held that where a party makes a motion for judgment non obstante veredicto, or a motion to modify the findings of fact or conclusions of law, or to substitute other findings, the moving party thereby waives, or rather loses, his right to file a motion for a new trial, unless he files such a motion within such time, after the original verdict is returned or the findings and conclusions filed, as the statute prescribes. In other words, a party may not file a motion and obtain the desired relief thereon in the court of original jurisdiction, and, when it is finally held on appeal that the motion was improperly filed and allowed, then after the judgment is reversed proceed to file the proper motion. The following cases, in my judgment, are directly in point upon the foregoing proposition, and are decisive of the question that the district court is without jurisdiction to entertain the motion for a new trial in this case. California Imp. Co. v. Baroteau, 116 Cal. 136, 47 Pac. 1018; Radabaugh v. Silvers, 135 Ind. 605, 35 N. E. 694; Outsinger v. Nebeker, 58 Ind. 401; Shaffer v. Milwaukee, etc., Ins. Co., 17 Ind. App. 204, 46 N. E. 557; Jacquay v. Hartzell, 1 Ind. App. 500, 27 N. E. 1105. In the Kansas case it was held, however, that a motion for a new trial is filed timely if filed within the time required by the statute after judgment has been directed by the appellate court. That case, in my judgment, is, however, not in point here. In that case the jury returned both a general and a special verdict in favor of the plaintiff in the action. The trial court, however, refused to receive or recognize either the general or special verdict, but directed the jury to return a general verdict in favor of the defendant in the action. The jury returned such a verdict, and judgment was duly entered thereon. The plaintiff objected and excepted to the ruling of the trial court, and prosecuted an appeal to the Supreme Court of Kansas. That court held that the trial court erred in refusing to receive and recognize the verdicts of the jury, and in directing it to return a verdict for the defendant, and reversed the court's ruling and judgment, and directed it to enter judgment upon the verdicts returned by the jury in favor of the plaintiff, which, in accordance with the remittitur from the Supreme Court, was done. Within the time allowed by statute after the trial court had thus received and recognized the verdicts of the jury in favor of the plaintiff, the defendant in that case filed a motion for a new trial. The plaintiff objected to the motion upon various grounds, one of which was that it was filed too late, and that the trial court was without jurisdiction to entertain the motion. The trial court, however, overruled the plaintiff's objections, considered and passed on the motion, and overruled the same, and the Supreme Court sustained the ruling of the trial court in entertaining the motion. The ruling of the Supreme Court is, however, based upon the sole ground that the trial court had never received nor recognized the verdicts of the jury until directed to do so by the Supreme Court, but had directed the jury to return a verdict in favor of the defendant. The latter verdict was therefore held to be the only verdict in the case, and in view that that verdict was in favor of the defendant there was no verdict which it could move against until the verdicts returned by the jury were received and recognized by the trial court, which occurred only after the remittitur of the Supreme Court had gone down. The decision in that case, therefore, had the same effect as though the trial court had by mandamus been coerced to receive and recognize the verdicts returned by the jury. Such is not the case here. Here the verdict of the jury was received, and it was that verdict, and nothing else, that the company moved to have set aside. For that purpose it made the motion, and the motion was granted. It developed, however, on appeal that the district court had erred in entertaining and granting the motion, and the ruling and judgment of that court were reversed. Now it is contended that since it has been decided that the company interposed the wrong motion and that the district court erred in granting it, and since that court was directed to set aside its ruling and judgment the company should be given a chance to interpose a proper motion for a new trial, and this upon the alleged ground that in view that the district court had ruled in favor of

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the company a motion for a new trial would have been a useless proceeding. Let me again call attention to the fact that it was the verdict of the jury that the company assailed and was required to assail. As pointed out by the Supreme Court of California, and of Indiana, in the cases herein referred to, the proper motion to set aside and vacate the verdict of the jury was a motion for a new trial, and if the company sought to attain that end by another motion which was erroneously granted by the trial court, the right to move for a new trial was thereby waived or lost, and that such a motion comes too late if it is delayed until after the ruling of the trial court is reversed, and that court is directed to enter judgment upon the verdict. It is held that under such circumstances the trial court is without power to entertain a motion for a new trial. In my judgment the decisions from California and Indiana are entirely sound. It goes without saying that the party who is dissatisfied with the result reached by either court or jury must not only pursue the remedies pointed out by the statute, but must do so within the specified time. Courts, of course, look to the substance rather than the form of things, and if the company had filed its motion for a new trial it could rely upon it regardless of the fact that it had also filed some other motion which was not proper. It could have filed the proper motion within the time required by statute, but cannot now retrieve its error by asking that it be permitted to do what the statute does not permit and what other litigants may not do. There must be an end to litigation, and this case forcibly illustrates that the rule is a salutary one in view that the case has been pending, as appears from our former decisions, for more than seven years. The case has been here twice on appeal, and is now here for a third time in the present form. If a new trial should now be granted in this case it may be in any case where a party has mistaken his remedy and has interposed the wrong motion, which was granted. In other words, if a verdict may be set aside upon an improper motion in this case without exhausting the remedy of the moving party, it may be in any case, and hence the proper motion for a new trial need not be interposed until this court has corrected the errors of the party making the wrong motion and of the court granting it. Such, in my judgment, is not the law anywhere, and should not be declared to be in this jurisdiction. Moreover, if a motion for a new trial may now be interposed, then it may be based upon all the grounds provided by our statute, some of which may go to questions of fact respecting irregularities which the statute clearly contemplates shall be made to appear within a specified time after trial, and which, by reason of lapse of time, the adverse party may now be unable to meet. But it is not necessary to multiply reasons. In my judgment it is quite sufficient that the statute does not contemplate nor authorize a motion for a new trial under the circumstances of this case.

I am of the opinion that the trial court is without jurisdiction to entertain a motion for a new trial, and hence a peremptory writ of prohibition as prayed for should issue.

(48 Utah, 629)

STATE v. THERKELSON. (No. 2884.)

(Supreme Court of Utah. Aug. 26, 1916. Rehearing Denied Nov. 23, 1916.)

INDICTMENT AND INFORMATION ⟸111(4)—INDECENT ASSAULT — INFORMATION — SUFFICIENCY.

Under Laws 1909, c. 26, providing that every person who shall assault a child, whether male or female, under the age of 14 years, and shall take indecent liberties with such child, without committing or intending to commit rape, or to assault with intent to commit rape, shall be deemed guilty of an indecent assault, etc., an information, alleging in the words of the statute that accused did willfully, etc., assault a female child, and did willfully, etc., take indecent liberties with said child, without committing, intending, or attempting to commit the crime of rape, was sufficient to charge the crime of indecent assault; the words "or the crime of assault with intent to commit rape" being mere surplusage.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 298; Dec. Dig. ⟸111(4).]

Appeal from District Court, Salt Lake County; M. L. Ritchie, Judge.

Lawrence Therkelson was convicted of having committed an indecent assault upon a female child of the age of 11 years, and he appeals. Affirmed.

Carlson & Carlson, of Salt Lake City, for appellant. A. R. Barnes, Atty. Gen., and E. V. Higgins and G. A. Iverson, Asst. Attys. Gen., for the State.

McCARTY, J. The defendant was convicted of having committed an indecent assault upon a female child of the age of 11 years. From a judgment imposing a term of imprisonment in the state prison he appeals.

The defendant filed a timely motion to arrest judgment, set aside the verdict, and to dismiss the action "upon the ground that the said information does not state facts sufficient to constitute the crime of indecent assault as defined by statute, for the reason that said information does not contain the clause 'or the crime of assault with the intent to commit rape.'" The statute (Laws Utah 1909, p. 25) which defendant was charged with having violated provides:

"Every person, who shall assault a child, whether male or female, under the age of fourteen years, and shall take indecent liberties with or on the person of such child, without committing, intending or attempting to commit the crime of rape, *or the crime of assault with intent to commit rape*, upon such child, with or without the child's consent, shall be deemed

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guilty of an indecent assault, and on conviction thereof shall be guilty of a felony." (Italics ours.)

The information on which the defendant was tried and convicted charged that:

"The said Lawrence Therkelson, at the county of Salt Lake, state of Utah, on the 25th day of February, A. D. 1915, did willfully, unlawfullly, and feloniously make an assault upon ——, a female child under the age of 14 years, to wit, of the age of 11 years, and did then and there willfully, unlawfully, and feloniously take indecent liberties with the person of the said ——, without committing, intending, or attempting to commit, the crime of rape on the said ——, contrary," etc.

The foregoing information, with the exception of the date therein mentioned and the parties named therein, is an exact copy of the information in the case of the State v. Macmillan, 46 Utah, 19, 145 Pac. 833, recently decided by this court. In that case a demurrer was interposed to the information on the ground that the specific act, or acts, constituting the offense were not set forth. In other words, the information failed to state under what circumstances and in what manner the defendant took indecent liberties with the child therein mentioned. The demurrer was overruled. On appeal this court, in effect, held, and properly so, that in this class of cases it is sufficient to allege and describe the assault in the language of the statute. The question raised in the case at bar was not presented or considered in that case. The question here presented is stated by appellant's counsel in their brief as follows:

"By the language employed in the information the commission of rape, the intent to commit rape, and attempt to commit rape, are expressly excluded."

They say:

"Do these enumerated offenses, considered collectively or separately or in any aggregation of their essential elements, necessarily exclude the crime of assault with intent to commit rape?"

And again:

"In negativing the commission of rape, the intention to commit rape, and the attempt to commit rape, has the crime of assault with the intent to commit rape been negatived?"

Counsel then proceed to argue that an attempt to commit rape and an assault with intent to commit rape are separate crimes, and that the exclusion of one in a pleading or information is not necessarily an exclusion of the other. Let that be as it may, the question is not decisive of the question here involved. The information in this case charges that the defendant—

"did willfully, unlawfully, and feloniously make an assault upon ——, a female child, * * * of the age of 11 years, and did then and there willfully, unlawfully, and feloniously take indecent liberties with the person of said ——, without committing, intending, or attempting to commit, the crime of rape," etc.

It will be observed that an unlawful and felonious assault is charged in the information, that the assault consisted of the taking by defendant of indecent liberties with the child mentioned in the information, and that the assault was made without "intending, or attempting, to commit the crime of rape." In other words, the information alleges in clear and unambiguous terms that the assault was made without "intent to commit rape." To have negatived in the information the specific crime described in the clause we have italicized in copying the statute, namely, "or the crime of assault with intent to commit rape," would not have negatived or excluded any element of an assault of this character which is not negatived and excluded by the information in its present form. The writer is clearly of the opinion that the clause, "or the crime of assault with intent to commit rape," could be eliminated from the statute without in any way or in any sense affecting the scope, purpose, or intent of the act. In other words, the writer regards the clause as surplusage, and that it neither adds to nor detracts from the balance of the section in which it is incorporated.

The judgment is affirmed.

FRICK, J., concurs.

STRAUP, C. J. The chief point made on the information is that the exception in our statute, "or the crime of assault with the intent to commit rape," ought to have been, but was not, negatived in the information. I think there is a distinction between "committing or intending, or attempting to commit," rape and "an assault with the intent to commit rape" (33 Cyc. 1430), and that to properly charge "an indecent assault" under the statute, both should be negatived. But I am of the opinion that both are sufficiently negatived by the information. It is affirmatively charged that the defendant "willfully, unlawfully, and feloniously made an assault" on the girl and took "indecent liberties" with her "without committing, or intending or attempting to commit, rape." The gist of "an assault with the intent to commit rape" is an assault with the intent to ravish the female or to have sexual intercourse with her. The alleged assault clearly negatives that intent. The information states that the assault was made "without intending or attempting to commit rape," but merely to "take indecent liberties" with the girl. Hence the specific "assault" described in the information clearly negatives "an assault" to commit rape.

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(13 Okl. Cr. 3)

WILEY v. STATE. (No. A-2394.)

(Criminal Court of Appeals of Oklahoma. Dec. 4, 1916.)

(Syllabus by the Court.)

HOMICIDE ⊂=300(11)—TRIAL—INSTRUCTIONS—SELF-DEFENSE.

Where the only eyewitness to a homicide testified that the deceased attempted to bribe the accused to swear falsely, and the accused resented the offer by using very violent and insulting language toward the deceased, and that the deceased thereupon became enraged and attacked the accused with an open knife, and the accused then shot the deceased in defense of his person, and where the evidence showed no previous hostility, but, on the contrary, that prior to the fatal difficulty the men had been friends, *held*, that it was prejudicial error for the court to instruct the jury, under this state of facts, to the effect that, if the accused addressed the insulting language towards the deceased for the purpose of provoking a difficulty, and doing the deceased bodily harm, he thereby forfeited his right of self-defense, for the reason that the accused had the right to resent this offer to bribe him, and to resent it in no uncertain language, and this instruction suggests a purpose on the part of the accused for using the insulting language which is not suggested by nor borne out by the evidence, and in effect denies to the accused the plea and right of self-defense which the evidence on behalf of the accused tended to establish.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 626; Dec. Dig. ⊂=300(11).]

Error from District Court, Pontotoc County; Tom D. McKeown, Judge.

Jim Wiley was convicted of manslaughter in the first degree, and brings error. Reversed and remanded.

Crawford & Bolen, of Ada, and W. M. Maben, of Shawnee, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

BRETT, J. Plaintiff in error in this case, who will be referred to as defendant, was charged with murder in the district court of Pontotoc county, and was convicted of manslaughter in the first degree, and sentenced to 12 years in the penitentiary.

There was no one present at the time of the fatal difficulty except the defendant and the deceased. The defendant's plea was self-defense; and in this he is not contradicted by the circumstances, and the state failed to show any hostility between the men prior to the difficulty which resulted in the homicide. In fact, the widow of the deceased testified that they were friends, and she knew of no differences between them.

The defendant was a tenant on the farm of the deceased, and had only a short while before the homicide made a deal with the deceased to cultivate the farm for another year. But a few days prior to the homicide defendant found a notice on his front gate warning him to settle up his affairs and leave the community within ten days. Defendant testifies: That, feeling unsafe because of this notice, he borrowed a Winchester rifle from the deceased, and also purchased a pistol, to defend himself against any violence that might be offered by the party or parties who were the authors of this unfriendly and threatening notice. That he kept the Winchester at the house, but carried the pistol with him wherever he went. That he had consulted with the deceased as to how he should treat the warning, and had decided to forfeit the contract for another year and leave the community. The deceased had made him an offer to buy his crop, but he thought the consideration was not enough and did not accept it. His oats had been threshed, and after defendant determined to leave he sold the oats to the merchant who had furnished him with groceries during the past year in settlement of what he owed him. That on the day of the homicide deceased came to his house and told him he wanted to talk to him privately, and suggested that they withdraw to a private spot near the house. That when they reached this place the deceased told him that a lady by the name of Hammersley had gone to Ada that day, and filed a suit against him for slander, and said to the defendant, "I need your help," to which the defendant replied, "All right," and asked deceased, "What do you want me to do?" Deceased replied, "I want you to swear that I have always spoken of that woman in the highest terms to you." Defendant replied that he could not do that. Deceased said, "Wiley, if you will, I will make you a different man." Defendant asked him what he meant by that, to which the deceased replied, "I will give you $50 if you will swear that." Defendant testified: That he became angry at this attempt to bribe him to swear falsely, and resented it by using some very violent and abusive language toward the deceased, which we will not here repeat. That deceased became furious and began to shake with rage, and called the defendant some vile names, and struck at him overhanded with a knife. That he jumped back and drew his pistol and began to shoot, and shot as rapidly as he could, until he emptied his revolver. That deceased made two lunges at him with the knife after he began shooting; that about the time he fired the last shot deceased staggered backward and fell. That he, the defendant, then turned and went to the house, and summoned the neighbors, and went to the nearest peace officer and surrendered.

There was, at the time the first neighbors saw the defendant and at the time he surrendered, a cut place on the shoulder and arm of his jumper. The deceased was left-handed, and near his left hand was an open knife, which his widow identified as the knife of her husband, and one of the state's witnesses, who lived only about 250 yards from the scene of the homicide, and was one of the first to arrive upon the ground, stated there were signs on the ground that indicated that there had been a tussle. Wit-

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nesses for the state testified that the shots were fired in very rapid succession. The records of the district court show that the lady, Hammersley, had on the very day of the homicide commenced an action against the deceased for slander. Dobson and other witnesses for the state say that the defendant told them immediately after the killing that he and the deceased had a difficulty which grew out of the Hammersley case, and he killed the deceased to prevent his cutting him with a knife, which is a circumstance which corroborates the defendant's story; for it is hardly probable that he would have known anything about the Hammersley case having been commenced if he had not been told about it by the deceased, since the lady had gone to Ada and filed the case that very day. For while it is reasonable, under the facts disclosed by the evidence, to suppose that the deceased was expecting this action to be filed, and consequently watching every movement of this woman, yet there is nothing in the evidence to indicate that the defendant had any interest in the matter, or would have known of the action being commenced, unless told about it by the deceased. There is considerable vague evidence on the behalf of the state which might have, under the explanation of counsel, been of value to the jury, but which on the cold face of the record throws but little, if any, light upon the motive or the circumstances of this homicide.

The defendant complains, among other things, of some instructions given by the court; the first complained of being No. 6. While we think, under the facts in this case, this instruction is both erroneous and prejudicial, yet no exception was taken to it, nor did the defendant call the court's attention to the error by offering a correct instruction. Hence we cannot consider the error complained of.

But instruction No. 13 was duly excepted to, and we think, under the facts in this case, was erroneous, and highly prejudicial to the substantial rights of the defendant. In this instruction the court tells the jury:

"That insulting words are not sufficient in law to justify an assault, but if a person address insulting words to another with a purpose and intent to provoke a difficulty, and with the intent to kill or to do serious bodily injury to the person insulted, then he cannot plead the law of self-defense, unless he voluntarily abandons the combat prior to the killing, and by words or acts notify his adversary of his intention to withdraw therefrom. So in this case, if you believe from the evidence beyond a reasonable doubt that the defendant, Jim Wiley, addressed insulting words to the deceased, J. N. Ross, with the intent and purpose to provoke said J. N. Ross into a fight and cause the said J. N. Ross to make an unlawful assault upon him, with the intent and purpose of the said Jim Wiley to kill said J. N. Ross or to do him serious bodily injury, then the defendant, Jim Wiley, cannot invoke the right of self-defense."

Under the evidence in this case, the insulting language used by the defendant towards the deceased was in resentment of the offer of the deceased to bribe the defendant to swear falsely. Prior to this time the evidence shows that they had been friends. The deceased came to the defendant as a friend, to get him to assist him in this slander suit; and the defendant indicated his willingness to render whatever assistance he could. But, when deceased revealed the fact that his mission and purpose was to induce the defendant to swear falsely, it was both the right and the duty of the defendant to resent his offer, and to resent it in no uncertain language. And under this state of facts it was highly prejudicial to the rights of the defendant to inject the implication contained in this instruction that the defendant might have addressed the insulting words toward the deceased for the purpose of provoking a difficulty with the intent to kill the deceased or do him serious bodily injury. The doctrine announced in this instruction as an abstract proposition of law is correct, and under certain conditions would be a proper instruction, but has no application to the facts in this case, and suggests a purpose on the part of the defendant for using this insulting language towards the deceased which is not suggested anywhere by the evidence. And this unwarranted suggestion and instruction in effect denies to the defendant the plea and right of self-defense, which his evidence tended to establish, and entitles him to a new trial.

There are some other matters complained of which, if error, will not likely recur in a retrial of the case; and, as the judgment must be reversed by the reason of the error contained in this instruction, we deem it unnecessary to pursue the matter further.

The judgment is reversed, and the cause remanded.

DOYLE, P. J., and ARMSTRONG, J., concur.

(93 Wash. 395)

REYNOLDS v. DAY et al. (No. 13103.)

(Supreme Court of Washington. Nov. 22, 1916.)

1. RELEASE ⇐1, 57(2) — VALIDITY — VACATION.

A written release of a claim for personal injury based on a valuable consideration is valid as any other agreement, and evidence of fraud, false representations, etc., to warrant it being set aside must be clear and convincing.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 5, 6, 9–11, 108; Dec. Dig. ⇐1, 57(2).]

2. RELEASE ⇐57(2) — EVIDENCE — SUFFICIENCY.

In a personal injury action where plaintiff contended that a release was obtained through fraud or overreaching, evidence *held* insufficient to warrant the setting aside of the release.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 108; Dec. Dig. ⇐57(2).]

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Department 2. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by Michael J. Reynolds against Harry L. Day and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded, with directions to dismiss.

See, also, 79 Wash. 499, 140 Pac. 681, L. R. A. 1916A, 432.

John H. Wourms, of Wallace, Idaho, and Plummer & Lavin and Graves, Kizer & Graves, all of Spokane, for appellants. Robertson & Miller and Corkery & Corkery, all of Spokane, for respondent.

MAIN, J. The purpose of this action was to recover damages for personal injuries. One of the defenses pleaded in the answer was a settlement and written release. The signing of the release is not controverted, but it is claimed that it was induced by fraud. The trial resulted in a verdict and judgment for the plaintiff. From this judgment, the appeal is prosecuted.

The facts which present the controlling question are these: On August 10, 1912, the respondent, while working for the defendants in the mine owned and operated by them at Burke, Idaho, sustained a serious injury to his feet and ankles by falling down a chute in the mine. At this time, the respondent had been at work in the mine about two weeks. After the accident, he was taken to a hospital at Wallace, Idaho, which hospital was conducted by Dr. M. T. Smith. The respondent remained in the hospital approximately twelve weeks. The mine was operated under the name of the Hercules Mining Company, with offices in Wallace.

After the respondent had been in the hospital about ten weeks, and was able to leave the hospital and go about town on crutches, he went to the office of the manager of the company, and, while there, discussed with the manager his injury, and the question as to who was liable therefor. He took the position that the company was to blame, and the manager took the opposite position. After talking with the manager for a time, he left the office and returned on October 21, 1912, when again he and the manager discussed the same questions as on the previous visit. On this date an agreement was entered into as follows:

"This agreement between John Reynolds, party of the first part, and the Hercules Mining Company, party of the second part, recites the following condition:

"Whereas, John Reynolds was injured in the Hercules mines by falling down a chute in the said mine, and whereas there is no blame or negligence attached to said company for this injury; the said company as a matter of grace gives John Reynolds time from the tenth day of August to the present date inclusive at the rate of ($3.50) three dollars and fifty cents per day, paid to him in hand this 21st day of October.

"The above-named company further agrees to allow the above-named John Reynolds three (3) month's wages at the rate of ($3.50) per day payable at the Hercules Mining Company's office, Burke, Idaho, on the tenth of each month thereafter. At the end of this time John Reynolds is to report for work, if he is unable to work at that time the company will allow him two month's additional wages at the above-named rate ($3.50) three dollars and fifty cents per day.

"For this consideration, the said John Reynolds has accepted this amount in full settlement for any claims of personal injury, which he might have upon the above-named company.

"John Reynolds.

"C. C. Richlie, Witness."

On the same date he was given a check for $255.50, and signed the following voucher:

Burke, Idaho, October 21, 1912.

Hercules Mining Co. Dr.

Check. No. 961 To John Reynolds,
1912. Burke, Idaho.

To Settlement ..... for injury to ..... (John Reynolds) in Hercules Mine, Burke, Idaho, i. e.:—

Time as follows:

August 22 days at $3.50 per day	$ 77.00	
September 30 days at $3.50...	105.00	
October 21 days at $3.50.....	73.50	255.50

$255.50 Wallace, Idaho, Oct. 21, 1912.

Received payment in full for above amount.

Approved:

[Signature illegible.] John Reynolds.
Gen'l Manager.

On November 1, 1912, the respondent again appeared at the office of the company and requested the manager to advance him 60 days' wages. The respondent desired this money so that he might make a trip East and consult Mayo brothers at Rochester, Minn., relative to his feet. At this time a memorandum was signed by the respondent which referred to "the former agreement between the Hercules Mining Company and myself," and acknowledged receipt of 60 days' wages before the same would be due under the release signed on the 21st of October. On the same date the respondent signed a voucher like the one above set out, which stated: "To settlement for injury: 60 days at 3.50 per day, $210." A check for this sum was then given him. After receiving this check, the trip to see Mayo brothers was made. Some time after January 1, 1913, the respondent returned to Wallace. On January 29, 1913, he received from the company a check for $105 and signed a voucher which stated: "To December wages—30 days at $3.50. Amount allowed account injury received in Hercules Mine, $105." Some time after this, and probably during the early part of March, the respondent went to Spokane to consult Dr. C. F. Eikenbary. Not at that time having money to bear the expense of the trip, Dr. Smith advanced him $50 after consulting with the manager of the company and being assured that the company would pay the same. Dr. Eikenbary operated upon the respondent's feet, and was paid therefor by the company the sum of $150. After so far recovering from the operation performed by Dr. Eikenbary as to

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be able to be about on crutches, the present action was instituted. Since the case is controlled by the settlement and release, a statement of the facts bearing upon other phases of the controversy would be immaterial. After a statement of the law by which the validity of the release is to be determined, a further reference to the facts will be made.

[1, 2] Releases of this kind are like any other writing, and are not to be lightly overcome. If they are not induced by fraud, false representations, or overreaching, they must be sustained. The testimony to sustain the charge of fraud must be clear and convincing. Nath v. Oregon R. & Nav. Co., 72 Wash. 664, 131 Pac. 251; Mattson v. Eureka Cedar Lumber, etc., Co., 79 Wash. 266, 140 Pac. 377; Spratt v. Northern Pacific R. Co., 90 Wash. 592, 156 Pac. 563.

The respondent claims that at the time he signed the release he was told by the manager of the company that he would be well in two months, and that he thought he was simply receiving wages. He admits that he knew at this time that the company owed him nothing for wages, the amount which he had earned prior to the injury having been previously paid. He also admits that for the money which was paid pursuant to the release the company received no benefit. He also admits that, prior to the signing of the release, some paper was read to him, but says that he does not know whether it was the one he signed or not. The manager of the company and the stenographer both testified that the release was dictated in the respondent's presence and was afterwards either read to him by the manager, or that he read it himself before he signed it.

As to the vouchers which he signed, the respondent says that he did not read them, and that, if he had, he would not have known the meaning of the word "settlement." He also testified that he would not have known the meaning of the word "injury," or "liability," as used in the release. He claims that at this time he was feeling much broken up, and that his head was "going around." The respondent had had some schooling; was able to write letters and read the replies which he received thereto from his relatives; and was able to read the newspapers to some extent, but did not understand the meaning of "big words." Although he testified that he was unable to understand such words as "injury," "liability," and "settlement," yet he was an unusually adroit witness. He speaks as correctly as the average witness, if not more so.

Some reference is made to the claim of the respondent that Dr. Smith told him he would be all right in two months. But, whatever Dr. Smith may have said, he was not employed by the company, but by the men in the mine, and his statements would not be binding upon the company, even assuming that the statement of the physician, if relied upon, would be sufficient to impeach the release.

The respondent left his home in Ireland when 15 years old, and went to Scotland, where he remained four years. Then he came to Philadelphia, and from there to Massachusetts, where he had a brother or brothers. After working in Massachusetts for a time, he went to Pennsylvania, where he worked in a mine. Subsequent to this, he worked in a number of different states at such work as mining, teaming, and carpentering. Before he went to see Dr. Eikenbary, as he says, Dr. Smith told him that he had signed a release; but, as Dr. Smith testified, it was the respondent who told him that he had settled with the company. Whoever may be right as to this, the fact is that, after this conversation, the respondent received the $50 which Dr. Smith advanced after being authorized to do so by the company. Under the evidence, it cannot be found that the respondent thought he was receiving wages because he admits that he knew no wages were due him. It cannot be said, at least when he received the payment on January 29th, that he relied upon the assurances of the manager of the company—assuming that he had a right to rely upon such assurances that he would be well in two months—because at this time much more than two months had elapsed, and he had been back to see Mayo brothers and had received some treatment from them, and knew that his injury to some extent was permanent. The only reason the company would be paying him this money was in settlement of any claim he might have for damages, and this fact must have been known to him.

Taking into consideration all the facts in the case as stated, as well as other details not stated, the only conclusion to be arrived at is that the evidence in this case by which fraud or overreaching is sought to be sustained is far from clear and convincing. If, under the facts in this case, the release can be impeached, it is difficult to see how it would be possible for a release in any case to be sustained.

A number of cases from this court have been cited by the respondent. Without reviewing these in detail, it may be said that, after a careful reading of all of them, it appears that each of the cases relied on is clearly distinguishable in its facts from the present case. Where a release is sought to be impeached for fraud, every case must depend to a large extent upon its own facts.

The judgment will be reversed, and the cause remanded, with direction to the superior court to dismiss the action.

MOUNT, HOLCOMB, and PARKER, JJ., concur.

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(93 Wash. 412)

BASSETT et al. v. CITY OF SPOKANE. (No. 13474.)

(Supreme Court of Washington. Nov. 22, 1916.)

ADVERSE POSSESSION ⟸91 — PAYMENT OF TAXES—COLOR OF TITLE.

Under Rem. 1915 Code, § 789, providing that every person having color of title to vacant and unoccupied land who pays the tax thereon for seven successive years shall be adjudged the legal owner thereof, *held*, that one who for seven years in good faith paid the tax on such lands and whose color of title was a warranty deed from a former owner acquired title to the lands superior to defendant's tax title and subsequent conveyance from such former owner.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 512–516; Dec. Dig. ⟸91.]

Department 2. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action to quiet title by Hannah Bassett and another against the City of Spokane. From a judgment for plaintiffs, the defendant appeals. Affirmed.

H. M. Stephens, Ernest E. Sargeant, and Dale D. Drain, all of Spokane, for appellant. R. L. Edmiston, of Spokane, for respondents.

MAIN, J. The purpose of this action was to quiet title to a certain tract of land in the city of Spokane, Wash. From a judgment, quieting the title as prayed for in the complaint, the defendant city appeals.

The controlling facts are these: On November 1, 1889, the respondents purchased the property, and received from the then owner a conveyance by warranty deed. This deed was thereafter duly recorded. On March 8, 1902, a two-thirds interest in the property was sold by Spokane county for the nonpayment of taxes for the years 1893 and 1895. On March 19, 1903, a tax deed was issued to the county. On September 1, 1904, the county conveyed the two-thirds interest in the property acquired by it, under the tax foreclosure proceedings, to one J. F. McElroy. On May 26, 1913, McElroy and wife conveyed their interest in the property to the city of Spokane. The McElroys, during the time that they held title to the property, at no time paid any taxes thereon. The taxes, during this time, were paid by the respondents. In fact, from the year 1889, when the respondents purchased the property, down to and including the year 1914, they paid all the taxes assessed against the same, except for the years 1893 and 1894. The land was vacant and unoccupied. From these facts, it appears that the respondents, while the title to the property was in the McElroys, paid taxes thereon, in good faith, for more than seven successive years. There are a number of contentions advanced in the briefs, but the determination of one is decisive of this appeal. That question is: Did the respondents, while the title to the land was in the McElroys, have color of title by reason of their warranty deed from the owner?

Remington's 1915 Code, § 789, provides:

"Every person having color of title made in good faith to vacant and unoccupied land, who shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land to the extent and according to the purport of his or her paper title. * * *"

As previously stated, the respondents paid taxes on the land, in good faith, for more than seven successive years, while the title was in the McElroys. Under the section of the statute quoted, this would give to the respondents title to the vacant and unoccupied land in controversy, provided the warranty deed, by which the title was conveyed to them, constitutes color of title. This question seems to be determined in Jones v. Herrick, 35 Wash. 434, 77 Pac. 798. In that case, it was held that an allegation, in an affirmative defense in the answer, that the defendant held under a warranty deed from the owner, was equivalent to alleging that he held under color of title, and the pleading was good as against a demurrer. In this case, the facts show that the respondents held under a warranty deed from the former owner, and therefore, under the holding in that case, they had color of title during the time that the title to the property was in the McElroys. This, with the payment of taxes, in good faith, for more than seven successive years, would operate to transfer the title from the McElroys back to the respondents; the land being vacant and unoccupied at all times. The respondents having acquired title to the property by virtue of their color of title, and the payment of taxes prior to the time that the McElroys conveyed the same to the city, their right was superior to that of the city, and the trial court properly adjudged that their title be quieted.

The judgment will be affirmed.

MORRIS, C. J., and FULLERTON and PARKER, JJ., concur.

(93 Wash. 407)

WALDY v. CITY OF SEATTLE. (No. 13410.)

(Supreme Court of Washington. Nov. 22, 1916.)

1. APPEAL AND ERROR ⟸518(5)—RECORD—EXHIBITS.

Exhibits are not made a part of the record by being included in or attached to the clerk's transcript, but must be brought up as a part of the statement of facts or bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2348–2350; Dec. Dig. ⟸518(5).]

2. MUNICIPAL CORPORATIONS ⟸267—PUBLIC IMPROVEMENT — CONSTRUCTION OF ORDINANCE.

An ordinance authorizing and directing a city's board of public works to construct a railroad in accordance with the plans to be prepar-

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ed by the city engineer embraced a reconstruction made necessary by a thaw after the roadbed had been constructed upon frozen ground and frozen earth had been used in the fill and embankments.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 716; Dec. Dig. ⊂⊃ 267.]

3. APPEAL AND ERROR ⊂⊃931(4)—PUBLIC IMPROVEMENT — CONTRACT — PERFORMANCE OF DUTY—PRESUMPTION.

Where a contract between a city and a contractor providing that, if extra work was required for which no price had been included in the contract, it should not be begun until the price therefor had been agreed upon in writing by the contractor and the city engineer, and that, if no price could be agreed upon, it would be paid for at the actual cost of labor and material, with 10 per cent. additional, and where the findings in a subcontractor's action for extra work at cost with 10 per cent. additional were silent as to any attempt to agree upon the price for extra work, it could not be presumed that the city engineer failed in the performance of the duty enjoined upon him by the contract.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3764; Dec. Dig. ⊂⊃931(4).]

4. MUNICIPAL CORPORATIONS ⊂⊃360(7) — PUBLIC IMPROVEMENT—EXTRA WORK—PRICE —ESTOPPEL.

In such case, where the extra work was accepted by the city, it was in no position in the subcontractor's action therefor to urge the silence of the findings as to the attempt to agree in writing as to the cost of extra work as required by the contract.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 892½; Dec. Dig. ⊂⊃360(7).]

5. MUNICIPAL CORPORATIONS ⊂⊃374(2) — CLAIM FOR DAMAGES—CONTRACT—FILING.

Under the charter of the city of Seattle, requiring all claims for damages to be filed, it was not necessary to file any claim as a condition precedent to an action upon a contract for the balance due thereon, and not for damages arising out of the breach thereof.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 905, 910; Dec. Dig. ⊂⊃374(2).]

6. MUNICIPAL CORPORATIONS ⊂⊃374(6)—PUBLIC IMPROVEMENT—CONTRACT—ASSIGNMENT.

Where a contractor was to surface a roadbed, lay the ties and rails, and do the ballasting under the direction of the city engineer, findings that further work under the contract was rendered impossible and that the city and the contractor jointly and severally hired the subcontractor to perform the work, showed that the subcontractor became the assignee of the contract.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 905, 910; Dec. Dig. ⊂⊃374(6).]

7. APPEAL AND ERROR ⊂⊃934(2)—PRESUMPTION—FINDING.

The presumption being in favor of the correctness of the judgment, the findings, if susceptible thereof, will be given such a reasonable construction as will sustain the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3777; Dec. Dig. ⊂⊃934(2).]

Department 2. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by John Waldy against the City of Seattle and the Cedar Lake Logging Company. Judgment for plaintiff against the defendant City, with judgment of dismissal as to the defendant Cedar Lake Logging Company, and the City appeals, and the plaintiff takes a cross-appeal from so much of the judgment as dismisses the action against the Logging Company. Affirmed.

Hugh M. Caldwell and Jas. A. Dougan, both of Seattle, for appellant. Vanderveer & Cummings and H. McC. Billingsley, all of Seattle, for respondent.

MAIN, J. This is an action upon a contract to recover for labor performed and material furnished to the defendant, the city of Seattle. The trial resulted in a judgment for the sum of $4,990.47 against the city, and a judgment of dismissal as to the other defendant, Cedar Lake Logging Company. From this judgment the city appeals, and the plaintiff appeals from that portion of the judgment which dismisses the action against the logging company.

[1] The case is here to be considered upon the findings of fact, conclusions of law, and judgment. No statement of facts or bill of exceptions has been filed. There appears attached to the back of the clerk's transcript certain exhibits which were introduced in evidence during the trial in the superior court. These are no part of the record. Without assembling the cases, it may be stated that under the repeated holdings of this court exhibits are not made a part of the record by being included in, or attached to, the clerk's transcript, but must be brought here as a part of the statement of facts or bill of exceptions.

The facts as they appear in the findings, so far as here necessary to be set out, are, in substance, as follows:

On February 13, 1912, the city of Seattle passed an ordinance authorizing and directing the board of public works to construct a railroad on the right of way belonging to the city from a connection with the existing municipal railway in section 26, township 23 north, range 8 east W. M. and the Chicago, Milwaukee & St. Paul Railroad to the site of the city masonry dam in King county. For this purpose the ordinance appropriated the sum of $50,000 to be used by the board of public works.

On February 20, 1912, the board of public works referred the ordinance to the city engineer, and instructed him to prepare plans and specifications for the construction of the railroad. Thereafter, and on the 8th day of March, 1912, the city engineer reported to the board of public works his plans and specifications, which were on that date approved and adopted. On October 4, 1912, the city engineer was authorized and instructed by the board to construct a railroad according to the plans and specifications. The city engineer, in pursuance of this authority, com-

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menced the construction of the railroad, and cleared, grubbed, and partly graded the roadbed for the same. On March 18, 1913, the board of public works entered into a contract with the Northwest Lumber Company for the completion of the railroad by that company upon the roadbed prepared by the city engineer. Under this contract the lumber company was to surface the roadbed, lay the ties and rails, and do the ballasting. This work was to be done under the supervision, direction, and control of the city engineer. Thereafter, and apparently before any work had been done under the contract, it was assigned to the Cedar Lake Logging Company. This company commenced the construction of the railroad upon the roadbed as prepared by the city engineer.

In grading the roadbed, the city engineer had constructed the same upon frozen ground, and had made the fills and embankments by the use of frozen earth, ice, snow, brush, and other material unfit for a permanent roadbed. After the respondent and cross-appellant, who will be referred to as the respondent, as subcontractor for the Cedar Lake Logging Company, had laid a part of the ties and rails upon the roadbed, and had surfaced and ballasted the same, the roadbed began to sink and slide by reason of a thaw; and such portion of the track as the respondent had laid became and was in imminent danger of being lost and destroyed. The portion of the grade upon which ties and rails had not been laid likewise began to sink and slide, rendering it impossible for the work under the contract to be pursued.

According to the recital in the findings, the Cedar Lake Logging Company and the city of Seattle, through its city engineer, jointly and severally hired the respondent to perform the work of regrading the roadbed, and reballasting the track where necessary, and relaying the ties and rails, all under the direction and control of the city engineer. For this work actual cost plus 10 per cent. for personal supervision thereof was to be allowed.

The contract under which the Cedar Lake Logging Company was to do the work recited that:

"In case any extra work is required for which a price has not been included in the contract for this improvement, the same shall not be begun until a price therefor shall have been agreed upon in writing, by the contractor and the city engineer. If for any reason the same extra work cannot be performed at an agreed upon price, it will be paid for at the actual cost of all labor and material required, together with 10 per cent. additional."

After the work which the respondent was required to do had been performed, he was paid on account thereof the sum of $1,320.07. Further payment being refused, this action was brought to recover the balance, and resulted in the judgment above indicated.

The appellant in its brief makes four points, distinctly and separately stated. These will be considered in the order in which they appear in the brief.

[2] The first point is that, since the ordinance provided for the construction of the roadbed, the reconstruction made necessary by the thaw was not within the scope of the ordinance, and therefore, in making such reconstruction, it was done without authority of the city council. The ordinance provided that the board of public works "be, and it is hereby, authorized and directed to construct a railroad * * * in accordance with the plans to be prepared by the city engineer." It would be too narrow a construction to place upon this ordinance to hold that after a portion of the work had been performed, and for any reason was damaged or destroyed, there was no authority to repair or rebuild. If that construction were given to the ordinance, then, in case any portion of the work were damaged or destroyed before it could be repaired or reconstructed, it would be necessary to go back and have the city council pass another ordinance authorizing such repair or reconstruction. It seems plain that the ordinance should not be given this construction. If our construction of the ordinance be the proper one, the case of Arnott v. Spokane, 6 Wash. 442, 33 Pac. 1063, and other cases cited by the appellant are not applicable.

[3, 4] The second point is that the contract between the city and the Cedar Lake Logging Company provided a method by which the price of extra work was to be determined, and that, because the findings do not recite that there was an attempt to agree upon the price of such extra work in writing as the contract required, no recovery can be had. The findings being silent upon this question, it cannot be presumed that the city engineer failed in the performance of a duty enjoined upon him by the contract. Further than this, the work was performed for a price fixed in the contract for extra work, providing no price could be agreed upon in writing. The work was accepted by the city. Under these facts the city is hardly in a position now to urge the silence of the findings upon the attempt to agree in writing as a defense to an action for extras which were to be paid for in the manner specified in the contract if the attempt to agree in writing should be abortive.

[5] The next point is that the action is for breach of contract and for damages arising out of the contract, and that, as no claim was filed as required by the city charter, the action must fail. The fallacy of this position is the assumption that the action is one for damages arising out of the contract, and not an action upon the contract. According to the facts found, a contract was entered into by which material was to be furnished and labor performed. Thereafter the contract was performed according to its terms

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The action is upon the contract for the balance due thereon, and not for damages arising out of the breach thereof. In International Contract Co. v. Seattle, 74 Wash. 662, 134 Pac. 502, it was held that the provision of the city charter requiring "all claims for damages" to be filed as therein provided included damages arising ex contractu as well as ex delicto. But it was not there held that in an action upon a contract it was necessary to file a claim for damages. The difference between an action upon a contract and a claim for damages arising out of a breach of contract is recognized in that case.

[6] The fourth point is that the respondent's contract was with the Cedar Lake Logging Company, and not with the city of Seattle, and therefore no action can be maintained against the city. The findings do not present a very definite theory, yet it is fairly deducible therefrom that the respondent became, so far as the performance of the extra work was concerned, the assignee of the contract. Under his contract with the logging company, the respondent was to do all of the work which that company had contracted to do. When the extra work became necessary, the city engineer and the logging company co-operated in authorizing him to do such extra work. The work was performed at the exact price fixed in the contract for the payment for extras. If the facts show an assignment, the right to maintain the action is not denied. While some of the facts found would be opposed to the theory of an assignment, yet the findings are reasonably susceptible of a construction which would support that theory.

[7] The presumption being in favor of the correctness of the judgment, the findings, if susceptible thereof, should be given such a reasonable construction as will sustain the judgment.

The judgment will be affirmed.

MORRIS, C. J., and HOLCOMB and PARKER, JJ., concur.

(93 Wash. 429)

STATE ex rel. TWISS v. SUPERIOR COURT OF LEWIS COUNTY et al. (No. 13638.)

(Supreme Court of Washington. Nov. 22, 1916.)

1. EMINENT DOMAIN ⇐⇒79, 80 — COMPENSATION BEFORE TAKING—WAIVER.

The benefit of Const. art. 1, § 16, providing that private property cannot be taken for public use until compensation has been paid, may be waived.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 205–214; Dec. Dig. ⇐⇒79, 80.]

2. EMINENT DOMAIN ⇐⇒79, 80 — COMPENSATION BEFORE TAKING—WAIVER.

Where an electric railway company enters upon land under a verbal agreement with its owner, locates and grades its right of way, and no action is taken against it for over two years, except protests against an alleged minor deviation from the agreed location, *held*, the landowner waived his constitutional right to payment in advance and was relegated to an action for damages.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 205–214; Dec. Dig. ⇐⇒79, 80.]

3. INJUNCTION ⇐⇒12—NATURE.

It is not the function of an injunction to correct past injuries.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 11, 12; Dec. Dig. ⇐⇒12.]

Department 1. Original certiorari proceedings by the State of Washington, on the relation of G. L. Twiss, against the Superior Court of Lewis County and others. Order affirmed.

C. A. Studebaker, of Chehalis, for relator. Forney & Ponder, of Chehalis, for respondents.

ELLIS, J. Certiorari to review an order of the superior court of Lewis county dissolving a temporary restraining order. From the return it appears that relator is, and at all times material to this inquiry was, the owner of the south half of the southwest quarter and the southwest quarter of the southeast quarter of section 26, township 13 north, range 1 east W. M. in Lewis county. In the spring of 1914 relator and the Washington Electric Railway Company, a public service corporation organized under the laws of this state, entered into a verbal agreement whereby that company was to be permitted to construct its grade and tracks and to operate its trains across relator's lands upon a right of way 35 feet wide extending along the north line of the westerly 80 acres above described and 70 feet wide extending diagonally in a southeasterly direction through the easterly 40 acres above described. It was admitted in argument that the 35-foot right of way across the first-mentioned tract was to be donated free of cost to the electric company, and that the 70-foot right of way across the easterly 40 acres was to be paid for at a price to be agreed upon between the parties. The agreement was conditioned upon the construction of the road so as to be ready for the regular operation of trains within 16 months. In June, 1914, the electric company entered upon the lands with relator's permission, and thereafter, with relator's knowledge, consent, and acquiescence, constructed the grade for its road on the north 35 feet of the 80-acre tract and across the easterly 40, and fenced and ditched the right of way throughout its extent across both tracts. Three written agreements were prepared at different times, two by the electric company and one by relator, but each side rejected each agreement as prepared by the other, claiming that it did not conform to the oral agreement. It is claimed that in the construction of its grade the electric company deviated from the right of way as proposed and agreed upon at a point near where it

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passed from the 80-acre tract onto the easterly 40, but it is admitted that this deviation was slight, being possibly about 40 feet. It appears that some objection was then made by relator, but whether after the grade was completed or before does not appear. No proceeding of any kind has ever been brought to forfeit the easement for the right of way because of the failure of the company to construct the road within the time agreed upon. After the grade was completed the electric company ceased work upon its line and nothing further was done until the spring of 1916, when it conveyed its line to respondent Chehalis, Cowlitz & Cascade Railway, which it seems to be assumed is also a public service corporation. In June, 1916, respondent began leveling the grade across relator's land for the imposition of ties and rails. In August, 1916, relator brought an action to enjoin respondent from proceeding with the work and claiming $200 damages for the work already done. A temporary restraining order was issued. Respondent moved to dissolve this restraining order, and upon a hearing the trial court granted the motion; the order being conditioned upon respondent's filing a bond of $500, or cash in lieu of bond in that sum, as security for any damages which relator might recover. Respondent deposited $500 in court and proceeded with the work of laying its track, whereupon relator instituted this proceeding. It is admitted that the deposit of $500 will be amply sufficient to cover all damages which relator may suffer by reason of the taking of his lands for a right of way.

[1] Relator rests upon the elementary proposition that under our Constitution private property cannot be taken for a public use without just compensation first being ascertained and paid. He relies upon State ex rel. Smith v. Superior Court, 26 Wash. 278, 66 Pac. 385. The court there had under review an order which permitted the defendant to damage private property and substituted a bond for the damages which the Constitution declares must be assessed and paid in advance. It was therefore properly held that an unconditional injunction should have been granted. But it does not follow from that decision that the right to compensation in advance may not be waived, and the property owner thereafter relegated to his remedy in damages. In Kaufman v. Tacoma, Olympia, etc., R. R. Co., 11 Wash. 632, 635, 40 Pac. 137, 138, this court said:

"The charter provided that before private property should be taken or damaged the damages should be ascertained and paid, and the constitutional provision aforesaid was to the same effect. This was not done, but the respondents saw fit to allow the work to proceed without attempting to restrain the performance of it, or to recover damages prior to its completion, and thus waived payment in advance and were confined to their right to bring an action to recover."

In Kakeldy v. Columbia & P. S. R. R. Co., 37 Wash. 675, 680, 80 Pac. 205, 206, this court said:

"An owner of land who stands by and without protest sees a railroad constructed thereon, is estopped thereafter to maintain an action in ejectment, or a suit for injunction, to prevent the operation of the road. His remedy is limited to an action for damages for his compensation."

[2] In the case before us respondent's predecessor in interest, the electric company, entered upon the relator's land in 1914 with his full consent and under a verbal contract. The relation of the parties was purely contractual. The right of way as now occupied by respondent was then fenced throughout. The grade for the road was fully completed across all of the relator's land. It is true relator claimed that there was a slight deviation at one point from the line as agreed upon, and that he did not know of this at the time, but it is admitted that he did know of it in 1914 at about the time the grade was completed. Though he then objected, he took no steps to recover the land, and the electric company and the respondent here, as its successor, have been in possession ever since. From the negotiations then and thereafter had, even down to a letter written by relator G. L. Twiss on May 31, 1916, it is clear that relator was not objecting so much to this slight deviation as to the amount of compensation offered by respondent and its predecessor. We are clear that under the foregoing decisions relator has waived his right to compensation in advance for the taking, and is relegated to his action in damages.

[3] Moreover, whatever damages can ever be caused by the building of respondent's road were inflicted in 1914 when the grade was constructed and ditched and the right of way fenced. "It is not the function of injunction to correct past injuries." Hodgeman v. Olsen, 86 Wash. 615, 150 Pac. 1122, L. R. A. 1916A, 739; 1 High, Injunctions, p. 38.

The order under review is affirmed.

MORRIS, C. J., and MAIN, PARKER, and CHADWICK, JJ., concur.

(93 Wash. 416)

KILLES v. GREAT NORTHERN RY.
(No. 13481.)

(Supreme Court of Washington. Nov. 22, 1916.)

1. MASTER AND SERVANT ⟸250¼, New, vol. 15 Key-No. Series—ACTIONS—FEDERAL STATUTE—ELECTION.

Where an employé as plaintiff in an action under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657–8665]) resists the removal of the action to the federal courts upon his right to sue in the state courts under the statute, he elects as between a right of action at common law and one under the statute, and must abide by such election as fixing the law of the case.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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2. COMMERCE ⊂⊃27—FEDERAL STATUTE—EMPLOYMENT WITHIN THE ACT—"INTERSTATE COMMERCE."

An employé, injured while building a scaffold to be used by him in painting a freight shed, which is used by a railroad as an instrumentality in interstate commerce, is not engaged in an act so directly and immediately connected with interstate commerce as substantially to form a part or necessary incident thereto, and his injury is therefore not compensable under the federal statute.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⊂⊃27.

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

Department 1. Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by William Killes, under the federal Employers' Liability Act, against the Great Northern Railway. Judgment for plaintiff, and defendant appeals. Reversed.

F. V. Brown and F. G. Dorety, both of Seattle, for appellant. Carkeek & McDonald, of Seattle, for respondent.

MORRIS, C. J. Appeal from a judgment in favor of respondent upon verdict in his favor. The action was brought under the federal Employers' Liability Act, and the first question to be determined is whether or not respondent was at the time of his injury engaged in interstate commerce, and, therefore, within the act. If he was not so engaged, then this action must fail.

Respondent was employed by appellant as a laborer. On the day in question he was directed to go down to appellant's freight shed, in which interstate commerce was handled, and paint or whitewash the ceiling of the shed. For this purpose a scaffold was to be erected upon which respondent and those engaged with him were to stand while applying the paint. Arriving at the shed respondent and two others, Wood and Casey, were directed by McGinity, the foreman in charge, to build the scaffold out of 4x4's laid across the main rafters of the shed about 13 feet above the floor. Upon these 4x4's 2x10 planks were to be laid, but not nailed, as it would be necessary to move the planks as the work progressed. After directing them how to build the scaffold, McGinity showed them a pile of lumber out in the yard from which the necessary timber for the scaffold was to be procured. Wood, Casey, and respondent thereupon proceeded to build the scaffold.

At the time of the accident respondent was upon the scaffold putting the planks in place, and Wood and Casey were below passing them up. Wood noticed that one of the 4x4's already in place was showing signs of breaking, and he and Casey went out to the pile of lumber and obtained another timber to place under the defective 4x4 as a brace. This was done, and while the brace was being held in place by the men below, Wood directed respondent to nail its upper end to the 4x4. Respondent proceeded to do so, kneeling upon a plank, when the 4x4 broke, and he fell to the floor. These facts will be sufficient to determine the question suggested.

[1] Respondent, having resisted a removal of his case to the federal courts upon his right to sue in the state court under the federal statute, elected as between a right of action at common law and one under the federal act, and must abide by his election as fixing the law of the case. Baird v. Northern Pacific Ry. Co., 78 Wash. 67, 138 Pac. 325.

[2] The freight shed itself as a storehouse and place for the handling of interstate commerce is conceded by appellant to be an instrumentality made use of in interstate commerce, but it does not follow that the building of a scaffold to be used in the painting of an interstate commerce freight shed bears such a relation to the movement of interstate freight, or is such an integral or necessary part thereof as to make such work fall within any definition or test of interstate commerce that has up to this time been announced. In Horton v. O. W. R. & N. Co., 72 Wash. 503, 130 Pac. 897, 45 L. R. A. (N. S.) 8, we reviewed the cases then reported to determine a practical test to apply to cases that would fall within the act, and reached the conclusion that the employment of the injured servant must be in connection with some instrumentality used in interstate commerce, and that the relation of the employment to interstate commerce must be such that an injury to the servant tended to hinder or delay the movement of trains engaged in such commerce. We sustained the action as within the act in that case upon the theory that an employé whose duty it was to attend a pumping plant furnishing necessary water to interstate trains was employed in furthering the movement of interstate traffic as much as the fireman who stoked the engine, the switchman moving oil for use in an interstate engine, or the servant who repaired the engine or cars; and that in going to his employment by the means supplied by the master he was under the protection of the act to the same extent as the fireman passing from one phase of his employment to another, in each of which cases the action has been sustained. Northern Pacific Ry. Co. v. Maerkl, 198 Fed. 1, 117 C. C. A. 237; Lamphere v. O. R. & N. Co., 196 Fed. 336, 116 C. C. A. 156, 47 L. R. A. (N. S.) 1; Montgomery v. Southern Pacific Ry. Co., 64 Or. 597, 131 Pac. 507, 47 L. R. A. (N. S.) 13.

We again passed upon the character of employment necessary to bring the servant under the federal act in Bolch v. C., M. & St. P. Ry. Co., 90 Wash. 47, 155 Pac. 422, where a switchman was injured while engaged in the removal of cars from one repair track to

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another, and sustained the action because of testimony that one of the cars being moved was loaded with lumber destined from transportation to the state of South Dakota. We there reasoned that the interstate transportation to which this car was then devoted was not ended merely because the car had become temporarily disabled and had been placed upon the repair track awaiting repairs. No case, either state or federal, has gone farther in sustaining liability under the federal act than either the Horton or the Bolch Cases, but in each of those cases the work in which the servant was engaged at the time of his injuries was within the test announced in the Horton Case, or, as said in New York Central & H. R. R. Co. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298, at the time of the injury the employé was engaged in an act which was so directly and immediately connected with interstate commerce as substantially to form a part or a necessary incident thereto.

Adopting this liberal rule of interpretation, the facts here presented do not come within it. The building of a scaffold in a freight shed upon which a workman is to stand while painting the roof has no direct or immediate connection with interstate commerce, nor is it a necessary incident in furthering the movement of interstate freight. It may be admitted that the freight shed is an instrumentality made use of in interstate commerce, but the respondent was not at work upon the freight shed. His act was at least one step removed from any connection with interstate commerce or any of its instrumentalities either directly or indirectly.

This view is in harmony with that expressed in Illinois Central Ry. Co. v. Rogers, 221 Fed. 52, 136 C. C. A. 530, where it was held that a workman engaged in cleaning stencils used in the manufacture and repair of interstate cars was not entitled to the protection of the federal act. It is likewise sustained by Shanks v. D., L. & W. R. R. Co., 239 U. S. 556, 36 Sup. Ct. 180, 60 L. Ed. 436, L. R. A. 1916C, 797. There a workman employed in the railway machine shops where repairs were made to engines operated in interstate commerce was injured while moving a heavy shop fixture used in repair work. It was held that the connection between the fixture and interstate transportation was too remote; the only function of the fixture being to communicate power to machinery used in repairing engines, some of which were used in such transportation. So here, the only function in building this scaffold was to assist in painting a freight shed which stored interstate commerce. If moving a fixture which furnishes power to machinery used in interstate commerce is without the act, then by the same reasoning the building of a scaffold to be used in painting a freight shed used in interstate commerce is without the act. The Shanks Case cites in its support Del., L. & W. R. R. Co. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397, in which it was held that a miner setting off a charge of dynamite for the purpose of blasting coal to be used in interstate commerce was not engaged in interstate commerce. If the mining of coal for use in interstate commerce is not an engagement in such commerce, then building a scaffold for a freight shed used in interstate commerce is not employment in such commerce.

Respondent relies upon Col. & P. S. R. Co. v. Sauter, 223 Fed. 604, 139 C. C. A. 150. It there appears that the railroad company was building a trestle across Cedar river to serve as a temporary structure for passing trains engaged in interstate traffic, and as a falsework for rebuilding an old bridge. An employé was at work in making a clear space in which piles could be driven among logs and débris that had drifted against a supporting truss when the bridge fell upon him. The court held that the employment was in interstate commerce. This case can be readily supported under all the cases. The trestle was an undoubted instrumentality of interstate commerce, and the driving of piles and the clearing of the necessary space through which they could be driven was a necessary incident in the building of the trestle. The abundant reason for this holding does not, in our judgment, support respondent's position. Eng v. Southern Pacific Ry. Co. (D. C.) 210 Fed. 92, is also relied upon.

The injured workman was there employed in constructing an office in a freight shed operated in connection with interstate commerce; held, the employment was in interstate commerce, since the freight shed was an instrumentality used in such commerce, and the work being done was in maintaining it in proper condition. This case would be authority for holding that painting the roof of the freight shed was employment within interstate commerce. Respondent was not so engaged. He was building a scaffold which was neither a necessary nor any part of the freight shed. To say that while painting the roof the workman was engaged in interstate commerce, but not so engaged while building the scaffold, is a sound distinction under the authorities which hold that a workman may often and rapidly during the same day pass from one class of employment to another. New York Central R. R. Co. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298.

Many other cases are cited where workmen were injured while working upon repair shops, roundhouses, stations, and outhouses, all of which were held to be instrumentalities of interstate commerce. These cases would be authority here if respondent was working upon the freight shed. We cannot escape the conclusion that the respondent was not engaged in interstate commerce, and for this reason his action must fail.

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The judgment is reversed, and the cause remanded, with directions to dismiss.

MOUNT, FULLERTON, and ELLIS, JJ., concur.

CHADWICK, J. I concur in the result.

(98 Wash. 422)

WILCE et al. v. CITY OF CHENEY et al.

(No. 13483.)

(Supreme Court of Washington. Nov. 22, 1916.)

1. MUNICIPAL CORPORATIONS ⇐293(2) — LOCAL IMPROVEMENTS — REGULARITY OF PROCEEDING.

Under Laws 1911, p. 444, § 10, prescribing the procedure of city councils in making local improvements and assessing the cost thereof against property to be benefited, a diagram of the proposed improvement filed pursuant to the resolution of the council which referred thereto may be looked to in aid of the resolution.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 773; Dec. Dig. ⇐ 293(2).]

2. MUNICIPAL CORPORATIONS ⇐293(2) — LOCAL IMPROVEMENTS — REGULARITY OF PROCEEDING.

Where the resolution for a local improvement under Laws 1911, p. 444, § 10, specifically mentioned culverts and catch-basins, the cost of constructing such culverts and catch-basins constituted a part of the proposed improvement and was chargeable against the property benefited.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 773; Dec. Dig. ⇐ 293(2).]

3. MUNICIPAL CORPORATIONS ⇐293(2) — LOCAL IMPROVEMENTS — REGULARITY OF PROCEEDING.

Where the resolution for the construction of local improvement under Laws 1911, p. 444, § 10, referred to a diagram of the proposed improvement on file but did not in terms direct the preparation of such diagram so as to show particular details of the improvement, *held*, nevertheless, that the diagram and resolution read together were effectual in informing the property owners of the nature of the improvement and were a substantial compliance with the statute.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 773; Dec. Dig. ⇐ 293(2).]

Department 2. Appeal from Superior Court, Spokane County; J. Stanley Webster, Judge.

Action by Annie Wilce and others against the City of Cheney and others. Judgment for defendant, and plaintiff appeals. Affirmed.

Graves, Kizer & Graves, of Spokane, for appellants. Wakefield & Witherspoon, of Spokane, Louis F. Bunge, of Cheney, and E. P. Twohy, of Spokane, for respondents.

PARKER, J. The plaintiffs, Annie Wilce et al., commenced this action in the superior court for Spokane county, seeking to have the city of Cheney and its officers enjoined from constructing a proposed local street improvement and charging the cost thereof by special assessment against the property of the plaintiffs and others. The cause being heard upon the merits in the superior court, judgment was rendered denying the relief prayed for by them, from which they have appealed to this court.

The contention of counsel for appellants is, speaking generally, that the city is proceeding without jurisdiction, or rather in the wrongful exercise of jurisdiction, in that the improvement as finally ordered by ordinance, and for the construction of which a contract was entered into, includes items of construction not mentioned or contemplated by the terms of the resolution of the city council declaring its intention to construct the improvement, and that therefore appellants had no opportunity to object to the improvement as finally ordered and contracted for by the city.

The controlling facts are not in dispute and may be summarized as follows: In May, 1915, the city council adopted a resolution declaring its intention to improve a number of the streets of the city by grading, constructing cement sidewalks, crosswalks, and gutters, and by "constructing drainage culverts and catch-basins, as will more fully appear from the diagram and print which the committee on 'Streets and Alleys' is hereinafter ordered to provide; constructing a concrete gutter, also concrete curbs on First street between D street and G street." This quoted language is the only portion of the resolution which could be construed as having reference to the items of construction of which appellants complain. The resolution directs notice of hearing to be given, and also directs the committee on streets and alleys to prepare estimates of the cost of the proposed improvement, and also a diagram thereof and of the district showing the property to be charged with the cost thereof, as required by the local improvement law. Notice was accordingly duly given, and an estimate and diagram also were prepared and filed. Upon this diagram there is designated as a part of the proposed improvement a storm sewer six blocks long in one of the streets proposed to be improved, and also five manholes in connection therewith. These are the principal items of construction complained of by appellants as not being provided for or mentioned in the resolution of intention. Thereafter, the time for remonstrances against the making of the improvement having expired, the city passed an ordinance finally ordering the construction of the improvement, including the storm sewer and manholes as designated upon the diagram filed in pursuance of the resolution of intention, and before the expiration of the time for filing remonstrances by the property owners. The contract for the construction of the improvement was accordingly entered into for the lump sum of $37,000. It is agreed that the storm sewer and five manholes desig-

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nated upon the diagram as composing a part of the improvement would cost $2,173.50, or a little less than 6 per cent. of the total cost of the entire improvement. The improvement district embraces about 75 ordinary city blocks, and the improvement is of substantially all of the portions of the streets bordering upon these blocks, so that the storm sewer and manholes in connection therewith form a comparatively small part of the improvement as to both quantity and cost. It was shown at the trial that the storm sewer and manholes in connection therewith were necessary to the proper drainage of the improvement, as much so as the catch-basins and culverts which were specifically mentioned in the resolution of intention.

By the general local improvement law the initiation of a local improvement proceeding may be either upon petition of the owners of property to be benefited by such improvement, or directly by resolution of the city council. Section 10 of the law relating to the initiation of such a proceeding by resolution reads as follows:

"Any such improvement may be initiated directly by the city or town council by a resolution declaring its intention to order such improvement, setting forth the nature and territorial extent of such proposed improvement, and notifying all persons who may desire to object thereto to appear and present such objections at a meeting of the council at the time specified in such resolution; and directing the proper board, officer or authority to submit to the council at or prior to the date fixed for such hearing the estimated cost and expense of such improvement, and a statement of the proportionate amount thereof which should be borne by the property within the proposed assessment district, and a statement of the aggregate assessed valuation of the real estate, exclusive of improvements, within said district according to the valuation last placed upon it for the purposes of general taxation, together with a diagram or print showing thereon the lots, tracts and parcels of land and other property which will be specially benefited thereby and the estimated amount of the cost and expense of such improvement to be borne by each lot, tract, or parcel of land or other property. Such resolution shall be published in at least two consecutive issues of the official newspaper of such city or town, the date of the first publication to be at least fifteen (15) days prior to the date fixed by such resolution for hearing before the city council. * * *" Laws 1911, p. 444, § 10.

It is insisted in appellants' behalf that the city council's resolution of intention to construct the improvement did not, as required by section 10 of the local improvement law above quoted, include the storm sewer and manholes which were constructed as a part of the improvement, so as to furnish appellants an opportunity to object to the construction of the improvement as finally ordered and contracted for by the city authorities. Counsel invoke a rule of strict construction and of strict compliance with the provisions of section 10 such as, they argue, finds support in the early decisions of this court in Buckley v Tacoma, 9 Wash. 253, 37 Pac. 441, McAllister v. Tacoma, 9 Wash. 272, 37 Pac. 658, and Kline v. Tacoma, 11 Wash. 193, 39 Pac. 453, dealing with somewhat similar provisions of the then existing city charter of Tacoma. In the Buckley Case, the initial resolution was in terms a resolution of intention, while the charter provided in terms that it should be a resolution ordering the improvement. It declared the council's intention as follows:

"To improve N street in Buckley's addition from Steele street to Pine street at the expense of the abutting owners. Grading and sidewalking."

No survey or diagram of the proposed improvement was made or filed as required by the charter, nor was the property to be charged with the cost of the improvement mentioned or described in any manner. Upon these facts it was held that the city had proceeded with the construction of the improvement without jurisdiction. In the McAllister Case, the resolution and notice thereof only showed the intention of the city to construct an improvement to consist of paving a roadway 54 feet wide with bituminous rock upon a 6-inch concrete foundation. Thereafter a contract was let by the board of public works (not by the city council) for the improvement, to include the construction of curbs and sidewalks. We note that the added curbs and sidewalks in that case constituted a much larger proportion of the improvement than do the storm sewer and manholes of this improvement. Besides, it is plain that a resolution to merely pave the roadway of the street does not include the construction of sidewalks and, it might also be well argued, does not include the construction of curbs. These facts were held to show that the city proceeded without jurisdiction. In the Kline Case, the city was held to have proceeded without jurisdiction because the improvement was attempted to be initiated by a mere resolution of intention, when the charter expressly provided that it should be initiated by a resolution ordering the improvement.

[1] While we would not now be inclined to overrule those decisions were the facts there involved again presented to us under the provisions of the then existing charter of the city of Tacoma, we think they are not controlling here in the light of a later expression of this court and the present local improvement law. In North Yakima v. Scudder, 41 Wash. 15, 82 Pac. 1022, it was held that the estimates and plans on file might be looked to in aid of the resolution of intention, manifestly upon the theory that the estimates and plans on file before the time for filing remonstrance by the property owners expires and after which the question of finally ordering the improvement is to be decided by the council furnished the property owner information touching the nature of the improvement, as well as the initial resolution itself. It would seem then that, if this resolution of intention, together with the diagram filed in pursuance thereof and referred to therein, fairly informed appellants of the

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"nature" of the improvement, it cannot be said that the city proceeded without or in the wrongful exercise of its jurisdiction in finally ordering the construction of the improvement and contracting therefor. Now, it seems to us that the language of the resolution providing for "constructing drainage culverts and catch-basins," etc., is a plain indication of the intention of the council to cause to be constructed a drainage system in connection with and as a part of the improvement, though the language of the resolution may not suggest any very elaborate or extensive drainage system. But it does refer to the diagram for further details as to the proposed drainage. This diagram was, as we have noticed, on file before the time for filing remonstrances expired and before the improvement was finally ordered, enabling appellants to readily learn the exact nature and extent of the proposed drainage system. An examination of the diagram shows that this comparatively short storm sewer and the few manholes in connection therewith are for the purpose of carrying the surface water away from the catch-basins and culverts, and are manifestly necessary for that purpose and a proper completion of the improvement and constitute a very small part thereof as to both quantity and cost. Indeed, this storm sewer, considering the short distance it runs, its connection with the catch-basins and culverts proper, and the entire district, is little else than a culvert within itself, though it is probably not strictly so in view of the fact that it does not run crosswise under the street. Yet it is manifestly little else than that in view of the purpose it serves. It seems to us that section 10 of the local improvement law above quoted, requiring that the resolution of intention shall set forth the "nature" of the improvement, means only that the resolution shall set forth in general terms a description of the improvement, and that such a description complies with the law without the necessity of entering into details. We think that this resolution, read in connection with the diagram filed in pursuance thereof, was such a compliance with section 10 of the local improvement law as to enable us to say that the city was not proceeding in the wrongful exercise of its jurisdiction.

[2] Some contention is made that the culverts and catch-basins were also wrongfully included in the improvement. This contention is manifestly without merit in view of the fact that "culverts and catch-basins" are specifically mentioned in the resolution of intention as constituting a part of the proposed improvement.

[3] Some contention is made resting upon the fact that the resolution of intention does not in terms seem to direct the streets and alleys committee to prepare the diagram so as to show the storm sewer, manholes, and other details of the construction of the improvement thereon. However, when the resolution of intention is read as a whole, it is, we think, plain that the council intended such details to be shown upon the diagram, as they are in fact shown. We conclude that the diagram in this respect was as effectual in informing the property owners of the nature of these items of construction as if the direction to the streets and alleys committee had been more specific in the resolution as to placing of this data upon the diagram.

We conclude that the superior court properly disposed of the cause, and its judgment is therefore affirmed.

MORRIS, C. J., and MAIN and HOLCOMB, JJ., concur.

(93 Wash. 401)

STATE ex rel. TITLOW v. CITY OF CENTRALIA et al. (No. 13355.)

(Supreme Court of Washington. Nov. 22, 1916.)

1. COURTS ⇐475(1) — EXCLUSIVE JURISDICTION—POSSESSION OF PROPERTY.

Where a court, in a suit properly before it, takes possession of property, its jurisdiction over the property for the time being is exclusive, and no other court can interfere with its possession, and, where the court acquiring jurisdiction may be compelled in the progress of the litigation to assume possession and control of the specific property, its jurisdiction is also exclusive.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1229, 1247–1257, 1259; Dec. Dig. ⇐ 475(1).]

2. COURTS ⇐489(11) — CONFLICTING JURISDICTION—FEDERAL AND STATE COURTS.

A city collected money to pay the warrants of a local improvement district, and called the warrants. Money was kept separately upon the treasurer's books, but, in depositing, was commingled with the general fund of the city. The city sued in the federal court to establish a preferred claim to moneys on deposit in a national bank at its failure, or, if not prevailing as a preferred claimant, to have warrants of the district held by the bank offset against the amount of its general claim. A restraining order against the prosecution of an action by the receiver of such bank in the state court on the warrants was dissolved, and it was provided that if upon final determination of the federal case the city was declared not to be a preferred claimant, the same right of offset should exist as to funds coming into the hands of the receiver in payment of the warrants as would exist had the warrants not been paid. *Held*, that proceeding in the federal court was not ground for abatement of an action by the receiver to compel the treasurer to pay such warrants.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1336; Dec. Dig. ⇐ 489(11).]

3. MANDAMUS ⇐109—WARRANTS—PAYMENT.

Where funds are in a city treasury available for the payment of certain warrants, and payment thereof is refused, mandamus is the proper proceeding to compel their payment, and, in such proceeding, there may be pleaded any defense which will defeat the claimant's right to the writ.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 227–229, 232–235, 237; Dec. Dig. ⇐ 109.]

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4. MUNICIPAL CORPORATIONS ⟸372(1)—PUBLIC IMPROVEMENT — IMPROVEMENT FUND — TRUST.

Under Local Improvement Act (Laws 1911, p. 459) § 28, requiring that all moneys collected by the treasurer for local assessments shall be kept in a separate fund and used for no other purpose than to redeem warrants drawn upon or against it, the local improvement fund is a trust fund.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 905; Dec. Dig. ⟸372(1).]

5. MUNICIPAL CORPORATIONS ⟸370—LOCAL IMPROVEMENT FUND — GENERAL FUND — PAYMENT OF IMPROVEMENT WARRANTS.

Where a city commingled its local improvement trust fund with its general fund, and there remained continuously in that fund sufficient to meet the local improvement warrants, the general fund was available for their payment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 902, 903, 908, 909; Dec. Dig. ⟸370.]

6. MUNICIPAL CORPORATIONS ⟸370—LOCAL IMPROVEMENT FUND—ACTION ON WARRANTS —CITY TREASURER.

Where local improvement funds commingled with the city's general funds were available for the payment of local improvement warrants, and such commingled fund was in the possession of the present city treasurer, it was no objection that he did not hold the office when the local improvement funds were received.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 902, 903, 908, 909; Dec. Dig. ⟸370.]

Department 2. Appeal from Superior Court, Lewis County; A. E. Rice, Judge.

Mandamus by the State of Washington, on the relation of A. R. Titlow, as receiver of the United States National Bank of Centralia, Washington, against the City of Centralia and W. G. Born, as treasurer of the City of Centralia. Judgment granting in part and denying in part the relief prayed for in the complaint, and both parties appeal. Judgment upon the plaintiff's appeal reversed, and upon the defendant's cross-appeal affirmed.

Oldham & Goodale, of Seattle, for appellant. Wm. R. Lee, of Centralia, for respondents.

MAIN, J. This is an action in mandamus to compel the defendant city and the treasurer thereof to pay certain local improvement bonds, coupons, and warrants. The cause was tried to the court without a jury, and resulted in a judgment granting in part and denying in part the relief prayed for in the complaint. From this judgment both parties have appealed.

[1, 2] The facts necessary to an understanding of the questions here for determination are these: There was in the city of Centralia a local improvement district known as district No. 32. The United States National Bank, of which the plaintiff is the receiver, held two warrants, Nos. 89 and 82, drawn against the local improvement fund for this district. The money to pay these warrants was collected by the city on or about the 10th day of February, 1914. On the 14th day of February, 1914, the warrants were called. On the 21st day of September, 1914, the United States National Bank failed. This action is prosecuted by the plaintiff as receiver thereof. At the time the bank failed, the city had funds deposited therein to a greater sum than the amount of the two warrants mentioned. At or about the time this bank failed, the Union Loan & Trust Company also failed, in which bank the city also had funds deposited. When the local improvement money was paid to the city it was kept separate upon the books of the treasurer, but in depositing it in the banks it was commingled with the general funds of the city. On September 29, 1914, a demand was made for the payment of warrants 89 and 82, and was refused.

On or about the 19th day of January, 1915, the defendant city brought an action in the district court of the United States for the Western District of Washington, Southern Division, seeking to establish a preferred claim to the moneys which it had on deposit in the United States National Bank at the time of its failure, and in the event that it did not prevail as a preferred claimant, that the warrants and bonds be offset against the amount of its general claim. On or about the 10th day of February, 1915, the present action was begun. A temporary restraining order was issued out of the federal court restraining the receiver from prosecuting the action. On the 17th day of June, 1915, the restraining order was dissolved, and the federal court entered an order in which it was provided that, if in the final determination of the cause in that court, or any court to which the cause might be appealed, it should be determined that the city of Centralia was not a preferred claimant, in that event the same right of offset should exist as to the funds coming into the hands of the receiver in payment of the warrants as would exist had the warrants not been paid.

The moneys paid to the city treasurer from local improvement district No. 32 were deposited in the Union Loan & Trust Company. After the failure of that company, and prior to the trial of this action, the city had received dividends in about the sum of $23,000, and also from bonding companies approximately the sum of $20,000. When this sum was received it was apportioned by the city commission to various funds, principally to the light and water fund. No part of it was apportioned to the payment of the warrants for local improvement district No. 32. The trial court found, and the evidence sustains the finding, that on the 14th day of February, 1914, and at all times thereafter, the city had

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on hand more than a sufficient amount of money to pay warrants 89 and 82.

In this action the defendants, as an affirmative defense, pleaded in abatement the action in the federal court. The first question is whether this plea should have been sustained. The rule is that, where the court, in the progress of a suit properly pending before it, takes possession of property, its jurisdiction over the property for the time being becomes exclusive, and no other court can interfere with the possession so acquired, and where, in the progress of the litigation, the court acquiring jurisdiction may be compelled to assume the possession and control of specific property, its jurisdiction is also exclusive. Merritt v. American Steel-Barge Co., 79 Fed. 228, 24 C. C. A. 530.

In Caine v. Seattle Northern Railway Co., 12 Wash. 596, 41 Pac. 904, it was held that an action in rem in the federal court is not a bar to another action between the same parties for the same cause in the state court.

In Puget Sound State Bank v. Gallucci, 82 Wash. 445, 144 Pac. 698, it was held that an action in equity in the federal court seeking an adjustment of funds as between creditors could not be pleaded in abatement in an action at law in the state court to recover a money judgment.

In State ex rel. Bank v. Tallman, 29 Wash. 411, 69 Pac. 1115, the parties were rival claimants to a local improvement fund then in the city treasury. The surety company, which had completed the improvement when the contractor failed, began an action in the federal court to restrain the city comptroller from paying the funds to any other person than the surety company. The defendant in that case claimed the fund, or a part of it, as assignee of the contractor. It was there held that the plea in abatement, setting up the proceedings in the federal court, should be sustained, because "the court which adjudicates this controversy should have the right to control this fund." That case, however, is distinguishable from the present case. Here the fund sought is in the city treasury. The litigation in the federal court is over the funds in the hands of the receiver of the United States National Bank. If the city there prevails as a preferred claimant the federal court would have no concern relative to the warrants for which payment is here sought. The federal court, in its order, recognized the right of the receiver to prosecute the present action, and protected the parties in their rights by allowing the same rights of set-off as against that fund as would exist against the warrants, if any. In the present action there is no plea of set-off. In the case last referred to, both parties were seeking the possession of the same fund, and in the progress of the litigation which had been brought in the federal court, it would be necessary to assume the possession and control of the specific fund. We think the plea in abatement in this action cannot be sustained.

[3] The next question is whether mandamus is the proper remedy to compel the payment of the warrants. The contention of the defendants is that the plaintiff's remedy, if any, was a suit sounding in tort for damages, and not by proceeding in mandamus. The rule is that, where funds are in the city treasury available for the payment of certain warrants and payment thereof is refused, mandamus is the proper proceeding to compel the payment of such warrants; and, in such proceeding, there may be pleaded any defenses which will defeat the claimed right to the writ. Cloud v. Town of Sumas, 9 Wash. 399, 37 Pac. 305; Abernethy v. Town of Medical Lake, 9 Wash. 112, 37 Pac. 306; Bacon v. City of Tacoma, 19 Wash. 674, 54 Pac. 609.

[4, 5] In the case now before us, the fund was available for the payment of the warrants at the time the demand was made, because there remained continuously in the general fund sufficient money to pay the warrants, and the city, by commingling the local improvement fund with its general fund, made the general fund liable for the payment of the local improvement warrants. Section 28 of the local improvement act requires that all moneys collected by the treasurer for local assessments shall be kept as a separate fund, known as "Local Improvement Fund District No. ———," and shall be used for no other purpose than for the redemption of warrants or bonds drawn upon or against such fund. Laws 1911, c. 98.

In State ex rel. American, etc., Mortgage Co. v. Tanner, 45 Wash. 348, 88 Pac. 321, it was held that local improvement obligations "cannot be made a general charge against the city." Reason and authority both sustain the proposition that the local improvement fund is a trust fund. Welk v. City of Wausau, 143 Wis. 645, 128 N. W. 429; State ex rel. Bank v. Tallman, 29 Wash. 411, 69 Pac. 1115.

Where trust funds are commingled with other funds, and there remains continuously in such commingled fund an amount in cash equal to the amount of the trust fund, the trust obligations are payable out of the commingled fund. In Carlson v. Kies, 75 Wash. 171, 134 Pac. 808, 47 L. R. A. (N. S.) 317, it was said:

"The appellant suggests that the identical money was not traced into the hands of the receiver. That is true, but the old rule requiring an identification of the specific fund or its avails in the hands of a receiver has been relaxed in the later cases. The doctrine of the modern authorities, and what we consider the sounder view, is that the trust fund is recoverable where an equal amount in cash remained continuously in the bank until its suspension and passed to the receiver."

Applying the doctrine of that case to the facts in the present case, it follows that, since the city commingled the trust fund with

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its general fund, and there remained continuously in that fund sufficient to meet the warrants, the fund is available for their payment, and the writ of mandamus should issue.

Our attention has been called to a sentence in the findings of the trial court, wherein it is stated that there is not in "the city treasury now funds applicable to the payment of warrants 89 and 82." While this sentence is embodied in the findings, it is only an expression of the opinion of the trial court as to whether the money then in the city treasury is applicable to the payment of the warrants. From what has already been said it would appear that, upon this question, we have reached a different conclusion from that of the trial court.

[6] Some contention is also made that, since the present city treasurer is not the same person that held the office when the local improvement funds were received, such fund never came into his possession, and, consequently, the writ should not issue. Little need be said upon this question. The office of city treasurer is continuous, regardless of the person who may fill that office. The funds, as already shown, having been commingled, were available for the payment of the warrants. The commingled fund, sufficient to pay these warrants, was in the possession of the present city treasurer.

The judgment upon plaintiff's appeal will be reversed, and upon defendants' cross-appeal affirmed.

MORRIS, C. J., and HOLCOMB and PARKER, JJ., concur.

(93 Wash. 433)

STATE ex rel. FIRST THOUGHT GOLD MINES, Limited, v. SUPERIOR COURT FOR STEVENS COUNTY et al. (No. 13754.)

(Supreme Court of Washington. Nov. 22, 1916.)

1. TAXATION ⟸528, 837—PENALTIES—VOID TAX.
A tax entirely void gives no rights and carries no penalties by way of interest or otherwise.
[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 981, 1652; Dec. Dig. ⟸528, 837.]

2. TAXATION ⟸840 — PENALTIES — PARTLY VOID TAX.
A tax partly void carries penalties on the valid portion after the date of delinquency, if the valid portion could have been reasonably ascertained and no tender was made.
[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1656; Dec. Dig. ⟸840.]

3. TAXATION ⟸494(2)—PENALTIES—PARTLY VOID TAX.
A tax partly void but indivisible, or where the valid portion cannot be readily ascertained, is valid as to the principal after deducting the unlawful excess.
[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 885; Dec. Dig. ⟸494(2).]

4. TAXATION ⟸528—PENALTIES—NATURE.
Interest upon a delinquent tax is no part of the tax, but is sustainable only as a penalty.
[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 981; Dec. Dig. ⟸528.]

5. TAXATION ⟸835—PENALTIES—POWER TO IMPOSE.
The state cannot take more than the actual tax, whether under the guise of interest or otherwise, until the taxpayer has defaulted in some duty imposed by law.
[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1650; Dec. Dig. ⟸835.]

6. TAXATION ⟸837 — PENALTIES — PERSONS LIABLE.
A taxpayer's tender based upon what he claims is a fair valuation of his property is sufficient to prevent delinquent penalties from accruing, although the courts later fix the correct tax at a different figure but lower than the amount demanded.
[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1652; Dec. Dig. ⟸837.]

7. TAXATION ⟸837 — PENALTIES—NATURE—PERSONS LIABLE.
A penalty attaches only when the obligation is certain or can be made certain by proper calculation.
[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1652; Dec. Dig. ⟸837.]

8. TAXATION ⟸607—PENALTIES—ACTIONS.
Suits to enjoin the collection of an excessive tax are equitable in nature, and the court will resort to equitable principles where possible.
[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1230; Dec. Dig. ⟸607.]

9. APPEAL AND ERROR ⟸1199—APPELLATE COURT PROCEEDINGS AFTER REMAND.
The question whether penalties accrued on the valid portion of a tax should preferably be raised in the Supreme Court at the time it held the tax partly void, instead of in the trial court after remittitur.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4674–4676; Dec. Dig. ⟸1199.]

Department 1. Original mandamus proceedings by the State of Washington, on the relation of the First Thought Gold Mines, Limited, a corporation, against the Superior Court for Stevens County, Washington, and W. H. Jackson, judge thereof. Writ issued.

L. C. Jesseph, of Colville, for relator. Howard W. Stull and H. Wade Bailey, both of Colville, for defendants.

CHADWICK, J. This case is an aftermath of the case of First Thought Gold Mines, Ltd., v. Stevens County, reported in 91 Wash. at page 437, 157 Pac. 1080, reference to which should be made for all material antecedent facts. When the remittitur went down, counsel for the appellant, relator here, prepared a judgment for an amount equal to an assessment at the established rate upon the values fixed by this court. The prosecuting attorney objected to the form of the judgment, in that it did not provide for interest at the rate of 15 per cent. per annum covering the period of delinquency. The court was of opinion that the judgment should have provided for the payment

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of interest at the rate of 15 per cent. per annum on the taxes found by this court to be due, and accordingly refused to sign the judgment. Whereupon the appellant sued out an original writ of mandamus in this court to compel the entry of the judgment.

It is provided that all delinquent taxes shall draw interest at the rate of 15 per cent. per annum from the date of delinquency. Rem. 1915 Code, § 9219. There seems to have been no provision made by statute for the payment of interest, or the remission of interest, where the tax is questioned either in whole or in part, and we are driven to the general principles of the law as they are to be gathered from the adjudged decisions.

[1-5] Cottle v. Union Pacific R. Co., 201 Fed. 39, 119 C. C. A. 371, is one of the best considered cases that has been called to our attention, and from the many authorities cited therein we gather the following as established principles: That a tax, void entirely, gives no rights and will carry no penalties either by way of interest or otherwise; that a tax valid in part and void in part will carry a penalty, either by way of interest or otherwise, to the extent that it is valid, if the amount of the tax which is valid can be reasonably ascertained, and, unless tender is made of the amount legally due, interest and penalties will attach from the date of delinquency; that where the amount of the tax is not divisible or the amount that ought to be paid cannot be readily ascertained, as where the tax is so excessive as to warrant a holding that it is arbitrary and therefore constructively fraudulent as to the excess, the tax is nevertheless legal within the legal power to tax, and is void only as to the unlawful excess. It is also well established that interest upon a delinquency is no part of a tax. It is sustained only as a penalty to insure prompt payment. People ex rel. v. Peacock, 98 Ill. 172. And this is so whether the penalty be in the way of interest, the addition of a certain per cent., or by doubling the tax. Desty on Taxation, § 130.

Interest upon delinquent taxes is a penalty, and not interest, within the general acceptation that it is a consideration for the forbearance of money. Evansville & Terre Haute R. Co. v. West, 139 Ind. 254, 37 N. E. 1009. This principle is most frequently illustrated in that line of cases holding that, where the Legislature passes a law for the taxation of property theretofore omitted as a subject of taxation, it cannot provide for interest from some antecedent date, but must provide some future time within which the tax must be paid after which interest may be demanded. In other words, even the state cannot take more than the actual tax, whether under the guise of interest or otherwise, until the taxpayer has failed or omitted to perform a duty imposed by law.

[6] Where a taxpayer has suffered an excessive assessment, he may tender a sum that he considers to be fair, considering the value of his property and the assessment of other like property. Landes Estate Company v. Clallam County, 19 Wash. 569, 53 Pac. 670. See, also, Miller v. Pierce County, 28 Wash. 110, 68 Pac. 358.

By resorting to the record in the main case, we find that relator made a tender, based upon a valuation which it is alleged is consistent with the valuation put upon other like property, which was refused, and which was made good by a tender in court. This, under any theory, ought to satisfy the law, for, if it be the duty of a taxpayer to make tender at all where a tax is alleged to be fraudulently excessive, a show of willingness, accompanied by tender, is all that can be required, for the actual amount due, being a subject of judicial inquiry, cannot be determined by the taxpayer. It may be greater or less.

[7] There is another rule that is pertinent, that is, if a penalty is "illegal in part it is wholly void." Cooley on Taxation (3d Ed.) vol. 2, p. 902; Michigan Central R. Co. v. Slack, Holmes' U. S. C. C. 231, Fed. Cas. No. 9527. This is evident, for the penalty is a a thing which is essentially entire, and therefore indivisible, and attaches only when the obligation is certain or can be made certain by proper calculation.

Respondent relies primarily upon the case of Western Union Telegraph Co. v. State, 64 N. H. 265, 9 Atl. 547. It was there held that, although an assessment was excessive to the extent that it was reduced after judicial inquiry to the extent of two-fifths, the taxpayer was nevertheless chargeable with interest on what it was finally held he should pay. The court said:

"All other taxpayers either paid their taxes on or before the 1st of December of these years, or became liable to pay interest thereafter till they did pay them, and justice requires that the plaintiffs should pay interest on their just and equal portion of the public burden due the state on or before the 1st of December in each of these years. Had the plaintiffs tendered or offered to pay, when due, the sum afterwards found to be their proportional share, and the state had declined or neglected to take the same, a different case would be presented. Heywood v. Hartshorn, 55 N. H. 476, 483; Thompson v. Railroad, 58 N. H. 524. A taxpayer, appealing from an excessive assessment, may be unable to determine the exact amount which will be found by the appellate court to be his share of the public expense. He may be unable to protect himself against the interest that will accrue after the 1st of December by paying the exact amount of his tax debt before it is ascertained. But this is not a reason for giving him an exemption that is not enjoyed by his neighbors who do not appeal."

Just how or why a taxpayer should be called upon to pay interest when he has neither failed nor refused to pay that which may be lawful is not explained. The case seems to stand alone. So far as we have been able to find, it has been cited but once. See Hartford v. Hills, 72 Conn. 599, 45 Atl. 433. Its holding was not essential to sustain the reason-

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ing of the court. Nor does it even remotely bear upon the real issue in that case. The case decided was no more than this: When a taxpayer contests the whole of a tax as illegal, and the court finds that it is valid in toto, he is bound to pay the statutory penalty. No other conclusion could have been arrived at. Were it otherwise, all penalties could be avoided by suit. The New Hampshire case is not cited by either Mr. Desty or Mr. Judson in their works on taxation. Its holding is not consistent with the law as we gather it from the text of Cooley on Taxation, p. 901. The case is referred to by that author in a footnote, but without comment. The text, based upon other cases which we shall notice, is:

"It has been held that, if the delay is attributable in part to the state itself, * * * the collection of a penalty might be enjoined, and in another case it is said that the penalty should not be exacted if the delay came from serious doubt of the validity of the tax."

It would seem that a tax so excessive as to warrant a holding that it was constructively fraudulent as to the excess would make the state chargeable with the delay in its payment, for no man is bound to pay a void tax. That the excess is void has been held so often by this court that the citation of the cases is unnecessary. See the principal case, 91 Wash. 437, 157 Pac. 1080.

In County of Redwood v. Winona & St. Peter Land Co., 40 Minn. 512, 41 N. W. 465, 42 N. W. 473, the court, in discussing an analogous question, said:

"A penalty for the nonpayment of a tax cannot be imposed until the person has an opportunity to pay it, and fails to do so. What we have heretofore said regarding 'interest' is equally applicable to penalties. Now, as the whole tax extended against a tract of land is an entirety, the owner cannot pay a part of it without paying the whole; and if a part of it is illegal, and he pays the whole, ordinarily it would be a voluntary payment, and he could not recover back the illegal part. Hence in such case his only remedy is to wait until proceedings are commenced to enforce judgment against his land, and then defend against the illegal part of the tax; and until it is deducted by the judgment of the court he has had no opportunity to pay the valid part of the tax, and consequently has been guilty of no default. Therefore, whether it be a case of a 'current' tax, or an 'omitted' tax, if the party succeeds in his defense as to part of it as illegal, all the penalties on the whole tax previously imposed for its nonpayment were unauthorized, and cannot be included in the judgment. This is precisely the present case. That part of the tax assessed and extended against the lands in 1886 as 'back interest' was, as we have already decided, unauthorized and illegal. To that extent appellant had a valid defense to the tax, which it had a right to interpose, and in which it was entitled to succeed. Until the correct amount of the taxes had been determined by excluding this illegal addition, it had not been in default, and no penalties could be legally imposed."

In another case, it was held that it would be inequitable to charge a taxpayer with penalties for nonpayment until there was a determination of the amount of the taxes due. United States Trust Co. v. New Mexico, 183 U. S. 535, 22 Sup. Ct. 172, 46 L. Ed. 315, citing Lake Shore & Michigan Southern Railway Co. v. People, 46 Mich. 193, 9 N. W. 249, and County of Redwood v. Winona & St. Peter Land Company, supra.

[8] Suits to enjoin the collection of an excessive tax are equitable, and the courts will resort to the principles of equity wherever it is possible to do so in deciding them. The statutes make no provision for the collection of interest from one who has obtained judgment that his tax was excessive. For a court of equity to impose a penalty in the way of interest, or to hold one who has not willfully evaded a tax, or who has not failed or refused to pay the lawful tax, but, on the contrary, has insisted upon his legal right to have the amount of his tax legally determined, would be the height of inequity.

[9] The point is made, and with much show of reason, that this is a collateral proceeding to correct our former judgment; that the county should have raised the issue in the former case. We regard the question as doubtful. But inasmuch as interest attaches, if at all, to unpaid taxes by force of statute, we are unwilling to hold that this proceeding does violence to our former holdings that a superior court is without power to modify our judgments. However, we think it would have been the better practice for the county to have raised the question in the former case, either directly or by way of motion in this court after judgment.

The writ will issue.

MORRIS, C. J., and MOUNT, FULLERTON, and PARKER, JJ., concur.

(93 Wash. 439)

STATE v. HEMRICH. (No. 13497.)

(Supreme Court of Washington. Nov. 22, 1916.)

1. STATUTES ⇐179—CONSTRUCTION AND OPERATION—STATUTORY RULES.

The provision of Prohibition Law, Initiative Measure No. 3 (Laws 1915, p. 2; Rem. Code 1915, § 6262—1 et seq.), that the act shall be liberally construed is binding on the courts.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 258; Dec. Dig. ⇐179.]

2. INTOXICATING LIQUORS ⇐6—CONSTITUTIONALITY OF ACTS—PROHIBITION OF NONINTOXICATING BEVERAGES.

In the exercise of the police power, the Legislature or the people acting in a legislative capacity may lawfully prohibit the sale of nonintoxicating beverages, and may conclusively define such beverages as intoxicating liquors whenever that course has any reasonable relation to the accomplishment of the dominating purpose of the act.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 4; Dec. Dig. ⇐6.]

3. INTOXICATING LIQUORS ⇐122—STATUTES —CONSTRUCTION—"LIQUOR."

The meaning of the word "liquor," as used in Initiative Measure No. 3 (Laws 1915, p.

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2; Rem. Code 1915, § 6262—1 et seq.), is not restricted to alcoholic or intoxicating liquids, but the word is to be given its original meaning as synonymous or inclusive of the word "liquid."

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. ⟸122.

For other definitions, see Words and Phrases, First and Second Series, Liquor.]

4. INTOXICATING LIQUORS ⟸122—STATUTES —CONSTRUCTION.

The phrase "intoxicating liquor," as defined by Laws 1915, p. 2, § 2 (Rem. Code 1915, § 6262—2), to include whisky, brandy, gin, rum, wine, ale, beer, and any spirituous, vinous, fermented, or malt liquor, and every other liquor or liquid containing intoxicating properties, etc., considered, and *held* that the clause, "every other liquor," etc., was not intended to limit or qualify the enumerated liquors.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. ⟸122.]

5. STATUTES ⟸194—CONSTRUCTION — RULES OF "EJUSDEM GENERIS."

In statutory construction the "ejusdem generis" rule is that, where the general words follow an enumeration of persons or things by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons and things of the same general kind or class as those specifically mentioned.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 272; Dec. Dig. ⟸194.

For other definitions, see Words and Phrases, First and Second Series, Ejusdem Generis.]

6. STATUTES ⟸194 — CONSTRUCTION — RULE OF EJUSDEM GENERIS—APPLICATION.

The rule of ejusdem generis *held* to have no application to the statutory definition of intoxicating liquors contained in Laws 1915, p. 2, § 2 (Rem. Code 1915, § 6262—2).

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 272; Dec. Dig. ⟸194.]

7. INTOXICATING LIQUORS ⟸122—CRIMINAL PROSECUTION — PRESUMPTION AND BURDEN OF PROOF.

Malt liquor and other liquors, specifically mentioned in Laws 1915, p. 2, § 2 (Rem. Code 1915, § 6262—2), defining intoxicating liquors, are conclusively presumed to be intoxicating liquors, without regard to their actual intoxicating properties.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. ⟸122.]

8. INTOXICATING LIQUORS ⟸224—CRIMINAL PROSECUTION—PRESUMPTIONS AND BURDEN OF PROOF.

To warrant a conviction for the sale of malt liquor and other liquors specifically enumerated in the statutory definition of intoxicating liquors contained in Laws 1915, p. 2, § 2 (Rem. Code 1915, § 6262—2), it is only necessary to prove that the thing sold was one of the classes named, but as to other liquors, or liquids, capable of being used as a beverage it is necessary to prove their intoxicating property.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 275–281; Dec. Dig. ⟸224.]

9. STATUTES ⟸188—CONSTRUCTION.

The first cardinal rule of statutory construction is that words are to be given their original meaning, unless the context of the statute shows that they were used in a technical or particular sense.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 267, 276; Dec. Dig. ⟸188.]

10. INTOXICATING LIQUORS ⟸122 — STATUTORY PROVISIONS—"MALT LIQUOR."

The words "malt liquor," as used in the prohibition law (Laws 1915, p. 2; Rem. Code 1915, § 6262—1 et seq.), mean a fermented or alcoholic liquor and do not include a liquor containing malt but neither fermented nor containing alcohol and therefore the manufacture or sale of the latter is not unlawful.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. ⟸122.

For other definitions, see Words and Phrases, First and Second Series, Malt Liquor.]

11. INTOXICATING LIQUORS ⟸122—PROHIBITION OF MANUFACTURE AND SALE OF MALT LIQUORS.

A malt beverage of such composition that, of itself under certain conditions, it will generate alcohol is potentially a malt liquor, the manufacture and sale of which is prohibited by Laws 1915, p. 2 (Rem. Code 1915, § 6262—1 et seq.).

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. ⟸122.]

12. INTOXICATING LIQUORS ⟸122—PROHIBITION—MALT LIQUOR.

The manufacture and sale of every malt liquor, though containing only a trace of alcohol, is prohibited by Laws 1915, p. 2 (Rem. Code 1915, § 6262—1).

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. ⟸122.]

En Banc. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Alvin Hemrich was convicted of violating the prohibition law, and he appeals. Judgment reversed.

McClure & McClure and Greene, Henry & Hemrich, all of Seattle, for appellant. Alfred H. Lundin and F. P. Helsell, both of Seattle, for the State.

ELLIS, J. Defendant was accused of a violation of the state-wide prohibition law commonly known as Initiative Measure No. 3 (Laws 1915, p. 2; Rem. Code 1915, § 6262—1 et seq.). The information charged that:

"He, said Alvin Hemrich, in the county of King, state of Washington, on the 9th day of February, 1916, did then and there willfully and unlawfully sell to one Fred M. Lathe certain intoxicating liquor, to wit, two bottles containing malt liquor, said malt liquor not then and there containing any alcohol, and being commonly known as 'Lifestaff,' receiving in payment therefor from said Fred M. Lathe the sum of twenty-five cents."

He demurred to the information, and it was stipulated that in considering the demurrer the court might consider as established certain agreed facts so far as they would be admissible as evidence if the cause were being tried on its merits after a plea of not guilty. These agreed facts were, in substance, as follows:

(1) That defendant was, and for a long time had been, president of a corporation which, prior to January 1, 1916, was engaged

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in the manufacture and sale of beer in the state of Washington; that immediately after that date it surrendered its government license, and remodeled its brewery and plant for the manufacture of Lifestaff, so that on February 9, 1916, they were not adapted to the manufacture of beer without extensive alterations in equipment and the issuance of a new license from the United States government.

(2) "That the liquid in the information herein referred to as 'Lifestaff' is an unfermented liquid, and is entirely free from alcohol, preservatives, or other harmful substances, but contains between 6 and 7 per cent. of extract of malt. That it is a healthful and nutritious liquid, capable of being drunk, but the character of the liquid itself is such that it is not intoxicating, does not in fact contain intoxicating properties, and is not capable of being imbibed in unusual quantities for merely social purposes."

(3) That the term Lifestaff has been copyrighted under the federal laws, and appropriated as a trade-mark under the state law.

(4) That L. E. Kirkpatrick, president and attorney of the Anti-Saloon League for the state of Washington, and who prepared Initiative Measure No. 3 as submitted to and adopted by the people, would testify that, in the conferences held to prepare the act, there was, to his knowledge, no discussion of or expressed intention to prohibit by the act the manufacture or sale of any liquor not containing alcoholic properties; that he was then not aware that a process had been discovered for removing all alcohol from malt liquor, and that the question of prohibiting the manufacture and sale of malt liquor not containing alcohol was not considered by him, nor discussed by others in his presence; that in preparing the original draft of the act the definition of intoxicating liquors as given therein was prepared, using as a basis the definition as given in the laws of various states having prohibition laws, and that he did not consider, nor did others with whom he consulted discuss, the operation of the proposed law as affecting the manufacture and sale of malt liquors not containing alcohol; that, so far as his knowledge goes, the general policy of the Anti-Saloon League and those associated with it has been to abolish only the manufacture and sale of liquors containing alcohol.

(5) That George D. Conger, state superintendent of the Anti-Saloon League, would testify substantially to the same effect.

(6) That the title of the measure as originally drafted and filed in the office of the secretary of state was as follows:

"An act relating to intoxicating liquors, prohibiting the manufacture, keeping, sale and disposition thereof, except in certain cases, the soliciting and taking of orders therefor, the advertisement thereof and the making of false statements for the purpose of obtaining the same, declaring certain places to be nuisances and providing for their abatement, regulating the keeping, sale and disposition of intoxicating liquors by druggists and pharmacists, the prescription thereof by physicians, the transportation thereof, and providing for the search for and seizure and destruction thereof, prescribing the powers and duties of certain officers, and the forms of procedure and the rules of evidence in cases and proceedings hereunder, and fixing penalties for violations hereof, and the time when this act shall take effect." Laws 1915, p. 2.

(7) That the ballot title as proposed by the Attorney General was as follows:

"An act prohibiting the manufacture, sale, or other disposition of intoxicating liquors, except in certain cases; regulating the keeping, use and transportation of the same; providing for the enforcement of this act; and fixing punishments and penalties for the violation thereof."

(8 and 9) That in the printed arguments for and against the measure distributed among the legal voters of the state as required by law, there was nothing advising the voters that the act was intended to prohibit the manufacture or sale of nonalcoholic malt liquors as a means to the more effective enforcement of the law as against alcoholic liquors. The two bottles of Lifestaff were submitted as exhibits. The trial court overruled the demurrer. Defendant, electing to stand upon his demurrer and the stipulated facts, was adjudged guilty as charged. From the judgment and sentence thereon he has appealed.

Appellant broadly contends that Lifestaff is not a liquor the manufacture and sale of which is intended to be prohibited by our statute, because it is admitted that it contains no alcohol, no intoxicating properties, and will not in fact intoxicate.

[1] It is first argued that our prohibition law, Initiative Measure No. 3 (Laws of 1915, p. 2; Rem. Code 1915, § 6262—1 et seq.), is a penal statute, and hence under the general rule must be strictly construed, and that, so construed, it embraces only intoxicating liquors. We shall not review the many authorities cited, announcing the general rule that penal statutes must be strictly construed, since the first section of the law itself answers this argument. It imposes its own rule of construction. It says:

"This entire act shall be deemed an exercise of the police power of the state, for the protection of the economic welfare, health, peace and morals of the people of the state, and all of its provisions shall be liberally construed for the accomplishment of that purpose." Rem. Code 1915, § 6262—1.

We must therefore construe the act liberally and inclusively, with a view to the accomplishment of its full purpose. It is true that the dominant purpose of the law is to prohibit the manufacture and sale of intoxicating liquors, to the end that the economic welfare, health, peace, and morals of the people may be promoted. Both the title of the act and the ballot title by which it was submitted to vote so show.

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[2] But in the exercise of the police power the Legislature, or the people acting in a legislative capacity, may, without impinging either the state or the federal Constitution, prohibit the sale of beverages, not intoxicating in fact and wholly innocuous, when separately considered, and may conclusively define such beverages as intoxicating liquors within the meaning of the prohibitory law, whenever that course has any reasonable relation to the accomplishment of the dominant purpose. "This is no longer a question for argument or even of doubt." State v. Frederickson, 101 Me. 37, 63 Atl. 535, 6 L. R. A. (N. S.) 186, 115 Am. St. Rep. 295, 8 Ann. Cas. 48; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184. If therefore any beverage of such composition and character as reasonable to include the stuff called "Lifestaff" is expressly prohibited or defined by our law as an intoxicating liquor, then Lifestaff is prohibited.

[3] It is next argued that nothing except "liquor" is prohibited, and that the word "liquor" ex vi termini means an alcoholic or intoxicating liquid, and that therefore nothing but alcoholic or intoxicating liquids are prohibited. It is true that such is one of the meanings of the word "liquor," but all of the standard dictionaries agree that it also means a liquid of any sort. See Century Dictionary, Webster's New International Dictionary, and Standard Dictionary. The first two of these, the three leading dictionaries, give the meaning of the noun "liquor" as synonymous with the noun "liquid," and the third gives the same meaning as a secondary definition. It can hardly be said, therefore, that the word "liquor" has any such settled and exclusive meaning of an alcoholic or an intoxicating liquid as to make it the basis of a persuasive, much less of a conclusive, argument, for such a construction of the statute. Appellant's minor premise failing, his argument fails.

[4] A further argument is based upon the statutory definition of the term "intoxicating liquor" as found in section 2 of our prohibitory law (Laws of 1915, p. 2; Rem. Code 1915, § 6262—2), which reads as follows:

"The phrase 'intoxicating liquor,' wherever used in this act, shall be held and construed to include whisky, brandy, gin, rum, wine, ale, beer and any spirituous, vinous, fermented or malt liquor, and every other liquor or liquid containing intoxicating properties, which is capable of being used as a beverage, whether medicated or not, and all liquids, whether proprietary, patented or not, which contain any alcohol, which are capable of being used as a beverage."

Respondent concedes that the only term in this definition which can reasonably include a nonalcoholic nonintoxicating liquor, such as Lifestaff is admitted to be, is the term "malt liquor." Appellant urges that the clause, "and every other liquor or liquid containing intoxicating properties," limits and restricts the classes of liquor specifically enumerated and preceding it to such liquors or liquids as contain intoxicating properties, and that therefore the term "malt liquor" cannot include Lifestaff. It is insisted that such is the necessary significance of the word "other" as found in the alleged qualifying clause. Several decisions from other states are cited as sustaining this view. Typical and strongest of these are Bowling Green v. McMullen, 134 Ky. 742, 122 S. W. 823, 26 L. R. A. (N. S.) 895, and People v. Strickler, 25 Cal. App. 60, 142 Pac. 1121. In the McMullen Case the stipulated facts admitted that the liquor, called "next-to-beer," was a malt liquor containing less than 2 per cent. and more than one-half of 1 per cent. of alcohol, and was nonintoxicating; that is to say, in the largest quantities in which it might be drunk it would not intoxicate. The statute defined the inhibited liquors as "spirituous, vinous, malt, and other intoxicating liquors." The question was whether malt liquor which would not intoxicate was within this definition. It was held that the inhibition was only against intoxicating drinks. The court said: "If not, why use the words 'or other intoxicating liquors?'" However conclusive this may seem to the court which announced it, it seems far from conclusive to us. The answer to the court's question seems plain. The general words, "or other intoxicating liquors," were intended to add to the things theretofore specifically enumerated, not to take away from or limit what had already been included. Moreover, even assuming the argument sound as applied to the statute there involved, that statute is palpably different from ours. It might be argued with some show of reason that the word "other" as there used qualifies the term "intoxicating liquors" as a whole. That statute says, "or other intoxicating liquors." In our statute the collocation of the words is different. It says, "every other liquor or liquid," the word "other" thus qualifying only the words "liquor or liquid," which are subsequently qualified by the words "containing intoxicating properties." State v. Bailey, 67 Wash. 336, 121 Pac. 821.

Our statutory definition was clearly intended to define as intoxicating liquors three distinct groups: (1) Whisky, brandy, gin, rum, wine, ale, beer, and any spirituous, vinous, fermented, or malt liquor; (2) every other liquor or liquid containing intoxicating properties which is capable of being used as a beverage, whether medicated or not; (3) all liquids, whether proprietary, patented, or not, which contain any alcohol which are capable of being used as a beverage. The first group defines, eo nomine, as intoxicating liquors, certain specific liquids without reference to their properties, because they are all liquors which are generally understood to contain alcohol in some quantity. The second group merely adds to the things prohibited another class of prohibited liquors, with

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no description save the intoxicating quality. The third group adds still another class to the things already prohibited, namely, liquids, whether proprietary or not, describing them by their alcoholic property. The words, "every other liquor or liquid containing intoxicating properties" qualify nothing else, but describe and add another class of the things the sale and manufacture of which are prohibited. The clause quoted was intended to add and include, not to limit or restrict.

In the case of People v. Strickler, supra, a demurrer to an information, charging the sale of malt liquor containing less than 1 per cent. of alcohol, was sustained by the trial court, and the people appealed. The statute defined the term "alcoholic liquors" as follows:

"The term 'alcoholic liquors' as used in this act shall include spirituous, vinous and malt liquors, and any other liquor or mixture of liquors which contain one per cent. by volume, or more, of alcohol and which is not so mixed with other drugs as to prevent its use as a beverage."

[5] The Supreme Court affirmed the judgment on the ground that under the rule ejusdem generis the specific words "spirituous, vinous, and malt liquors" were qualified and controlled by the succeeding clause, "any other liquor or mixture of liquors which contain 1 per cent. by volume, or more, of alcohol." The decision is obviously unsound. It reverses the rule of ejusdem generis in order to make the general terms of the statutory definition control the particular terms. The correct application of that rule in statutory construction is just the converse.

"In statutory construction, the 'ejusdem generis rule' is that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." Black's Law Dictionary, p. 415.

See, also, Bouvier's Law Dictionary (Rawle's 3d Revision) p. 979.

[6] The fact is that the rule ejusdem generis has nothing to do with the case. The statute there under construction, as ours, defined one group by specific enumeration and a second group by quality. The McMullen Case makes the same mistake in argument, though not labeling the process as an application of the rule ejusdem generis. In the following cases in which the same argument was advanced as that of appellant here the courts have ruled contrary to his contention. In each of these cases the general clause in the statute included the word "other" as here. Marks v. State, 159 Ala. 71, 48 South. 864, 133 Am. St. Rep. 20; Fuller v. Jackson, 97 Miss. 237, 52 South. 873, 30 L. R. A. (N. S.) 1078; La Follette v. Murray, 81 Ohio St. 474, 91 N. E. 294; United States v. Cohn, 2 Ind. T. 474, 52 S. W. 38. In the Marks Case the statute was much like ours. It prohibited—

"any alcoholic, spirituous, vinous or malt liquors, intoxicating bitters or beverages or other liquors or beverages by whatsoever name called, which if drunk to excess will produce intoxication. * * *"

In answer to the argument here advanced the court said:

"While we agree in part with counsel for appellant, we cannot concur with them in the contention (so forcefully and ably insisted upon) to the effect that the clause, 'which if drunk to excess will produce intoxication,' qualifies and relates to each and all of the liquors or beverages which precede it; that is, to alcoholic, spirituous, vinous, or malt drinks. We are inclined to the opinion that this phrase qualifies or refers only to the clause, 'or other liquors or beverages by whatsoever name called,' which immediately precedes it, and which two phrases, taken together, constitute one of the six classes of liquor and beverage the sale of which is prohibited. We are led to this conclusion, not alone by the composition, and grammatical construction of this section of the act, but also by a reference to the history of such legislation in this and other states, and the judicial construction put upon the terms 'spirituous,' 'vinous,' 'malt,' and 'intoxicating' liquors and beverages by this and other courts. These terms each had a well defined and accepted judicial construction by the courts, when used in such statutes; and it does not appear that there was any intention to change that well-accepted judicial construction. They were severally treated as being well known and defined; but the phrase, 'or other liquors or beverages by whatsoever name called,' is clearly shown not to refer to every well known or defined class, but is intended to include any and all other classes or kinds, not embraced in the foregoing five classes named, 'which if drunk to excess will produce intoxication.'"

The reasons given in the other decisions cited for holding the same way are equally cogent. It will not avail to use the argument of convenience to the effect that our construction will make the sale of "ginger ale" and "root-beer" criminal. These things have as distinctive a meaning in common parlance as ale or beer have when standing alone. They, like other unnamed beverages, will have to be tested by the fact whether they contain intoxicating properties, since they are not enumerated by name in the statutory definition of intoxicating liquors. Sawyer v. Botti, 147 Iowa, 453, 124 N. W. 787, 27 L. R. A. (N. S.) 1007.

[7, 8] We hold, therefore, that the liquors enumerated by name in our statutory definition of intoxicating liquors are conclusively presumed to be intoxicating liquors without regard to their actual intoxicating properties and whether in potable quantities they will in fact intoxicate or not. That as to such liquors it is only necessary to prove that the thing sold was one of the class named, but that as to other liquors or liquids capable of being used as a beverage it is necessary to prove their intoxicating properties. It is conceded that Lifestaff cannot belong to either the second or third class mentioned in the statutory definition. By this process of elimination the question here involved is finally reduced to this: Is the stuff called "Lifestaff" a malt liquor? If it

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is, it is prohibited whether it contains intoxicating properties or not, and whether it contains alcohol or not.

[9] The first cardinal rule of construction is that words used in a statute, unless the context shows that they are used in a technical or particular sense, are to be given their ordinary meaning. 2 Lewis' Sutherland, Statutory Construction (2d Ed.) p. 749, § 390; Endlich, Interpretation of Statutes, p. 4, § 2.

[10] It follows that the words "malt liquor" which are evidently used in no technical sense, must be given the meaning accorded to them in the standard dictionaries of our language. The following are the definitions given by the three dictionaries universally recognized as authority:

Standard Dictionary:

"*Malt liquor*, any alcoholic beverage brewed from malt."

Century Dictionary:

"*Malt liquor*, a general term for an alcoholic beverage produced merely by the fermentation of malt as opposed to those obtained by the distillation of malt or mash."

Webster's New International Dictionary:

"*Malt liquor*, an alcoholic liquor as beer, ale, porter, etc., prepared by fermenting an infusion of malt."

We have been unable to find any definition giving to the term "malt liquor" any other meaning than the above, whether technical or not. The text-books are equally in unison. Joyce, Intoxicating Liquors, p. 12, § 12, defines malt liquor as follows:

"The common and approved usage of the term 'malt liquor' is 'an alcoholic liquor as beer, ale or porter, prepared by fermenting an infusion of malt.' 'Malt liquors' embrace porter, ale, beer, and the like, which are the result or product of a process by which grain—usually barley—is steeped in water to the point of germination, the starch of the grain being thus converted into saccharine matter, which is kiln dried, then mixed with hops, and, by a further process of brewing, made into a beverage. In Alabama it has been decided that the court will take judicial notice of the meaning of the words 'malt liquor' as used in a penal statute, and may, in a proper case, give its definition in a charge to the jury."

Black's Law Dictionary, p. 752, defines the term as follows:

"*Malt liquor.* A general term, including all alcoholic beverages prepared essentially by the fermentation of an infusion of malt (as distinguished from such liquors as are produced by the process of distillation), and particularly such beverages as are made from malt and hops, like beer, ale, and porter."

26 Cyc. 121, defines the term as follows:

"*Malt liquor.* An alcoholic liquor, as beer, ale, or porter, prepared by fermenting an infusion of malt; a general term for alcoholic beverages produced merely by the fermentation of malt as opposed to those obtained by distillation of malt or mash."

19 Am. & Eng. Ency. of Law (2d Ed.) p. 705, defines it as follows:

"*Malt liquor.* Malt liquor is a general term for an alcoholic beverage produced merely by fermentation of malt, as opposed to those obtained by distillation of malt or mash."

Wherever any court has essayed a definition of the term "malt liquor," it is in strict accord with the foregoing definitions.

In Pennell v. State, 141 Wis. 35, 123 N. W. 115, 116, the court defined the terms "spirituous liquor," "malt liquor," and "vinous liquor" as follows:

"The word 'liquor' in a statute regulating or forbidding the sale of intoxicants should be taken to mean an alcoholic beverage. Cent. Dict.; Standard Dict.; People v. Crilley, 20 Barb. (N. Y.) 246; U. S. v. Cohn, 2 Ind. 474, 52 S. W. 38. The associated word 'drinks' in such statute means an alcoholic beverage. State v. Oliver, 26 W. Va. 422, 53 Am. Rep. 79. Alcohol is a product of fermentation. Malting is a process preliminary to fermentation. Alcohol is separated, not produced, by distillation, and the liquor thus separated containing a percentage of alcohol is called spirituous liquor. Where there is no such separation, but the alcohol produced by fermentation remains in the liquid drawn off from the malt, the product is called malt liquor. Where the production of alcohol by fermentation is preceded by no malting process, as in the case of wine, the product is called vinous liquor."

In Marks v. State, supra, the court says:

"'Malt liquors' are the product of a process by which grain is steeped in water to the point of germination, the starch of the grain being thus converted into saccharine matter, which is kiln dried, then mixed with hops, and, by a further process of brewing, made into a beverage. The term embraces porter, ale, beer, and the like."

Though in the last definition the term "fermentation" is not used but "brewing" instead, the term "brewing" itself includes fermentation. See Standard Dictionary; Webster's New International Dictionary; Century Dictionary.

In United States v. Ducournau (C. C.) 54 Fed. 138, it was said:

"The ordinary acceptation of the term 'malt liquor' imports a fermented liquor, made chiefly of malt. * * *"

In Sarlls v. United States, 152 U. S. 570, 14 Sup. Ct. 420, 38 L. Ed. 556, Justice Shiras adopted the definition given in the Century Dictionary and above quoted.

In State v. Gill, 89 Minn. 502, 95 N. W. 449, the court said:

"But the defendant claims that there are some malt liquors which are not intoxicating; hence the complaint should have alleged the sale of an intoxicating malt liquor. This is just what the complaint did do without any tautology, for the term 'malt liquors' is used in the charter of the city, in the ordinance in question, and in the complaint in accordance with the common and approved usage of the term, and not in any technical sense. G. S. 1894, § 255. The common and approved usage of the term 'malt liquor' is 'an alcoholic liquor, as beer, ale or porter, prepared by fermenting an infusion of malt.' Webster's International Dictionary."

In State v. Lynch (Del.) 96 Atl. 32, the court used the following language:

"Malt liquor, or beer, as is commonly known, is a brewed liquor made of grain, especially barley, flavored with hops, and is a liquor which has undergone fermentation, and contains alcohol."

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In Ex parte Townsend, 64 Tex. Cr. R. 350, 144 S. W. 628, Ann. Cas. 1914C, 814, we find the following language:

"This leads to the inquiry of what is malt liquor. Mr. Joyce, in his work on Int. Liq. § 12, defines it as follows: 'The common and approved usage of the term "malt liquor" is an alcoholic liquor, as beer, ale, or porter, prepared by fermenting an infusion of malt.' The Century Dictionary defines it as a 'general term for an alcohol [alcoholic] beverage produced merely by the fermentation of malt.' So, then, it is clear that all malt liquor is an alcoholic liquor, and the Legislature in this instance was dealing with a nonintoxicating alcoholic liquor. Intoxicating liquor is any liquor containing alcohol which can be drunk as a beverage in such quantity as will produce intoxication."

We have set out the foregoing definitions in order to show the absolute unanimity of opinion that "malt liquor" is an alcoholic liquor and is a fermented liquor. Fermentation produces alcohol. Every malt liquor is fermented, and hence contains at least some percentage of alcohol. Unless the foregoing definitions are all wrong, such is the inevitable conclusion to which we are driven. The mere fact that a liquid contains malt does not bring it within any definition of the words "malt liquor," which can be found in any recognized dictionary, text-book or in any definition given by any court. Malt is neither fermented nor does it contain alcohol. It is defined in the Century Dictionary as follows:

"Grain in which, by partial germination, arrested at the proper stage by heat, the starch is converted into saccharine matter (grape-sugar), the unfermented solution of the latter being the sweetwort of the brewer. By the addition of hops, and the subsequent processes of cooling, fermentation, and clarification, the wort is converted into porter, ale, or beer. The alcoholic fermentation of the wort without the addition of hops, and distillation, yield crude whisky."

It is defined in Black's Law Dictionary as follows:

"Malt. A substance produced from barley or other grain by a process of steeping in water until germination begins and then drying in a kiln, thus converting the starch into saccharine matter."

We have been cited to but one case, and have been unable after many days of search to find another, in which any liquor or liquid has been held to be a malt liquor merely because it contained some percentage of malt. That case is Purity Extract & Tonic Co. v. Lynch, 100 Miss. 650, 56 South. 316. The liquid there involved was called "Poinsetta." It was admitted that it contained no alcohol, preservatives or saccharine; that it was sold as a beverage; that it was composed of 90.45 per cent. pure distilled water, 9.55 per cent. of solids derived from cereals in an unfermented state; and that it contained 5.73 per cent. of malt. It was admitted that the grain used was not fermented or steeped in such a way as to produce either saccharine matter or alcohol. On these facts the court said:

"In the discussion of this case we start out with the admission of counsel that this drink is a beverage containing no alcohol, it is true, but containing 5.73 per cent. of malt, and we unhesitatingly pronounce the beverage a malt liquor. It can be nothing else."

Had that court hesitated long enough to look at any standard dictionary, any law dictionary, or the decision of any court in which the term "malt liquor" had been defined, it would have found that the mere fact that a liquid beverage contains malt does not make it a malt liquor, unless it be also fermented and is alcoholic. We are asked to proceed in the same unhesitating manner and pronounce the beverage here involved a malt liquor in the face of every other decision where the question has arisen. Malt liquor is both alcoholic and fermented. While the generic term "malt liquor" includes both intoxicating and nonintoxicating liquors, this is because some liquors which are both fermented and contain alcohol have too small a percentage of alcohol to produce intoxication in any quantity which a person may be able to take at one time. This is the distinction found in many of the cases between intoxicating and nonintoxicating malt liquors. Lifestaff, the liquid here involved, is concededly neither alcoholic nor fermented. It is therefore not a malt liquor. None of the decisions cited by either side save the Lynch Case sustains the other view. On the contrary, so far as they have any bearing at all on the meaning of the term "malt liquor" they impliedly sustain the conclusion which we have reached. The Lynch Case was appealed to the Supreme Court of the United States (Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184), but that court holding itself bound by the decision of the state court as to the scope of the Mississippi statute, did not pass upon the question whether Poinsetta was or was not a malt liquor. On the contrary it held that it had no jurisdiction to pass upon that question.

In the following cases cited by respondent the sale of "malt liquor" was prohibited eo nomine by the statutes involved. It was held that it was neither necessary to allege nor prove that the "malt liquor" in question in the given case was capable of producing intoxication. But in each of these cases the liquor involved was either admitted to be a "malt liquor," or admitted or proved to be a fermented liquor, containing both malt and alcohol—hence was either admitted to be or proven to be such a liquor as is defined to be a "malt liquor" by the dictionaries. In Fuller v. Jackson, 97 Miss. 237, 52 South. 873, 30 L. R. A. (N. S.) 1078, same case on suggestion of error, 97 Miss. 253, 52 South. 876, 30 L. R. A. (N. S.) 1078, the liquor was "malt ale." The agreed facts showed that it contained 2.71 per cent. of alcohol by volume, and conceded that it was a "malt liquor." The statute (Code 1906, § 1746, as amended by Laws 1908, c. 115) prohibited:

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"Any vinous, alcoholic, malt, intoxicating, or spirituous liquors, or intoxicating bitters, or other drinks, which if drunk to excess will produce intoxication. * * *"

It was held that the liquor in question, being "malt liquor," was prohibited in terms whether it would in fact intoxicate or not.

In Ex parte Lockman, 18 Idaho, 465, 110 Pac. 253, 46 L. R. A. (N. S.) 759, the liquor was "near beer." It was admitted that this near beer was a "malt liquor." The undisputed evidence showed that it contained 1.28 per cent. alcohol and 7.1 per cent. malt extract, but did not contain enough alcohol to intoxicate in the largest quantity which could be consumed at one time. The statute (Laws 1909, p. 18, § 31) defined intoxicating liquors as follows:

"The words 'intoxicating liquors' as used in this act shall be deemed and construed to include spirituous, vinous, malt and fermented liquors, and all mixtures and preparations thereof, including bitters and other drinks that may be used as a beverage and produce intoxication."

The court said:

"The Legislature likewise recognized the fact that vinous, malt and fermented liquors all contain, to some extent, the element of alcohol, although it may not be to such a degree as will produce intoxication. They, therefore, concluded when writing this statute defining the words 'intoxicating liquors,' to declare as a matter of law that all 'spirituous, vinous, malt, and fermented liquors' are intoxicating, irrespective of the amount of alcohol they may contain, and whether or not the particular kind of drink will in fact produce intoxication."

Held, the liquor in question, being concededly a "malt liquor," was declared by the statute as a matter of law to be an intoxicating liquor and prohibited.

In Brown v. State, 17 Ariz. 314, 152 Pac. 578, the liquor was called "Barette." It was conceded that it contained 1.96 per cent. of alcohol by volume. It was conceded to have been made by the same process as beer, except that it was made from "barley, rice, and hops," while beer is made from "barley and hops." The undisputed evidence showed that it was nonintoxicating in the largest quantity which could be drunk. The Constitution of Arizona prohibits the manufacture or sale in that state of any "ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind." The case was tried to the court without a jury. The court said:

"We are forced to the conclusion that the word 'beer,' as used in the Constitution, does not mean an intoxicating liquid only, but also a nonintoxicating fermented malted liquor, even though it be not intoxicating; that is, if the liquor be 'beer' as defined and historically known by the standard lexicographers and by the courts, its traffic is forbidden by the Constitution. If the article involved in this case falls within the well-known definition of 'beer,' whether it be intoxicating or not, the appellant's act was criminal and subjects him to punishment."

Then quoting various definitions of "beer" from Century Dictionary, Webster's Dictionary, Standard Dictionary, Encyclopedia Britannica, Joyce on Intoxicating Liquors, and Woolen & Thornton on Intoxicating Liquors, the court held that the liquor, being beer, was prohibited, eo nomine, by the Constitution, whether intoxicating or not.

In Douglas v. State, 21 Ind. App. 302, 52 N. E. 238, the stuff sold was called "hop ale." The indictment charged a sale of "beer." There was evidence tending to show that it was in fact beer. There was also evidence that it was not beer, and was not in fact intoxicating. There was no evidence that it was not of a malted and fermented quality. The statute declared:

"The words 'intoxicating liquor' shall apply to any spirituous, vinous, or malt liquor, or any intoxicating liquor whatever which is used or may be used as a beverage."

The court instructed the jury that "'beer' in the estimation of the law is fermented liquor, made from any malted grain, with hops or other bitter flavoring matter." He also instructed that only a sale of "beer," as charged in the indictment, could sustain a verdict of guilty, and that:

"It is claimed by the defendant that the liquor on the occasion referred to in the indictment was hop ale, which is not intoxicating. As heretofore stated, the question for you to determine is not whether hop ale was sold, or whether hop ale is intoxicating, or whether beer is intoxicating, but your attention must be directed to the fact whether the liquor called hop ale was, in fact, beer, and whether it was sold as charged in the indictment."

On appeal these instructions were approved. The court said:

"If the court, as matter of law, must know that beer is a malt liquor, it is not necessary to a conviction for the jury, besides finding a sale of beer, to find also, as a matter of fact, that beer—that is, malt liquor—is intoxicating."

In United States v. Cohn, 2 Ind. T. 474, 52 S. W. 38, the liquor sold was "Rochester Tonic." The evidence showed that it was made in the same manner as beer, and was in fact the second draw or brew from the mash from which beer had previously been made, and that it was simply beer with a less percentage of alcohol than is contained in ordinary beer. It contained 3 per cent. of malt extract and 1.73 per cent. alcohol. It was admitted that Rochester Tonic was a malt liquor. It was conceded in argument that the stuff contained 2 per cent. and under of alcohol, and would not intoxicate. The statute prohibited the sale of "any vinous, malt or fermented liquors, or any other intoxicating drinks of any kind whatsoever." A prior statute had prohibited "ale and beer." The court said, at pages 500, 502, of 2 Ind. T., page 47 of 52 S. W.:

"The evident object of Congress in making the change of phraseology in the statute from 'ale and beer' to 'any malt or fermented liquors' was not to exclude that which the old had included, but it was to include in the new law that which was excluded by the old, by using an expression broad enough to cover all forms and kinds of alcoholic drinks. * * * The law as it existed prior to the act of 1895 prohibited ale and beer in all of their forms. The first act passed afterwards, relating to the same conditions, prohibits malt liquors, ale and

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beer, in all of their forms. Did Congress intend to make an exception in the act of 1895? We think not, and therefore hold that malt and fermented liquors, when to be used as beverages or for drinks, are prohibited by the statute, in all of their forms, and the question as to whether or not they are intoxicating is immaterial."

In Sawyer v. Botti, 147 Iowa, 453, 124 N. W. 787, 27 L. R. A. (N. S.) 1007, the action was to enjoin the sale of "justus beer," and was of course tried to the court. The evidence showed that in the manufacture of justus beer the same materials were used as in lager beer, and the process of malting and extracting were the same, except that the process of fermentation was arrested before any considerable amount of alcohol was produced, so that justus beer contained about one-half of 1 per cent. of alcohol by volume, while lager beer contains 3½ per cent. of alcohol. The evidence further showed that justus beer was not intoxicating because no ordinary person could imbibe enough at one time to get sufficient alcohol to produce intoxication. The statute prohibited the sale of "intoxicating liquor," except as otherwise provided, and defined that term to mean "alcohol, ale, wine, beer, spirituous, vinous and malt liquor, and all intoxicating liquor whatever." The injunction was granted. On appeal the Supreme Court affirmed the decree saying:

"We reach the conclusion without the slightest doubt that the beverage in question, *being a liquor manufactured from malted grain by a process involving fermentation*, no matter how slight the fermentation may be, and irrespective of the amount of alcohol which it actually contains, and also without regard to whether it is in fact intoxicating, is within the statutory description of liquors the sale of which is prohibited. It is conceded that the process of manufacture of justus beer is the same as that of lager beer, save that the fermentation is arrested at an earlier stage, and therefore less alcohol is contained in the product. We think that such liquor is 'beer' within the statutory definition, but, whether so or not, it is unquestionably a malt liquor." [Italics ours.]

The court thus clearly recognized the elements of *fermentation of malt and at least some trace of alcohol* as the essential and distinctive features of malt liquors, just as do all of the dictionaries, though the liquid in question was not intoxicating.

In Luther v. State, 83 Neb. 455, 120 N. W. 125, 20 L. R. A. (N. S.) 1146, the defendant was charged with selling, without a license, "a certain malt and intoxicating liquor, to wit, malt tonic." The undisputed evidence showed that the liquor contained 1.1 per cent. of alcohol and was "in the class of beers." The manufacturer's label stated that it contained "less than 2 per cent. of alcohol" and was "brewed." The statute prohibited the sale of "malt, spirituous, or vinous liquors, or any intoxicating drinks," without a license. The court held that as to the character of the liquor it was not necessary to prove more than that it was a "malt liquor." In answer to the claim that there was no proof that it would intoxicate the court said:

"At any rate, the law prohibits the sale of 'malt liquors' without a license, and we must obey its plain mandate. Alcoholic beverages are under the ban of the law in some form or other, in most civilized countries. They are known to be the cause of crime, destitution, and pauperism. *Malt liquors used as beverages are known to contain that destructive ingredient.* It was proven upon the trial of this case that the beverage kept and sold by plaintiff in error contained it. The liquor sold by him was simply an effort to evade the law. The title of the act is 'An act to regulate the license and sale of malt, spirituous, and vinous liquors,' etc. The whole act is built upon that title. Malt liquors are as much within both the letter and spirit of the law as either of the other classes named. To say that the Legislature intended to provide for the regulation and license of intoxicating malt liquors would require the same word to be used as defining the other classes, and would be legislating and reading into the statute a word which the Legislature clearly intended should not be there. This is not the province of the courts." [Italics ours.]

While the court did not define "malt liquor," it recognized that all malt liquors contain alcohol, thus agreeing with the definitions of the lexicographers, all of which as we have seen include the alcoholic element.

In La Follette v. Murray, 81 Ohio St. 474, 91 N. E. 294, the liquor involved was "Friedon Beer." Defendant was sued for an occupation tax laid by statute on the trafficking in "spirituous, vinous, malt or other intoxicating liquors." The case was tried on an agreed statement of facts, in which it was admitted that the stuff was "a malt liquor containing .47 of 1 per cent. of alcohol, but not intoxicating." The court sustained a judgment for the tax, holding that the generic term "malt liquors" includes both non-intoxicating and intoxicating malt liquors. It did not attempt to define malt liquors because the liquor in question was admitted to be a malt liquor and contained alcohol.

In State v. O'Connell, 99 Me. 61, 58 Atl. 59, the defendant was indicted for being a common seller of intoxicating liquors. While the statute then in force in Maine is not set out in the opinion, the court said:

"Rev. St. 1883, c. 27, § 33, amounts to a prohibition of the sale of malt liquor."

The evidence showed a sale of "Uno Beer, brewed from malt, and containing 2.36 per cent of alcohol." On the trial the court refused to instruct that the jury must find the liquor was intoxicating, but did instruct that:

"If you find beyond a reasonable doubt that the beer in question was brewed from malt, it was a malt beer, and comes within the prohibition of the statute."

The Supreme Judicial Court held that this was not error, saying:

"The issue was whether the defendant sold malt liquor. If he did sell it, it was in violation of the statute, and it was not necessary, in order to establish his guilt, for the jury to go further, revise the judgment of the Legislature, and determine whether malt liquor was or was not in fact intoxicating. * * * The

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presiding justice was not bound to define the term 'malt liquor.' State v. Starr, 67 Me. 242; State v. Wall, 34 Me. 165. While the court should define to the jury legal terms to which the law has attached a specific meaning, it is not required to define words in common and ordinary use, the definition and meaning of which jurors are presumed to understand as well as the court."

If as the court says the common meaning is the true meaning of the term "malt liquor," then where the question as here is presented as one of fact for the court, we can only take that definition on which the dictionaries in common use are unanimous, namely, an "alcoholic beverage brewed from malt" or "produced by fermentation from malt." See Standard, Century and Webster's International Dictionaries above quoted.

In Feibelman v. State, 130 Ala. 122, 30 South. 384, the cause was tried to the court without a jury. The liquor sold was "hop jack." The evidence showed that it contained from 1.75 to 2 per cent. alcohol, and "was produced by fermentation of malted barley, diluted with water, and was therefore a malt liquor," but in potable quantity was not capable of producing intoxication. The statute prohibited "the selling of spirituous, vinous, or malt liquors, or intoxicating bitters or beverages." The Supreme Court sustained a conviction on the ground that the statute expressly prohibited the sale of "malt liquor," and that the evidence showed that "hop jack" was a malt liquor. The court further said:

"We may, for all the purposes of this case, concede, without indicating any opinion upon the question, that the Legislature may not, in the exercise of the police power, prohibit the sale of a malt liquor which is not intoxicating, nor otherwise deleterious in any way, where the sole purpose and object is the prevention of the sale of that particular character or quality of malt liquor. But it is common knowledge that most malt liquors are intoxicating and harmful when used excessively, and are capable of excessive use as a beverage. The sale of all such, of course, the Legislature has the power to prohibit."

Clearly the evidence there brought the hop jack within the exact terms of the Century Dictionary definition, "an alcoholic beverage produced merely by fermentation of malt," and within the specific meaning of the definitions found in the Standard and Webster's International Dictionaries.

State ex rel. Guilbert v. Kauffman, 68 Ohio St. 635, 67 N. E. 1062, was a suit in mandamus to compel the enforcement of a statute imposing a tax "on the business of trafficking in any intoxicating liquors, and also on the business of trafficking in spirituous, vinous, or malt liquors." The petition alleged that the liquor involved was "a malt liquor or beverage, commonly known as 'Bishop's Beer,' * * * which malt liquor or beverage contains less than 2 per cent. of alcohol, and is not intoxicating." The court overruled a demurrer to the petition on the ground that:

"The generic term 'malt liquors' includes both nonintoxicating and intoxicating malt liquors."

The court did not define the term "malt liquors" because the demurrer admitted the allegation of the petition that the stuff was a malt liquor and contained alcohol.

In Flanders v. Commonwealth, 140 Ky. 38, 130 S. W. 809, the liquor involved was called "temperance beer" or "Dr. Fizz." It was admitted to contain 1 per cent. of alcohol. Witnesses who drank it testified that:

"The liquor looked like beer, smelt like beer, foamed like beer, and tasted like beer. Several of them testified that they had drank beer many times, one of them that he had been a barkeeper, selling beer for some years, and that in their opinion the liquor was beer, somewhat diluted."

Defendant and the manufacturer testified that it was merely a carbonated water, with 1 per cent. of alcohol added. The statute prohibited the sale of "spirituous, vinous and malt liquors." The court took judicial notice that beer is a malt liquor, and instructed the jury that if it found that the decoction in question was "ordinary beer, a malt liquor," defendant should be found guilty. The appellate court approved this instruction saying:

"As, therefore, the statute in terms prohibits the sale of malt liquors in local option territory, it is enough to inquire whether the liquor sold is malt liquor; if it is, the guilt is fixed. Whether it intoxicates some people or not, or is only a mild intoxicant, or whether defendant believed that it was an innocent soft drink, are immaterial."

In Commonwealth v. Goodwin, 109 Va. 828, 64 S. E. 54, one statute known as the "Byrd law," a state revenue act, permitted the sale of "malt beverages" which it defined as:

"The product of a brewing plant, or brewery, and shall, as to its composition, comply with the standards now, or as may hereafter be prescribed by the pure food commissioner of the United States, but shall be nonintoxicating and in no event contain in excess of two and one-quarter per cent. in volume of alcohol."

Another statute prohibited licensing the sale of "ardent spirits, malt liquors, or any mixture thereof or any bitters containing alcohol" in any town except upon the written consent of the town council. The court held that "malt beverages" as defined in the first statute were "malt liquors" within the meaning of the second statute. Since "brewing" essentially involves fermentation it is clear that the definition of "malt beverages" in the Byrd law brings such beverages within the definition of "malt liquor" as found in all the dictionaries.

In State v. Walder, 83 Ohio St. 68, 93 N. E. 531, the statute defined "intoxicating liquor" as including "any distilled, malt, vinous or any intoxicating liquor whatever." The liquor sold was "near beer." The accused testified that it was made as other beer, only weaker; that it was then boiled so as not to contain any alcohol; that "sugar, etc.," was then added, and the mixture was "carbonated"; that "if you keep it in a warm place, it would generate alcohol right away," but if kept cool "it might go two or three

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weeks * * * and never get alcohol." That this was why he did not ship it or sell it except on his own place; that in the beer he sold at the time in question there was probably .2 of 1 per cent. of alcohol. He admitted that if left standing it would become intoxicating. The court held that the concoction was a "malt liquor" and was hence in law an intoxicating liquor because the Legislature had defined it so. It is clear that it was brewed from malt and contained at least a trace of alcohol as admitted by the defendant, and would soon develop sufficient alcohol to become intoxicating. It plainly fell within the standard definition of malt liquor as an "alcoholic beverage brewed from malt." The facts showed a plain attempt to evade the statute by selling a potential beer.

The case of Campbell v. Thomasville, 6 Ga. App. 212, 64 S. E. 815, has no bearing upon the case before us. The court there defines "near beer" as—

"a term now of general currency in this state, and perhaps elsewhere, used to designate any and all of that class of malt liquors which contain so little alcohol that they will not produce intoxication, even though drunk to excess. It includes all malt liquors which are not within the purview of the general prohibition law."

The case merely held that because its sale was not prohibited by the general statute, it could not be prohibited by a city ordinance, but because it was an imitation and substitute for beer and liable to be used as a cover for the sale of real beer, it was within the police power of the city to regulate its sale by ordinance. This is elementary. In fact it is admitted in the case before us that the sale of beverages containing no alcohol whatever may be by state statute absolutely prohibited in the exercise of the police power as an aid to the enforcement of the prohibition of alcoholic beverages. But our statute contains no such provision unless every liquid containing malt, whether fermented or not, and whether containing alcohol or not, is a "malt liquor," which is the real question here involved.

In People v. Kinney, 124 Mich. 486, 83 N. W. 147, the court merely held that fermented cider was a "fermented liquor," and hence prohibited by the statute, whatever the degree of fermentation.

We shall not review in detail the other cases cited by respondent, involving statutes prohibiting the sale of "cider" eo nomine. They merely hold that, cider being in terms prohibited, the courts will not inquire whether the given cider is or is not "sweet" or "hard," fermented or unfermented, new or old, intoxicating or nonintoxicating. They throw no light on the question before us. Commonwealth v. Dean, 14 Gray (Mass.) 99; State v. Frederickson, 101 Me. 37, 63 Atl. 535, 6 L. R. A. (N. S.) 186, 115 Am. St. Rep. 295, 8 Ann. Cas. 48; State v. Spaulding, 6 Vt. 505, 17 Atl. 844.

[11] We want it distinctly understood we do not hold that the statute does not prohibit the manufacture and sale of a malt beverage of such composition that of itself under proper conditions it will generate alcohol. We hold just the contrary. Such a liquor would be potentially a malt liquor. In the language of the statutes it would contain "intoxicating properties." Its manufacture or sale would be a palpable evasion of the statute. State v. Walder, supra. But the liquid here involved, it is admitted, "is entirely free from alcohol," and "does not in fact contain intoxicating properties." The admission clearly negatives the idea that it will of itself generate any alcohol whatever. It is not even claimed by the state that it will. We have therefore neither allegation nor proof to bring the beverage here involved within any definition of malt liquor actual or potential.

We further want it distinctly understood that we are not giving to the stuff called "Lifestaff" a certificate of character. *We are merely passing on the admitted facts now before us.* If in any future case it shall be either admitted or proved that Lifestaff, or any other beverage by whatever name called, is in fact a malt liquor, either actual or potential, as the dictionaries, text-books, and courts have defined the term "malt liquor," then in such a case it must be held an "intoxicating liquor" as defined in the statute, and hence prohibited.

Neither do we hold that liquids absolutely harmless, wholly free from alcohol and wholly free from intoxicating properties of any kind, might not be directly prohibited, or might not be conclusively defined as intoxicating liquors, and so prohibited, by a law so declaring in order to aid in the enforcement of the purpose of the prohibition law. The Legislature, or the people in a legislative capacity, have the undoubted power to prohibit any liquid, however harmless in itself, but which might be used as a cover for the sale of the harmful liquors, or to prohibit all imitations or substitutes for intoxicating liquors, however harmless separately considered. *But we have no such statute and this court cannot pass one. It cannot legislate.* Experience in the enforcement of the law as it is now written may eventually show such a need, but this court cannot supply it. The law as it now is contains no such provision, either in terms or by any possible implication, however liberally construed.

[12] Again, we do not hold that the prohibition law as it now reads prohibits nothing but liquors or liquids capable of producing intoxication when taken to capacity. On the contrary, we hold that every malt liquor, though containing only a trace of alcohol, is in terms prohibited because it is a "malt liquor" under the common meaning of that term as defined by every standard dictionary

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and every court which has attempted to define it.

We merely hold that a liquid containing malt, if unfermented and containing no alcohol whatever, is not a "malt liquor," as defined by any standard dictionary of our language, or as defined by any text-book, or as defined by any court which has attempted to define the term, to which our attention has been directed, or which after many days of careful search we have been able to find. In this we are not merely following precedent. We are simply giving to the term "malt liquor" the only meaning that it has in our language. We are not even selecting between a primary and secondary meaning. We are taking the only meaning which the words have. It is admitted that the liquid here involved does not come within that meaning. We are bound by the admitted facts.

The judgment is reversed.

MORRIS, C. J., and PARKER, MOUNT, MAIN, HOLCOMB, and CHADWICK, JJ., concur.

(29 Idaho, 576)

SHANER v. RATHDRUM STATE BANK.

(Supreme Court of Idaho. Nov. 10, 1916.)

1. MORTGAGES ⇐33(2) — REQUISITES — ABSOLUTE DEED AS MORTGAGE.

S. and wife on the 6th day of June, 1912, borrowed $8,800 of a bank, and on the same day executed a promissory note and a mortgage to secure the payment of said debt. Default was made in payment of interest, taxes, and insurance, and the debt became due and the bank demanded payment on the 29th day of October, 1914, and S. and wife were unable to pay, and at that time there was found to be due $10,879, and a contract was entered into between the parties, whereby S. and wife were to sell the property to the bank, and they executed a warranty deed conveying the mortgaged property to the bank in extinguishment of the debt; and at the same time a separate agreement was entered into between the parties, giving the mortgagors the right to repurchase said property within a year from said date, and the promissory note was canceled and surrendered to S. *Held*, that the transaction was a purchase and sale of said property, and not a mortgage to secure the payment of said debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 68–72, 77, 78, 80–82; Dec. Dig. ⇐33(2).]

2. MORTGAGES ⇐32(3) — CONVEYANCE OF PROPERTY MORTGAGED—EFFECT.

Held, that the borrowing of said money and the execution of said mortgage and the subsequent contract of sale made over two years thereafter were two separate and distinct transactions.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 60, 84; Dec. Dig. ⇐32(3).]

3. MORTGAGES ⇐38(1)—ACTION TO DECLARE DEED A MORTGAGE—EVIDENCE.

Held, that the evidence sustains the findings and judgment of the court.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 108; Dec. Dig. ⇐38(1).]

4. MORTGAGES ⇐38(1)—ACTION TO DECLARE DEED A MORTGAGE — SUFFICIENCY OF EVIDENCE.

Held, under the evidence, that the value of the property conveyed was a little more than the amount of the debt at the time the deed was executed, but not sufficient difference to indicate that there was any fraud or overreaching in the transaction, and no fraud or undue influence is charged in the complaint.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 108; Dec. Dig. ⇐38(1).]

5. MORTGAGES ⇐38(2) — ABSOLUTE DEED AS MORTGAGE—SUFFICIENCY OF EVIDENCE.

It is a well-settled rule that where one asserts that a deed, absolute on its face, with a conditional contract to repurchase within a certain date, is simply a mortgage given as security for the payment of a debt, he must show by clear and convincing evidence that it was intended as a mortgage, and not as a sale.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 109; Dec. Dig. ⇐38(2).]

6. MORTGAGES ⇐294 — CONVEYANCE TO MORTGAGEE—PAYMENT OF INDEBTEDNESS.

A payment of a mortgage indebtedness may be made by the transfer to the mortgagee by the mortgagor of the mortgaged premises.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 806–814; Dec. Dig. ⇐294.]

7. MORTGAGES ⇐32(5)—ABSOLUTE DEED AS MORTGAGE—REQUISITES.

A deed absolute on its face cannot be held to be a mortgage unless there is a debt to be secured thereby, since a mortgage is a defeasible conveyance made simply to secure a debt; and where there is no continuing debt, the agreement to reconvey the property within a certain period of time, provided certain payments are made, does not make the conveyance a mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 61, 88; Dec. Dig. ⇐32(5).]

8. MORTGAGES ⇐38(2)—ABSOLUTE DEED AS MORTGAGE—SUFFICIENCY OF EVIDENCE.

The evidence to support the claim that a deed, absolute on its face, is a mortgage, must be clear and satisfactory to show the intent of the parties to be that such deed is security for a debt, and not a conveyance of absolute title.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 109; Dec. Dig. ⇐38(2).]

9. MORTGAGES ⇐608½—ACTION TO DECLARE DEED A MORTGAGE—OFFER TO RESTORE CONSIDERATION.

Where it is claimed that a deed, absolute on its face, is a mortgage, the claimant ought not to recover without tendering the amount of the debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1815; Dec. Dig. ⇐608½.]

10. MORTGAGES ⇐38(1)—ACTION TO DECLARE DEED A MORTGAGE — SUFFICIENCY OF EVIDENCE.

Held, that the evidence is sufficient to support the findings and decree.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 108; Dec. Dig. ⇐38(1).]

Appeal from District Court, Kootenai County; Robert N. Dunn, Judge.

Action by Katie Shaner, as executrix of Joseph Shaner, and individually, against the Rathdrum State Bank. From a judgment for defendant, plaintiff appeals. Affirmed.

Charles L. Heitman, of Rathdrum, for appellant. Ezra R. Whitla, of Cœur d'Alene, for respondent.

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SULLIVAN, C. J. This action was brought to have a warranty deed, conveying certain real estate, executed by Joseph Shaner and wife to the Rathdrum State Bank, declared a mortgage, and a contract for the reconveyance of the land described in the deed by the bank to Shaner and wife declared void and of no force and effect. Upon the issues made by the pleadings the cause was tried by the court without a jury, and the court made findings and entered judgment in favor of the respondent bank, whereby it was held that said warranty deed was not a mortgage, but a deed in fact, and that said contract to reconvey the real estate involved was a valid contract. This appeal is from the judgment. The insufficiency of the evidence to sustain the findings and judgment is the principal error assigned. The following facts appear from the record:

[1] Joseph Shaner on the 6th day of June, 1912, borrowed $8,800 from the respondent bank, and he and his wife, Katie Shaner, the plaintiff and appellant in this action, executed their promissory note for said amount. Said note bore interest at the rate of 10 per cent. per annum from date, interest payable semiannually. The principal was made payable on June 6, 1915. On that date, to secure the payment of said note, Joseph Shaner and the appellant herein executed a certain mortgage upon real estate. Said mortgage provided, among other things, that in case of default in payment of said note and interest, or any part thereof, or any payment of any disbursements authorized by said mortgage, the holder thereof might at once proceed to foreclose said mortgage for the amount due, and that said note, at the election of the holder, should become due and payable without notice. Shaner failed and was unable to pay the interest or taxes on the property mortgaged, as he had agreed to do, and the debt became due and payable according to the terms of the mortgage, and the property was rapidly depreciating in value. Thereupon the respondent bank demanded of the Shaners that they pay the mortgage debt, which they refused to do. At the time the bank demanded payment the interest had accumulated and the bank had been compelled to pay taxes and insurance on said property. At the time this demand was made, the indebtedness had increased from $8,800 to $11,297.23, less some small credits or payments that had been made, after deducting which there remained a balance due of $10,879, and thereupon Shaner and his wife offered to deed the property included in said mortgage to the bank in payment of said debt. It was the agreement at that time that the bank would enter into a contract with Shaner, giving him the right to repurchase said property within one year from the date of the deed. This option, no doubt, was intended to allow Shaner all of the advantages which he would have obtained had the mortgage been foreclosed, under his right to redeem within one year after the foreclosure, and also save him the additional cost of a foreclosure of the mortgage and attorney's fees, which cost and fees would no doubt have amounted to more than $1,000. Subsequent to the execution of said deed, Joseph Shaner died, and the plaintiff became the executrix of his estate.

We think the evidence clearly shows that the value of the property mortgaged had considerably decreased from the time of the execution of the mortgage until the deed was executed.

[2] It is alleged in the complaint that the mortgage executed on the 6th day of June, 1912, and the deed and contract executed on the 29th of October, 1914, constitute one and the same transaction. There is nothing in the record to sustain this contention. Here were two separate and distinct transactions, one occurring two years after the other. The first one was to borrow and secure the payment of money; the second was for the purpose of discharging or paying the debt.

[3] The court found, and the finding is fully sustained by the evidence, that the total balance due defendant bank for advances, interest, taxes, and principal in said matter was the sum of $10,879, and that for said sum the said Joseph Shaner and Katie Shaner, his wife, made and executed and delivered to the defendant a warranty deed for said premises; that at the time said warranty deed was so delivered, the indebtedness due from said Joseph Shaner to the Rathdrum State Bank, evidenced by said promissory note, was canceled and paid and said promissory note returned to the said Joseph Shaner; that at that time said defendant made and delivered to Joseph Shaner an optional contract to purchase, whereby he might purchase said property within one year from the date thereof, by the payment to the defendant of the sum of $10,879, together with taxes upon said property and interest upon said sum and insurance premiums upon the buildings situated upon said premises; that said Shaner and plaintiff failed to pay said sum, and that said contract became forfeited, annulled, and terminated, and that the plaintiff has no interest whatever in or to said premises. We think these findings are fully sustained by the evidence.

[4] It is not claimed that there was any fraud in this transaction, but it is claimed that the price paid for said property was far below its actual value at the time the deed was executed. However, we do not think, after a careful examination of the evidence, that there is anything in this contention, since the competent evidence in the case shows that the value of the property was but little more than the amount of the debt at the time the deed was given.

It also appears that after this action was brought, the defendant bank made a written

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tender and offer to the plaintiff to deed to her the property in controversy if she would pay the amount called for by said contract. This offer was not accepted.

It is disclosed by the record that the Rathdrum State Bank was about to foreclose said mortgage, and that Shaner desired to save the cost of foreclosure, and to have matters put in such condition that if he had the opportunity to sell the property he could do so, which he thought he could better do than if a foreclosure action was pending. The officers of the bank concluded at the date of the loan that the property involved was worth about $16,000, and the evidence shows that the value of the property had decreased considerably at the time of the execution of said deed. A part of the property was a large frame building in the town of Rathdrum, known as the Mountain View Hotel, which had been vacant for some time. It also appears that much of the acreage property had decreased in value in the two years.

In regard to the sale of the property in satisfaction of said debt, the cashier of the bank testified that Shaner preferred to transfer said property to the bank, and then have the bank give him a certain time or option in which to purchase back the property, and thus save the expense of a foreclosure, and he also wanted to keep the property out of the courts, "because he figured that during the time it was in court he would have a very poor show to sell any of the property" in case a foreclosure suit was brought.

[5] It is a well-settled rule of law that where one asserts that a deed shall be given a different construction from that clearly appearing on its face, claiming that it is a mortgage, he must show by clear and convincing evidence that a mortgage, and not a sale with the right to repurchase, was intended. Johnson v. National Bank of Commerce, 65 Wash. 261, 118 Pac. 21, L. R. A. 1916B, 4.

There is no allegation in the complaint of undue influence or fraud in the transaction, and the complaint is drawn upon the theory of the intention of the parties. The evidence is conclusive that the indebtedness due from Shaner to the bank was upon a promissory note, and that the mortgage was a mere incident to the note, security for its payment. At the time said deed was executed, the promissory note was canceled and delivered to Shaner, thus canceling the debt. The deed was not given as security for a debt that had been canceled, but in satisfaction of the debt represented by the promissory note.

[6] It is a well-established rule of law that payment of an indebtedness may be made by the transfer to the mortgagee of the mortgaged premises. 27 Cyc. 1390. The promissory note having been canceled and delivered to the maker, there certainly was no debt existing which was enforceable against Shaner.

[7] It was held in Fabrique v. Cherokee & P. C. M. Co., 69 Kan. 733, 77 Pac. 584, that a deed cannot be held to be a mortgage unless there is a debt to secure, as a mortgage is a defeasible conveyance, simply made to secure the debt, and where there is no continuing debt the agreement to reconvey does not make the conveyance a mortgage.

In McNamara v. Culver, 22 Kan. 661, where the question as to whether a certain deed was a mortgage or not was before the court, Mr. Justice Brewer in delivering the opinion said:

"Now that a deed and an agreement to reconvey, though separate instruments, may operate as simply a mortgage, is clear, and that they do not necessarily create one is equally clear. The test is the existence or nonexistence of a debt. And equity looks behind the form to the fact. If the transaction was intended as a loan, if there remains a debt for which the conveyance is only a security, and the collection of which may be enforced independent of the security, equity will hold it a mortgage, no matter whether the transaction is evidenced by one or two instruments. But if there be no debt, there can be no security—no mortgage."

A mortgage is an incident of the debt, and without a debt, obligation, or liability there is nothing to secure, consequently there can be no mortgage.

We knew of no reason why a mortgagee should not, by contract subsequent to the execution of a mortgage, purchase from the mortgagor the equity of redemption or obtain a release of the right of redemption, provided it is fairly done and for an adequate consideration. Circumstances may be such as to render such a sale mutually beneficial and entirely optional on the part of the mortgagor, uninfluenced by the relation of the parties, and to convert such an instrument into a mortgage, there must be a continuing, binding debt in its fullest sense. See Miller v. Smith, 20 N. D. 96, 126 N. W. 499, and authorities there cited.

Under the law there can be no question that a party can make a purchase of lands, either in satisfaction of a precedent debt or for a consideration then paid, and may at the same time contract to reconvey the land upon the payment of a certain sum, without any intention on the part of either party that the transaction should be in effect a mortgage. There is no absolute rule that the covenant to reconvey shall be regarded, either in law or in equity, as a defeasance. Under the law the mortgagor has the same capacity to contract with reference to his interests in the mortgaged premises that he has with reference to other property.

[8] This court held in Bergen v. Johnson, 21 Idaho, 619, 123 Pac. 484, that:

"In an action * * * for the purpose of declaring a deed a mortgage, the evidence to support the claim of the plaintiff must be clear and satisfactory and show the intent of the parties to be that the instrument delivered is security for a debt, and not a conveyance of absolute title."

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It was aptly said in the case of Johnson v. National Bank of Commerce, 65 Wash. 261, 118 Pac. 21, L. R. A. 1916B, 4, by the Supreme Court of Washington:

"We think the purpose was on the part of the bank to avoid a foreclosure, and on the part of Johnson to avoid a deficiency judgment. Courts should encourage rather than condemn such settlements when fairly and understandingly entered into. * * * If the property had depreciated in value, and the appellant had sought to treat the transaction as a mortgage, no court would have decreed a foreclosure. The evidence would have forbidden such a course."

[9] It is held by many courts that where it is attempted to have a deed declared a mortgage, that equity requires the party so asking to tender an offer to pay the amount of the debt and interest before he is entitled to any standing in a court of equity.

It was held in Hicks v. Hicks (Tex. Civ. App.) 26 S. W. 227, that:

"A plaintiff claiming that a deed to defendant's ancestor, absolute on its face, is a mortgage, cannot recover the land without tendering the amount of debt and interest."

Jones on Mortgages (7th Ed.) § 1095, referring to the question here involved, says:

"In like manner tender of the debt should be made in a bill to have an absolute deed declared a mortgage."

[10] The evidence in this case discloses the fact that the debt for which it is claimed that the property in question was given as security has been paid and satisfied in full, and that there is no personal debt existing against Joseph Shaner or his estate which could be enforced independent of the security. The record clearly shows that the intent of the parties at the time said deed was executed was that it was given in full satisfaction of the debt due the bank, and that there was no intention whatever that said deed was given as security for the payment of said debt.

The judgment, therefore, must be affirmed; and it is so ordered. Costs in favor of respondent.

BUDGE and MORGAN, JJ., concur.

(86 Or. 474)

DAVIS et al. v. FIRST NAT. BANK OF ALBANY et al.

(Supreme Court of Oregon. Nov. 28, 1916.)

APPEAL AND ERROR ⊂⊃414—NOTICE OF APPEAL—ADVERSE PARTIES.

Defendants sued as makers of a note secured a cross-decree against certain parties as the real maker and as sureties, with the cross-complainants, thereof, and plaintiff payee and one of the said sureties appealed. *Held*, that other alleged sureties were not adverse parties upon whom notice of appeal must be served, for a reversal would benefit them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2137, 2138; Dec. Dig. ⊂⊃414.]

Appeal from Circuit Court, Linn County; Wm. Galloway, Judge.

Cross-bill by W. H. Davis and Worth Huston against the First National Bank of Albany, Or., Alfred C. Schmitt, and others. From a decree for plaintiffs, the named defendants appeal. Motion to dismiss appeal denied.

Hewitt & Sox and Hill & Marks, all of Albany, for the motion. Schmitt & Schmitt, of Portland, opposed.

PER CURIAM. The First National Bank of Albany, Or., commenced an action against W. H. Davis and Worth Huston to recover the amount of their promissory note. They answered admitting the allegations of the complaint and as plaintiffs also filed a cross-bill in equity, making as parties defendant Alfred C. Schmitt, Linnhaven Orchard Company, a corporation, E. C. Roberts, Chas. H. Wieder, Geo. M. Crowell, Owen Bean, F. J. Fletcher, and J. M. Hawkins, admitting the execution of the note, but alleging it was in fact the note of the Linnhaven Orchard Company and that the makers and the defendants who were made parties to the suit were sureties for that company. The trial court rendered a decree granting the relief prayed for in the cross-bill, and the First National Bank and Alfred C. Schmitt appealed, but they did not cause the notice to be served upon the defendants Wieder, Crowell, or Hawkins. The plaintiffs' counsel, contending that the parties who were not served with the notice are adverse, move to dismiss the appeal for that reason.

By the decree Alfred C. Schmitt and the other parties who were made defendants in the cross-bill were held to be jointly and severally liable for the payment of the promissory note which was executed by the plaintiffs to the bank. A reversal or modification of that decree would be an advantage to the parties who were not served with the notice of the appeal, and for that reason they are not adverse. Lane v. Wentworth, 69 Or. 242, 133 Pac. 348, 138 Pac. 468; United States National Bank v. Shefler, 77 Or. 579, 143 Pac. 51, 152 Pac. 234.

The motion to dismiss the appeal is denied.

(82 Or. 80)

YAMHILL SANITARY PUBLIC MARKET CO. v. STROWBRIDGE et al.

(Supreme Court of Oregon. Nov. 28, 1916.)

APPEAL AND ERROR ⊂⊃627(2)—ABSTRACT OF RECORD—FAILURE TO FILE.

Where no abstract was filed within 20 days after the transcript was filed as required by Supreme Court rule 6 (56 Or. 616, 117 Pac. ix), and no reason given for the neglect, an appeal will be dismissed upon motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744–2747, 2749, 3126; Dec. Dig. ⊂⊃627(2).]

Appeal from Circuit Court, Multnomah County; George N. Davis, Judge.

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Action by the Yamhill Sanitary Public Market Company, a corporation, against Joseph Strowbridge and the Strowbridge Estate Company, a corporation. Judgment for defendants, and plaintiff appeals. Appeal dismissed.

H. W. Strong, of Portland, for the motion. Guy C. H. Corliss, of Portland, opposed.

PER CURIAM. An appeal from a judgment rendered in this action against the plaintiff, a corporation, for the costs and disbursements was taken and perfected by it. The transcript was filed with our clerk July 8, 1916, but no abstract has been filed as required by rule 6 of this court (56 Or. 616, 117 Pac. ix). The defendants' counsel, as soon as they learned of the default, moved upon notice to dismiss the appeal on account of that failure. No reason has been assigned or excuse given for the neglect.

Upon the authority of Swanson v. Leavens, 26 Or. 561, 40 Pac. 230, Close v. Close, 28 Or. 108, 42 Pac. 128, and Morrison v. Hall, 55 Or. 243, 104 Pac. 963, the appeal is dismissed.

(85 Or. 213)

FARRELL v. DAVIS et al.*

(Supreme Court of Oregon. Nov. 28, 1916.)

1. CORPORATIONS ⟸99(2)—ISSUE OF STOCK—STATUTE—"ACTUAL FRAUD"—"PROPERTY."
Under L. O. L. § 6696, providing that in the absence of actual fraud the judgment of the directors of a corporation as to the value of property for which they issue stock, shall be conclusive, "actual or positive fraud" consisting in circumventing, cheating, or deceiving a person to his injury, by any cunning, deception, or artifice, and a contract right being a chose in action, and therefore "property," where directors issued stock for an exclusive right to market the products of another corporation for a term of years, which all concerned believed to be a valuable contract, the fact that the contract turned out to be of little or no value, not being sufficient to show fraud on the part of the directors, their judgment will not be revised, or a subsequent purchaser of the stock be held liable as for unpaid subscriptions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 445; Dec. Dig. ⟸99(2).

For other definitions, see Words and Phrases, First and Second Series, Actual Fraud; Property.]

2. CORPORATIONS ⟸232(3)—STOCK ISSUED AT OVERVALUATION—RIGHT OF CREDITOR.
As a general rule, a corporate creditor cannot complain where, at the time he contracted with the company, he knew the stock had been issued for property taken at an overvaluation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 884; Dec. Dig. ⟸232(3).]

Department 2. Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Suit by W. E. Farrell, as assignee of the Hygienic Mattress Company, against A. E. Davis and others. From a decree against named defendant, he appeals. Reversed and dismissed.

This suit is brought by W. E. Farrell, as assignee of the Hygienic Mattress Company, against A. E. Davis, H. H. McCarthy, R. E. Norton, G. A. Emery, and S. B. Hendee, to recover from them as stockholders in the insolvent mattress company for alleged unpaid stock subscriptions. From a decree against defendant A. E. Davis for the sum of $8,945.88, he appeals.

It is alleged in the complaint that defendants H. H. McCarthy and R. E. Norton are not within the jurisdiction of the courts of Oregon. The suit was dismissed as to G. A. Emery as not commenced within the time limited by the Code. Plaintiff avers that the issuance of $40,000 of the capital stock of the insolvent corporation to H. H. McCarthy, R. E. Norton, and G. A. Emery was without consideration, in that no money nor anything else of value ever passed into the treasury of the bankrupt company therefor, and that the present and past holders of this stock should be required to pay to the assignee sufficient money to satisfy the debts of the corporation. The Oregon Pine Needle Fiber Company, a corporation, obtained a patented machine for the manufacture of pine needles into fiber for mattresses. On October 12, 1904, having recently constructed a building in Union county, Or., to be used for such manufacturing purposes, it contemplated the installation of additional machinery to be used in the business, which was somewhat in its infancy, and, in order to pave the way to interest capital in the enterprise to a sufficient extent to better insure the success of the undertaking, entered into a contract with Dr. M. W. Bruner and H. H. McCarthy, according to the terms of which the latter men agreed to buy and were given the exclusive right to market the products of the fiber company outside of a local radius of 100 miles for the term of five years from that date with the privilege of extending the contract for an additional five years if desired by the purchasers. The contract net price agreed to be paid for the fiber was ten cents a pound, and $4 a pound, apothecary's weight, for all pine needle oil. The price of the insect powder was to be decided upon thereafter. These prices were to be for goods delivered at Chicago or St. Louis and at all points in the United States west thereof, the fiber to be delivered in car lots of a minimum weight of 20,000 pounds, and the freight to be paid by Bruner and McCarthy and deducted from the purchase price. It was mutually agreed that, in case the Pine Needle Company should build other factories for the manufacture of pine needle products during the continuance of the contract, the other parties should have the option of taking the entire product under the same terms. In December, 1904, the Hygienic Mattress Company was organized for the sole purpose of taking over this contract from the individuals

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then interested in it, and manufacturing and marketing the products of the fiber company. The mattress company was organized with 500 shares of stock each having a par value of $100. Mr. A. E. Davis, the defendant-appellant, took 100 shares for which he paid $10,000 in cash. Ninety-eight of these shares were issued to Davis and one each to A. E. Gebhardt and J. C. Flanders for the purpose of qualifying them as directors of the mattress company. The other 400 shares were issued to the defendants McCarthy, Emery, and Norton in exchange for their rights under the contract with the Oregon Pine Needle Fiber Company. This latter company ratified the transfer to the Hygienic Mattress Company and agreed to accept this corporation as a substitute for the individuals on the contract. Davis, McCarthy, Norton, Gebhardt, and Flanders were elected directors of the mattress company. Davis was elected president and manager at a salary of $500 a month and resigned his position in the Portland Flouring Mills, where he was next to the head of the concern, to engage in the pine needle fiber business. McCarthy was chosen vice president, and Norton, secretary. An assessment of 100 per cent. was levied upon the stock subscriptions and an agreement made by which McCarthy's shares for $10,000, and those of Norton for $20,000 were declared to be fully paid by the transfer of the contract. Subsequently Davis purchased the 100 shares of stock held by Norton for which he paid $10,000 in cash. These 200 shares for which he paid $20,000 cash were Davis' entire personal holdings, but for voting purposes only and as a protection to him he was assigned 51 shares of the 100 owned by McCarthy. The latter assigned to him a block of stock in the Oregon Pine Needle Fiber Company, and Davis attended its annual meeting and asked the fiber company to take the mattress company as party of the second part in the contract of October 12, 1904, instead of Bruner and McCarthy. The mattress company continued in business about 16 months and manufactured a good mattress. In April, 1906, it made an assignment for the benefit of creditors under the state law. On July 9, 1906, the plaintiff was appointed assignee for creditors. Mr. Davis put in a claim of $6,116.40 to the assignee for salary and disbursements made in behalf of the corporation, which was contested by the other creditors and disallowed by the assignee. After a full hearing upon all the evidence, it was held by Judge Cleland of the circuit court that Mr. Davis was entitled to this amount. It appears that this finding was ignored in the present case. The defendant Davis has interposed a plea of res adjudicata and has set off a claim for salary against the mattress company the amount of which claim is disputed.

C. E. S. Wood and Prescott W. Cookingham, both of Portland (Wood, Montague & Hunt, of Portland, on the brief), for appellant. Turner Oliver, of La Grande, and Frank S. Grant, of Portland, for respondent.

BEAN, J. (after stating the facts as above). [1] This suit was instituted in 1908. The theory of the complaint is that the $40,000 worth of stock issued in exchange for the contract with the fiber company was entirely without consideration, for the reason that the contract was not property within the meaning of section 6696, L. O. L. The suit is defended upon the theory that the stock subscribed was fully paid up by the assignment in good faith to the mattress company of a valuable contract right which would be considered as property under the section of the statute referred to which provides as follows:

"All sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder or person from whom the same is purchased, and subject such purchaser to the payment of any unpaid balance due, or to become due, on such stock; but if the sale be voluntary, the seller is still liable to existing creditors for the amount of such balance, unless the same be duly paid by such purchaser; provided, that any corporation formed under the laws of this state may purchase real or personal property, including the stock of any other corporation, and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be fully paid stock and not liable to any assessment; and in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property purchased shall be conclusive; and in all statements or reports of the corporation to be published or filed, stock so issued shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported in this respect according to the fact."

All that part of the section commencing with the word "provided" was added thereto by an amendment in 1903. If there was no actual fraud in the transaction of issuing the stock for the contract, we are precluded by the legislative mandate from questioning the judgment of the directors of the mattress company as to the value of the contract. The evidence shows that the machine for the manufacturing of fiber from pine needles was patented by a man at Grants Pass, Or., and that the Oregon Pine Needle Fiber Company had obtained the patent right. There appears to have been but little, if any, question in the minds of all the interested parties at the time but that the manufacturing of the fiber by the fiber company and the manufacturing and sale of mattresses by the mattress company would be a very profitable business and that the obtainment of the ten years' contract of the fiber plants was a very valuable right. McCarthy was vice president of the fiber company and in connection with Bruner was apparently armed with this chose in action in order to interest other capitalists in the manufacturing of mattresses and thereby make a demand and sale of the output of their factory. About November 5, 1904, Davis was presented with a prospec-

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tus showing a detailed statement of the estimated cost of operating and the profits of the Oregon Pine Needle Fiber Company's plant for a run of ten months taking the prices named in the contract as a basis and leaving a net balance of profit of $91,597.40. Emphasis was placed upon the fact that "this is the only pine needle fiber machine in the world and the only process in operation" and covered by a patent. For the company to be organized for manufacturing the fiber into mattresses and selling the products, oil, etc., an estimate was made of the cost and selling price for the same length of time, and after deducting all expenses a net profit was estimated at $140,400. All appear to have had confidence in the success of the venture, to have believed that the advantage of the contract would work out a good profit, and that it was valuable. There was no actual fraud on the part of the directors in estimating the value of the rights obtained under the contract. Defendant Davis proved his good faith in the transaction by putting $10,000 into the treasury of the mattress company for a one-fifth interest in the contract right. In order to do this he relinquished an established position with a well-known, reliable concern to devote his entire time to promote the success of the enterprise, and later he paid $10,000 more for that amount of the capital stock of the mattress company.

"Actual or positive fraud" has been said to consist in circumventing, cheating, or deceiving a person to his injury, by any cunning, deception, or artifice. 20 Cyc. 8. A contract right being a chose in action comes within the legal understanding of "property." 32 Cyc. 654. Thus a contractual license to mine, revocable only by consent or condition broken, is property though coupled with an obligation to continue the work, and may be accepted by a corporation in payment of a subscription to its stock. Shepard v. Drake, 61 Mo. App. 134. See, also, Beyrich v. Liebler, 3 N. Y. Supp. 293.[1] The same principles govern the payment for stock by a contract right as control the analogous line of cases where stock is paid for by other intangible rights such as patent rights. Rich v. Bank, 7 Neb. 201, 29 Am. Rep. 382. It is said in 4 Thomp. Corp. § 3953:

"* * * An agreement between the owner of a patent right and a third party that the latter should form a corporation to work the patent and should issue to the former a certain number of full paid shares of the capital stock of the corporation for the transfer of the patent right, there being no evidence of fraud or of a purpose to impose upon the public, has been held a valid agreement."

The fact that it subsequently turned out that this contract had little or no value is not of itself sufficient to show fraud on the part of the directors. American Tube & Iron Co. v. Hays, 165 Pa. 489, 30 Atl. 936; Young v. Erie Iron Co., 65 Mich. 111, 122, 31 N. W. 814.

S. B. Hendee, a stockholder of the Oregon Pine Needle Fiber Company, appears to have assisted H. H. McCarthy in promoting the enterprise, and everything seems to have been done in the interests of that company as well as the mattress company. On November 5, 1904, Hendee wrote Davis, in part, as follows:

"In presenting the within manufacturing enterprise, I would respectfully call your attention to the truthfulness of the statements that can be verified and indorsed by your family physician, also the point that the sale of every article assists in retaining as well as restoring to health the purchaser, besides providing the owners of mill and factory a handsome profit."

From all indications these corporations were closely allied, and it is not easy to believe that the officers of the pine needle company did not know all about the arrangement as to the issuance of the stock for the contract. In fact, the circumstances show that they were aware of this.

[2] The claims of the pine needle company for fiber, etc., which have been assigned to an individual, constitute the principal part of the indebtedness of the mattress company for which this suit is brought. As a general rule, a corporate creditor cannot complain where, at the time when he contracted with the company, he knew that the stock had been issued for property taken at an overvaluation. 1 Cook on Corp. § 46, p. 203, citing Bank of Fort Madison v. Alden, 129 U. S. 372, 9 Sup. Ct. 332, 32 L. Ed. 725; McDowell v. Lindsay, 213 Pa. 591, 63 Atl. 130; Bonet, etc., Co. v. Central, etc., Co., 153 Mo. App. 185, 132 S. W. 270; Davies v. Ball, 64 Wash. 292, 116 Pac. 833, Ann. Cas. 1914B, 750; Johnson v. Tennessee Oil Co., 74 N. J. Eq. 32, 69 Atl. 788; Bank v. Am., etc., Co., 69 N. J. Eq. 326, 60 Atl. 54; Lea v. Iron, etc., Co., 147 Ala. 421, 42 South. 415, 8 L. R. A. (N. S.) 279, 119 Am. St. Rep. 93.

The Oregon Pine Needle Fiber Company, being the father of the whole enterprise and instrumental in interesting Davis to the extent of paying $10,000 to the mattress company for stock, and afterwards $10,000 more to McCarthy, the vice president of the Oregon Pine Needle Fiber Company for his stock in that company, is in a poor position to insist that Davis bear another large share of the burden or to assert that the contract executed by it and sent out into the market to raise funds for the enterprise in which that company was vitally interested was then of no value. There is no actual fraud shown in the issuance of the stock afterwards purchased by Davis. Under our statute the court cannot readjust the matter by revising the judgment of the directors of the mattress company in fixing the value of the then much prized monopoly contract for the exclusive right to market the products of the

[1] Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 50 Hun, 606.

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Oregon Pine Needle Fiber Company's factories for the period of ten years.

The decree of the lower court will therefore be reversed, and the suit dismissed.

McBRIDE and BENSON, JJ., concur.

(85 Or. 444)

STENNICK v. J. K. LUMBER CO. et al.

(Supreme Court of Oregon. Nov. 28, 1916.)

1. LOGS AND LOGGING ⟸3(15) — SALES OF TIMBER—RESCISSION—EVIDENCE.

In a suit to rescind a contract for the sale of timber, evidence *held* insufficient to show that defendants intentionally misrepresented the amount of timber on the tracts involved.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 12; Dec. Dig. ⟸3(15).]

2. LOGS AND LOGGING ⟸3(4)—SALE OF TIMBER — MISREPRESENTATIONS — EFFECT OF WRITING.

That an alleged misrepresentation as to the quantity of timber involved in a contract was written into the contract does not add to its efficacy or make it fraudulent.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 8; Dec. Dig. ⟸3(4); Contracts, Cent. Dig. § 890.]

3. CONTRACTS ⟸99(3)—RESCISSION—FRAUD—EVIDENCE.

Where it is sought to set aside a contract for fraud, the evidence should be clear and satisfactory; it being a maxim of law that fraud is never presumed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 449–453, 1199; Dec. Dig. ⟸99(3).]

4. LOGS AND LOGGING ⟸3(4) — SALES OF TIMBER—VALIDITY OF CONTRACT—FRAUD.

In order to have a rescission of a sale of timber for fraud, plaintiff must show that defendants made a material representation; that it was false; that when they made it they either knew it was false or made it recklessly without knowledge of its truth, as a positive assertion; that it was made with intent that it should be acted upon by the opposite party; that such party did act in reliance upon it and suffered injury.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 8; Dec. Dig. ⟸3(4).]

5. LOGS AND LOGGING ⟸3(15)—SALES OF TIMBER — RESCISSION OF CONTRACT — EVIDENCE.

In a suit to rescind a sale of timber, evidence *held* to show that representations made by defendants as to the quantity of timber were in fact false.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 12; Dec. Dig. ⟸3(15).]

6. LOGS AND LOGGING ⟸3(15)—SALES OF TIMBER — RESCISSION OF CONTRACT — EVIDENCE.

In a suit to set aside a sale of timber for fraud, evidence *held* insufficient to show that defendants promised the other contracting party a quarter interest in a corporation to be formed.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 12; Dec. Dig. ⟸3(15).]

7. APPEAL AND ERROR ⟸193(2)—REVIEW—SCOPE AND EXTENT — MISJOINDER OF CAUSES.

Where no demurrer for misjoinder of causes was interposed, and a motion to compel plaintiff to elect between causes was withdrawn or overruled by consent, the Supreme Court will, notwithstanding the contention that a cause of action for rescission and one to set aside a declaration of forfeiture cannot be joined, consider both causes on the merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1227; Dec. Dig. ⟸193(2).]

8. CONTRACTS ⟸318 — CONSTRUCTION — FORFEITURE.

Courts are reluctant to enforce a forfeiture, and no language will be construed to work one where a contrary intent can be derived from a consideration of the whole instrument or from the circumstances attending its execution.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1508–1527; Dec. Dig. ⟸318.]

9. CONTRACTS ⟸318—"FORFEITURE"—"PENALTY"—DISTINCTION.

In contracts and in civil matters generally the term "penalty" imports a clause by which the obligor agrees to pay a certain sum of money if he shall fail to fulfill the contract; while "forfeiture" is a broader term, including not only the payment of money, but the loss of property or of some right by reason of failure or neglect of a party to perform a contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1508–1527; Dec. Dig. ⟸318.

For other definitions, see Words and Phrases, First and Second Series, Forfeiture; Penalty.]

10. LOGS AND LOGGING ⟸3(14)—CONTRACTS —FORFEITURE—ENFORCEMENT.

Where a contract relating to timber provides that in case of default by one of the parties his property and interest in the contract shall forthwith become the property of defendants who hold the legal title to the land, if the language of the agreement shows an intent of the parties to prescribe a forfeiture, and there has been a default, unless it is occasioned by the inequitable conduct of the defendants, the forfeiture must be enforced.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 11; Dec. Dig. ⟸3(14); Contracts, Cent. Dig. § 890.]

11. CONTRACTS ⟸272 — PERFORMANCE — FORFEITURE FOR BREACH.

Declaring a forfeiture for breach of conditions of a contract is not a rescission of the contract, but the assertion of a right growing out of it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1192, 1193; Dec. Dig. ⟸272.]

In Banc. Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Bill in equity by Parker Stennick, trustee in bankruptcy for the E. H. Dodge Lumber Company and others, against the J. K. Lumber Company and others. From a decree for defendants, plaintiff appeals. Affirmed.

This is a suit to rescind a contract for the sale of timber, situated in the state of Washington, on the ground of fraudulent representations as to the quantity of such timber and other alleged false representations materially affecting the contract. The pleadings independent of the exhibits would occupy 130 pages of the Oregon Reports, and the testimony taken on the trial contains over 3,000 pages of typewritten legal cap. The following excerpt from the opinion of the learned circuit judge who tried the case below indicates in a condensed form the various transactions between the parties up to the time this suit was begun:

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"For some time before January 27, 1913, E. H. Dodge, Percy Allen, Fred A. Kribs, W. N. Jones, and F. A. Brewer conferred and negotiated concerning the bonding of timber interests in Skamania county, Wash., and the logging and manufacture of timber. Fred A. Kribs was interested with the Pillsburys of Minnesota, in a large tract of timber in that section. The Pillsburys owned a three-quarters interest and Kribs a quarter interest therein. W. N. Jones had a small tract of timber in that locality, and E. H. Dodge was the owner of a considerable tract of timber adjacent to the Pillsbury and Kribs tract. F. A. Brewer was a broker of Chicago, and was engaged in promoting the bonding of timber lands. As a result of those negotiations it was agreed that the timber lands owned by F. A. Kribs and Pillsburys, E. H. Dodge, and W. N. Jones should be transferred to a holding company and bonded in the sum of $900,000, and under an agreement for the logging and manufacture of the timber Kribs and Jones organized and incorporated a holding company known as the J. K. Lumber Company, and on January 27, 1913, the said J. K. Lumber Company, the Hamilton Creek Timber Company, the Rainier Lumber & Shingle Company, and E. H. Dodge entered into a contract in writing to effectuate this enterprise. By this contract it was agreed, among other things, that the J. K. Lumber Company had or would acquire title to about 8,000 acres of timber land in townships 2 and 3 north, range 7 east, in Skamania county, Wash., on which there was 441,609,000 feet of timber, and that it would use its best endeavors forthwith to acquire title to approximately 75,000,000 feet of additional timber in township 3 north, 7 east, in said county, that might be agreed upon by the parties to the contract. It was further agreed that it would mortgage the property covered by the contract as security for an issue of bonds in the sum of $900,000. Said holding company agreed that it would use and apply out of the proceeds of said bonds such sums as might be necessary, not exceeding $215,000, to construct two railroads, one up Hamilton creek to about the center of section 36, the other up Rock creek about 2 miles from a connection with the S. P. & S. railroad; to construct and equip a sawmill on section 35, with an annual capacity of 20,000,000 feet of lumber; to purchase railroad equipment for both roads; and to construct and equip logging camps sufficient to handle 300,000 feet of logs per day. The construction and equipment on Hamilton creek were to be completed within six months after the fund of $215,000 was available, and the construction and equipment on Rock creek were to be completed within one year after the completion of the construction on Hamilton creek. Said holding company agreed to pay over moneys from time to time as they should be needed for construction and equipment, out of the proceeds of the sale of the said bonds, upon receipt of bills therefor and certified accounts of expenditures verified and certified to be correct by the president or treasurer of the Rainier Lumber & Shingle Company. Dodge and his corporations agreed to repay to the holding company the difference between $155,000, the price paid for the Dodge timber, and the amount actually expended as above provided, in ten equal annual payments, with interest at 6 per cent. per annum. The holding company agreed to sell, and Dodge and his corporations to buy, 658,895,000 feet of timber located on the land then owned or to be acquired by the holding company, at the total agreed price of $1,383,679.50, with interest from January 1, 1913, at the price of $2.10 per thousand for the year 1913, and increasing 6 per cent. each year thereafter. The payments were to be made to the trustees under the trust deed until the bonds were paid, and thereafter to the holding company. Dodge and his corporations agreed to cut not less than 50,000,000 feet during each calendar year, or, failing in this, to pay to the amount of 50,000,000 feet.

"Dodge and his corporations agreed that any money derived from the logging and manufacturing of timber after the stumpage price had been paid should be used: (1) To provide a working capital; (2) for the extension of logging roads and purchase of equipment, together with other equipment to replace such as would be worn out or destroyed; (3) to make annual payments on the difference in the cost of construction aforesaid, and the price paid by the holding company for the 93,400,000 feet of timber purchased from Dodge; and (4) that the money should be paid in advance to the holding company to be applied by said company in the redemption and retirement of the bonds. And it was agreed that all profits derived from the operation of said timber should be devoted to said purpose, and that no money derived from the logging and manufacturing of said timber should be used for any other purpose. A checking and settlement was to be made on the 15th day of December of each year. Dodge and his corporations agreed that, so far as practicable, they would first cut the burned timber on Rock creek in preference to the green timber, and they agreed that, in the event of their failure to fully comply with all the terms, conditions, and provisions of said agreement, the mill property of the Rainier Lumber & Shingle Company, at Rainier, Or., the mill situated on said section 35, and all of the railroad equipment, sawmill, and logging equipment purchased for the logging of said timber, either with funds of the holding company, or with funds of Dodge and his corporations, should forthwith become the property of the holding company, and might be used by it for the logging and manufacture of the said timber or any other timber, and they agreed forthwith in case of such default to transfer and convey all of such mill property by good and sufficient deeds of conveyance, and thereby authorized the holding company, in case of such default, to take possession of said mill property and equipment and use and employ the same. Both parties to said agreement agreed to guarantee each of the bonds to be issued, and to indorse such guaranty on each bond.

"On the same day, January 27, 1913, a supplemental agreement was executed for the purpose of more clearly defining the rights and obligations of the parties to the original agreement; but it will be unnecessary to consider the provisions of this later agreement at this point. And on the 26th day of March, 1913, the parties entered into another agreement modifying section 12 of the original agreement in certain particulars not essential to the present consideration. On October 3, 1913, an agreement was closed between the parties whereby Dodge and his corporations, in consideration of obtaining the signature of Fred A. Kribs and W. N. Jones to their note for $50,000, assigned to the said Kribs and Jones as collateral security 710 shares of the capital stock of the E. H. Dodge Lumber Company, and agreed upon reasonable demand to confer upon said Kribs and Jones the voting power of said stock, and also the voting power of the stock constituting a controlling interest in the Hamilton Creek Timber Company, the Rainier Lumber & Shingle Company, and the Patterson Lumber Company. And they also conveyed to said Kribs and Jones as collateral security their interest in said original and collateral contracts dated January 27, 1913. This agreement contained other conditions and provisions to secure said Kribs and Jones for extending their credit to the second parties.

"On February 28, 1914, the holding company served upon Dodge and his corporations a written notice of forfeiture, asserting that they had made default in certain essential features of their contract particularly enumerated

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and designated in the notice, and notified them that said holding company elected to treat said contract as violated in certain fundamental features, and further notified them that, unless they made payment of $6,000 and interest within 30 days from the date of the notice, and within said period proceed to carry out the other provisions of the contract concerning which they were in default, by entering upon and pushing to completion the Hamilton creek railroad, and by completing the Rock creek railroad by January 1, 1915, and by entering upon said logging operations as required by said contract, it would treat their rights under the contract as forfeited. And on the 12th day of May, 1914, the holding company executed a formal written declaration of forfeiture which contained an option available until January 1, 1915, to set aside said forfeiture and reinstate said contract upon furnishing said company with satisfactory evidence of financial responsibility to carry out said contract in strict accordance with its terms. Pursuant to this declaration of forfeiture the holding company took over the interest of the second parties and is now operating the logging business on its own account. When the forfeiture was declared the railroad up Hamilton creek was completed for a distance of more than six miles. The construction of the Rock creek railroad and the sawmill on section 35 was not begun. The sum of $215,000 provided by the contract for these purposes had been paid over to Dodge and his corporations, but logging operations had not begun."

The material allegations upon which plaintiff bases his claim for relief herein may be briefly summarized as follows: There is first a showing that plaintiff, Stennick, is the trustee in bankruptcy of the E. H. Dodge Lumber Company, the Hamilton Creek Timber Company, the Hamilton Creek Railroad Company, and of E. H. Dodge; that the three corporations mentioned were organized under the laws of the state of Washington; that the J. K. Lumber Company is an Oregon corporation; that Kribs and Jones are large stockholders therein, Kribs being president and Jones treasurer, and that these two organized and own and control the corporation; that in 1912 Dodge owned a tract of timber land in Skamania county, Wash., upon which was 93,400,000 feet of standing timber for which Dodge had paid $155,000, and which was worth $250,000; that in 1912 Kribs and Jones owned or were in process of acquiring a tract of between 8,000 and 9,000 acres of land adjacent to the land of Dodge. Then follows an allegation that in 1912 Jones and Kribs conspired in a fraudulent plan to take Dodge's land away from him by a fraudulent contract; the alleged fraudulent conspiracy being that they would by means of such contract induce Dodge to build a logging road to cost several hundred thousand dollars into the timber land owned by them, said contract to contain a forfeiture clause rendering it possible for Kribs and Jones to forfeit and take over said railroad at any time there should be a default in the essential conditions of said contract, which conditions could never be performed because of a shortage of the timber on the Jones and Kribs land below the amount represented by them as an inducement to Dodge to enter into the contract. After fully setting forth the nature and extent of the conspiracy, the complaint charges the following alleged false representations: That Jones and Kribs would give Dodge and his corporation a quarter interest in a holding corporation which they proposed to organize; that they falsely represented and warranted that all the timber land would be included in the holdings of the new corporation, including Dodge's holdings and 75,000,000 feet which Kribs and Jones agreed to use their best efforts to acquire, and that Kribs and Jones' holdings contained a total stumpage of 658,895,000 feet, which amount they agreed to sell to Dodge and his corporation for the sum of $1,383,679.50, knowing at the time that there was a shortage in said timber of from 20 to 50 per cent. below the quantity represented and warranted; that in order to facilitate the fraud and to successfully sell bonds to be issued in the sum of $900,000 Kribs and Jones made use of false cruises estimated prior to the time of the contract which grossly exaggerated the quantity of timber upon said lands, and which represented the total amount of stumpage to be 658,895,000 feet, whereas they well knew that the amount of timber actually on said land was from 20 to 50 per cent. less than the amount represented; that after these representations had been made, and Dodge had thereby been fraudulently inveigled into the scheme, a contract was entered into between a corporation which had been formed by Kribs and Jones and called the J. K. Lumber Company and Dodge and his corporations, which contract is annexed to the complaint, a brief synopsis thereof being contained in the excerpt from the opinion of the circuit judge above quoted; that the contract provided, among other things, that the sum of $215,000 arising from the sale of bonds should be turned over to the Dodge interests on or before May 1, 1913, to be used in building and equipping the road, but that no money was actually turned over until June 24, 1913, and that the Dodge interests, having in reliance upon the contract begun work on April 1, 1913, found it necessary to advance $40,000 in order to carry on the construction of the road; that, owing to the delay of defendants in furnishing the money in accordance with the contract, the work was greatly hindered and carried over into a more inclement season of the year; that, when the defendants began to furnish money, it was not furnished promptly, thereby greatly retarding and delaying the Dodge interests in the work of construction, whereas, if the $215,000 had been furnished on May 1, 1913, the road could have been commenced and completed before the winter season had commenced at much less cost; and that thereby the cost of building said road was increased to $370,464.31. There are other allegations of fraud

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and failure of defendants to perform their agreements, but it is impracticable to state them in full in this opinion.

There is another cause of suit stated which, in effect, reiterates the charge of conspiracy, false representations, breach of warranty, and proceeds upon the theory that defendants have themselves breached the contract and destroyed it by failure to perform their part. The further and separate cause of suit repeats all the charges of conspiracy and false representations contained in the first cause of suit, recites the bankruptcy of Dodge and his corporations, states that the only asset of value in the hands of plaintiff is the Rainier lumber mill, worth from $40,000 to $50,000, alleges liabilities on the part of Dodge and his corporations amounting to about $500,000, and declares that they were solvent when the contract with defendants was entered into; that the corporate property was then worth $250,000, and that the value of their assets was correspondingly diminished by entering into the contract in question; that in attempting to build the railroad and in purchasing logs for their mill during the summer of 1913, and while in good faith attempting to carry out the contract with defendants E. H. Dodge and his corporations became so involved that they were petitioned into bankruptcy; that the contract with defendants contained a forfeiture clause providing that upon a failure of the Dodge interests and the Hamilton Creek Timber Company to conform to the contract made with the defendants the defendants could forfeit the right of the Dodge interests in the Rainier Lumber & Shingle Company and in the railroad equipment, sawmill, and logging equipment in Skamania county; that early in 1914 the Dodge interests had constructed about seven miles of railroad into the timber lands mentioned in said contract; that the value of said railroad equipment amounted to $374,461.31; and that the defendants, disregarding their own fraud in inveigling the Dodge interests into the contract, ignoring the fact that they had so misstated the quantity of timber growing upon the land described in the contract to such an extent as to make it impossible for the Dodge interests to comply therewith, and had delayed the construction of the road, and realizing that the Dodge interests must inevitably go into bankruptcy, and in order to give their fraud a color of legal right, and thereby convert said property to their own use, in fraud of other creditors, sent a notice, dated February 27, 1914, to the effect that, unless the Dodge interests carried out their contract with defendants, defendants would declare a forfeiture within 30 days. The complaint then recites that after sending said notice a meeting of the creditors of the bankrupts was called, and it was agreed between them and defendants that defendants would allow the original contract to be carried out by a committee composed of representatives of the creditors, of the defendants, and of the Dodge interests, and that a manager should be selected for that purpose after the Dodge interests should have secured the assent of 95 per cent. of the creditors thereto; that thereupon Dodge in person carried out the agreement by securing the assent of approximately 95 per cent. of the creditors, and the Dodge interests made the necessary financial arrangements to carry out said agreement, the said interests and the said creditors being wholly ignorant of the frauds and false representations practiced upon Dodge and his corporations by the defendants; that thereupon the Dodge interests contracted with Cox and Armstrong to begin logging operations, when the defendants, disregarding their agreement, declared a forfeiture and took possession of the property. It is further alleged that the forfeiture was illegal and void both on account of the fraudulent representations inducing the contract and because of the violation by defendants of the subsequent agreement with the Dodge interests and the creditors; that it was in fraud of creditors, and merely a pretext to enable defendants to get all the assets of Dodge and his corporations in their own hands, and to make it appear that they were justified in taking possession. In addition to the prayer in the first cause of suit there is an additional prayer that a trust be impressed upon the property for the benefit of all the creditors, and for general relief.

Thomas Mannix and E. E. Coovert, both of Portland, for appellant. A. E. Clark and Guy C. H. Corliss, both of Portland (Clark, Skulason & Clark, and W. S. Nash, all of Portland, on the brief), for respondents.

McBRIDE, J. (after stating the facts as above). [1] This suit has the distinction of containing the most extensive record in the matter of pleadings, testimony, and briefs of any case ever brought to this court. The first cause of suit is for the rescission of the contract between Dodge and the defendants upon the ground of false representations by defendants whereby Dodge and his corporations were induced to enter into it. Conceding, without deciding, that the trustee in bankruptcy is authorized to bring a suit to set aside a contract on the ground of fraud, we will consider the question as to whether the allegations of fraud are borne out by the testimony.

The principal misrepresentation complained of is that defendants falsely represented to Dodge that there was 658,895,000 feet of timber upon the land. No attempt was made by plaintiff upon the trial to establish the fact that there was any misrepresentation as to 48,886,000 feet contained in section 36, nor in the Dodge tract of 93,400,000 feet or in the land to be subsequently acquired, which

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is said to contain 75,000,000 feet. Confessedly all these figures are correct, and the controversy centers around the Kribs tract, upon which the contract states there is 441,609,000 feet, and which the plaintiff claims actually contained something like 100,000,000 feet less. To make clear the exact situation at the time the contract was entered into it is necessary to recapitulate the circumstances and negotiations of the parties leading up to its execution. The pooling of the Dodge, Jones, and Kribs interests was first mooted late in the summer or early in the fall of 1912. At that time Dodge was the owner of a tract in Skamania county consisting of about 1,520 acres of timber land and tributary to Hamilton creek as the route of which a logging railroad could be built to convey it to market. There was also school section 36, which Dodge had caused to be cruised, and which he contemplated purchasing, being estimated by his cruisers to contain 48,886,000 feet. Jones and Kribs had adjoining these tracts and tributary to Rock creek as a means of access by a logging road 8,200 acres upon which their original cruises showed 441,609,000 feet. Of the amount in the Kribs tract Jones had only a one-third interest in 260 acres; the rest of the land being owned by Kribs and his associates, but managed by Kribs individually. Dodge also owned two sawmills at Rainier, Or., which, while going concerns, do not appear to have been doing a profitable business.

The matter was discussed between the parties for some time, and a tentative oral understanding arrived at, and pending the actual execution of the contract Dodge sent cruisers to examine and report upon the Kribs tract, who actually cruised more than three-fourths of it before they were driven out by the winter snow. Dodge had their reports before he entered into the contract, and it is apparent that so far as the cruise had gone it was satisfactory and coincided so nearly with the estimates of Kribs' cruisers that he was content to accept it. Cox, one of his cruisers who had cruised 2,807 acres, was put upon the stand, and his testimony indicates a substantial coincidence between his cruises and the summary of all the cruises furnished Dodge by Kribs and Jones. Porden, the other cruiser, claimed that he had destroyed the notes to his cruise after furnishing a copy to Dodge, but that copy is not produced by plaintiff, and the presumption follows that it would, if produced, have been unfavorable to plaintiff's contention. In the cruise made by Cox he testified that he kept the dead timber separate from the other because he considered estimates upon that class of timber were extremely uncertain, and that the only reliable test was cutting it out, but that he did not include any dead timber in his estimates which he did not consider merchantable. There was a considerable quantity of dead timber shown by the Cox Cruise. Porden also testifies that the dead timber cruised by him was separately itemized, so that it may safely be assumed that as to the 6,000 and odd acres cruised by Cox and Porden Dodge was fairly well informed as to its quality and quantity, and that there was, in fact, no material variance in the quantity of timber shown in the cruise book furnished him by Kribs and Jones from that found by Cox and Porden. So that as to the 6,247.9 acres cruised by Cox and Porden Dodge must be presumed to have acted upon the independent examination made for him by these two cruisers and not from representations made by defendants. This leaves 1,953 acres uncruised by Dodge before he entered into the contract. It is true that Cox advised him that the cruise of the dead timber might vary from his estimate and run either a little above or a little below it, with a probability that it would run below, but one fact stands out in bold relief, and that is that he was informed that there was a quantity of dead timber upon the tract, and that its value was to some extent uncertain. In fact, any cruise except a tree cruise is of necessity a mere estimate as Dodge must have known. The custom in these cruises, and generally, is to go twice through each 40 acres of a quarter section, carefully noting the size, height, and soundness and apparent merchantability of the timber perceivable along the line followed, and to assume from the data thus gathered the average quantity of timber upon the tract. This average is an estimate. The lumber contents of the trees examined and their soundness and quality are mere estimates which may exceed or fall short upon an actual test in cutting or by an examination of each tree upon the tract, which latter would have been impracticable under the circumstances. There was a cruise book of the whole tract containing a summary of several cruises theretofore made by Kribs' cruisers which was given to Dodge before the contract was executed. From these cruises was derived the estimate of 441,000,000 feet which was placed in the contract. Both the defendants and Dodge knew that these cruises were merely estimates, and the testimony does not, in our opinion, disclose that there was any intention on the part of the defendants to place an extravagant estimate upon the amount of timber included in the contract. The plan was to transfer all the timber to the J. K. Lumber Company as a holding corporation, which should bond it for $900,000, which bonds Jones, Kribs, and Dodge were to underwrite. It was to the interest of all parties that every foot of merchantable timber on all of the tracts of Kribs and Jones and Dodge should appear in the contract as a basis for the proposed bond issue, and it was not to the ultimate advantage of any of the parties indorsing the proposed bonds that any extravagant or mislead-

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ing estimate should appear therein. The safety of the indorsers lay in making the proposed project a success as a whole, and we are of the opinion that, whatever the future cutting of the timber may disclose, Jones and Kribs were honestly of the opinion that the Kribs tract actually contained 441,000,000 feet of timber, and that their cruises justified them in this belief. Dodge testifies that Jones orally guaranteed in the presence of another person that there was 441,000,000 feet on the tract. This is denied by Jones, and the person in whose presence the alleged guaranty was made was not called as a witness; but, conceding that Dodge's statement is correct, it does not seem probable that Jones, who seems to be pecuniarily responsible, would have made a guaranty of this character in the presence of Percy Allen, an employé of Dodge, unless he believed the facts justified him in making it. The alleged guaranty appears in any event to have been merely a guaranty that the cruise of Jones and Kribs showed 441,000,000 feet. The whole conversation is thus detailed by Dodge:

"A. After seeing Mr. Cox, I went over and called up Mr. Jones and told Mr. Jones Mr. Cox had to come in for the reason that the snow shut him off and he could not cruise the timber, and that he advised me that I had better wait until spring to have the timber recruised. Q. What else took place at this time? A. And Mr. Jones said he could not wait until spring to have this timber cruised; that if we were to go ahead on this bond issue we had to go ahead now. I told Mr. Jones I did not want to go ahead under this proposition unless I had this timber cruised. He said, 'Well, I think we have some cruises in our office, and I will go over those cruises;' and he came back and said he had figured up, I think, of course, in a day or two, and said they had 441,000,000 feet up in that timber. I said, 'Well, I don't want to go ahead and sign this contract just on account of you saying you have 441,000,000 feet of timber on those cruises there; I want some kind of a guaranty;' and Mr. Jones said, 'Well, we will have to go ahead with the contract or not, one or the other, and I have gone all over this cruise and checked them up, and there is 441,000,000 feet there;' and I said, 'Do you say there is 441,000,000 feet?' He says, 'I guarantee there is 441,000,000 feet of merchantable timber up there on our cruise;' and consequently he put it into the contract and I signed it."

Dodge knew that Jones and Kribs had no other means of knowledge than their cruises which had been furnished him, and if Jones said, as claimed, "I guarantee there is 441,000,000 feet of merchantable timber up there on our cruise," it could be reasonably construed as signifying "according to our cruise."

[2] So far as this branch of the case is concerned, we do not find sufficient evidence to justify us in saying that the quantity of timber was intentionally misrepresented, nor does the fact that the substance of the alleged representation was written into the contract add to its efficacy or make it fraudulent. If Jones induced Dodge to execute the contract by falsely and fraudulently representing to him either orally or in the writing that there was 100,000,000 feet more timber on the tract than actually existed, then a rescission should be granted, or, if he recklessly made such a representation without knowing whether it was true or false, or without reason for believing it to be true, and it afterwards turned out to be false, a rescission should be granted, provided the other elements necessary to a rescission are shown, not upon the ground of a breach of a written warranty, but because such alleged warranty also constituted a false and fraudulent representation inducing the contract.

[3] Where it is sought to set aside a contract on the ground of fraud, the evidence should be clear and satisfactory; it being a maxim of law that fraud is never presumed. Shebley v. Quatman, 66 Or. 441, 134 Pac. 68; Coffey v. Scott, 66 Or. 465, 135 Pac. 88.

[4] In order to have a rescission in this case plaintiff must show: (1) That defendants made a material representation; (2) that it was false; (3) that when defendants made it they either knew it was false, or made it recklessly without any knowledge of its truth and as a positive assertion; (4) that it was made with the intent that it should be acted upon by Dodge; (5) that he acted in reliance upon it; (6) that he thereby suffered injury. If any one of these requisites is not established by a clear preponderance of the evidence, plaintiff cannot recover; and, as before shown, the evidence is insufficient in many particulars. There are no such allegations in the complaint as would authorize the court to rescind the contract on account of a mistake mutual or otherwise, nor is there such a condition shown by the testimony as to authorize the court to say that the defendants acted so recklessly that the representations were so grossly inaccurate as to amount to constructive fraud, and that therefore the contract should be rescinded. The case is based upon allegations of actual and intentional fraudulent representations, such as would support an action of deceit.

[5] Again, conceding that defendant Jones made every representation and guaranty that Dodge claims, it is not sufficiently proved that such representations are false. Taking the testimony as a whole, it appears quite as probable that there was 441,000,000 feet of merchantable timber upon the Kribs tract in 1912, when this contract was signed, as there was a smaller quantity. It does not follow that because fire had run through a portion of the tract and scorched and killed the timber all such timber was rendered valueless. The fire had occurred in 1902, and Kribs had purchased after that date up to 1906 various tracts, amounting in the aggregate to the 8,200 acres mentioned in the contract with Dodge. All the cruises made by him for the purpose of purchasing, taken together, indicate above 441,000,000 feet of merchantable timber upon the land, not necessarily

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green timber, but such as could be cut into lumber or otherwise made available on the market. A significant fact is found in the report of Capt. Hill, who cruised a large portion of this tract in the interests of Mr. Elliott, who had an option on something over 6,000 acres of this tract; a portion of said report reading:

"On this tract there are fifty million feet of burned timber, and from trees examined in different parts of the burned area we found that the timber is still sound and in marketable condition, and the condition indicates that it will be sound and marketable for from six to eight years from the date of this examination."

This opinion, given a little more than three years before the date of the contract in suit and by a disinterested expert acting for a prospective buyer, is entitled to weight, and tends to show that the dead timber, was, in fact, of value when the contract was made. We have carefully gone over all the cruises in evidence which were made before the contract was entered into, and, assuming that they are fair and honest cruises made for the purpose of ascertaining the actual quantity of merchantable timber on the land, we are of the opinion that there was upon the land at the time the contract was entered into substantially the quantity of merchantable timber represented. The Cox cruises made for Dodge before the contract was entered into, and which are entitled to credit, are a shade higher upon an average than the Kribs cruises, and the cruises made after this suit was in contemplation were so hasty and superficial in character, and are so at variance with other cruises made by men apparently reliable, we are not inclined to accept them. A few instances will suffice to show the wide difference between the cruises made before and after this action commenced: On S. E. ¼, Sec. 11, Tp. 37 E., Lacey & Co., cruiser for Brewer & Co., the bankers who were negotiating the prospective bond issue, reported 5,800,000 feet; Kribs' cruise, 5,200,000 feet; Cox, Dodge's cruiser, 6,820,000 feet; and McDonald, cruiser for plaintiff, 1,000,000 feet. On a tract in section 12, in the same township, Lacey estimated 13,654,000 feet; Kribs' cruise, 12,250,000 feet; Cox, 19,699,000 feet; and McDonald, only 4,400,000 feet. On a quarter section in section 13, in the same township, Lacey estimated 6,150,000 feet; Kribs' cruise, 5,850,000 feet; Cox, 8,378,000 feet; and McDonald, only 1,200,000 feet. On another tract Lacey estimated 21,858,000 feet; Kribs' cruise, 22,210,000 feet; Cox, 22,687,000 feet; and McDonald, 6,900,000 feet. These differences run all through the cruise and differ so widely from the results obtained by other cruisers who had previously examined the tract that we cannot accept the McDonald cruise as fair in any particular. The testimony of J. S. McGinnis, offered by plaintiff to discredit the Kribs cruise, is equally out of accord with all previous cruises. Thus upon Sec. 19, Tp. 3, R. 7 E., where Lacey & Co. estimated 18,364,000 feet, the Kribs cruise 22,210,000 feet, and Cox 22,687,000 feet, he estimates only 6,100,000 feet; in section 22, where Lacey & Co. estimate 46,697,000 feet, the Kribs cruise 54,970,000 feet, and Cox, cruising for Dodge, 56,551,000 feet, he gives only 27,700,000 feet; on section 30, where Lacey & Co. found 12,295,000 feet, the Kribs cruise 12,355,000 feet, Grady, a cruiser for plaintiff, 10,225,000 feet, and Cox, cruiser for Dodge, 18,224,000 feet, he found only 4,930,000 feet. His estimates are so grossly at variance with all the other cruises made, not only for the Kribs interests, but for the Brewer, Dodge, and plaintiff interests, that they cannot be relied upon. His testimony indicates either a very imperfect knowledge of cruising, or a very careless, slipshod method of putting what knowledge he had into practice. He claims to have cruised eight 40-acre tracts in one day, and asserts that three quarter sections can be cruised in one day, which every one familiar with cruising knows to be an impossibility, and is so shown by the testimony. A number of gentlemen more or less familiar with the lumbering business took a cursory view of the tract, but their examination was confined to walking across a portion of it, and was too superficial to give any weight to their testimony. The plaintiff has succeeded in showing that there was a large quantity of dead timber on the land, that the various cruises included a portion of this as merchantable, and that it is subject to deterioration and decay, but has not, in our judgment, established the fact that any considerable quantity of the timber shown in the Kribs cruises was unmerchantable at the time the contract was entered into, or that unmerchantable dead timber was included in the estimates which went to make up the 441,000,000 feet mentioned in the contract. It may be an overestimate, or it may not. Dodge knew that there was a considerable quantity of dead timber included in the estimates, and clause 8 of the contract contained this provision:

"The second parties further agree that so far as practicable they will first cut the burned timber on Rock creek in preference to the green timber," etc.

This indicates that the matter of dead timber had been considered by the parties, and that its quantity was deemed of sufficient importance to make it the subject of affirmative mention in the contract, which would hardly have been likely had it consisted of mere inconsiderable patches resulting from camp fires. We do not believe that the contract was induced by any fraud or false representations on the part of defendants, and these charges appear to be an afterthought when for reasons that have affected the whole logging interests of the Northwest the bright prospects for the future of that industry proved to be illusory. At the time this contract was entered into there was a steady demand for lumber in the East, which for rea-

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sons not easily understood suddenly ceased. There were great expectations of profit to the industry from the opening of the Panama Canal, by means of which it was supposed that lumber could be sent to the East and Europe more expeditiously and at a reduced cost. It unfortunately happened that the canal was not opened for general commerce as soon as expected, and that when it did open an unexpected toll charge which would amount to $1,500 for every 1,000,000 feet of lumber passing through it was imposed. This alone would, if Dodge contemplated shipping the 50,000,000 feet he was to cut annually to the eastern market, reduce his annual profits by $75,000. Added to this the stringency in the money market which prevailed in 1913 and 1914 and the fact that his other lumbering operations were also affected, greatly in debt, and unprofitable, we find abundant reason for his failure to carry out his contract without imputing it to any sinister action on the part of defendants. In the light of circumstances as they appeared in 1913 the prospects of success for his venture seemed fair and his contract a good business proposition. As events actually turned out, he was wrecked, as many another good business man was from the same causes. In fact, he does not impute his bankruptcy to the shortage of timber, which he claims was not then discovered, but to other causes. In his testimony before the referee in the bankrupt proceedings Dodge admitted that he did not have enough liquid assets to offset his indebtedness, and that he was practically insolvent, and stated that his principal assets were the Rainier mill and the contract with the J. K. Lumber Company. Referring to the contract in suit, he testified:

"I always considered it a good asset. * * * Q. I mean, if the timber market was good, it would have been a good asset, and if the timber market was the way it is at the present time, it would have been a poor asset? A. Yes."

The summing up of the learned circuit judge who tried this cause below upon the question of false representations is so cogent that we quote a portion of it:

"It is contended that this and other statements relating to the quantity of timber were expressions of opinion or estimates, and not statements of fact, that the amount of merchantable timber on this 8,000-acre tract, situated as it is, was not susceptible of accurate knowledge, and that the utmost one could do was to estimate the timber by means of cruises. It is clear that this quantity was ascertained for the purpose of the contract by computing the cruises contained in the cruise book, marked Plaintiff's Exhibit DD. This is the same cruise book that was delivered to Dodge before the contract was signed. It contains cruises by C. J. Clement, J. C. Murray, Charles Thom, Ben McMullen, A. J. Bennison, P. C. Garrison, C. W. Mead, and James D. Lacey & Co. All of these cruisers verified their cruises by affidavit, except C. W. Mead, whose affidavit could not then be procured, and Lacey & Co. It comprised cruises previously made and which were in the possession of Kribs. Jones says they were collected by Frank Garrison, a clerk in Kribs' office, at his direction, but without any suggestion as to the selection of any particular cruises. Clement's cruise was made about November, 1905; Murray's about July 26, 1909; Thom's about May 1, 1906; McMullen's about May 1, 1906; Bennison's about August 1, 1909; Garrison's about February, 1912; and Mead's in 1907. These are the cruises from which Jones computed the 441,000,000 feet on the Kribs tract. The cruise book also included the cruises of J. F. Cox of the Dodge tract, section 36, and eight 40's in section 31, duly verified under the cruise date of June 2, 1912. Now, was this body of timber capable of accurate ascertainment? The land was broken and mountainous, and the evidence establishes beyond dispute that the only practical method of ascertaining the quantity of timber in a tract of this area and contour was by careful cruising by competent cruisers. I was impressed at the trial by the fact that accurate knowledge of the timber on this tract was impossible, and that owners and purchasers alike must depend upon the estimates of cruisers for their information. In cruising timber the human equation is always present, and the accuracy of the cruise depends upon the skill, the judgment, and the conscientious service of the cruiser. The extent to which the estimates of cruisers may vary is forcibly illustrated by the evidence in this suit. Under favorable and similar conditions two cruisers of apparently equal ability will often vary greatly in their estimates. Representations should be considered in the light of existing conditions, and the physical facts should be kept in view, in construing this provision of the contract. And the situation and relative information of the parties should be considered. Both Jones and Dodge were familiar with timber cruising. Both had timber cruised before; it was part of their business. Dodge was the owner of timber adjacent to the Kribs tract which had been recently cruised. He had two other adjoining tracts cruised which he intended to buy. One of his business associates, and one of his employés, had taken a run through the Kribs tract. Two of his cruisers, Cox and Porden, had cruised over 6,000 acres of the Kribs 8,000-acre tract, and submitted a detailed report of their cruises, with a contour map which were available for inspection and comparison. He had the cruise book in his possession upon which Jones' statement of quantity was based. So with these means of information, with these opportunities for comparison, and with the past experience in the timber and logging business, he entered into the contract.

"When the parties contracted concerning this timber, their knowledge of the inaccuracy of timber cruising and the practical impossibility of accurate knowledge of the quantity of standing timber were present, existing facts, which cannot be excluded from their negotiations. They both knew that their estimates might vary; that the timber could not be expected to cut out in exact accordance with the estimates; that it might overrun or might shrink in the cut or scale. Dodge knew that Jones could not give him a definite statement of the Kribs timber, and Jones knew that Dodge could not give him a definite statement of the timber on the Dodge tract, on section 36, or on section 31. A reasonable margin of variance must have been within the contemplation of both parties. This cruise book DD contained cruises procured by Kribs on his tract, and cruises procured by Dodge on his tract, and on the tracts he intended to purchase. These cruises were estimates only, but they formed the only basis on which negotiations could proceed. Jones evidently accepted Dodge's estimates, as shown by the cruise book, on the three tracts in which Dodge was interested, and it is entirely reasonable to assume that Dodge accepted Jones' estimates on the Kribs tract, as shown by the cruise book. Now these same cruise estimates on the Kribs tract, on the Dodge tract, and

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on section 36 were taken and inserted in the contract. The Kribs tract was given as containing 441,609,000 feet, section 36 as containing 48,886,000 feet, and the Dodge tract as containing approximately 93,400,000 feet. These figures by that time must have become familiar to all of the contracting parties. Dodge says the cruise book was delivered to him a couple of days before the contract was signed. I am inclined to think that his memory is at fault there. The testimony of Jones refutes this, and the circumstances attending the negotiations, point, in my opinion, to an earlier delivery. It appears that Brewer, the bonding broker, brought the parties together. Both evidently intended originally to secure separate and independent bond issues upon their properties. There were preliminary negotiations and conferences between the parties. Jones collected the cruises on the Kribs tract, Dodge collected those on his tracts, and all were bound together in the cruise book. Jones secured several copies and took one East on December 14th, to deliver to Brewer, and says that he gave Dodge a copy before his departure. On December 12th Dodge sent J. F. Cox and Ben Porden up to the Kribs tract to cruise the timber. This was an independent investigation to determine the quantity of timber on the Kribs tract before the contract was signed. Cox cruised 2,807.9 acres, and Porden cruised 3,440 acres, aggregating 6,247.9 of the Kribs 8,000-acre tract, before they abandoned the cruise on account of the snow. Their cruise reports and a contour map were delivered to Dodge's office about January 10th, which was about 16 days before the contract was signed. These cruises were available for comparison with the cruise book. It is true Cox advised a recruise for the reason, as he says, that the cruise of the entire tract was not completed, and because they might have overlooked some defects on account of the snow. But he says that the cruise should not vary more than 5 per cent. on account of weather conditions. Cox also cruised 920 acres of the Kribs tract in the fall of 1913, under ideal weather conditions. Cox was Dodge's cruiser, and the same man whose cruises of the Dodge tracts form a part of the cruise book. If Cox's cruises were sufficient estimates of the Dodge timber as a basis for this contract, why were not his cruises on the Kribs tract useful and serviceable to Dodge in these negotiations? There is nothing in this record to impeach his honesty, or to detract from his capacity. Weather conditions might have affected his winter cruise to some extent. It is rather significant that the Cox cruises are generally higher on the same land than the Kribs cruises used in the cruise book. Neither the Cox cruise nor the Porden cruise was produced by the plaintiff, although they were both traced to Dodge's possession, and their absence was not explained to my satisfaction. The Cox cruise was available through original notes which Cox preserved, but the Porden cruise was not available, because Porden had lost or destroyed his original notes. But he identified the lands he had cruised. Now with the Cox and Porden cruises in Dodge's possession about 16 or 17 days before the contract was signed, and with the Kribs cruises in his possession for at least a few days before it was signed, Dodge either compared the cruises and satisfied himself concerning the quantity of timber, or else he would appear to be lacking in reasonable prudence and diligence. I do not think they should have been ignored in this important transaction. Making due allowance for weather conditions, the cruise of more than three-fourths of the Kribs tract by Cox and Porden should still have shown the run of timber on the tract. So I am persuaded from all the evidence and the attending circumstances that both parties contracted with the definite knowledge that the quantity of timber was not susceptible of accurate knowledge; that both parties knew that the quantities inserted in the contract were derived from a computation of cruises contained in the cruise book; that neither had any source of information other than cruises; that their cruises were nothing more than estimates of cruisers, and that these statements of the quantity of timber were intended and understood by the contracting parties to express the estimates of the parties of the quantities of timber on the respective tracts; that, while the provision in question is positive in terms, it was based entirely upon estimates, and was only an estimate of that which was not susceptible of accurate knowledge, and was not intended nor understood to be a representation of a definite, ascertained quantity of timber."

[6] Another alleged false representation is that the defendants, for the purpose of inducing Dodge and his corporations to execute the contract, promised that they would receive from Kribs and Jones a one-quarter interest in the corporation which they proposed to organize, which quarter interest would give Dodge and his corporations one-quarter of the profits to be derived from such enterprise, that such promise was fraudulently made with no intent to perform it, and that it was not performed. There was some discussion in the court below and in the briefs here as to whether failure to keep a promise to perform an act in the future and after the contract induced by it should have been fulfilled could be a ground for rescission; but, passing by this question, we are of the opinion that plaintiff has failed to prove that such promise was actually made. Dodge's testimony concerning the alleged promise is as follows:

"I says [to Jones], 'Well, I can see under this contract where I am going to get away.' He says, 'Well, what are you going to do about it?' I says, 'Well, I think I ought to have an interest in this proposition.' He says, 'What kind of an interest?' I says, 'Well, I think that I am entitled to some interest in the J. K. Lumber Company; I think I am entitled to a quarter interest for doing all this.' And Jones thought a while, didn't say anything, and I says, 'I think that is fair, that we should have that.' He says, 'Well, I will think the matter over and let you know.' So we held the thing off a little while, held this contract off, and he said, 'You fellows going to get busy with this thing?' And I said, 'I am waiting to hear from you.' So he came down and we went down to the Oregon Grill again. We sat down and had lunch, and he said, 'Well, to satisfy you, if you will sign this agreement, we will give you a quarter interest in the J. K. Lumber Company.' So I said—I think he said, I don't know whether it was exactly the J. K. Lumber Company or timber company to be formed—but I says, 'I will sign that agreement and the contract that way.' Then after we talked the proposition over I says, 'You pay the bills and I will have a quarter interest in the J. K. Lumber Company, if I cannot finance this thing and handle it that way.'"

Dodge also testified that at the preliminary talk with Jones on this subject Mr. Allen, a business associate of his, was present. Allen testified that he had no recollection of such a conversation, and Jones positively denied it. Kribs denied making any such promise, and this interest was not mentioned in Dodge's schedule in bankruptcy, nor did he at any time after the J. K. Lumber Company was

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organized demand of any of the defendants any portion of the stock. The alleged agreement is not shown by a preponderance of the testimony.

[7] We will next consider the second cause of suit. It reiterates the charges of false representations contained in the first cause, and as to these nothing further need be added. They are out of the case. The complaint, however, goes farther, and alleges facts apparently upon the theory that, conceding the contract was fairly procured, the defendants have so breached it that it would be inequitable to allow a forfeiture to stand. It was claimed by the defendants upon the argument that a cause of suit to rescind a contract upon the ground of fraud rendering it void could not be joined with a cause of suit to set aside a forfeiture prescribed in the same contract by reason of a breach in its provisions, the first being, in effect, a denial of the existence of a valid contract, and the second an affirmation of its existence; and this seems to be the general rule. However, in the case at bar no demurrer for misjoinder was interposed; the only demurrer filed being general as to each cause of suit. Later a motion to compel the plaintiff to elect was withdrawn or overruled by consent. In this state of the case we will consider the second cause of suit upon its merits as disclosed by the testimony.

The situation as to the railroad was this: The J. K. Lumber Company had the legal title to the Dodge lands, and to the Jones and Kribs lands as well. The legal title to the road therefore vested in the J. K. Lumber Company, subject to be reconveyed to the Dodge interests upon the performance by them of their contract. That this was the intent of the parties as well as the legal effect of the conveyance to be executed by the Dodge interests is clearly shown by clause 6 of the contract, which is as follows:

"It it further agreed that, when the second parties shall have repaid to the first party the amount advanced by the first party for the construction of logging railroads, mills, and equipment over and above the amount paid by the second parties for the timber conveyed by second parties to the first party, such logging railroads, mills, and equipment shall thereupon belong to said parties of the second part, subject, however, to the faithful performance of all of the covenants and agreements herein made by the second parties, and subject also to the lien of said trust deed in so far as it may cover such property."

The forfeiture clause in the contract is as follows:

"The second parties agree that, in the event of their failure to fully comply with all of the terms, conditions, and provisions of this agreement, the mill property of the Rainier Lumber & Shingle Company, now located at Rainier, Or., and the mill situated in section 35, township 3 north, range 7 east, Skamania county, Wash., and all of the railroad equipment, sawmill, and logging equipment purchased for the logging of the lands covered by this agreement, either with funds of the first party or with funds of the second parties, shall forthwith become the property of the first party, and may be used by said first party for the logging and manufacture of the logs and lumber of the timber referred to in this agreement or any other timber, and the second parties forthwith agree in the event of such default to transfer and convey all of such mill property by good and sufficient deeds of conveyance, and in the event of such default of the second parties, the first party is hereby authorized to take possession of such mill property and equipment and use and employ the same, and said second parties agree not to interfere with such possession and use of said property of said first party."

The land title itself being in the J. K. Lumber Company, the road built upon the land became a part of it, and a forfeiture of the land necessarily carried with it the roadbed, and it was only necessary to designate the equipment, which did not become part of the realty, to bring all the improvements under the forfeiture clause, and this was done. So that for a substantial breach of the conditions of the contract by the Dodge interests the J. K. Lumber Company, upon declaration of its intention to enforce the forfeiture, had a right to take possession of the property described therein, except the mill property at Rainer, which for reasons hereinafter shown could not be the subject of forfeiture, not being embraced in the property conveyed under the contract.

[8-10] It is claimed that the alleged forfeiture clause is, in fact, a penalty, and not a forfeiture, and that for this reason the defendants had no right to seize the property. It is a familiar rule of law that courts will always be reluctant to enforce a forfeiture, and no language will be construed to work one where a contrary intent can be derived from a consideration of the whole instrument or from the circumstances attending its execution. O. R. & N. Co. v. McDonald, 58 Or. 228, 112 Pac. 413, 32 L. R. A. (N. S.) 117, note. Now the words "forfeiture" and "penalty," while often used interchangeably, are not always synonymous; that is to say, a forfeiture is not always or necessarily a penalty. The principal distinction between the two is that in contracts and in civil matters generally the term "penalty" invariably imports a clause in an agreement by which the obligor agrees to pay a certain sum of money if he shall fail to fulfill the contract contained in the same agreement. Bouvier Dict. tit. "Penalty"; Tayloe v. Sandiford, 20 U. S. (7 Wheat.) 13, 5 L. Ed. 384; Watt's Ex'rs v. Sheppard, 2 Ala. 425; State ex rel. Rodes v. Warner, 197 Mo. 650, 94 S. W. 962; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. A forfeiture, on the other hand, is a broader term, and may include not only the payment of a sum of money, but the loss of property or of some right in it by reason of failure or neglect of a party to perform a contract. Where a contract provides that a party shall forfeit a sum of money in case of failure to perform a contract, the courts, if such a construction seems reasonable in view of all the circum-

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stances, will treat the stipulation as a penalty rather than as an agreement for liquidated damages (which would amount to a pure forfeiture of the whole sum stipulated), and will allow the promisee to recover only such amount as will cover his actual damages by reason of the breach.

"A forfeiture is a deprivation or destruction of a right in consequence of the nonperformance of some obligation or condition." Webster v. Dwelling House Ins. Co., 53 Ohio St. 558, 42 N. E. 546, 30 L. R. A. 719, 53 Am. St. Rep. 658.

"The omission or neglect of a duty which the party binds himself to perform, or to the performance of which he is enjoined by the law, is upon the breach * * * thereof called a forfeiture; that is, the advantages accruing from the performance of the thing are by his omission defeated and determined." Beard v. Beard, 22 Ky. (6 T. B. Mon.) 430.

"Forfeiture is a divestiture of property without compensation, in consequence of a default or offense." Union Glass Co. v. First National Bank, 10 Pa. Co. Ct. R. 565.

"Forfeiture relates to something done or omitted by which one's rights are lost. * * * There can be no forfeiture of a contract that has no existence. * * * Forfeiture assumes a pre-existing valid contract or obligation." Roblee v. Masonic Life Ass'n, 38 Misc. Rep. 481, 77 N. Y. Supp. 1098.

It will thus be seen that, while the words "penalty" and "forfeiture" are frequently used interchangeably, and while often the legal effect of their use is the same, such a construction in an instrument relating to the loss or destruction of a right under a contract is impossible. The reason is apparent. In a case where a person agrees to perform a certain act or to pay a certain sum of money, the court under certain circumstances may be able to say that the sum agreed to be paid is so disproportionate to the injury suffered it will hold the stipulation to be a mere penalty intended only to cover any actual damages that may ensue from a breach; that is, if the sum to be forfeited were fixed at $500, and the actual damages were only $100, the court under some circumstances, not all by any means, might award the promisee $100; but in a case where the thing to be forfeited is a property right dependent upon the payment of purchase price or the performance of some condition, the court cannot say to the promisee:

"The contract provides that the right to 160 acres of land shall be forfeited, but you are damaged only to the extent of 80 acres. Therefore we will apportion that quantity to you instead of the 160 acres mentioned in the contract."

The court must enforce the forfeiture as it finds it, or not at all. It has no leeway to substitute damages for the forfeiture mentioned in the contract. In Seeck v. Jakel, 71 Or. 35, 141 Pac. 211, L. R. A. 1915A, 679, which was an action in ejectment brought for breach of a condition in a deed whereby the purchasers bound themselves not to carry on a particular business upon the granted premises, the defendants in their answer made the following tender:

"[The defendants] offer and tender to the plaintiffs any damage which the plaintiffs may have sustained by reason of a livery business being carried on on said premises by the defendants A. J. Newman and J. W. Newman, in case the court adjudges that the said provision against carrying on said business on said premises is a lawful provision."

This court said:

"We can only enforce the condition subsequent as we find it embodied in the deed. We find nothing in the pleadings or the testimony authorizing us to relieve the defendant, or to enlarge the estate which he knowingly and voluntarily purchased, incumbered as it was by the condition named."

So here, if we find from the language of the agreement that the intent of the parties was to prescribe a forfeiture as the result of noncompliance by the Dodge interests with the terms of the contract, it is our duty to ascertain the facts, and if our investigation discloses that there has been such failure to live up to its terms, we should, unless such failure has been occasioned by the inequitable conduct of the defendants, declare the legal result of such failure.

[11] Again, declaring a forfeiture for breach of the conditions of a contract is not rescission of the contract. It puts an end to the contract and extinguishes it in pursuance to its terms just as performance extinguishes it. The act of taking possession under a forfeiture clause is not an act of rescission or in avoidance of the contract, but the assertion of a right growing out of it. A. contracts with B. thus:

"If I fail to do a certain act at a particular time, you may take to yourself the interest or right that I have in the property, the legal title of which is in you."

A. fails to do the act, and B. takes possession of the property. Here is, in fact, no rescission of the contract by A., but merely the exercise of a contract right. The forfeiture takes the place of performance.

To discuss the evidence in detail would consume more space in the reports than would be practicable. It is sufficient to say that it fully supports every charge of default made in the notice of forfeiture, and that the exigencies of the case were such that the defendants were forced to the alternative of either taking the property and trying to save something out of it or of allowing the interest on the $900,000 bond issue to default, and the property to be sold at a probable, or at least possible, sacrifice. The defendants, being indorsers on the bonds, were in a precarious position. The Dodge institutions and himself were practically insolvent, and could raise no more money. They had fallen down on the contract, and were unable to proceed further, and it is apparent that their creditors never agreed to and never would have agreed to take up the Dodge contract where he left off and complete it in the depressed condition that the lumber market then was, and still is. It is true that the creditors discussed the matter, but arrived at no favorable result, and the

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testimony of Mr. Stennick shows that they could have arrived at none. If present lumber conditions continue, it is evident that there will be no profit in logging the lands described in the contract that will more than suffice to pay the bonds and interest if every foot of timber claimed by the defendants to be upon the land is actually there. Any profit is purely speculative and dependent upon a return of former favorable conditions. No unprejudiced person can read this testimony and not be impressed with the idea that defendants as a matter of self-interest were desirous that Dodge should succeed in carrying out his contract, and that they performed their part of it and more, advancing money and loaning their credit to enable him to borrow and evincing in every way a desire to make the project a success. Whether he failed because of the prevailing depression in the lumber market or from mismanagement or through attempting to carry out a contract too large for his resources cannot alter the fact that his failure cannot be traced to any act of defendants.

Other interesting questions have been discussed in the briefs, but we have chosen rather to decide this case upon its merits than upon the technical matters presented.

We have read and re-read the evidence presented in the 3,000 pages of transcript and given much attention to the elaborate briefs of counsel, and upon the whole are satisfied that the decree of the circuit court should be affirmed.

(82 Or. 448)

HEWEY v. ANDREWS.*

(Supreme Court of Oregon. Nov. 28, 1916.)

1. TRIAL ⟸1—PARTIES JOINTLY LIABLE — DEFAULT.

Where the complaint alleged a joint liability of all defendants, the court may proceed to trial as to those who have answered and joined issue without first entering default and judgment against others who had been served but did not appear, for the old technicality with respect to joint actions has been relaxed, and, though a joint liability is averred, recovery may be had on proof of a several liability.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 1, 2; Dec. Dig. ⟸1.]

2. HUSBAND AND WIFE ⟸25(1)—CONTRACTS —SIGNING OF WIFE'S NAME.

Where a husband without authority signed his wife's name to an agreement to pay brokerage fees, the wife is not liable for such fees.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 148, 150, 153; Dec. Dig. ⟸25(1).]

3. FRAUDS, STATUTE OF ⟸159—JURY QUESTION.

In an action for brokerage fees, where a written agreement by the owner to pay brokerage fees was supplemented by telegrams and a letter, *held*, that under the evidence it was a question for the jury whether there was a sufficient memorandum within the statute of frauds (L. O. L. § 808), declaring that an agreement authorizing or employing a broker to sell real estate for compensation or commission shall not be effective unless in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 378; Dec. Dig. ⟸159.]

4. APPEAL AND ERROR ⟸1068(1)—REVIEW—HARMLESS ERROR.

Error in instructing the jury that they might find against a particular defendant is cured by subsequent vacation of judgment and dismissal of the action against him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4225; Dec. Dig. ⟸1068(1); Trial, Cent. Dig. §§ 525, 526.]

5. APPEAL AND ERROR ⟸232(2)—OBJECTIONS —SUFFICIENCY.

In an action by a broker for commissions, objection to the admission of parol evidence, on the ground that no parol evidence was admissible to establish any of the issues in the case because of the statute of frauds (L. O. L. § 808), is insufficient to raise the question whether particular parol evidence was admissible, for parol evidence was, of course, admissible to establish some of the issues in the case, such as whether a sale was effected, etc., though the employment could not be established in that manner.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1430, 1431; Dec. Dig. ⟸232(2); Trial, Cent. Dig. § 218.]

Department 1. Appeal from Circuit Court, Wasco County; W. L. Bradshaw, Judge.

Action by Sam Hewey against C. S. Andrews and others. There was a judgment for plaintiff against the named defendant, and he appeals. Affirmed.

See, also, 159 Pac. 1149.

This is an action to recover an unpaid balance of a commission alleged to have been earned by plaintiff as a real estate broker. It is averred in the complaint that in January, 1915, the defendants employed plaintiff to procure a purchaser for a tract of land therein described; that he was to have as compensation therefor one-half of all that defendants might receive for such property in excess of $20,000; that plaintiff did find a purchaser at a price exceeding $26,000; that he afterwards agreed to accept $3,000 in full for his commission, and defendants agreed in writing to pay the same; that defendants have paid thereon the sum of $1,272.50, and there remains unpaid $1,727.50; that demand has been made for payment thereof, which has been refused. Then follows a prayer for judgment. The defendants C. S. Andrews and Lillie M. Andrews answered separately with general denials. The defendants Clarence L. Look and Ethelda M. Look were personally served with summons but made no appearance. When the cause was called for trial, the answering defendants objected to proceeding further until default and judgment should be entered against the defendants C. L. and Ethelda M. Look. The objection being overruled, a trial was had resulting in a verdict against both the answering defendants in the sum of $1,727.50, and on the same day these defendants filed separate motions for judgment on the verdict dismissing the suit. On Feb-

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⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied.

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ruary 29th, a judgment was entered in accordance with the verdict in favor of plaintiff. When the plaintiff rested, the defendant C. S. Andrews moved the court for a nonsuit and for a directed verdict in his favor on the ground that the plaintiff had not introduced testimony supporting, or tending to support, the allegations of his complaint, and that the testimony introduced is in violation of the provisions of the statute of frauds, which motions were overruled by the court, and the defendants did not offer any evidence upon the trial. On February 29th, the court entered a judgment in favor of plaintiff in accordance with the verdict and, having taken under advisement the motions of the defendants for a judgment dismissing the suit, on March 1st, made and entered the following final judgment order:

"Now on this day the court having considered the motion of the defendants C. S. Andrews and Lillie M. Andrews for a judgment against the verdict dismissing the action and for a judgment against the plaintiff for their costs and disbursements incurred herein upon the ground that this is an action upon an alleged joint liability of all the defendants, and the trial being against a portion of the defendants only, there can be no judgment against separate defendants, and the court being fully advised as to said motion.

"It is ordered that said motion be and the same is in all things denied upon the grounds mentioned and set forth in said motion, but it appearing to the court from all the evidence in said cause that there was no joint obligation on the part of any of the defendants to pay the commission claimed in the plaintiff's complaint and no contract or obligation within the provisions and requirements of section 808, Lord's Oregon Laws, as to the defendants Clarence L. Look, Ethelda M. Look, and Lillie M. Andrews, and that no cause of action has been proved against said defendants or any of them, and that the evidence offered at the trial of said cause tended to show and did show a separate agreement by the defendant C. S. Andrews alone.

"Thereupon it is hereby ordered that the judgment heretofore given and made in this court and cause on the 16th day of February, 1916, be and the same is hereby set aside, vacated, and held for naught as to the defendant Lillie M. Andrews, but the same is continued in full force and effect as to the defendant C. S. Andrews, and that this cause be and the same is hereby dismissed as to the defendants Lillie M. Andrews, Clarence L. Look, and Ethelda M. Look, and that the defendant Lillie M. Andrews have and recover of and from the plaintiff her costs and disbursements in this action to be taxed."

The defendant C. S. Andrews appeals.

Ralph R. Duniway, of Portland, for appellant. W. H. Wilson, of The Dalles, for respondent.

BENSON, J. (after stating the facts as above). [1] There are several assignments of error, but they only involve two serious questions for the consideration of this court: (1) Does the fact that the complaint alleges a joint liability of all the defendants preclude the court from proceeding to trial as to those who have answered and joined issue, without first entering default and judgment against others who have been regularly served with summons but have not made any appearance? (2) Is there sufficient competent evidence disclosed by the record to justify a submission of the case to the jury for their consideration?

In Wilson v. Blakeslee, 16 Or. 43, 16 Pac. 872, this court distinctly holds that it is error to enter a default and judgment against part of the defendants in an action upon a joint obligation before the trial of the action upon the issues raised by the answering defendants. In the case of Dairy Ass'n v. Schermerhorn, 31 Or. 308, 51 Pac. 438, Mr. Justice Wolverton speaking for the court says:

"The idea formerly obtained that a joint obligation or contract constituted as indivisible demand. The several individuals jointly contracting were considered as a single entity, and, to describe that entity, it was necessary to name the identical individuals bound. A description which omitted any that were bound, or included others not bound, would not identify the entity. Hence it was requisite that all the individuals composing it should be charged, and no more; otherwise, the contract sued on would not be the one made. So, it was considered that an amendment which omitted a party formerly charged jointly with another was a statement of a new and distinct cause of action. Modern code practice, however has materially encroached upon this idea, and a nonjoinder or misjoinder of parties defendant does not necessarily nonsuit the plaintiff or defeat the action. It is provided by statute that when an action is against two or more defendants, and 'all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant, or defendants, if the action had been against them, or either of them alone.' Hill's Ann. Laws, § 60, subd. 8. Furthermore, 'judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants'; and, 'in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, whenever a several judgment is proper, leaving the action to proceed against the others.' Hill's Ann. Laws, §§ 244, 245. A statute identical in effect with these sections has received judicial construction in New York, and it is there held that: 'A plaintiff is not now to be nonsuited because he has brought too many parties into court. If he could recover against any of the defendants upon the facts proved had he sued them alone, the recovery against them is proper, although he may have joined others with them in the action against whom no liability is shown.' McIntosh v. Ensign, 28 N. Y. 169, 172. And, under a statute of similar import more recently enacted, and which it was declared should receive the same construction as the former, Andrews, J., says: 'The common-law rule that, in an action against several defendants upon an alleged joint contract, the plaintiff must fail unless he establishes the joint liability of all the defendants, is no longer the rule of procedure in this state. By the former Code (section 274), the court was authorized in an action against several defendants to render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment was proper. The court, in construing this provision, did not limit its application to cases of joint and several liability, but considered it as authorizing a separate judgment where a separate liability of some of the defendants was established on the trial, although the cause of action, as alleged in the complaint, was joint only.' Stedeker v. Bernard, 102 N. Y. 327, 330, 6 N. E. 791.

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"From these authorities the true and reasonable construction of the several sections of our statute alluded to would appear to be that when, in an action upon a joint contract, it is determined that one or more of the defendants are not liable, but that one or more of the others are, judgment may be given and rendered against those liable, whether their liability be joint or several, and the other defendants may be dismissed."

[2, 3] Let us now examine the evidence presented upon the trial and apply the law as above quoted to the established facts. On June 15, 1914, defendant C. S. Andrews listed his farm of 1,280 acres in Wasco county with the firm of Hartman & Thompson of Portland, Or., for sale, signing and leaving with them a written memorandum containing the following terms:

"Messrs. Hartman & Thompson, Portland. In consideration of the benefit I expect to derive from the sale of the property below described, and of securing an interest and effort on your part and at your expense, to obtain for me the sum below mentioned for said property, I hereby agree to sell and convey by a good and sufficient grant and deed of conveyance, and give the usual covenants therein, to you or your assigns, at any time within the next two mos (or thereafter, until I give you ten days' notice to the contrary in writing), the following described property, viz.: Situate in 15 E. 1 S. See abstract. County of Wasco, state of Oregon, with the appurtenances as described below for the sum of —— dollars ($44,800) to be paid as follows: You being at liberty to take or sell the same on said terms. In case a sale or exchange of said property is effected, I agree to pay you a commission of 2¼ per cent. on the $44,800 above stated or a lesser sum in case I agree to sell for less, and after a deposit is taken, I will allow fifteen (15) days to search title.

"[Signed] C. S. Andrews (owner)
"L. M. Andrews (his wife).

"Subscribing witnesses (who listed this): Sam Hewey, Tabor 3248."

Thereafter, some months elapsed without a sale being effected, and then C. S. Andrews had a conversation with plaintiff in which he agreed that if he should find a buyer for the farm he would give him an additional commission of one-half of all he should obtain for the property in excess of $20,000, and on January 5, 1915, plaintiff wired to C. S. Andrews, who was then in Los Angeles, as follows:

"Have prospective buyer for your Wasco county ranch will you confirm your offer to give me one half of all over twenty thousand dollars that I can get for this ranch cash payment buyer to assume mortgages this does not include stock implements and Clarence's lease on Kelly place wire answer care Stelwyn apartment number forty eight cor St Clair and Washington. Sam Hewey."

On January 6th, Andrews replied:

"I will give you one half of all over twenty thousand dollars that you can get me for my ranch buyer assuming mortgages this does not include stock implements or Clarence's lease on Kelly place Letter follows."

The letter reads thus:

"January 6, 1915. Mr. Sam Hewey, Stelwyn Apt. No. 48, Portland, Oregon—My dear Mr. Hewey: Your night telegram 'Have prospective buyer for your Wasco County ranch. Will you confirm your offer to give me one half of all over twenty thousand dollars that I can get for this ranch cash payment buyer to assume mortgages. This does not include stock implements and Clarence's lease on Kelly place. Wire answer care Stelwyn Apartment #48 Cor. St. Clair & Washington. Sam Hewey'

"Sure thing! Mr. Hewey, yes, and I hope you make five thousand out of it and it is a grand good cheap buy at that figure. 'For exchange—or sale—1,280 acres, Oregon, wheat and stock farm, fully equipped, horses, hogs, poultry. Bank appraised value $40,461. Andrews, the Angelus Hotel.' I have been running this add here for a month and have had over 100 answers now. There are two parties that mean business and have good propositions and they look good to me. Now if your client means business you better hurry so I can shut off these two good prospects I have here. Should you not wire me again this week I will try to close with one of these two and will wire you again that I am bringing my customer up to see the 1,280. In other words the party closing first is the best man and he gets the farm. Now I wish you all kinds of luck and hope you make over $5,000. Yours very truly, C. S. Andrews."

On January 7th, plaintiff wired Andrews as follows:

"Your telegram received. I sold your ranch including stock implements, and Clarence lease on Kelly place. Price above twenty five thousand. Have two hundred fifty dollar deposit. Twenty five hundred to be paid in twenty days, Seventy two hundred fifty in thirty days. Buyer to assume sixteen thousand one hundred twenty five mortgages. You to square up with Kelly—Wire when can come, meet me at Stelwyn Apts. Sam Hewey."

On January 8th the following reply was received:

"Allow me to congratulate you on the sale of wheat farm will meet you at Stelwyn Apartment number forty eight cor St Clair and Washington at nine on Monday. C. S. Andrews."

When the first memorandum above set out was delivered to Hewey, there was also delivered an abstract containing a detailed description of the land to be sold. The property was sold by Hewey to H. L. Price for a consideration of something more than $29,000. It will be noted that the agreed commission on this amount would be considerably more than the sum prayed for in the complaint, but the evidence discloses that after the sale was consummated the plaintiff agreed to take a less amount and Andrews wrote out, signed, and delivered to plaintiff the following instrument:

"I hereby agree to pay Sam Hewey three thousand ten and $^{50}/_{100}$ dollars as extra commission above the regular 2½ per cent. on the $29,580. Sale of my wheat ranch. Regular commission amounts to $739.50. C. S. Andrews, Jan. 11, 1915."

The plaintiff admits having received $1,272.50, leaving a balance of $1,727.50 still unpaid. The evidence also discloses the fact that the name of L. M. Andrews was signed to the Hartman & Thompson memorandum by C. S. Andrews, and it is not disclosed that he had any authority to act for her. It therefore clearly appears that plaintiff failed to establish any joint liability, and therefore, under the authorities above cited, it was not error for the court in its final judg-

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ment to dismiss the action as to all of the defendants except C. S. Andrews. It is contended by defendant that there is no competent evidence in the record satisfying the statute of frauds (section 808, L. O. L.); but the writings set out herein when read together, as they should be, afford abundant competent evidence to go to the jury upon the question of a sufficient written memorandum under the statute of frauds.

[4] It is true that the court erred in instructing the jury that they might find against the defendant Lillie M. Andrews, for there is absolutely no evidence in the record connecting her with the agreement made by her husband; but this error was obviated by the subsequent conduct of the court in vacating the judgment and dismissing the action as to her.

[5] There is some discussion in the briefs of the admissibility of certain parol evidence, but the only objection made to the admission thereof, as disclosed by the bill of exceptions and the assignment of errors, was a general protest upon the expressed ground that no parol evidence whatever is admissible to establish any of the issues in the case because of the provisions of section 808, L. O. L. However, this contention is untenable for the reason that the statute referred to prohibits only the admission of parol evidence for the purpose of proving the terms of the agreement itself, and parol evidence is still admissible for the purpose of showing, for example, the fact that a purchaser was found, that a sale was effected, that a part of the agreed commission has been paid, and that there is an unpaid balance. The objection and exception are therefore unavailing.

The judgment is affirmed.

BURNETT and McBRIDE, JJ., concur.

(82 Or. 81)

STATE ex rel. STEWART v. MACY, City Atty., et al.

(Supreme Court of Oregon. Nov. 28, 1916.)

TIME ⟹9(1)—COMPUTATION — DAYS — STATUTE.

Under L. O. L. § 531, providing that the time within which an act is to be done shall be computed by excluding the first day and including the last, etc., the filing of an initiative petition and proposed ordinance completed on November 4, 1916, to be acted upon at the election of December 4, 1916, having been filed only 29 days before December 4, 1916, did not comply with an ordinance requiring such petition to be filed 30 days before the election at which a proposed ordinance or amendment to the city charter is to be submitted or referred.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 11-16, 24½; Dec. Dig. ⟹9(1).]

Department 2. Original proceeding in mandamus by the State of Oregon, on the relation of Josie L. Stewart, to compel Bert Macy, as city attorney, and Charles Elgin, as city recorder, of the city of Salem, to prepare the ballot title of a certain measure, and cause it to be printed on the official ballot at the general election of the city on December 4, 1916. Demurrer to the writ sustained.

This is a mandamus proceeding to compel the city attorney and city recorder of the city of Salem to prepare the ballot title of a certain measure, and to cause it to be printed on the official ballot to be voted at the general election of the city on December 4, 1916.

On October 24, 1916, the common council of the city of Salem passed an ordinance amendatory to the one theretofore enacted, entitled:

"An ordinance to provide for carrying into effect the initiative and referendum powers reserved to the legal voters of municipalities by section 1a of article 4 of the Constitution of the state of Oregon, and the power to enact and amend their municipal charters reserved to the legal voters of the cities and towns by section 2 of article 11 of the Constitution of the state of Oregon, to provide for the number of signers necessary for initiative and referendum petitions, to fix the time within which referendum petitions may be filed and ordinances become effective, to provide the time which must elapse before measures referred may be voted upon, and to provide a mode of procedure for submitting municipal measures to the people by the common council, and to repeal Ordinance No. 509, approved March 26, 1907, and to repeal Ordinance No. 685, approved June 28, 1909, and to repeal Ordinance No. 818, approved June 21, 1910."

This ordinance was numbered 1464, and approved by the mayor of the city on October 25, 1916. Among other provisions it required that initiative petitions for the amendment of the charter should be signed by a number of the legal voters equal to 15 per cent. of the votes cast at the last preceding city election and filed with the city recorder "not later than 30 days before the next regular city election at which such proposed ordinance or amendment is to be submitted or referred."

The alternative writ recites, among other things, that an initiative petition and proposed measure, a copy of which is thereto annexed and marked Exhibit A, signed by the requisite number of qualified and registered voters of the city in proper form and duly verified, was filed with the city recorder "on and between November 2, 1916, and November 4, 1916," and that the next general election of the city occurs on December 4, 1916. The writ further shows a compliance in other respects with the requirement for the initiation of an amendment to the city charter.

S. T. Richardson, of Salem, for petitioner.
Bert W. Macy, of Salem, for defendants.

BEAN, J. (after stating the facts as above). The city officers demur to the alternative

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writ for the reason that it does not state facts sufficient to constitute a cause of action or entitle the relator to the relief sought therein. The former ordinance of the city of Salem provided that such an initiative petition should be filed with the recorder 60 days prior to the election at which the measure was to be voted upon. It is the contention on the part of the city that the initiative petition was not filed with the city recorder within the time provided by law. It is insisted that the ordinance amending the former ordinance and reducing the time for filing such petition to 30 days before the election did not go into effect until 10 days after the same was approved by the mayor, or until November 6, 1916, and therefore there was not time for a compliance with the terms thereof before the election on December 4th, and that the petition was not filed within the time allowed. The contrary is maintained by counsel for plaintiff. That the city council may ordain provisions for the carrying into effect of the initiative and referendum powers reserved to the legal voters of a municipality is well settled and unquestioned. Assuming without deciding that the ordinance approved October 25th, is in force, the date of the election at which it is desired to have the initiative measure acted upon being December 4, 1916, by the terms of the latter ordinance such initiative petition must be filed with the recorder not later than 30 days before that date. In order to comply with this requirement the last date upon which such petition could have been filed was November 3, 1916. In other words, after the filing of such petition 30 full days must elapse before the election. The filing of the petition having been completed on November 4th, excluding that day only, 29 days would elapse before December 4, 1916.

Section 531, L. O. L., provides in part as follows:

"The time within which an act is to be done, as provided in this Code, shall be computed by excluding the first day and including the last, unless the last day fall upon Sunday, Christmas, or other nonjudicial day, in which case the last day shall also be excluded."

In Rynearson v. Union County, 54 Or. 181, 102 Pac. 785, in applying section 531, L. O. L., to the statute requiring a satisfactory proof "that notice has been given by advertisement, posted * * * thirty days previous to the presentation of said petition to the county court" where the notice was posted upon September 3d, and the first day of the term of the county court then next ensuing was October 3, 1906, it was held that such notices were posted only 29 days prior to the session of the court. See, also, U. S. Nat. Bk. v. Shefler, 77 Or. 579, 581, 143 Pac. 51, 152 Pac. 234.

It is unnecessary, therefore, to consider the question as to whether the ordinance is in force as in any event the initiative petition was not filed according to the allegations of the alternative writ 30 days before the city election, in accordance with Ordinance No. 1464.

The demurrer to the writ will therefore be sustained.

McBRIDE, BENSON, and HARRIS, JJ., concur.

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(173 Cal. 660)

IMPERIAL LAND CO. et al. v. IMPERIAL IRR. DIST. et al. (L. A. 3765.)

(Supreme Court of California. Nov. 17, 1916.)

1. CONSTITUTIONAL LAW ⊂⊃285 — DUE PROCESS OF LAW—CURATIVE ACTS.

In a proceeding to subject property to the burden of a tax or assessment, no curative act can deprive a property owner of the right to resist a pretended sale, where the assessment, if enforced, would deprive him of his property without due process of law, or otherwise infringe his constitutional rights.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 897–903; Dec. Dig. ⊂⊃285.]

2. WATERS AND WATER COURSES ⊂⊃231—IRRIGATION DISTRICTS—CURATIVE ACTS—"JURISDICTIONAL."

Bridgford Act (St. 1897, p. 276) § 68, authorizes the board of directors of an irrigation district to bring an action in the superior court to determine the validity of any bonds issued, or assessments levied, while section 69 provides that if no such proceedings shall have been brought, then at any time within 30 days after the levy of any assessment or issue of any bonds, any district assessment payer may sue to determine the validity of any such assessment, while section 72 declares that no contest of anything or matter shall be made other than within the time and manner specified. *Held*, that the statutes prescribe a particular method of contesting irrigation assessments, and while a wholly defective assessment cannot, be cured, a property owner cannot, unless he sues within the 30-day period, attack an assessment for mere noncompliance with those provisions which the Legislature need not have required in the first place, this being true as to jurisdictional steps relating to procedure which need not have been required, the term "jurisdictional" not only referring to the power to levy the assessments, but to the procedure.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. ⊂⊃231.

For other definitions, see Words and Phrases, First and Second Series, Jurisdiction.]

3. WATERS AND WATER COURSES ⊂⊃227—IRRIGATION DISTRICTS—CURATIVE ACTS.

The failure of the board of directors of an irrigation district to enter in full in the minutes a call for a special meeting in accordance with Bridgford Act, § 14, is a mere irregularity, and failure of property owners to sue on such ground within the 30 days prescribed by section 69 operates as a waiver.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 318; Dec. Dig. ⊂⊃227.]

4. WATERS AND WATER COURSES ⊂⊃227—IRRIGATION DISTRICTS—SPECIAL MEETINGS.

Under Bridgford Act, § 14, declaring that special meetings must be ordered by a majority of the board, and that the order must be entered of record, and 5 days' notice given to each member not joining in the order, it is sufficient, all members joining, to record in the minutes of the board an order for a special meeting for the purpose of setting the rate of taxes for the yearly assessment of an irrigation district; it being unnecessary that the record set forth the matter with particularity.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 318; Dec. Dig. ⊂⊃227.]

5. WATERS AND WATER COURSES ⊂⊃227—IRRIGATION DISTRICTS—SPECIAL MEETINGS.

As the section does not prescribe when the order shall be entered, it is sufficient that the entry be made in the minutes of the meeting held pursuant thereto.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 318; Dec. Dig. ⊂⊃227.]

6. WATERS AND WATER COURSES ⊂⊃231—IRRIGATION DISTRICTS—ASSESSMENTS—IRREGULARITY.

Under Bridgford Act, § 59, as amended in 1911 (St. 1911, p. 1111), providing for special elections for submission to voters in irrigation districts of special assessments, and that an assessment of not to exceed 2 per cent. of the value of the assessable property may be levied in any one year by resolution of at least four-fifths of the members of the board of directors, the amount not to exceed $75,000, the board of directors of an irrigation district has jurisdiction to levy a special assessment, and though the mode of levy was irregular, such irregularities are waived under section 69, where property owners did not sue within the 30 days allowed.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. ⊂⊃231.]

7. WATERS AND WATER COURSES ⊂⊃231—IRRIGATION DISTRICTS — ASSESSMENTS — OFFER TO DO EQUITY.

Where assessments levied by an irrigation district were valid, property owners, objecting to the mode of enforcement, who did not offer to pay the amounts legally due, have no standing in a court of equity; for a person must do equity to be entitled to equitable assistance.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. ⊂⊃231.]

8. WATERS AND WATER COURSES ⊂⊃231—IRRIGATION DISTRICTS—ASSESSMENTS.

Where under Bridgford Act, § 69, irregularities in an assessment by the board of directors of an irrigation district were waived, evidence of such irregularities was properly excluded in a suit to enjoin the assessment as invalid.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. ⊂⊃231.]

9. WATERS AND WATER COURSES ⊂⊃231—REVIEW—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW.

In a suit to enjoin an assessment by an irrigation district, where it was contended that the lands of plaintiffs were not described upon the assessment book as required, but the record did not show the book was offered in evidence, or that plaintiffs' questions relative to such book indicated they were seeking to show the insufficiency of the descriptions, the exclusion of questions as to the book cannot be complained of on appeal; the matter not having been raised and disposed of below.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. ⊂⊃231.]

Department 1. Appeal from Superior Court, Imperial County; F. J. Cole, Judge.

Action by the Imperial Land Company, a corporation, and others against the Imperial Irrigation District and others. From a judgment for defendants and an order denying new trial, plaintiffs appeal. Affirmed.

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Valentine & Newby, of Los Angeles, for appellants. Haines & Haines, of San Diego, and R. D. McPherrin, of Imperial, for respondents.

SLOSS, J. The plaintiffs, owners of land within the boundaries of Imperial irrigation district, brought this action against the district and its officers to obtain an injunction restraining the sale of the property of plaintiffs for nonpayment of an assessment attempted to be levied by the district for the year 1912, and for a decree annulling said assessment. Judgment went for the defendants, and plaintiffs appeal from such judgment and from an order denying their motion for a new trial.

Imperial irrigation district was organized in December, 1911, under the act approved March 31, 1897 (commonly known as the Bridgford Act), and amendments thereto. Stats. 1897, p. 254. The assessment herein attacked was levied on August 2, 1912, and was an assessment of seven mills ($0.007) upon each dollar of assessed value of real property within the district. The present action was commenced on August 16, 1913, something more than a year after the levy of the assessment.

[1, 2] The plaintiffs and appellants rely upon various asserted defects in the proceedings both before and after the levy of the assessment. With respect to everything taking place up to the date of the assessment (August 2, 1912), the defendants set up in their answer the limitations contained in sections 68, 69, 70, 71, and 72 of the statute. Section 68 authorizes the board of directors of the district to bring an action in the superior court to determine the validity of any bonds issued or assessments levied. Section 69 provides that if no such proceeding shall have been brought, then "at any time within thirty days after the levy of any assessment or issue of any bonds under the provisions of this act, any district assessment payer may bring an action in the superior court of the county where the office of the board of directors is located, to determine the validity of any such assessment or such bonds." Section 70 provides for the consolidation of contests; section 71, for the manner of disposing of such contests. Section 72 declares that:

"No contest of anything or matter herein provided shall be made other than within the time and manner herein specified. * * *"

The court below, after finding that this action was commenced more than 30 days after the date of the levy of the assessment, drew as one of its conclusions of law:

"That said suit is barred as to all attack upon said assessment by the provisions of sections 69, 70, 71, and 72 of the Irrigation District Act."

Sections 69 and 72 create a particular action as the sole mode by which a landowner may attack the validity of an assessment, and enact a period of limitation for such action. These provisions are not analogous to those of the street law giving an appeal to the city council. Stats. 1885, p. 147. The decision of the council is made conclusive only upon "errors, informalities, and irregularities which said city council might have remedied and avoided." Where the contract is void in its inception, the owner is not therefore required to appeal to the council. Manning v. Den, 90 Cal. 610, 27 Pac. 435; McBean v. Redick, 96 Cal. 191, 31 Pac. 7; Chase v. Treas., 122 Cal. 540, 55 Pac. 414. But the proceeding authorized by the Bridgford Act is brought in a court of general jurisdiction, which has full power to pass upon any question touching the substantial rights of the parties, and the grounds of attack which may be made upon the levy in such proceeding are in no way limited. It may be that the provisions under discussion would not bar an action directed against the pretended levy of an assessment by a body which had no legal existence or had no power, by any kind of proceeding, to levy the assessment. But we think they must certainly be operative to foreclose an attack based upon mere irregularities, or upon the failure to comply with statutory requirements which the Legislature might in the first instance, have failed to enact. In this respect, the effect of the statute is at least as strong as is the provision of the Street Bond Act (Stats. 1893, p. 33), declaring that the bonds issued under the act shall be conclusive evidence of all proceedings previous to the making of the certified list of all assessments unpaid. This provision received careful consideration at the hands of this court in Chase v. Trout, 146 Cal. 350, 80 Pac. 81. See, also, Baird v. Monroe, 150 Cal. 568, 89 Pac. 352; Board of Ed. v. Hyatt, 152 Cal. 519, 93 Pac. 117; Wilcox v. Engebretsen, 160 Cal. 292, 116 Pac. 750; Schaffer v. Smith, 169 Cal. 771, 147 Pac. 976. The conclusion reached was, as above indicated, that a curative act, or a clause making bonds conclusive evidence of the regularity of prior proceedings, was operative so far as to cure a failure to comply with any step which the Legislature might originally have omitted from the requirements of the statute. In any proceeding designed to subject the property of an individual to the burden of tax or assessment, certain elements are essential to constitute compliance with the mandates of the state or federal Constitutions. It is agreed on all hands that no curative act can deprive a property owner of the right to resist a pretended assessment which, if enforced, would deprive him of his property without due process of law or otherwise infringe his constitutional rights. But short of this, there is no more reason for denying to the statute before us than to that involved in Chase v. Trout, supra, the effect of foreclosing any attack based upon the failure to pursue regularly or at all those steps which the Legislature was not bound to make a part of the statutory procedure. As is pointed out in

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Chase v. Trout, supra, the applicability of curative statutes is not to be determined solely by inquiring whether the steps omitted or defectively performed were "jurisdictional." The term "jurisdictional" has been used in various senses. The power to levy an assessment or impose a liability on private property is derived solely from the statute, and must be exercised in the manner laid down in the statute. In this sense, the jurisdiction of the board extends only to its right to act in the manner prescribed by the Legislature. But with respect to any steps which are not constitutionally necessary, the Legislature may, in the very act which requires these "jurisdictional" steps to be taken, declare that unless objection is made at a certain time or in a certain way, a failure to take these steps shall not affect the validity of the proceeding. This is the plain meaning of the holding in Chase v. Trout, supra, and we do not doubt that it is equally applicable here.

The objections urged by the appellant to the assessment all fall within the character of irregularities not affecting the constitutional rights of the assessment payer, and therefore not beyond the remedial power of a curative clause or a statutory limitation like that contained in the Bridgford Act.

[3-5] 1. The assessment was levied at a special meeting. Section 14 of the act provides that special meetings—

"must be ordered by a majority of the board. The order must be entered of record, and five days notice thereof must, by the secretary, be given to each member not joining in the order."

It also provides that the order must specify the business to be transacted. The complaint alleges that the call or order for said meeting was not entered upon the minutes of the board, and the purpose of the said call was not specified therein. The answer, while not as specific and direct as it might have been, did, we think, contain a sufficient traverse of the material portions of these allegations. It appeared that the minutes of the special meeting of August 2, 1912, stated that said meeting was called by order of all the board to set the rate of taxes for the assessment of 1912–1913. We think this was a sufficient compliance with the requirement that "the order must be entered of record." The record, i. e., the minutes of the board, contain an entry of the fact that all the members of the board had ordered a special meeting at a given time for the purpose of setting "the rate of taxes for the assessment of 1912–1913." It is true that the order made by the directors was not entered in hæc verba in the record, but the substance thereof was so recorded and this, we think, was sufficient. There is no claim that the directors did not, in fact, unite in making an order for a special meeting for the purposes named. This was sufficient to vest in the board the power to levy an assessment authorized by the statute. The failure to enter the call in full in the minutes is at most a mere irregularity, which would be cured by the failure of an assessment payer to bring his action within 30 days. We find nothing in the statute which requires that the order for meeting shall be entered of record "five days before the meeting." All that is required is that the order shall be entered, and that 5 days' notice shall be given to members not joining in the order. No notice was required here, since all the members joined in the order. The statute does not prescribe the time when the order must be entered, and it would seem that the appropriate place for such entry would be in the minutes of the meeting held pursuant to the order.

[6] 2. It is claimed that the board had no authority to levy an assessment except by resolution specifying the amount of money proposed to be raised and the purpose for which it is intended to be used. Section 39 of the act provides for the levy of an assessment sufficient to raise interest on outstanding bonds, sums due or to become due on account of rentals or charges for lands or water rights acquired by the district or to pay contracts or obligations which have been reduced to judgment. The complaint alleges, and it is not denied, that the district had not, on August 2, 1912, any obligations falling within these classes. The assessment was not therefore authorized by section 39. But section 59 authorizes the board to call a special election for submission of the question whether or not a special assessment shall be levied "for the purpose of raising money to be applied to any of the purposes provided in this act." Among such purposes are the necessary expenses of conducting the district, including the payment of salaries of officers and employés. Section 59, as originally enacted, made an election a prerequisite to the levy of any assessment thereunder. In 1911 (St. 1911, p. 1111) the section was amended by the adoption of the following proviso:

"Provided, however, that an assessment of not to exceed two per centum of the value of the assessable property within the district may be levied in any one year without such vote by the adoption of a resolution by at least four-fifths of the members of the board of directors, such amount not, however, to exceed the sum of seventy-five thousand ($75,000) dollars."

It is under this proviso that the district asserts the right to levy the assessment in question. The language quoted clearly authorizes the levy of an assessment for the general purposes of the district. It is argued by the appellant that section 59, read in conjunction with other provisions of the act, provides that any resolution, levying such assessment, must be preceded by an estimate and determination of the amount of money necessary to be raised, and must specify the amount of money proposed to be raised and the purpose for which it is intended to be used. We need not determine whether the act should be construed in the manner thus claimed. Certainly these re-

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quirements, if they be requirements of the act, are matters which might have been omitted by the Legislature without infringing constitutional rights. The failure to observe them, therefore, constitutes an irregularity which, under the views hereinabove expressed, cannot be availed of by an assessment payer who has failed to bring his action within the period of 30 days limited by section 69 of the act.

The same answer applies to the suggestion of appellants that the assessment was levied (according to the recital of the minutes) by a mere motion rather than by a resolution. Assuming that there is any substantial difference between a motion and a resolution, this point is no longer available to the appellants.

Without specifying other objections to the levy of the assessment, it may be said that they are all of such character as to be cured by the sections fixing a specific procedure and a period of limitation for attacks upon assessments.

[7] Other objections based on proceedings had after the levy of the assessment are also urged by the appellants. The complaint contained no offer to pay the amount justly due. "It is now firmly settled by our decisions that where a property owner applies for equitable relief against the public authorities, as, for example, to restrain proceedings for the collection or enforcement of taxes assessed against it, or to enjoin the execution of a tax deed, or to cancel a lien or charge for taxes, of record against his land, and it appears that all or some part of the tax charged is justly and equitably due from the plaintiff, or chargeable upon the land, he must, as a condition of obtaining such relief, first pay or offer to pay the amount justly due, or he must be required to do so before the relief to which he shows himself entitled is given." Holland v. Hotchkiss, 162 Cal. 366, 370, 123 Pac. 258, 259 (L. R. A. 1915C, 492); Couts v. Cornell, 147 Cal. 560, 82 Pac. 194, 109 Am. St. Rep. 168; Trippet v. State, 149 Cal. 530, 86 Pac. 1084, 8 L. R. A. (N. S.) 1210; San Diego, etc., Co. v. Cornell, 150 Cal. 637, 89 Pac. 603; Johnson v. Canty, 162 Cal. 391, 123 Pac. 263. The principle has been applied to an action to enjoin a sale of land for delinquent assessments of an irrigation district organized under the Wright Act, in force prior to the enactment of the statute here involved. Quint v. Hoffman, 103 Cal. 507, 37 Pac. 514, 777. There being, as we have seen, a valid assessment upon the lands of appellants, the rule is properly applied to prevent any attack upon subsequent proceedings looking to the collection of the assessment.

[8, 9] The appellants complain of various rulings of the court sustaining objections to offers of evidence. With one possible exception, all of the evidence thus rejected related to irregularities in proceedings leading up to the levy of the assessment. Under the views already expressed regarding the effect of a failure by the assessment payer to bring his action within the time limited by section 69, the rulings were proper. The single point which may be excluded from this general statement is the assignment that the court erred in excluding evidence offered to show that the lands of the plaintiff were not described upon the assessment book as required by section 35 of the act. The complaint alleged and the answer denied that there had been no such description. But the record does not show that the assessment book was offered in evidence, or that the appellant's counsel in asking questions relative to such book gave any intimation that he was seeking to show the insufficiency of the descriptions. The point now urged was not brought to the attention of the court below, and there was no ruling of which the appellant may complain here.

It becomes unnecessary, therefore, to consider in detail the other points urged by the appellant. All of them are disposed of by what has been said.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; LAWLOR, J.

(173 Cal. 668)

IMPERIAL LAND CO. et al. v. IMPERIAL IRR. DIST. et al. (L. A. 4196.)

(Supreme Court of California. Nov. 17, 1916.)

1. WATERS AND WATER COURSES ⇐231—IRRIGATION DISTRICTS—ASSESSMENT BOOKS.
Where the various pages of the assessment book of a drainage district contained columns for the entry of different matters required, and the columns designed to show the values of property assessed were in each case headed by a dollar mark, and in each column were inserted figures showing the value of the property, there was a sufficient compliance with Bridgford Act (St. 1897, p. 266) § 35, requiring the book to show the cash value of property assessed; it being immaterial that dollar marks preceded other columns which contained entries not relating to values.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. ⇐231.]

2. WATERS AND WATER COURSES ⇐231—IRRIGATION DISTRICTS—ASSESSMENT BOOKS.
Under Bridgford Act, § 38, providing that within 10 days after the close of a meeting of the board of directors for equalization of irrigation assessments, the secretary shall have the total values as finally equalized by the board extended in columns and added, it is unnecessary that the assessment books show that the extension and addition were made within the required time, and when such fact is shown by parol evidence, the assessment is good.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. ⇐231.]

3. WATERS AND WATER COURSES ⇐231—IRRIGATION DISTRICTS—ASSESSMENTS.
Where a resolution of the board of directors of a drainage district recited that it was necessary for the lawful purposes of the district that

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the sum of $28,935 be raised by special assessment for the general fund, property owners could not complain that the board did not estimate or determine that the amount specified was the sum required to be raised by special assessment.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. ⊂⊃ 231.]

4. APPEAL AND ERROR ⊂⊃1061(2)—REVIEW—HARMLESS ERROR.

Where plaintiffs, suing to enjoin enforcement of an assessment by an irrigation district, were not entitled to relief, they were not prejudiced by a judgment of dismissal, instead of one on the merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4209; Dec. Dig. ⊂⊃1061(2).]

5. PLEADING ⊂⊃279(4) — SUPPLEMENTAL PLEADING—EFFECT OF.

Facts to be alleged in a supplemental pleading must relate to and be material to the original case.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 838, 839; Dec. Dig. ⊂⊃279(4).]

6. PLEADING ⊂⊃279(4) — SUPPLEMENTAL PLEADING—EFFECT OF.

As a supplemental pleading is proper only in aid of the case made by the original complaint, relief cannot be granted upon such pleading, where the proof shows that the plaintiff had no cause of action when its original complaint was filed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 838, 839; Dec. Dig. ⊂⊃279(4).]

7. PLEADING ⊂⊃279(3)—SUPPLEMENTAL COMPLAINT — IRRIGATION DISTRICTS — ASSESSMENT AGAINST ENFORCEMENT.

In an action under Bridgford Act, § 69, to determine the validity of an assessment levied by the board of directors of an irrigation district, plaintiffs filed a supplemental complaint, questioning the assessment on the ground that after the filing of the original complaint, a petition for an election pursuant to section 59, as amended by St. 1911, p. 1111, providing that where after the levy of an assessment and petition signed by the qualified voters in the district equal in number to 15 per cent of the votes cast at the last general election, such assessment shall not be levied without the election authorized, was filed, which petition was, by the board, rejected. *Held*, that as the supplemental complaint referred to matters not arising until after the filing of the original complaint, and as the election provided for is only in the nature of a referendum election, which does not invalidate the assessment, relief could not be granted on the supplemental complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 837½; Dec. Dig. ⊂⊃279(3).]

8. WATERS AND WATER COURSES ⊂⊃231—IRRIGATION DISTRICTS — ASSESSMENT — ACKNOWLEDGMENT.

Where notwithstanding a sufficient petition under Bridgford Act, § 59, as amended by St. 1911, p. 1111, providing that an assessment by the board of directors of an irrigation district shall not be collected without an election, if a petition therefor is signed by voters equal in number to 15 per cent. of the votes cast at the last general election, the board of directors proceed to collect the assessment without election, property owners may maintain an action to restrain enforcement of the assessment.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. ⊂⊃231.]

Department 1. Appeal from Superior Court, Imperial County; Robert M. Clark, Judge.

Action by the Imperial Land Company, a corporation, and others, against the Imperial Irrigation District, a corporation, and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Valentine & Newby, of Los Angeles, for appellants. Haines & Haines, of San Diego, and M. W. Conkling, of El Centro, for respondents.

SLOSS, J. This action was brought by various landowners in the Imperial irrigation district to contest the validity of an assessment levied by the board of directors of the district. We have just filed an opinion in a case bearing the same title 160 Pac. 113 (L. A. No. 3765). In that action, the assessment attacked was one levied for the year 1912, and our decision turned, in part, upon the fact that the complaint had not been filed within the period limited by section 68 of the Bridgford Act (St. 1897, p. 276). The assessment here in question was levied on September 24, 1913, and the action to determine its validity was begun on October 23, 1913, less than 30 days after the levy. On January 9, 1914, the plaintiffs filed a supplemental complaint, in which they alleged the filing of a petition for an election pursuant to the terms of section 59 of the act. That section provides for an election by which the qualified electors of the district shall determine whether or not a special assessment shall be levied "for the purpose of raising money to be applied to any of the purposes provided in this act." This grant of power to call such election is followed by a proviso (St. 1911, p. 1111), authorizing the board to levy in any year an assessment not exceeding 2 per centum of the value of the assessable property within the district, and not exceeding $75,000, without the vote of the electors; "provided, further, that if a petition signed by qualified voters in the district equal in number to fifteen per centum of the votes cast at the last preceding general election in such district, shall, within thirty days after the board shall by resolution have provided for the levying of such assessment, be filed with such board petitioning that an election relative to the levying of such assessment be held, such assessment shall not be levied without the election provided * * * in this section." The supplemental complaint, after setting forth the filing of a sufficient petition within the 30 days, alleged that the board of directors had refused to call an election, and was proceeding to enforce the assessment without submitting the question to the vote of the electors. The answer to the original complaint put in issue the allegations designed to show irregularities in the levying of the assessment itself. The answer to the supplemental complaint, while admitting the filing of a petition, denied that it had been signed by the requisite number of

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voters, and alleged that the board had determined that it was "not satisfied * * * that said petition is signed by qualified voters in the district equal in number to 15 per cent of the votes cast at the last preceding general election. * * *" In response to the issues raised by the original complaint and the answer thereto, the findings were that the assessment had been levied in compliance with the requirements of the law. On the supplemental pleadings, the court found in accordance with the allegations of the answer. The conclusions of law were that "the original complaint herein should be dismissed on the merits," and that the declarations and action of the board of directors with reference to the petition for election "are conclusive in this action and are not open to collateral attack herein." The judgment was that the complainants take nothing, that the temporary injunction theretofore issued be dissolved, and that the defendants recover their costs. The appellants appeal from the judgment and attack the propriety of the determinations made by the court below with reference both to the original and the supplemental pleadings.

[1] We are satisfied that the court below correctly determined that there was no merit in the attacks upon the assessment, made by the original complaint. Certain irregularities were alleged and denied, and the court found against the averments of the complaint in each instance. We cannot accede to the claim that these findings are without support in the evidence. It is claimed that the assessment book did not comply with section 35 of the Bridgford Act, in that it did not state the cash value of the real estate assessed. It appears, however, that the various pages of the assessment book contained columns for the entry of the different matters required, and that the columns designed to show the values of the properties assessed were, in each case, headed by a dollar mark. The mark thus appearing at the head of the column was applicable to all of the figures appearing in that column. It was not necessary to repeat the symbol before each valuation on the page. Knobloch v. Associated Oil Co., 170 Cal. 144, 148 Pac. 938. An entirely different situation was presented in Fox v. Townsend, 152 Cal. 51, 91 Pac. 1004, 1007, and the earlier decisions there cited. In those cases the assessment roll did not contain a dollar mark connected in any way with the figures of valuation. The appellants attempt to make a point of the fact that the dollar mark was also printed at places where it had no purpose or significance, as, for example, at the head of the column for "total number of acres to be assessed." But the circumstance that the sign was unnecessarily or uselessly appended in some instances furnishes no reason for denying it its true significance in the places where it properly belonged.

Without going into unnecessary detail, it will suffice to say that an inspection of the portions of the assessment book copied in the transcript demonstrates that there is no substantial force in plaintiffs' contention that the evidence does not sustain the finding that the assessment book shows "the total value of all property assessed" and "the total value of all property after equalization by the board of directors of said district." The figures appearing in the last volume of the assessment book disclose these totals, and they are entered in such manner that there can be no fair ground for doubt or uncertainty regarding their meaning.

[2] It is claimed that the assessment book does not show on its face that the total valuation, as finally equalized by the board, had been extended into columns and added by the secretary within 10 days after the close of the session of the board of equalization. Section 38 of the act. But the act does not require that the books shall show that the extension and addition were made within the required time, and there was uncontradicted oral testimony that the requisite acts had been so done.

[3] The next objection is that the evidence does not sustain the finding that the board of directors estimated or determined that the sum of $28,935 was the sum required to be raised by special assessment. It is sufficient in answer to this point, to quote the following language from the resolution adopted by the board on September 24, 1913:

"Be it resolved by the board of directors of said Imperial irrigation district, that it is necessary for the lawful purposes of said district for its fiscal year 1913–1914, that the sum of $28,935 be raised by special assessment for the general fund."

The statute does not require that any more detailed estimate shall be spread upon the record.

[4] The foregoing discussion disposes of every substantial point bearing upon the validity of the assessment as originally levied. The appellants complain of the conclusion of law that the "original complaint should be dismissed," claiming that judgment upon the merits should have been ordered. We cannot see that the appellants are prejudiced by a dismissal in place of a judgment against them on the merits. However, a judgment of the latter kind was, in fact, entered.

[5-8] The plaintiffs having, then, failed to establish a case for relief under their original complaint, were they entitled to prevail under the supplemental pleadings? The court below proceeded upon the theory that the determination of the board with respect to the insufficiency of the signatures to the petition for election concluded the plaintiffs, and prevented them from showing that a sufficient petition to require an election had in fact been presented. In the view we take of the case, we are not called upon to deter-

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mine whether this position can be supported. An analogous question was fully considered by this court in Wilcox v. Engebretsen, 160 Cal. 288, 116 Pac. 750. It may well be that the doctrine of that case would require a holding that the determination of the board regarding the sufficiency of the signatures to the petition for an election under section 59 is not conclusive, but that the question is open for examination and review in any judicial proceeding in which the validity of the board's action is properly called in question. But the propriety of the action of the board in refusing to call an election was not a proper subject of inquiry in the present action. It was not a matter which could be brought into litigation by supplemental pleadings. The action was brought under section 69 of the Bridgford Act to determine the validity of an assessment levied by the board. The case of the plaintiffs was based upon the theory and contention that the assessment so levied was invalid. The election authorized by section 59 of the act is not an attack upon the validity of the original levy. It presupposes such validity, but seeks to subject the action of the board to a referendum; i. e., to the veto power of the electors of the district. The original complaint was one to determine the validity of the assessment; that is to say, to obtain an adjudication that the assessment was invalid. The supplemental complaint sought an adjudication, not that the assessment was invalid, but that it should be suspended until the holding of an election which should result in authorizing or prohibiting the enforcement of the assessment. It follows, therefore, that the supplemental complaint is not consistent with or in aid of the original complaint, but is the assertion of a new and independent cause of action. It is well settled by our decisions that the facts to be alleged in a supplemental pleading must relate to and be material to the original case. Gleason v. Gleason, 54 Cal. 135; Brown v. W. M. Co., 127 Cal. 630, 60 Pac. 424; Bowman v. Wohlke, 166 Cal. 121, 135 Pac. 37, Ann. Cas. 1915B, 1011.

Furthermore, since a supplemental pleading is proper only in aid of the case made by the original complaint, relief cannot be granted upon a supplemental complaint, where the proof shows that the plaintiff had no cause of action when his original complaint was filed. "If a party has no cause of action at the time of the institution of his action, he cannot maintain it by filing a supplemental complaint founded on matters which have subsequently occurred." Wittenbrock v. Bellmer, 57 Cal. 12; Gordon v. San Diego, 108 Cal. 264, 41 Pac. 301; Hill v. Den, 121 Cal. 42, 53 Pac. 642. Here as we have seen, the plaintiffs had no cause of action when their complaint was filed. The findings of the court against their allegations of irregularity were fully supported by the evidence. They could not therefore make a new case by supplemental complaint.

For these reasons the court could not have granted the plaintiffs relief upon their supplemental complaint, and they are not injured by the court's action thereon, even though such action may have been based upon an erroneous reason.

We do not doubt that the action of the board in attempting to collect an assessment, notwithstanding the filing of a sufficient petition for an election under section 59, would justify an action by the assessment payer to restrain the enforcement of the assessment until the holding of the election. Whether such action can be regarded as a proceeding, under section 69, "to determine the validity of such assessment," as is suggested in Imperial Land Co. v. Imperial Irrigation District, 26 Cal. App. 529, 147 Pac. 593, it is not necessary here to decide. It is sufficient for the purposes of this case to say that, if the failure to call an election gives to the landholder the right to proceed under section 59 of the act, such right is entirely distinct from the right, asserted by a complaint filed before the presentation of the petition for election, to assail the validity of the original levy.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

(173 Cal. 674)

IMPERIAL LAND CO. et al. v. IMPERIAL IRR. DIST. et al. (L. A. 3774.)

(Supreme Court of California. Nov. 17, 1916.)

APPEAL AND ERROR ⟸790(2) — QUESTIONS PRESENTED FOR REVIEW—MOOT CASES.

An appeal from an order granting an injunction pendente lite, restraining the enforcement of an assessment levied by defendant irrigation district, will be dismissed, where judgment on the merits for defendant was affirmed on appeal; the question having become moot.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4383, 4384; Dec. Dig. ⟸ 790(2).]

Department 1. Appeal from Superior Court, Imperial County; Louis W. Myers, Judge.

Action by the Imperial Land Company, a corporation, and others, against the Imperial Irrigation District and others. From an order granting an injunction pendente lite, defendants appeal. Appeal dismissed.

A. Haines and Haines & Haines, all of San Diego, for appellants. Valentine & Newby, of Los Angeles, for respondents.

SLOSS, J. This is an appeal by defendants from an order granting an injunction pendente lite. The injunction restrained the enforcement of an assessment levied by the board of directors of the Imperial irrigation district. The trial of the action resulted in a judgment in favor of the defendants, and we

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have this day filed an opinion affirming such judgment. Imperial Land Co. v. Imperial Irr. Dist. (L. A. No. 4196) 160 Pac. 116.

The judgment on the merits, which now becomes final, ended the life of the temporary injunction. The defendants have accordingly secured every substantial benefit which they could obtain by a reversal of the order which they seek to review by the present appeal. The rights of the parties would not be affected in any way by either an affirmance or a reversal of such order. In this state of facts, the questions presented are merely moot or academic, and the court will not exercise its appellate jurisdiction for their decision. Foster v. Smith, 115 Cal. 611, 47 Pac. 591; Bradley v. Voorsanger, 143 Cal. 214, 76 Pac. 1031.

The appeal is dismissed.

We concur: SHAW, J.; LAWLOR, J.

(173 Cal. 657)

Ex parte BALLESTRA. (Cr. 2028.)

(Supreme Court of California. Nov. 16, 1916.)

1. CONSTITUTIONAL LAW ⟸89(1)—RIGHT TO CONTRACT—REGULATION.

The right to make contracts, like other personal and property rights, is subject to reasonable regulation designed to promote the general convenience, prosperity, and welfare.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 157; Dec. Dig. ⟸89(1).]

2. MASTER AND SERVANT ⟸69—PAYMENT OF WAGES—STATUTORY PROVISIONS.

Act June 5, 1915, amending Act March 1, 1911 (St. 1915, p. 1215), making it an offense to issue in payment of wages any order, check, memorandum, or other acknowledgment of indebtedness, unless it is negotiable and payable on demand without discount, or to issue in payment of wages any script, or other thing redeemable in merchandise or otherwise than in money, as applied to ordinary transactions between employers and employés of the kind within its terms, is valid and constitutional.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 78–81; Dec. Dig. ⟸69.]

3. MASTER AND SERVANT ⟸84—PAYMENT OF WAGES—CRIMINAL OFFENSES.

An affidavit charging that on a date named accused did willfully and unlawfully issue in payment of and as evidence of indebtedness for wages to an employé a note for the amount of wages due two years after date, and not on demand, no part of which has been paid, states an offense under Act June 5, 1915, amending Act March 1, 1911 (St. 1915, p. 1215), forbidding payment of wages by any order or acknowledgment of indebtedness unless it is negotiable and payable on demand without discount in cash or by any script or other thing redeemable in merchandise or otherwise than in money.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 78–81; Dec. Dig. ⟸84.]

4. HABEAS CORPUS ⟸92(1) — HEARING — SCOPE OF INQUIRY.

On writ of habeas corpus for the discharge of one accused of violation of Act June 5, 1915, amending Act March 1, 1911 (St. 1915, p. 1215), relating to payment of wages of employés, the contention in the brief of counsel that the note given by the petitioner was not for current wages, but for accumulated wages for months passed, will not be considered, but must await the trial of the accused.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 89; Dec. Dig. ⟸92(1).]

In Bank. Petition by John Ballestra for writ of habeas corpus. Petition denied, and petitioner remanded to custody.

W. F. Cowan, of Santa Rosa, for petitioner. Clarence F. Lea and G. W. Hoyle, both of Santa Rosa, for respondent.

SHAW, J. The petitioner is in custody upon the charge of having violated the provisions of the act of June 5, 1915, in effect August 8, 1915, amending the prior act of March 1, 1911 (Stats. 1915, p. 1215). Section 1 of the statute is, in part, as follows:

"No person, firm or corporation shall issue, in payment of or as an evidence of indebtedness for wages due an employé, any order, check, memorandum, or other acknowledgment of indebtedness, unless the same is negotiable, and is payable upon demand without discount in cash at some bank or other established place of business in the state; and no person, firm or corporation shall issue in payment of wages due, or wages to become due an employé, or as an advance on wages to be earned by an employé, any script, coupons, cards or other thing redeemable in merchandise or purporting to be payable or redeemable otherwise than in money."

Section 2 makes a violation of the act a misdemeanor, punishable by fine or imprisonment, or both.

In considering this statute we may presume, in support of the legislative enactment, that some employers in this state had adopted and followed the custom of paying the daily, weekly, or monthly wages of their employés when due by giving orders for the amount thereof payable only in goods, or orders of an indefinite nature not payable on demand, but at some future time. The purpose of the statute evidently is to prevent the evils which the Legislature believed had arisen from such practices.

[1, 2] The right to make contracts, like other personal and property rights, is subject to reasonable regulation designed and calculated to promote the general convenience, prosperity, and welfare. Mutual Loan Co. v. Martell, 222 U. S. 232, 32 Sup. Ct. 74, 56 L. Ed. 175, Ann. Cas. 1913B, 529. Laws having a reasonable tendency to accomplish these results, and not imposing unreasonable burdens upon individuals, are valid. The provisions of the statute in question do not transgress this rule. As applied to ordinary transactions between employers and employés, of the kind embraced within its terms, the statute is, in our opinion, valid and constitutional.

[3] The affidavit on which Ballestra is held in custody charged, in the language of the statute, that on October 30, 1915, in Sonoma county, Cal., Ballestra "did willfully and unlawfully issue in payment of and as

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evidence of indebtedness for wages due an employé, to wit: Pasquale Barberies," a certain note set forth in the affidavit, for the amount of wages due Barberies, payable two years after date, and not on demand, no part of which has been paid. This clearly states an offense embraced in the description given in the statute.

[4] It is claimed in the brief of the petitioner that the note in question was not given for current weekly or monthly wages in the ordinary course of business, but that, in fact, the employé had worked for many months for Ballestra, allowing his wages to accumulate without payment, or to accrue in excess of partial payments, until the amount due was many times the monthly wages agreed on, that Ballestra was unable presently to pay this sum, and that the note was executed in pursuance of an agreement between them to give him further time for payment, or in consideration that Mary Ballestra, who also signed the note, should execute it as surety the terms of the note lend color to this suggestion. We are not prepared to say that the statute in question was intended to, or that it does, apply to such a transaction, or that, if it did, it would be a reasonable regulation of the right of private contract secured by the Constitution, and within the legislative power. We have not the facts before us. The petitioner has not been put upon his trial, and no evidence has been taken. He seeks release solely upon the facts stated in the affidavit upon which the warrant of arrest was issued, and we cannot consider other facts which may exist and which may take the case out of the legitimate operation of the statute, or which raise the constitutional question suggested. We express no opinion concerning the proper solution of such a case. The petitioner must go to trial upon the charge made against him.

The petitioner is remanded to the custody of the officer.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.; LAWLOR, J.

(173 Cal. 646)

ARTHUR v. MERCHANTS' ICE & COLD STORAGE CO. OF LOS ANGELES.

(L. A. 3484.)

(Supreme Court of California. Nov. 11, 1916.)

1. MASTER AND SERVANT ⟸217(17)—INJURY TO SERVANT—ASSUMPTION OF RISK.

Under Civ. Code, § 1970, as amended by St. 1907, p. 119, providing that an employé's knowledge of dangers incident to the work does not prevent his recovery unless he "fully understood, comprehended and appreciated such dangers and thereafter consented to proceed with his work," where a driver who was injured while in the employ of the defendant ice company from being kicked by a vicious horse remained in defendant's employ and continued to drive the horse after being warned of the animal's propensity to kick, he assumed the risk of injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 585; Dec. Dig. ⟸ 217(17).]

2. MASTER AND SERVANT ⟸217(1)—ASSUMPTION OF RISK.

A servant assumes the ordinary risks of his employment so far as those risks at the time of his employment are known to him, or should be readily discoverable by a person of his age and capacity.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 574; Dec. Dig. ⟸217(1).]

3. MASTER AND SERVANT ⟸150(1)—WARNING OF PERILS—DUTY OF MASTER.

The master should give warning of those perils to which his servants will be exposed, and of which he is or ought to be aware, other than such as they in the exercise of ordinary care should have foreseen as necessarily incident to the employment in the natural and ordinary course of affairs.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 297, 300; Dec. Dig. ⟸ 150(1).]

4. MASTER AND SERVANT ⟸157—INJURY TO SERVANT—SUFFICIENCY OF WARNING—LIABILITY OF MASTER.

That the defendant ice company's route superintendent, who notified plaintiff, also a servant of the company, that the horse which kicked him while he was sitting on the wagon seat about 3½ feet above the ground was addicted to kicking viciously while being driven, failed to warn him that the horse was an unusually high kicker, though he knew such to be the case, did not make the master liable, where the route superintendent was not in the discharge of any duty when he warned the servant, who had previously received a sufficient warning from one charged with such duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 303; Dec. Dig. ⟸157.]

5. MASTER AND SERVANT ⟸157—INJURY TO SERVANT—SUFFICIENCY OF WARNING.

Where a driver in the employ of defendant ice company, who was injured from being kicked while riding on the wagon seat about 3½ feet from the ground, had been warned that the horse was addicted to kicking viciously, and the employé was as well acquainted with the danger from such horses and the means of protection as the employer's servants whose duty it was to warn him, the fact that he had not been warned that the horse was an unusually high kicker did not render his employer liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 303; Dec. Dig. ⟸157.]

6. MASTER AND SERVANT ⟸157—INJURY TO SERVANT—DUTY TO WARN.

The law does not require the employer to give his employé minute directions as to the character of the danger he incurs and the means of avoiding it if the employé has experience in such matters.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 303; Dec. Dig. ⟸157.]

7. MASTER AND SERVANT ⟸125(1)—INJURIES FROM VICIOUS ANIMALS—LIABILITY.

Since the gist of an action for injuries caused by a vicious animal is the defendant's keeping the animal with knowledge of his vicious propensities, a servant injured by a kick from a vicious horse could not recover in the absence of evidence that the master knew of the vicious propensities of the horse.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 243; Dec. Dig. ⟸ 125(1).]

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8. MASTER AND SERVANT ⊂=278(14) — INJURIES FROM VICIOUS ANIMALS—LIABILITY.

The fact of knowledge of the owner of a vicious animal of its vicious propensities cannot be inferred from a statement of an employé of such owner that the horse "once got him and kicked the whole shirt off of him."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 966; Dec. Dig. ⊂= 278(14).]

9. EVIDENCE ⊂=244(11)—INJURIES TO SERVANT—DUTY TO WARN—KNOWLEDGE OF MASTER—EVIDENCE.

A statement of a foreman made several months after plaintiff servant's injury from a kick by a horse as to the vicious character of the horse is not competent evidence of the master's knowledge of such vicious character at the time of the injury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 926, 928; Dec. Dig. ⊂=244(11).]

In Bank. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Plinnie Enos Arthur against the Merchants' Ice & Cold Storage Company of Los Angeles. From a judgment for plaintiff and denial of new trial, defendant appeals. Reversed.

George Beebe, of Los Angeles, for appellant. Morton, Hollzer & Morton and Frank M. Fowler, all of Los Angeles, for respondent.

SLOSS, J. A hearing in bank having been ordered after decision in Department 1, we have carefully re-examined the case. The department opinion, prepared by Shaw, J., reads as follows:

"In this case the defendant appeals from the judgment and from an order denying its motion for a new trial. The plaintiff sued for damages arising from the alleged negligence of the defendant. The defense was that the injury to the plaintiff arose from a danger incident to the employment, that the plaintiff was informed thereof, and that he assumed the risk of injury therefrom.

[1-3] "The law on the subject is well settled. Section 1970 of the Civil Code, as amended in 1907, was in force at the time of the injury, July 8, 1911. It provides that knowledge by an employé of dangers to himself incident to the work does not prevent his recovery for an injury therefrom, unless it appears that he 'fully understood, comprehended and appreciated such dangers and thereafter consented' to proceed with his work. The question here is whether the evidence shows that plaintiff was fully informed that a horse behind which he was to work was addicted to kicking, and was for that reason a source of danger. 'A servant is held to assume the ordinary risks of the business upon which he enters, so far as those risks, at the time of his entering upon the business, are known to him, or should be readily discernible by a person of his age and capacity.' 1 Shearman & R. on Negl. § 185. 'A servant does not assume any risks which are not thus known or discernible.' Id. § 185a. 'The master must give warning to his servants of all perils to which they will be exposed, of which he is or ought to be aware, other than such as they should, in the exercise of ordinary care, have foreseen as necessarily incident to the business in the natural and ordinary course of affairs.' Id. § 293. See, also, Baxter v. Roberts, 44 Cal. 192 [13 Am. Rep. 160]; Rodgers v. Cent. P. R. Co., 67 Cal. 608 [8 Pac. 377]; and Bone v. Ophir, etc., Co., 149 Cal. 294 [86 Pac. 685].

"A kick from a horse belonging to the defendant broke the plaintiff's leg. The defendant was engaged in the business of manufacturing and selling ice in Los Angeles. The ice was delivered in wagons drawn by horses and operated by two men, a driver and a helper. The wagons were fitted with but one seat, situated at the front immediately behind the horses. On this seat the driver and helper would sit while going from place to place on the route. Plaintiff had been in the service of the defendant for about a year prior to the injury, part of the time as a driver, and part of the time as a helper. Just prior to the day of the injury he was assigned to a new route, and on that day he was directed to ride on a certain wagon on which one Gardner was driver, and one Nearon was helper, for the purpose of learning a part of the new route. He was to sit on the seat between the driver and the helper as they passed over the route. The horse, 'Ned,' attached to this wagon, was addicted to kicking viciously while being driven. This propensity was known to the defendant's agent and servants in charge of the horses, but was not known to the plaintiff until that morning before he began the work. Plaintiff, as above stated, had been working with the defendant's horses for about a year, and he also had had some experience with horses and had been around them more or less during his life. Although his testimony is evasive in some respects, he, in effect, admitted that, when about to start on the route that morning, Gardner, the driver, told him that the horse Ned was a bad one to kick, and to look out for him; that he talked with Gardner about it during the forenoon as he rode on the wagon; that in the afternoon, before the injury, he accosted Robinson, the defendant's route superintendent, and asked if he could not have Ned to drive on the following Monday, when he was to begin his new route, saying that with proper handling he could break the horse of the habit of kicking; that Robinson said, 'You don't want him,' that he was a bad one and to look out for him, and that he (Robinson) had known the horse for two years, and that he was given to kicking and was sure to kick when the whip was used or when the line got under his tail. Gardner and Nearon were present at that time. Both Gardner and Nearon testified that the plaintiff was warned by Gardner and Robinson as above stated. Robinson also testified to the same effect with respect to the conversation in the afternoon. The injury occurred a short time after the conversation with Robinson and while plaintiff was riding on the wagon sitting on the seat between Gardner and Nearon. This comprised all the testimony on the subject of his information regarding the character of the horse and his conduct with respect thereto. There is no substantial conflict in the testimony between the several witnesses who testified on that subject.

"It is manifest from this testimony that the plaintiff was warned of the vicious character of the horse and of the particular trait which made him dangerous to persons riding on the seat behind him. With knowledge of this danger plaintiff proceeded on his work. Under the rule stated in the above-cited authorities he must be presumed to have taken upon himself the risk of the danger which he incurred, and he cannot hold his employer liable for the injury received in consequence thereof.

[4-6] "The evidence shows that the bottom of the wagon body upon which the plaintiff's feet rested while sitting on the seat where he was injured was about 3½ feet above the ground. It does not appear how far it was from the horse. Plaintiff's counsel claim that there was evidence to the effect that the horse Ned was

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an unusually high kicker, and that the defendant's servants failed to inform plaintiff of that fact. This claim is based on testimony of the plaintiff to the effect that after he recovered from the injury Robinson told him that the 'horse once got him and kicked the whole shirt off of him.' He did not state the relative positions of himself and the horse when this occurred, nor that he was on the seat of a wagon drawn by the horse. Robinson did not have charge of the horses and it was not his duty to assign the plaintiff to work behind any particular horse. He was the route superintendent. His duty was to assign drivers to their routes. The man in charge of the stable chose the horses to be hitched to particular wagons. Robinson's information concerning this horse was given to the plaintiff casually while he was in the course of his employment as route superintendent, and not in the discharge of any duty of the defendant to the plaintiff with respect to the horse. It does not appear that it was any part of his duty to act for the defendant in informing the plaintiff of the character of the horse. Furthermore, it cannot be said that the law requires the employer to give to his employé minute directions as to the character of the dangers he incurs and the means of avoiding them, if any there be, when, as in this case, it appears that the employé himself has experience in such matters and is as well acquainted with the dangers from such horses and the means of escape or protection as the defendant's servants whose duty it was to warn him. 1 Shearman & R. on Negl. § 203, note 16. We think the court erred in denying the motion for a nonsuit and in refusing to grant a new trial.

"The judgment and order are reversed."

We are satisfied that the foregoing opinion makes proper disposition of the material questions involved in the appeals. A few words of answer to the criticisms contained in the petition for hearing in bank may not be amiss.

The respondent makes complaint of the statement in the opinion that he had been told that the horse "was a bad one to kick," and that he had asked to have the horse to drive, saying that he could break him of "the habit of kicking." It is claimed that, according to the plaintiff's testimony, he had been told merely that the horse was a bad one; he did not remember that anything had been said about kicking. But a reading of the entire testimony given by plaintiff must convince any fair mind that he had been informed that the horse was given to kicking. Despite the caution with which he sought to guard his testimony, the statements made by him were pregnant with admissions which fully justify the declaration in the department opinion.

[7] Beyond this it is strongly urged that the evidence warranted the inference that the plaintiff did not fully understand the dangers involved in his employment, inasmuch as he had not been warned that the horse could kick a man occupying the wagon seat. This contention implies that there is something unusual in the kind of kick which injured plaintiff, and consequently that mere knowledge that a horse would kick would not lead one to suppose that he would kick to the height reached by this horse. The difficulty with this argument is that, if it be assumed that plaintiff's information did not include knowledge of the danger inherent in his position, there is nothing in the case to indicate that the defendant had such knowledge. The gist of an action for injuries caused by a vicious animal is the defendant's keeping of the animal with knowledge of his vicious propensities. Hanemann v. Western Meat Co., 8 Cal. App. 698, 97 Pac. 695; Barrett v. Metropolitan Contracting Co., 155 Pac. 645. The plaintiff here relies on the negligence of his employer in directing him to ride behind a dangerous animal. If a man was in no apparent danger from riding on the seat of the wagon behind a horse that would kick, it was not negligent for the defendant to direct him to so ride. On the plaintiff's theory he was bound to show, not only that he did not know that the horse was an unusually high kicker, but that the defendant was, or ought to have been, aware of this fact. At this point the evidence fails.

[8, 9] Certainly the necessary fact cannot fairly be inferred from the vague and perhaps figurative statement of Robinson that the horse "once got him and kicked the whole shirt off of him." Furthermore, this statement was made by Robinson, as plaintiff testified, five months after the injury, at a time when plaintiff was asking Robinson for re-employment. It was not shown that Robinson was then or at any other time empowered to speak for the defendant on that subject. A statement so made is not competent evidence of defendant's knowledge at the time of the injury of the vicious character of the horse. The witness Gardner, who had warned plaintiff about the horse, does not appear to have been aware of the animal's unusual agility (if it was unusual); his testimony being that he did not think the horse would kick "that high, quite." If, then, the plaintiff founds his right to recover upon the fact that he was subjected to a danger beyond that ordinarily attaching to the driving of a kicking horse, he did not meet the burden resting upon him to show that defendant was negligent in subjecting him to this unknown and hidden danger.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; MELVIN, J.; LAWLOR, J.; HENSHAW, J.

(173 Cal. 652)

NORTHWESTERN PAC. R. CO. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (S. F. 7928.)

(Supreme Court of California. Nov. 16, 1916.)

1. MASTER AND SERVANT ⇐⇒417(5)—WORKMEN'S COMPENSATION ACTS — PROCEEDINGS FOR COMPENSATION—REVIEW.

Under Workmen's Compensation Act (St. 1913, p. 315) § 81, providing that the applicant

⇐⇒For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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for rehearing before the Industrial Accident Commission shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the matter on which rehearing is sought other than those set forth in the application for rehearing, and section 16, limiting the time for proceedings under the act to six months after the accident or a payment or agreement for payment of disability indemnity, where an award is made in proceedings commenced more than six months after the only payment was made, and no objection is made on motion for rehearing before the Commission as to time of commencement of proceedings, it must be assumed, in proceedings to review the award that the Commission concluded there was an agreement for payment of the compensation.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⊂⊃417(5).]

2. MASTER AND SERVANT ⊂⊃405(1) — WORKMEN'S COMPENSATION ACT — PROCEEDINGS FOR COMPENSATION—EVIDENCE.

In proceedings under the Workmen's Compensation Act, evidence *held* to authorize a finding by the Industrial Accident Commission that there was an agreement between the employer and workman as to compensation within six months before commencement of proceedings.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⊂⊃405(1).]

3. MASTER AND SERVANT ⊂⊃414—WORKMEN'S COMPENSATION ACT—PROCEEDINGS FOR COMPENSATION—"AGREEMENT."

To constitute an "agreement" within Workmen's Compensation Act, § 16, providing that an agreement for the payment of disability indemnity shall extend the time for proceedings for its collection, no more is necessary than an understanding between the parties as to the amount to be paid and a promise of the employer to pay that amount.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⊂⊃414.

For other definitions, see Words and Phrases, First and Second Series, Agreement.]

In Bank. Application by the Northwestern Pacific Railroad Company for writ of review to the Industrial Accident Commission to review an award in favor of one George Prescos against petitioner of $722.10, being $8.30 per week for 87 weeks. Award affirmed.

Stanley Moore, of San Francisco (Elliott Johnson, of San Francisco, of counsel), for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

ANGELLOTTI, C. J. Certiorari to review an award of the Industrial Accident Commission, in favor of one George Prescos against petitioner, of $722.10, being $8.30 per week for 87 weeks.

By reason of an accident in the course of his employment, by petitioner, and arising out of said employment, Prescos suffered complete loss of vision of the left eye, and became entitled, upon proper application therefor, to receive the amount of compensation awarded him. The accident occurred on December 1, 1914, and the proceeding before the Commission was not instituted until December 23, 1915. The only amount ever in fact paid to him by petitioner was $18, paid on January 5, 1915. The claim of petitioner here is that at the time the proceeding was instituted before the Commission the right of Prescos to so proceed was barred by the provisions of section 16 of the Workmen's Compensation Act, which provides that "unless compensation is paid or an agreement for its payment made within the time limited in this section for the institution of proceedings for its collection, the right to institute such proceedings shall be wholly barred," and that proceedings for the collection of such a benefit as is here involved "must be commenced within six months from the date of the accident, except as otherwise provided in this act," and that "the payment of the disability, * * * indemnity, or any part thereof, or agreement therefor, shall have the effect of extending the period within which proceedings for its collection may be commenced, six months from the date of the agreement or last payment of such disability indemnity * * * or any part thereof." Petitioner by its answer before the Commission claimed the benefit of these provisions. Their effect was to bar the proceeding instituted by Prescos unless there was some "agreement" for the payment of the compensation under which it may be held that the time was extended. See Miller v. Industrial Accident Commission, 156 Pac. 1033.

[1] It is urged that the award cannot stand in the absence of an express finding by the Commission on the issue made as to this question. There is no express finding in regard to this matter. But petitioner failed to make any such objection in its petition to the Commission for a rehearing, and therefore must "be deemed to have finally waived" the same. Section 81, Workmen's Compensation Act (St. 1913, p. 315). The award must be considered upon the assumption that the Commission concluded that there was an "agreement" for the payment of the compensation as, in fact, it said in its order denying a rehearing, and the only question for us is whether there is enough in the evidence to furnish legal support for such a conclusion.

[2] Prescos is an illiterate Greek, living in Humboldt county, where the accident occurred. One Johnson conducted for him his correspondence with petitioner railroad company relative to the payment of compensation, concerning his right to which there appears never to have been the slightest question. In March, 1915, application was made on his behalf to the rating department of the Commission for information as to the amount of compensation to which he was entitled. A letter was sent him by such rating department on March 29, 1915, informing him that he was entitled, on the facts stated, to $8.30 per week for 87 weeks. The letter states that a copy was sent to his employer and a copy to the Eureka office of the Commission. Prescos and Johnson testified that about this time he (Prescos) received a letter from Mr. C. A. Coombs, division engineer of petitioner, to the

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effect that he was to receive $8.30 per week for 87 weeks. Johnson testified that in this letter it was promised that the company would pay this. Subsequently Johnson for Prescos wrote Mr. Coombs about the matter, and in a letter in reply dated June 22, 1915, at Ft. Seward, and addressed to Johnson at Garberville, Mr. Coombs said:

"Referring to accident happening to Mr. George Prescos, I wish to advise that the Industrial Accident Commission has decided that he is entitled to a compensation of $8.30 per week for 87 weeks. We desire to know whether it will be agreeable to Mr. Prescos to accept payments in monthly vouchers and where should voucher be sent so as to reach him. We have been endeavoring to get this information from Mr. Prescos, but to date he has refused to give us this data, so that vouchers may be issued to him. All vouchers are issued by our San Francisco office. We have none here for him, as he has refused to inform us where they should be sent."

In reply, Johnson said that he had seen Prescos, who was working some distance out of town, and that he had left the matter with him (Johnson) to settle with Coombs; that he (Prescos) said that he is "satisfied for company to give him, but he wants to get that money all at one time, that is, the full amount in one payment," and that he would like to be allowed to continue to work for the company because, on account of the loss of sight, he could not get a job elsewhere. As late as August 6, 1915, Mr. Coombs, as division engineer, by letter of that date said:

"With reference to my letter of June 22d and your letter of July 19th: Will you kindly advise me to what post office address compensation vouchers should be mailed for George Prescos? Should they be mailed to Garberville in your care? They will be mailed once a month by registered mail, such being in accordance with the award of the Industrial Accident Commission. We cannot mail them more oftener than that. We have been endeavoring for several months to have Mr. Prescos advise us where these vouchers should be mailed, but to date he has failed to furnish such information, which accounts for the lateness in his receiving vouchers. A prompt reply will be appreciated."

About three months later, viz. on October 30, 1915, Johnson again wrote Coombs, to the effect that Prescos would like to have his money, and Coombs replied to the effect that, as the Industrial Accident Commission and the railroad company's legal department "now have his case up," he could do nothing for him in the matter of final settlement. It is not questioned that Mr. Coombs in all his communications was acting in accord with authority so to do. Prescos substantially testified that he believed from the correspondence that the whole matter had been adjusted, and that the checks were being retained for him by the company, he preferring to let the matter thus remain so that he could get all of his money at one time. Hence his failure to even think of commencing formal proceedings before the Commission until after receipt of the letter of October 30th. The evidence very clearly shows that both Prescos and petitioner accepted as a final disposition of the matter as to the amount of compensation, the estimate of the rating department of the Industrial Accident Commission. Can it be fairly held that there was in all this a sufficient foundation for a conclusion that there was an "agreement" within the meaning of the Workmen's Compensation Act for the payment thereof. We are satisfied that this question must be answered in the affirmative.

As we have seen, according to the uncontradicted evidence, petitioner three times substantially promised in writing to pay to Prescos the amount of compensation declared by the rating department of the Industrial Accident Commission to be due him, $8.30 a week for 87 weeks. The assent of Prescos to the amount of compensation thus proffered is certainly sufficiently expressed in the reply to the letter of June 22, 1915, to constitute an agreement between the parties, within the meaning of the act, for the payment of the compensation stated. There was certainly a meeting of the minds of the parties as to this, an acceptance by both of them of the amount stated by the rating department of the Industrial Accident Commission. The fact that Prescos expressed therein a desire to have all of the money paid to him at one time instead of in monthly installments, as proposed by the petitioner, is not material in this connection. It was the mere expression of a desire as to the way in which he should receive the agreed amount, just as what followed was a mere request that he be allowed to continue to work for the company, in no degree qualifying his acceptance as to the amount. There was an agreement for the payment of a certain sum as compensation, the sum determined by the rating department of the commission to be the correct amount, and this is all the act requires. The act prescribes no particular form of agreement.

[3] To constitute an agreement within the meaning of the act, certainly no more should be held to be necessary than an understanding between the parties as to the amount to be paid, and a promise on the part of the employer to pay that amount.

It is not suggested that, if the correspondence constituted a sufficient manifestation of an "agreement" for the payment of this amount of compensation, the proceeding of December 23, 1915, was not instituted within the time allowed by the act. The whole claim of petitioner in this connection, as shown by the briefs, is that a sufficient agreement is not shown by the correspondence.

It is proper to state that there can be no doubt, in view of the evidence, that Prescos regarded the matter as to the amount of compensation to be paid him to be fully adjusted and determined between himself and petitioner, and understood that petitioner had

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agreed to pay him this amount, as promised by it more than once.

The award of the Industrial Accident Commission is affirmed.

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.; HENSHAW, J.; LAWLOR, J.

(31 Cal. App. 623)

RAFAEL v. BOYLE, City and County Auditor. (Civ. 1778.)

(District Court of Appeal, First District, California. Oct. 6, 1916.)

MUNICIPAL CORPORATIONS ⇐214(3)—CIVIL SERVICE COMMISSION—EMPLOYMENT OF ATTORNEY.

The charter of the city and county of San Francisco providing a city attorney, directed to give legal advice to all officers, boards, and commissions when requested by them, by implication requires the civil service commission to avail itself of his services, and it cannot, when he is ready and willing to perform the necessary legal service, employ an attorney at the expense of the city, to defend its members in legal proceedings, merely because the charter empowers it to institute and prosecute legal proceedings for violation of an article of the charter.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 584, 585; Dec. Dig. ⇐214(3).]

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Mandamus by Joseph Rafael against Thomas F. Boyle, Auditor of the City and County of San Francisco. From an adverse judgment, defendant appeals. Reversed.

Percy V. Long, City Atty., and Robert M. Searles, Asst. City Atty., both of San Francisco, for appellant. Joseph T. Curley, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment granting a peremptory writ of mandamus directed against the defendant herein, commanding him to audit a certain demand against the treasury of the city and county of San Francisco.

In brief, the facts are as follows: William A. Kelly, an attorney at law, was employed by the members of the civil service commission of said city and county to defend them in certain legal proceedings. At the time of such employment the commission had received from the city attorney certain written opinions contrary in tenor to its views as to the legality of certain matters then before it. In each of these matters the commission, disregarding the city attorney's opinion, acted in accordance with its own judgment; and thereafter legal proceedings were commenced in the superior court against said commission to determine the legality of its action. Notwithstanding that the commission had acted contrary to his views in these matters, the city attorney was ready and willing to appear in court and defend said suits. The members of the commission, however, ignored the offer, and by resolution engaged William A. Kelly to defend them in the proceedings. A total compensation of $500 was agreed upon. The city attorney was not consulted further in the matter nor requested to appear. In accordance with his agreement Kelly appeared for the commission in said actions, and thereafter he presented his demand drawn on the city treasurer for payment of the agreed compensation, which demand was approved by the civil service commission and by the board of supervisors, and passed to the auditor, defendant herein, for audit. That officer declined to audit the demand on the ground of illegality. Kelly assigned his claim to the petitioner herein, who brought the proceeding here under review. Judgment was rendered in favor of the petitioner as prayed, and defendant takes this appeal.

The sole question presented for determination is whether or not under these facts the civil service commission had the power to retain an attorney at the expense of the city when the city attorney was ready and willing to perform the necessary legal services. It is contended by the respondent that under the broad provisions of article 13 of the charter of the city and county of San Francisco the right to retain counsel other than the city attorney is incidental to the very nature and life of the civil service system as therein created. Nowhere in the charter is express power conferred upon the civil service commission to engage private counsel, but it is insisted by petitioner that this power is implied in section 20, art. 13, of that instrument, providing that the commission shall have power "to institute and prosecute legal proceedings for violation of any of the provisions of this article." We are of the opinion that such contention cannot be maintained.

Whether attorneys may be employed in behalf of a municipal corporation depends upon the proper construction of the law under which such employment is sought to be sustained, the nature of the service to be performed, or, in the absence of legal provisions pertaining thereto, the character of the litigation or legal controversy involved. There is much variety in the charters and statutes of different jurisdictions relating to law officers of municipal corporations. In general, unless forbidden by law, when necessity arises therefor and the interests of the municipal corporation require it, the employment of attorneys has usually been sanctioned. 2 McQuillin on Municipal Corporations, § 501. It is usual, however, to find in municipal charters or laws applicable to the government of local public corporations, provisions dealing with the conduct of the municipality's legal business. Such is the case in the char-

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ter of San Francisco, which provides for a legal department, the head of which is known as the city attorney, and whose duties are set forth in article 5, c. 2, § 2, as follows:

"He must prosecute and defend for the city and county all actions at law or in equity, and all special proceedings for or against the city and county; and whenever any cause of action at law or in equity or by special proceedings exists in favor of the city and county he shall commence the same when within his knowledge, and, if not within his knowledge, when directed to do so by resolution of the board of supervisors. He shall give legal advice in writing to all officers, boards and commissions named in this charter, when requested so to do by them, or either of them, in writing, upon questions arising in their separate departments involving the rights or liabilities of the city and county. He shall not settle or dismiss any litigation for or against the city and county under his control unless upon his written recommendation he is ordered to do so by the mayor and supervisors."

This express provision clearly indicates an intention that the city attorney should handle all the legal work of the various departments of the city government, except where special provision is made for additional counsel. The manifest intention of the framers of the charter in the adoption of this provision was to systematize the conduct of the city's legal business, and to limit the power of the authorities to incur expenditure for this character of service; and the mere power given the commission to institute and prosecute legal proceedings does not imply that this above-quoted provision of the charter should be inoperative with regard to the civil service commission so as to empower it to employ another attorney to perform the duties belonging to the law officer of the municipality. The charter having provided a city attorney upon whom the board can call when a defense to any suit is necessary, it by implication makes it incumbent upon the board to avail itself of his services, and it cannot ignore this provision and employ some other attorney to render those services which it is the duty of the city attorney to perform. Denman v. Webster, 139 Cal. 452, 73 Pac. 139; Merriam v. Barnum, 116 Cal. 619, 48 Pac. 727.

The judgment is reversed.

We concur: LENNON, P. J.; RICHARDS, J.

(31 Cal. App. 612)

BARSI v. SIMPSON. (Civ. 1920.)

(District Court of Appeal, First District, California. Oct. 4, 1916.)

1. APPEAL AND ERROR ⟸1058(2)—HARMLESS ERROR.

In suit for alleged negligent setting of broken bones, exclusion of answer whether a fracture set as shown by an X-ray photo was properly set was harmless error, where the witness later in effect answered the question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4201; Dec. Dig. ⟸ 1058(2).]

2. APPEAL AND ERROR ⟸237(2) — SCOPE — PRESERVATION OF EXCEPTIONS.

Where the court permitted testimony to be heard subject to plaintiff's right to subsequent motion to strike it out, and no such motion was made, plaintiff could not complain.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ⟸237(2); Trial, Cent. Dig. § 239.]

3. APPEAL AND ERROR ⟸971(2)—EVIDENCE ⟸546 — EXPERTS — QUALIFICATION — REVIEW.

Whether a trained nurse in charge of an operating room was qualified to say whether defendant properly set a fracture of plaintiff's arm is for the discretion of the trial court, not reviewable in the absence of a clear showing of abuse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3852; Dec. Dig. ⟸971(2); Evidence, Cent. Dig. § 2363; Dec. Dig. ⟸ 546.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Annunziata Barsi, by Serafine Barsi, her guardian, against J. A. Simpson. From an order denying motion for new trial, plaintiff appeals. Affirmed.

Louis Ferrari, of San Francisco, for appellant. Chickering & Gregory and Evan Williams, all of San Francisco, for respondent.

PER CURIAM. The appeal is by plaintiff from an order denying her motion for a new trial.

The plaintiff suffered a fracture of the left arm between the wrist and elbow on the 15th day of March, 1913, and on the same day employed the defendant, a physician and surgeon, to set the fracture. Thereafter the defendant set the fracture, and it is claimed on behalf of the plaintiff that the defendant failed to use due care in this respect, by reason of which certain permanent injuries to the plaintiff resulted. The sole claim of negligence, as appears from an examination of the complaint, is that the defendant, at the time the arm was set, did not bring the ends of the fractured bones into position. There is no claim that any subsequent treatment given by the defendant was improper in any way, nor is any contention made on behalf of the plaintiff that the verdict, which was in favor of the defendant, is not sustained by the evidence. The points relied upon for reversal fall under two heads: First, the action of the court in admitting or rejecting offered testimony; second, the instructions given by the court, and the refusal of the court to give certain instructions offered by the plaintiff.

[1] Dr. Guido Caglieri, who was the first witness for the plaintiff, testified that he had caused to be made certain X-ray plates of the bones some two months after the arm had been fractured. The witness was asked whether a fracture set in the manner shown by the plates was a proper setting. The question was objected to on the ground that it

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assumed something not in evidence, viz. that the fracture was set in that manner. The objection was sustained. Assuming that the ruling of the court was erroneous, still it was a harmless error, for the witness later in his testimony said that if the fracture of the arm had been properly set in the first place there would have been no angulation at that time; and the witness further testified fully as to how the operation upon the arm should have been performed. Considering the testimony of this witness as a whole, he in effect answered the question to which the objection just noted was sustained.

[2] The next contention of this plaintiff is that the trial court committed prejudicial error in permitting defendant to ask Dr. Isaac W. Thorne on cross-examination a question which assumed facts not in evidence; but the question was permitted with the understanding that the defendant would later supply the omitted facts; and, as there is no claim now made that the facts assumed were not thereafter proven, it follows that the plaintiff is without any substantial ground of complaint on this score. Moreover, it is clear that the court permitted the question to be asked with the idea that such evidence was admitted subject to a motion to be thereafter made to strike it out if the defective proof was not supplied. No such motion was made. Consequently plaintiff cannot now be heard to complain of this ruling. Tarpey v. Veith, 22 Cal. App. 289, 134 Pac. 367.

[3] Maud Compton, a trained nurse, who was at the time the superintendent of the operating room of a large hospital, witnessed the performance of the operation on the plaintiff by the defendant, and testified that from her experience as a trained nurse she would say that Dr. Simpson's treatment of the injured arm was proper and not subject in any respect to adverse criticism. Passing the point made by the defendant that the question was answered before the objection was made, and that therefore it cannot now be considered, we think the question of whether or not the witness was qualified to testify as an expert was a matter within the sound discretion of the court; and, there being no showing of a clear abuse of that discretion, the ruling of the trial court will not be disturbed. Vallejo, etc., R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 575, 147 Pac. 238. Instances of cases where others than medical practitioners have been allowed to give their opinion on medical matters are found in the following cases: Lund v. Masonic Ass'n, 81 Hun, 287, 30 N. Y. Supp. 775; Robinson v. Exempt Fire Co., 103 Cal. 1, 36 Pac. 955, 24 L. R. A. 715, 42 Am. St. Rep. 93; Kimic v. San Jose & Los Gatos Ry. Co., 156 Cal. 379, 391, 104 Pac. 986, 991. In the last-mentioned case a professional nurse was allowed to so testify, and the court said:

"There can be no doubt that one who is shown to be a graduate nurse and to have been constantly engaged in the calling of a professional nurse for five years may properly be called upon * * * to give evidence of the character * * * elicited by the question asked."

There are two other points made as to the admission of evidence, but they are without any substantial merit, as is also the objection to certain of the instructions of the court, and we see no necessity for a detailed discussion of them.

The order appealed from is affirmed.

(31 Cal. App. 655)

TUOLUMNE COUNTY ELECTRIC POWER & LIGHT CO. v. CITY OF SONORA.

(Civ. 1527.)

(District Court of Appeal, Third District, California. Oct. 10, 1916. Rehearing Denied by Supreme Court Dec. 7, 1916.)

MUNICIPAL CORPORATIONS ⇐249 — ORDINANCE REGULATING ELECTRICITY — CONTRACT BY IMPLICATION.

Defendant city by ordinance provided that electric current, except for street lights, should be furnished for 24 hours every day, and for street lighting for a period stated each night. Plaintiff wrote defendant that to comply with said ordinance it would be necessary to leave power on its former night circuit for 24 hours, and that it would be necessary for the city to turn off the street lights belonging to the city which were attached to such circuit, during the day, or the city would be charged for power used in the street lamps during the day, and that the obligation of the company ceases when it furnished power to the city's connection. Defendant city replied that it would only pay for current furnished at the time and in the manner required by the ordinance, unless otherwise specifically requested, that the obligation of the company was to furnish power at the time and in the manner required in the ordinance, and that its obligation did not cease when it furnished power to the city's connection. *Held* that, regardless of the question of whose duty it was to furnish appliances to prevent the waste of electricity, plaintiff could not recover for electricity used in the defendant city's street lighting system during the daytime on the theory that its use created an implication that the service was performed at the instance and request of the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 697, 853; Dec. Dig. ⇐249.]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by the Tuolumne Electric Power & Light Company against the City of Sonora. Judgment for defendant, and plaintiff appeals. Affirmed.

J. B. Curtin, of Sonora, and W. H. Mahony, of San Francisco, for appellant. J. C. Webster, of Sonora, for respondent.

BURNETT, J. The action was for the recovery of the sum of $2,425.37 for electrical energy claimed to have been furnished by plaintiff and consumed by defendant in the street lights of said city. For years plaintiff, which is a public service corporation purchasing its electricity from the Sierra & San

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Francisco Power Company and then selling it to consumers, has been engaged in furnishing electrical energy for lighting dwellings, business places, and the streets in said city of Sonora. From its substation along the side of Washington street, the main street of said city, for more than 10 years prior to October 1, 1913, the plaintiff had two main power lines, and to these other lines extending along the sides of the other streets were attached, thus forming the system by which electric lights were furnished for houses and streets. During these years one of these main lines from the substation carried what is called the day circuit current of 24 hours, the other, what is called the night circuit current, both of which currents were turned on and off at said substation. The night circuit was loaded one-half hour after sunset and turned off one-half hour before sunrise, this period being recognized generally as the standard hours for street lighting, and the day circuit was left continuously turned on so as to have 24 hours always of continuous service on that line. More than 10 years prior to October 1, 1913, the trustees of said city, for the purpose of lighting the streets, caused wires from the center of the street to be connected with plaintiff's night service main line; an incandescent light being attached to the end of each of these wires. The light was anchored on the opposite side of the street so that each light would be suspended over the middle of the street at a given height. By this method most of the streets were lighted during this period of time, and all street lights were connected with and received current from plaintiff's night circuit line. During this period the city of Sonora owned all of the wires extending from plaintiff's main night service line into the streets, and also owned all bracket street lamps. When the street-lighting system was constructed, no automatic switches or devices of any kind were connected therewith or constructed thereon, so as to turn on or off independent of other consumers' hours, any of the street lights, the entire street-lighting system being regulated as to that by a switch at said substation, controlled and operated by the Sierra & San Francisco Power Company. As the electric current flowed through the said main night circuit line, it ran out into the street lamps and bracket lamps, and thus the streets were lighted.

With knowledge of these facts, and without any previous notice to plaintiff, the trustees of Sonora on September 15, 1913, adopted and passed to print, to take effect on October 1, 1913, the ordinance in controversy here, which appears in full in the transcript. The title of said ordinance is:

"An ordinance fixing the rate which may be charged and collected by any person, firm or corporation furnishing, distributing or delivering electric current for lighting, heating, power and other purposes to the inhabitants of the city of Sonora, California, providing for the installation of meters and regulating the installation of electric current and prices to be charged for labor and supplies therefor, and fixing a penalty for the violation of any of the provisions of the ordinance."

Section 11 provided:

"Electric current furnished or distributed to consumers in the city of Sonora, except for street lights, shall be an all day and all night service, and shall be furnished every day for twenty-four hours each day, and electric current furnished for street lighting shall be from 4:30 p. m. of each and every day to 7 o'clock a. m. of the following morning."

This section, it may be said, was amended on the 18th of June, 1914, so as to read:

"Electric current furnished or distributed to consumers in the city of Sonora, except for street lights, shall be an all day and all night service and shall be furnished every day for twenty-four hours each day, and electric current furnished for street lighting shall be from one-half hour after sunset to one hour before sunrise each night."

When plaintiff saw the publication of this ordinance of September 15th, it addressed the following letter to said trustees:

"Sonora, Cal., Sept. 25, 1913.

"To the Trustees of the City of Sonora, Sonora, California—Gentlemen: The Tuolumne County Electric Power & Light Company on and after October 1, 1913, will furnish twenty-four hour service to all its customers as required by Ordinance No. 63 of the city of Sonora and in order to so do it will be necessary to leave for said twenty-four hours, power on what is now our night circuit. As all the street lighting apparatus for lighting the city streets is the property of the city, it will be necessary for the trustees of said city to turn off the street lights between 7 a. m. and 4:30 p. m. each day otherwise the power thus used between said hours will be charged for as provided in said ordinance. The obligation of this company ceases when it furnishes power to the city's connection. * * *"

The street lights were not turned off, and the city of Sonora enjoyed the unique and illuminating experience of street lamps burning day and night. In passing it may not be amiss to venture the conjecture that strangers must have regarded with some degree of astonishment, if not of admiration, the spectacle of prodigality thereby exhibited.

Plaintiff presented its bill for the whole amount of electric energy consumed by said lights, and it was allowed for the said hours so contemplated by said section 11. Plaintiff declined to accept such payment in full, and hence the suit.

Appellant contends in the first place that: "The * * * duty of such a corporation is fully performed when it has brought its commodity safely and conveniently to the door of the consumer. Within that door the company is not by law obliged and may not by law be compelled to go for any purpose foreign to the public service it is called upon to render, and that the purpose here contemplated is foreign is abundantly established." Ex parte Goodrich, 160 Cal. 418, 117 Pac. 456, Ann. Cas. 1913A, 56.

It is argued that, if the light company desired to raise or lower the lights from their present height across the street, it would have no right or power to do so, because the lights and wiring connected with the same be-

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long to the city. So, if the company desired to put a longer wire from its main wire to the street lamps, it would have no right to do so for the same reason. It would also have no right to put new lamps on the streets in place of the old ones, or in any manner to interfere with the city's street lamps. These circumstances are mentioned to illustrate appellant's contention that it has done its full duty when it turns on its electrical energy in the main lines to which the city street lamps are connected, and that then it "has brought its commodity safely and conveniently to the door of the consumer and beyond that the company is not by law obliged and may not be by law compelled to go."

Again it is claimed that, since the city of Sonora is a consumer of electrical energy, the same rule of law will control it as would control a private individual, and herein is cited Davoust v. City of Alameda, 149 Cal. 70, 84 Pac. 761, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847, wherein is quoted the following from Touchard v. Touchard, 5 Cal. 307:

"A corporation, both by the civil and common law, is a person, an artificial person; and, although a municipal corporation has delegated to it certain powers of government, it is only in reference to those delegated powers that it will be regarded as a government. In reference to all other of its transactions, such as affect its ownership of property in buying, selling, or granting, and in reference to all matters of contract, it must be looked upon and treated as a private person, and its contracts construed in the same manner and with like effect as those of natural persons."

Lastly, it is claimed that when the "company loaded its electrical energy in its main night service line for the 24 hours required, and to which line the city more than 10 years ago attached its street lamp wires," it had done all that could be required of it and then it "became the duty of the city to take care that it used only so much of that commodity as it required for street-lighting purposes, and not permit any that had entered its door to go to waste and to prevent any waste, if it was necessary, to attach or furnish any appliance to turn on or off the 'commodity' when not required." It is insisted that the duty to so attach and furnish said appliance devolved upon the city, and not upon the company. As authority for this proposition attention is directed to Hunt v. Marianna Electric Co., 114 Ark. 498, 170 S. W. 96, L. R. A. 1915B, 897, wherein it appears that said company for several years had been operating a system or plant in which the generator of electricity produced what is known as "133-cycle current of electricity," and plaintiffs had installed motors and machines for conducting their business adapted to this cycle system, that the said company was proceeding to change the kind and character of machinery operated by them into what is termed a "60-cycle system," so that it would not operate the motors used by plaintiffs and the citizens generally, and that the company was demanding of the users of its electricity that they bear the expense of the readjustment and repairs to their various motors so that they could be operated. It appears further that plaintiffs had demanded of the company to readjust said motors for said purpose to the end that the company might carry out its contract and agreement with them and the public to properly serve electricity, but that the company refused to do so, and was proceeding to change its system to the great injury of plaintiffs. It was held that the company was not bound at its own expense to alter the consumers' fixtures so that they would be adapted to the use of the new current, even though many of the fixtures had been bought from the company and were suitable only for the current formerly furnished; it appearing that the change was not made capriciously. The court said:

"In our judgment, it not having been alleged that the change was needlessly or capriciously made, we think this expense should be borne by the plaintiffs. Otherwise, having become a part of the operating expense of the company, this would be an item to be considered in fixing the rates to be charged all consumers of electricity, and would be an expense to be borne at least by the public generally, rather than by those owners who were required to supply themselves with new appliances."

It is contended that the rule applies with stronger force here for the reason that plaintiff did not change its system "of its own volition from night service to day service of 24 hours. The light company here was compelled to turn in 24 hours of load on what it theretofore had only loaded from one-half hour after sunset to one-half hour before sunrise, and if it failed to do so it was guilty of misdemeanor and subject to a fine." And the claim is that the trustees knew that if they did not put in some device to turn off the current, the lights would burn for 24 hours, and hence arises the responsibility of the city for the whole amount consumed.

It is also claimed that from the showing made the inference must be drawn that the whole amount was furnished upon the demand and at the instance and request of defendant city. In this connection some authorities are cited, among them Babbitt v. Chicago & A. Ry. Co., 149 Mo. App. 449, 130 S. W. 367; Abbot's Trial Evidence, 358, and S. F. Gas Co. v. San Francisco, 9 Cal. 453. In the first it is said:

"It has * * * been held that the specific word 'demand' need not be used in making such a * * * request; but it is sufficient if any words are used which are understood by both parties to be a demand. Furthermore, it has been held that the existence of a demand may be shown by circumstantial evidence, or may be inferred from acts and declarations of the parties as proven by direct evidence."

In the second it is declared:

"In general, there must be evidence that the defendant requested plaintiff to render the service, or assented to receiving their benefit, under circumstances negativing any presumption that they would be gratuitous. The evidence usually consists in: First, an express request precedent

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to the service; or, second, circumstances justifying the inference that plaintiff in rendering the services expected to be paid, and defendants supposed or had reason to suppose and ought to have supposed that he was expecting pay, and still allowed him to go on in the service without doing anything to disabuse him of this expectation; or, third, proof of benefit received, not on an agreement that it was gratuitous and followed by an express promise to pay."

In the S. F. Gas Co. Case, supra, it is held that:

"Under some circumstances, a municipal corporation may become liable by implication. The obligation to do justice rests equally upon it as upon an individual. It cannot avail itself of the property or labor of a party, and screen itself from responsibility under the plea that it never passed an ordinance on the subject. As against individuals, the law implies a promise to pay in such cases, and the implication extends equally against corporations."

Thus far it would seem that the case for appellant is very persuasive, as it appears that it furnished the electric energy, and that it was used by respondent, and the implication would arise that it was furnished at the instance and request of said respondent, although attention is called to no direct evidence to that effect.

Another feature, however, is injected into the situation through the action taken by the council when it received the said written notification from appellant that it would furnish electricity for the entire 24 hours and hold respondent liable for it. To that communication the city replied as follows:

"Sonora, Cal., Sept. 27, 1913.

"Tuolumne Co. Elec. Power & Lt. Co., Sonora, California—Gentlemen: In reply to your communication of the 25th inst. the board of trustees of the city of Sonora desire to inform you that the ordinance of the city of Sonora, being Ordinance No. 63, requires any person, firm or corporation supplying electric current for consumption in the city of Sonora for street lighting only from 4:30 o'clock p. m. to 7 o'clock a. m. the following morning, and it requires any person, firm or corporation engaged in that business in the city of Sonora to so furnish electric current for the purpose of lighting the streets, and it prohibits any charge to be made for any electricity furnished in excess of the amount required. See Section 4 of said ordinance. The obligation of such company is to furnish and supply electricity in the manner required by the ordinance and at the times required and its obligation does not cease merely when it furnishes power to the city's connection. The city will pay for electricity furnished at the time and in the manner provided for in said ordinance and not otherwise, as long as said ordinance remains in effect. Any electric current furnished other than that required by ordinance, unless specifically requested by proper authorities, will not be paid for by the city of Sonora, but must be furnished, if at all, without charge to the city of Sonora. The lighting company is required to equip its system to comply with the requirements of the ordinance. The city does not want street lights at other times than required by the ordinance and is not required to turn off the lights."

The foundation of appellant's cause of action is thus swept away. The theory to which appellant's claim is anchored embodied in the allegations of the complaint is that the electricity was furnished at the instance and request of respondent, and to prove this there must be some evidence either direct or circumstantial that defendant "requested plaintiff to perform the services or assented to receiving their benefit under circumstances negativing any presumption that they were to be gratuitous." In other words, the party to be charged must either directly authorize the services or by his declarations or silence he must acquiesce in the action of the one performing and avail himself of the services performed. Here there was neither express promise nor acquiescence, nor was there conduct by silence or otherwise on the part of the city that would justify any expectation that the city would pay for the additional service that was not demanded in said ordinance. To the contrary, the city, by the terms of said ordinance, requested and demanded that the energy be furnished for street lighting during certain hours only, but it went still further and notified appellant by letter that it did not want any longer service, that it had no use for it, and that, if it was furnished, it would not pay for it, but it must be furnished gratuitously. If, in the face of this repudiation of any contractual relation as to the extra electricity, the company persisted in allowing the current to flow into the city's lines during the entire 24 hours, it certainly cannot claim that it was done "at the instance and request" of respondent.

No case cited by appellant is parallel to this in this essential feature. As we have already intimated, if the city had used said electric energy and remained silent as to remuneration, an altogether different situation would be presented. In such case the law as well as principles of equitable dealings would create the implication that the service was performed at the instance and request of the city. Assuredly it is not true, as alleged in the complaint, that "plaintiff herein at the special instance and request of defendant has furnished and delivered electrical energy" during the entire period.

Again, it cannot be said in any proper sense that said electrical energy was used by the city during the additional hours already referred to. It answered no municipal purpose. It was well known that the city desired the electricity for lighting the streets, and there was, of course, no such need during the daytime. Instead of being used during said hours, it was simply allowed to go to waste. It was of no benefit whatever to the city, and it is true, as found by the court:

"That the defendant has never at any time mentioned in plaintiff's complaint had any use whatever for electricity for lighting its streets in the daytime and never at any of said times purchased or procured and accepted electricity from plaintiff for such use, and plaintiff has never at any of said times, at defendant's request, furnished or delivered any electric energy for street lights in the daytime."

It is true that until the said ordinance was amended the city demanded electricity for

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a portion of the day, but there is no controversy as to that.

It seems clear that the plaintiff utterly failed to make out its case as presented by its complaint. As far as this action is concerned, it seems immaterial as to whose duty it was to furnish appliances to prevent the waste of electrical energy. If appellant is right in its contention that such burden should be borne by the city, then probably an action for damages would lie for its failure to prevent the waste, but in view of the undisputed showing we do not see how it can be held that an action on contract can be maintained by plaintiff.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(31 Cal. App. 654)

SHELLMAN et al. v. HERSHEY et al.

(Civ. 1569.)

(District Court of Appeal, Third District, California. Oct. 7, 1916.)

1. LANDLORD AND TENANT ⟸169(3)—INJURIES TO THIRD PERSONS — CONDITION OF PREMISES—SUFFICIENCY OF COMPLAINT.

A complaint alleging ownership of premises in certain parties, that defendants on the day of the accident were the lessees, that the premises were a public place of amusement let for hire, describing what was claimed to constitute the nuisance complained of, alleging that the nuisance existed in the theater prior to the letting to the defendants and at the time of plaintiff's personal injury, describing the injury and alleging the amount of damages, stated a cause of action.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 644, 664, 682; Dec. Dig. ⟸169(3).]

2. APPEAL AND ERROR ⟸907(3)—PRESUMPTION—EVIDENCE TO SUPPORT FINDINGS.

Where a case was fully tried on all the issues, it must be assumed in the absence of a bill of exceptions that the evidence presented in support of the findings was competent to establish the facts alleged, and was received without objection, and was sufficient to sustain each of the facts found.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3673; Dec. Dig. ⟸907(3).]

Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by Nancy Shellman and A. J. Shellman, her husband, against Ella L. Hershey, L. Henry, and F. A. Giesea and others. Judgment for plaintiff, and defendants Henry and Giesea appeal. Affirmed.

E. M. Rosenthal, of San Jose, for appellants. A. C. Huston and H. L. Huston, of Woodland, for respondents.

CHIPMAN, P. J. This is an appeal by defendants Henry and Giesea from the judgment in the case of like title, No. 1568, 161 Pac. 132, this day decided and is here on the judgment roll alone. The only question presented arises on a general demurrer.

[1, 2] The complaint alleged ownership of the premises in defendants, the Hersheys; that defendants Henry and Giesea on the day of the accident were lessees of the premises; that the premises are a public place of amusement let for hire; describes what was claimed to constitute the nuisance complained of; that the theater on the day mentioned was leased to defendants Henry and Giesea; that said nuisance existed in the theater prior to the letting to Henry and Giesea and at the time of the accident, and describes fully the accident and alleges amount of damages.

We think a cause of action was sufficiently stated against these appellants. There was no special demurrer. The case was fully tried on all issues. It must be assumed, in the absence of a bill of exceptions, "that the evidence presented in support of the findings was competent to establish the facts alleged, and was received at the trial without any objection, and was sufficient to sustain each of the facts found." Cutting Fruit Company v. Canty, 141 Cal. 692 (syllabus), 75 Pac. 564.

The judgment as to defendants Henry and Giesea is affirmed.

We concur: BURNETT, J.; HART, J.

(31 Cal. App. 641, 654)

SHELLMAN et al. v. HERSHEY et al.

(Civ. 1568.)

(District Court of Appeal, Third District, California. Oct. 7, 1916. Rehearing Denied by Supreme Court Dec. 4, 1916.)

1. LANDLORD AND TENANT ⟸167(7)—INJURY TO THIRD PARTY—LIABILITY OF TENANT.

The lessees of a theater, who, through their agent and manager, opened a door not used or intended to be used as an exit, and left it under circumstances leading plaintiff, a patron, to believe that she could safely pass out at that door when in fact there were no steps from the sill to the sidewalk and no guard or light, so that exit was dangerous and unsafe, were liable for personal injury to plaintiff.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 674, 679; Dec. Dig. ⟸167(7).]

2. LANDLORD AND TENANT ⟸167(7)—INJURY TO THIRD PARTY—NUISANCE—LANDLORD'S LIABILITY.

In such case, though the landlord knew the location of the door and that it had no steps leading to the sidewalk, he was not guilty of maintaining a nuisance on the premises when leased, and was not liable for personal injury from a nuisance caused by the manner in which the lessee used it.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 674, 679; Dec. Dig. ⟸167(7).]

Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by Nancy Shellman and A. J. Shellman, her husband, against Ella L. Hershey and others of that name, and other defendants. Judgment for plaintiffs, and from an order denying a new trial, the Hersheys' appeal. Order reversed, and a new trial granted as to the defendants Hershey.

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Black & Clark, of San Francisco, for appellants. A. C. Huston and H. L. Huston, both of Woodland, for respondents.

CHIPMAN, P. J. This is an action commenced by plaintiffs to recover damages for an injury suffered by plaintiff Nancy Shellman in passing out through a doorway of the Woodland Opera House owned by defendants, the Hersheys, and under lease to defendants Henry and Giesea. The cause was tried by the court without the aid of a jury, and plaintiff had judgment for $2,000, and costs of suit.

Defendants, the Hersheys, moved for a new trial, which was denied. They appeal from the order. Defendants Henry and Giesea appeal from the judgment on a separate transcript No. 1569 (161 Pac. 132), but do not appeal from the order.

The Woodland Opera House is situated on Second street of the city of Woodland. The main entrance and exit of the auditorium is on Second street at the southeast corner of the building. Along the east wall opening into the auditorium, about midway of the building, is a door opening from the dress circle. It was in stepping out of this door that plaintiff Mrs. Shellman fell and received the injury of which she complains. The interior of the opera house is similar to most playhouses. In the center next to the stage is the parquet; surrounding the parquet by a half circle are the dress circle seats extending back to the rear wall; at the center of the rear wall is an exit door 8½ feet wide leading from the dress circle into the main entrance area; the center aisle passes from this door down through the dress circle and parquet; aisles also lead from this door along the south, east, and west walls down to the stage. The defendants, the Hersheys, are and have been for many years the owners of this opera house, and at the time of the accident, on the evening of May 29, 1912, it was under lease to defendants Henry and Giesea. It had been let by the lessees to the graduating class of the high school of Woodland for an entertainment that evening, for which a rental of $25 was paid to the lessees. Admission to the entertainment was free and the house was crowded with spectators, many standing in the aisles for lack of seating capacity. It is alleged in the complaint: "that the entrance to said opera house is on Second street in the city of Woodland; that said opera house is so constructed that a door bearing the same relative position to the entrance leads onto Second street from the main auditorium of the theater; that said door is built 3 feet above the sidewalk on Second street; that during all times herein mentioned, there was no light over said door, and said door was not protected or guarded in any way, or at all; that said door as built and situated in said theater is unsafe, insecure, and dangerous to the patrons of said theater; that on the 29th day of May, 1912, said theater or opera house was leased to L. Henry and F. A. Giesea, but said door was in said building and was so built and located, and was not connected with the sidewalk by any steps or otherwise, or at all, and was not protected or guarded as above described, and was an unsafe and insecure and a dangerous passageway as above described, prior to the leasing of said opera house to said L. Henry and F. A. Giesea; that said owners had during all of the times herein mentioned full knowledge of the unsafe, insecure, and dangerous character of said door, and negligently permitted it to remain in such condition, and failed to properly or at all to safeguard it; that on the evening of the 29th day of May, 1912, plaintiff Nancy Shellman, above named, attended a public entertainment at said opera house; that during said performance the above-described door was left open; that at the close of said performance, as the spectators were leaving the building, plaintiff Nancy Shellman, believing that said door was an exit from said theater, walked through said door and was violently precipitated upon the sidewalk; that at the time said plaintiff walked through said door it was unguarded and unprotected, and there was nothing about said door to warn plaintiff of its dangerous or unsafe character; that by reason of said fall, the left arm of plaintiff Nancy Shellman was broken at the elbow; that the bones in said elbow were broken in such a way that they could not and did not properly mend; that said elbow is now stiff"; that she was otherwise injured as set forth in much detail.

In their answer, "defendants deny that said door was constructed for use as an entrance or exit or that it was in any manner necessary" for such use, or that defendants or either of them directed or sanctioned the use of said door as an entrance or exit in the use of said opera house; "admit that said door was not connected with the sidewalk by any steps or otherwise * * * because said door was not an entrance to, or exit from, the said opera house in the use thereof by persons going into, or coming out of, said opera house at the time the same was used for public entertainment;" deny that said door as built is or was unsafe or dangerous or that any act of defendants caused the same to be unsafe or dangerous; deny that on May 29, 1912, or at any other time, defendants had full or any knowledge that said door was unsafe or that they permitted it to remain unsafe; allege that when said opera house was leased to said Henry and Giesea, it was never understood that in the management thereof "said doorway should at any time be or remain open as a means of entrance or exit * * * for the use of persons going into or leaving the same"; "that on the occasion of giving said entertainment and after the audience was assembled, some person, whose name cannot be ascertained, requested

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one Robert Eastham, who at said time was employed by said L. H. Henry and F. A. Giesea, lessees of said opera house, to unlock said door; that said Eastham did thereupon, and pursuant to said request, unlock and open said door and allowed the same to remain open, but all without authority, consent, or knowledge of defendants hereby answering, or either of them;" that said plaintiff Mrs. Shellman entered said opera house without any charge therefor and voluntarily; that the injury suffered by her in leaving said entertainment was caused by her own negligence "in an effort to leave said opera house speedily and by an unusual means and by stepping out of the doorway mentioned in the complaint, which said doorway could be plainly observed; * * * and if the said Nancy Shellman suffered the injuries mentioned in the complaint, they were the direct result of her negligent and careless conduct in so endeavoring to leave said opera house."

The findings of the court are substantially in accord with the averments of the complaint, and are challenged by defendants as not supported by the evidence. A diagram was introduced showing the sidewalk elevation along Second street. "It shows the sill elevation and floor elevation of the door; in front of that door there is a concrete sidewalk; it is 2 feet 5 inches from the sidewalk to the sill of the door; it is 9 inches from the sill of the door to the floor of the opera house. There is no step between the sill and the sidewalk. The door is 7 feet 4 inches by 3 feet 4 inches. The door opens outward into the street."

Plaintiff Mrs. Shellman testified as follows:

"I went to the opera house that evening by going up the front steps, the wide steps, on Second street, and I went down into the lower floor of the opera house, walked around the wall, down to the door. I walked around there; there were no seats, so I stood up there until the entertainment was over. There were a great many that did stand up. There wasn't seats. I was standing near the door, not a great ways from the stage, a yard or so from the door. The door was open all the time. I think people were going out there, that is why I stepped out. I thought they were going out there. There was several in between the door and myself where I stood, and that is why I stepped out there. I thought I could step out there. The floor in the opera house inclines towards the rear. It seemed to me it was much lower there as I went down the side of it, it seemed so much lower that I could step right out on the sidewalk, that is why I stepped out. I thought I could step onto the sidewalk. The Court: Did you see the sidewalk when you stepped down? A. No, sir. Q. It was dark? A. Yes. Q. You looked out from a light room into the dark street? A. Yes, there was no light there as far as I could see, but I supposed I could step right onto the sidewalk. Mr. Huston: State whether or not there was anything there to prevent you from going out. A. No, sir; nothing there and nobody to tell me; nobody guarded the door. Q. The door was not guarded in any way? A. No, sir. Q. State whether or not the door was standing open or closed. A. Yes, it was standing open. The Court: Was that a warm night? A. Yes, sir; it was warm the 29th of May; it was very pleasant and warm. Mr. Huston: When was the first time you noticed the door was open? A. It was open all the time, I think, during the entertainment. Q. Just state to the court how that door or opening looked to you that night. A. Well, it looked to me like a door right down near the sidewalk that I could step right out and without any harm, of course, or I wouldn't have stepped out. Mr. Huston: That is all."

On cross-examination, she testified:

That she had been at the theater twice before, and both times had entered and left by the main entrance, and did not see the other door on those occasions. "There was no light in front of the door through which I stepped. There was no light only on the inside; the lights were inside the house. Q. Had there been a light at that exit or doorway through which you went the night you hurt your arm would you have been able to see whether there was or was not a step there, or would you have been able to see how far the sidewalk was from the door sill? A. Yes, I think I could have seen if there had been a light there. Mr. Clark: But you are rather emphatically of the opinion that there was no light there? A. Yes, sir. Q. You are a lady 67 years of age you stated? A. Yes, sir. Q. And in stepping through an exit that you never went through before you paid some attention to where you were stepping, you looked before you as you walked, didn't you, to that exit? A. Why, I walked to the door and just stepped; I just stepped through; I thought it was right onto the sidewalk of course, or I wouldn't have stepped through. Q. You were looking out of that doorway as you came to the doorway? A. Yes, I was looking out; I just started and went to that door and just stepped right through thinking I could step right onto the sidewalk. Q. Did you pay attention to where you were stepping? A. Yes, sir. Q. Did you endeavor as you went through the door to look to see whether you were stepping safely towards the sidewalk? A. I had no thought that it wasn't safe."

Witness Eastham was the lessee's manager in charge of the theater at the time of the accident. He testified that he had the key to the door referred to and opened it and left it open during the entertainment. He testified:

"It was very warm that night, and it was very warm in there and oppressive, and some one came and asked me to open the door; some one requested me, that there was a lot of ladies there about to faint, but who it was I don't remember; so I unlocked the door, but not for an exit. Q. You had been manager of the opera house for some time? A. Yes."

He testified that it was not any one of defendants who made the request; that he had charge of the theater for Henry and Giesea and let the theater to the board of education and collected the rental for the lessees who had the theater for 1911 and 1912. The lease bears date August 26, 1910, and was executed by "Ella L. Hershey and Cornelia A. Hershey, executrices of the last will and testament of D. N. Hershey, deceased, the parties of the first part." It was admitted that when the lease was made, the defendants Hersheys owned the opera house, and that witness Eastham had been in charge of the opera house three seasons under other tenants before the lease to Henry and Giesea was executed, and had the key in his possession all the time. He testified that this particular door was used occasionally "to sweep some of the dirt out that way or take something in that way, but was never used as an

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exit or entrance"; that while he had charge "there was no box or step leading to that door whereby a person could step into that from the outside"; that he had no instructions from the lessees with reference to that door; that the Hersheys never gave him any instructions about that door; that it was locked that night before the witness opened it, and was always kept locked during entertainments; that he had been acquainted with the building since its construction, and there never had been any step placed at that door, and that to make use of it as an exit or entrance a step would have been necessary.

Witness Clary was asked whether, during the time he was city marshal, the city trustees ever gave him any instructions in reference to the opera house. Over objection, the court allowed the answer if "connected with the defendants in some way." Answering "yes," the witness was asked what the directions were. "A. Well, the board ordered me to notify them that they had to repair the sidewalk, and fix the step for a kind of fire escape there." Defendants' counsel moved to strike out the answer as immaterial, irrelevant, and incompetent. Motion denied. "Mr. Huston: The step you mention was in reference to this door at the opera house? A. Yes, sir. Q. In obedience to these instructions, did you notify the defendants Hershey concerning this condition?" Over defendants' objection, the court allowed the answer: "A. I know that I told Mr. Webber, and I don't know but I think I wrote them a notice. Mr. Huston: To whom did you address your notice? A. To Mrs. Hershey." An objection was allowed to precede the answer on the same grounds, and that it is not the best evidence. "The Court: The objection will be sustained unless it is connected, but for the present it will be overruled. Mr. Huston: You mailed this notice in the regular course of business? A. Yes, sir. Q. You also notified Mr. Webber? A. Yes, sir. Q. What connection, if any, did Mr. Webber have with this opera house? A. He was manager. Q. He had charge of it? A. Yes, sir. Q. What, if anything, did they do in reference to this notice that you gave them? Mr. Clark: Our objection is going to this. The Court: Same ruling. A. Put a box there for a step. Mr. Huston: At this same door? A. Yes, put a box on the sidewalk at that door. Q. When was that? A. That was after I told Mr. Webber, they put it there for a step." He testified that this was in 1909 while he was marshal, and that his term expired in 1910. Defendants' attorneys moved to strike out all the testimony of Clary on various grounds: that no foundation was laid for it; nothing to connect the Hersheys with the transaction, and other grounds. "Mr. Huston: Mr. Clary, you put that letter in the post office at Woodland? A. Sure. Q. Mrs. Hershey lives in the city of Woodland? A. Lives in Woodland. Mr. Huston: This proof is offered in furtherance of our allegation in the complaint to the effect that the defendants Hershey had prior knowledge and actual knowledge of this door and its dangerous condition prior to the time of the accident. The Court: It doesn't appear who this man Webber is. Mr. Huston: Mr. Clary says he was the manager of the opera house. The Court: You say you told Mr. Webber this? A. Yes, I told him. The Court: The motion to strike out is denied."

Recalled as a witness for defendants, he testified:

"I know the side door of the opera house was never used as an exit or as an entrance. I have been there in the opera house at performances. I have been there when people were going in and out."

Witness Curson, a city trustee from 1907 to 1911, testified that Clary was night watchman up to the time he was appointed marshal, and that during that time "the board gave him directions to enforce some matters that the building committee of the board was asked to look into regarding fire escapes, etc., and the protection of the building, and I think Mr. Clary was authorized to notify the owners of the building that such steps were necessary for the protection of the public at large in regard to fire escapes," etc.

Witness Eastham was recalled as a witness for defendants. He testified that he received the keys to the theater from Mr. Farrell, president of the Great Western Theatrical Circuit and was employed by him and was the only manager of the opera house from that time; that the Farrell lease was made on August 1, 1908, and continued until Henry and Giesea took the theater; that "Mr. Webber had nothing to do during that time with the booking of the shows or attending to that opera house"; that Webber was employed at one time as manager, previous to Mr. Farrell's time. He testified that he had known the opera house ever since it was built, and that in using it "the entrance and exit to that lower auditorium for performance purposes has been through the main entrance over at the south wall."

Defendant Cornelia Hershey testified that she and her mother acted for the others of the family in leasing the theater; that they got some notice about fixing the sidewalk in 1912 which was attended to, and the work done, but that she had been unable to find among their papers any notice sent them by Mr. Clary relative to that side door; that she knew there was no step there, and that it was in that condition when they took the premises and when they leased them to tenants; that no step was ever maintained there and the door had never "been used as an exit or entrance to the opera house down to the time of this accident." She testified that she and her mother, as executrices, leased the opera house to the Great Western Theatrical Circuit, August 1, 1908, and that Mr. Eastham acted as manager. She tes-

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tified that she never got any notice from Mr. Clary telling them to put steps at that central side door; that she "got a notice from Mr. Scott regarding the fixing of the sidewalk in 1912," and it was done; that she had made it a practice to keep all papers served upon them and had searched the files, but could find no notice from Mr. Clary relative to that side door.

[1] We do not think there can be any doubt of the lessee's liability. They, through their agent and manager, opened the door in question and left it open under circumstances such as would and did lead the plaintiff Mrs. Shellman to believe that she could safely pass out at that door. Although this door was not used or intended to be used as an exit or entrance, the tenants are chargeable with knowledge that in opening and leaving it open, unguarded, and unlighted, with no step to aid a person in reaching the pavement, the passage out by that door was dangerous and unsafe. This situation was one of their own creation for which upon well-settled principles they were liable.

[2] A much more serious question arises as to the owners' liability. They knew that this door had no step leading from it to the sidewalk; they knew this when they leased the premises to their codefendants, for it was in the same condition it had been in ever since they inherited the property in 1903 at the death of the original owner. But the uncontradicted testimony was that this particular door was not intended for use as an exit or entrance for patrons of the theater and had never been used for that purpose in all the years of defendants' ownership. The only use to which it had ever been put was "only occasionally to sweep some of the dirt out that way or to take something in that way, but it was never used as an exit" and it was "always kept locked." Defendants the Hersheys, had never given any directions concerning this door and personally had nothing to do with the management of the theater. Their liability must spring, if at all, from the single fact that they knew the location of this door and also knew that no step or steps had been placed there.

Witness Clary's testimony that he "mailed notice to Mrs. Hershey," that he "deposited it in the post office at Woodland," does not meet the statutory requirements of such form of service, and at most would be but prima facie evidence which was rebutted by the testimony of Cornelia Hershey that no such notice was received. His testimony that he served the notice when city marshal was disproved by the record showing that in 1909 when he said he served the notice, he was not the city marshal. He was night watchman, however, and he was no doubt honestly mistaken as to when he became city marshal. If he served the notice in either capacity, it would be equally effective, but the proof of service is insufficient.

As to his having notified Webber, this may be taken as established. But Webber was not then the manager. Eastham was manager under the then lessees, Farrell's Company. But, assuming that such notice was given to the Hersheys while the theater was under lease to the Farrell Company, it would have conveyed no new fact to the Hersheys for they admit that there never had been a step placed at this door. Their defense is that this door was not intended to be used and never was used for the convenience of patrons to the theater, and was intended for the use of and used only by the lessees to take in and out stage properties, and was used occasionally to sweep dirt through or to air the house, but never as an exit or entrance for patrons or during performances.

Respondent relies upon the rule stated in note E to the case of Griffin v. Jackson Light & Power Co., 92 Am. St. Rep. p. 526:

"No person can create or maintain a nuisance upon his premises and escape liability for the injury occasioned by it to third persons. Nor can a lessor so create a nuisance and then escape liability for the consequences by leasing the premises to a tenant. Prior to and at the time of the lease, it was the duty of the lessor to put an end to the nuisance. If he fails to do this, and leases the premises with the nuisance on them, he may be deemed, and is deemed, to authorize the continuance of the nuisance, and is therefore liable for the consequences of such continuance. Whether, therefore, the defect be one of original construction, or arises from a failure to repair, or from the maintenance on the premises of any condition endangering the health or safety of strangers, whatever its nature, if it constitute a nuisance, the lessor will be responsible for its consequences if he leases the premises with the nuisance upon them, and thus authorizes its continuance."

Among the cases cited in support of the text is Kalis v. Shattuck, 69 Cal. 593, 11 Pac. 346, 58 Am. Rep. 568, in which injury arose from an awning falling upon a person while passing under it. The tenant of the premises allowed the awning to be used by sightseers going upon it, thus causing it to fall. It was not built or intended for such use, but only as a cover for the sidewalk from sunshine and rain, and was properly constructed for that purpose. The lessor was held free from liability for the injury. Said the court:

"It is well settled that a landlord is not liable for such consequences, unless: (1) The nuisance occasioning the injury existed at the time the premises were demised; or (2) the structure was in such a condition that it would be likely to become a nuisance, in the ordinary and reasonable use of the same for the purpose for which it was constructed and let, and the landlord failed to repair it (citing cases); or (3) the landlord authorized or permitted the act which caused it to become a nuisance occasioning the injury."

Quoting from Gandy v. Jubber, 5 Best & Smith, 485:

"To bring liability home to the owner the premises being let, the nuisance must be one which was in its very essence and nature a nuisance at the time of letting, and not something which was capable of being thereafter rendered a nuisance by the tenant. * * *"

In notes B and C (at page 524) to the case from which respondents extract note E, su-

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pra, in 92 Am. St. Rep., the liability of the lessor of real property to third persons is considered. Note B points out the nonliability of the lessor to third persons for injuries arising from a nuisance not on the premises at the time of the lease, but which was erected or created by the tenant alone without the license or consent of the lessor. Note C is as follows:

"The same considerations control where the nuisance is occasioned by a misuse by the lessee of the premises, or of appliances which were thereon at the time of the lease. It is not sufficient to render a lessor liable that the premises leased by him are capable of a use which will prove a nuisance to strangers. 3. 'If a landlord demise premises which are not in themselves a nuisance, but may or may not become such, according to the manner in which they are used by the tenant, the landlord will not be liable for a nuisance created on the premises by the tenant. He is not responsible for enabling the tenant to commit a nuisance if the latter should think proper to do so. [Citing cases.] In such a case it may be said, in one sense, that the landlord permitted the tenant to create the nuisance, but not in such a sense as to render him liable. [Citing cases.] The landlord will not be liable for the use of the premises in such a way as to do harm, merely because there was a manifest possibility of their being used in such a way.' [Citing cases.] * * * Where, therefore, the premises, while capable of improper use, may be used in an ordinary manner without the creation of a nuisance, the lessor is not chargeable with the improper uses of them by the tenant which results in a nuisance. [Citing cases.]"

In Owings v. Jones, 9 Md. 108, the court, referring to Rich v. Basterfield, 4 Manning, Granger & Scott, 56 Eng. Com. Law, 784, said:

"After a full review of all the cases, and that too after a second argument, we understand the court to deduce, at least, the two following principles from the numerous adjudications to which reference is had: First, that where property is demised, and at the time of the demise is not a nuisance, and becomes so only by the act of the tenant while in his possession, and injury happen during such possession, the owner is not liable; but, second, that where the owner leases premises which are a nuisance, or must in the nature of things become so by their user, and receives rent, then, whether in or out of possession, he is liable."

Further reference to authorities seems unnecessary. We think it results from the principles above stated that the only question here is: Was this side door to the theater a nuisance when the premises were leased to defendants Henry and Giesea, or did it become such for the time being when the tenants used it for a purpose other than that for which it was designed and had, from the day the house was built, been used to the moment the present tenant misused it? We think the premises were not a nuisance when demised and became so because of the manner in which the tenants used them on the night of the accident. It follows that the defendants, the Hersheys, are not liable for the injury complained of.

It is not necessary to consider any of the other alleged errors.

The order is reversed, and a new trial granted as to defendants, the Hersheys.

We concur: BURNETT, J.; HART, J.

(31 Cal. App. 615)

WESTERN NAT. BANK v. WITTMAN et al.

(Civ. 1291.)

(District Court of Appeal, Third District, California. Oct. 4, 1916.)

1. CORPORATIONS ⟸426(1) — NOTE — RESOLUTION—RATIFICATION.

Where the note of a corporation was authorized by the unanimous vote of its directors and was executed according to the vote or resolution and the money derived from the loan was placed to its checking account and was used by it to pay an obligation assumed by it, no ratification of the note was necessary.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702; Dec. Dig. ⟸426(1).]

2. GUARANTY ⟸78(1) — LIABILITY OF GUARANTOR—DEFENSES.

The vice president of a corporation, and the indorser and guarantor of its note in his individual capacity, would not be heard to defend on the ground that the note was contrary to public policy under Civ. Code, § 2228 et seq., relating to the obligations of trustees, and declaring that in all matters connected with his trust a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage by misrepresentation, concealment, etc.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 91; Dec. Dig. ⟸78(1).]

3. CORPORATIONS ⟸465—NOTES—CONSIDERATION—CORPORATION.

Where a corporation executed its note, there was a consideration, where the money received for the note was subsequently used to pay its obligation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1822–1826; Dec. Dig. ⟸465.]

4. CONTRACTS ⟸88—PRESUMPTION—CONSIDERATION.

A presumption of consideration arises where an obligation is in writing.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 403–405, 407; Dec. Dig. ⟸88.]

5. CORPORATIONS ⟸382—NOTE—ULTRA VIRES.

A corporation empowered by its articles of incorporation to manufacture and deal in harnesses, etc., and to borrow and loan money, might assume the obligation of one who conveyed his property to it for purposes of such business, so that its note, given to obtain money to discharge such obligation, was not ultra vires.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1514, 1515, 1517, 1518, 1536; Dec. Dig. ⟸382.]

6. CORPORATIONS ⟸99(2) — STOCK — EXCHANGE.

It was legal for parties forming a corporation to exchange its stock for property conveyed to it by its president.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 445; Dec. Dig. ⟸99(2).]

7. GUARANTY ⟸49—RELEASE OF GUARANTOR.

The vice president of a corporation, an indorser and guarantor of its note to plaintiff in his individual capacity, was not released by an arrangement by which the president was to manage its business and pay its obligations out of the earnings, where no time for payment was fixed and no extension given by the creditors, and no

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consideration passed to plaintiff for the agreement.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 60; Dec. Dig. ⊂⇒49.]

Appeal from Superior Court, City and County of San Francisco; K. S. Mahon, Judge.

Action by the Western National Bank against George W. Wittman, J. G. Leibold, and the California Vehicle & Harness Company. Judgment for plaintiff against defendants Wittman and Leibold. Wittman's motion for a new trial was denied, and he appeals. Judgment and order affirmed.

J. J. Dunne, of San Francisco, for appellant. Gavin McNab, B. M. Aikins, A. H. Jarman, and W. F. Williamson, all of San Francisco, for respondent Western Nat. Bank. J. J. Lermen, of San Francisco, for respondents Leibold and California Vehicle & Harness Co.

CHIPMAN, P. J. Plaintiff commenced the action by verified complaint to recover the balance due on a certain promissory note. Judgment went against defendants Geo. W. Wittman and J. G. Leibold for the sum of $7,076.82, with interest from date of the judgment and costs. Defendant vehicle company, maker of the note, did not answer. The appeal is from the judgment and order denying his motion for a new trial by defendant Wittman alone. The promissory note in suit reads as follows:

"$9000.00.

"San Francisco, Cal., March 30, 1907.

"One day after date, for value received, California Vehicle & Harness Co., a corporation, organized and existing under the laws of the state of California, promises to pay to the Western National Bank of San Francisco, likewise a corporation, or order, at its banking house in this city, the sum of nine thousand 00/100 dollars in United States gold coin of the present standard, with interest thereon in like coin from date until paid, at the rate of six per cent. per annum, said interest to be paid monthly, and if not so paid to be added to the principal and thereafter bear interest at the same rate. Should default be made in the payment of interest as herein provided, then the whole sum of principal and interest shall immediately become due and payable. [Signed] J. G. Leibold, Pres.

"[Signed] L. Holt, Secy."

On the back of the note is indorsed: "J. G. Leibold and Geo. W. Wittman," and then:

"San Francisco, for value received, we, or either of us, guarantee the payment of the within note and interest according to its terms, and we, or either of us, hereby waive presentation thereof to the maker, demand of payment, protest, and notice of nonpayment.

"[Signed] J. G. Leibold,

"[Signed] Geo. W. Wittman."

Stamped on the back of the note are various sums of interest and principal.

Defendant Leibold in his answer admitted, by not denying, the due execution of the note, the indorsements and guarantee, and that the vehicle company received consideration for its note, but alleged want of consideration passing to him for his indorsement; denied that the whole or any part of said note or interest is now, or ever was, due from this defendant.

Defendant Wittman's answer is of considerable length, a summary of which he states in his brief as follows:

"The answer denies that the corporation defendant executed the note sued on, or that it ever authorized any one to execute that note, and alleges that the note is not, and never was, the note of the corporation defendant. It also denies that either Wittman or Leibold ever indorsed or guaranteed the payment of any note of the corporation defendant. It denies that no part of the principal has been paid, that the whole or any part of the principal or interest is due, owing or unpaid, and that the plaintiff is the owner or holder of the note in question. The answer then sets up as a separate defense that the note is ultra vires and void, because issued by Leibold and his secretary, Laura Holt, to take up a private and personal indebtedness of Leibold to the plaintiff corporation, without authority from or ratification by the board of directors of the defendant corporation, all to the knowledge of the bank. It further sets up, as an additional separate defense, that no consideration for this note ever passed to the corporation defendant. It further sets up, as an additional separate defense, the fraud of the plaintiff and of Leibold in inducing the defendant Wittman to go upon the note, and it further sets up as an additional separate defense, under section 2819 of the Civil Code, the execution of a contract without the consent of the defendant Wittman, he being unindemnified, which contract suspended the plaintiff's rights and remedies against the defendant corporation."

It appeared that prior to March 23, 1907, defendant Leibold was engaged in business in San Francisco under the name of Leibold Harness Company, and was indebted to plaintiff in the sum of $9,000, evidenced by Leibold's promissory note. On that day defendant the vehicle company was incorporated by three persons, one of whom was in Leibold's employment. Neither Wittman nor Leibold was then a corporator. After this date and prior to the execution of the note sued upon, Leibold transferred his business to the vehicle company, and the latter assumed all the liabilities of the Leibold Harness Company, including the bank indebtedness of $9,000, and agreed to, and did, issue a block of the stock of the vehicle company to Leibold as consideration for his business. Leibold was then made a director and president of the corporation, and defendant Wittman, having invested some money therein, became a stockholder in and was made vice president of the corporation. Thereafter Leibold, on behalf of the corporation, applied to plaintiff for a loan of $9,000, and was told by an officer of the bank that the corporation would have to execute its note for the loan, which must be indorsed by the principal stockholders. On March 30, 1907, at a meeting of the board of directors of the corporation defendant, held at its office, all directors and the secretary, L. Holt, being present, defendant Wittman offered and defendant Leibold seconded a resolution, which was adopted, authorizing the corporation to borrow from the Western National Bank an amount of money not to exceed at

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any one time the sum of $9,000, "and that either the president or vice president, together with the secretary or treasurer of this corporation are hereby empowered to execute its promissory note or notes therefor to said Western National Bank of San Francisco, for all such sums so borrowed, upon such terms in respect to amount or rate of interest or otherwise as may be agreed upon." The resolution directed the secretary to deliver to said bank "a copy of these resolutions properly certified by her in evidence of the authority of the persons hereinbefore named to make said loans and execute the notes as above specified." A duly certified copy of this resolution was delivered to plaintiff, the promissory note above set out was also delivered to and accepted by the bank, and the amount, $9,000, placed to the credit of the vehicle corporation, in its regular checking account. Later, on April 3, 1907, the corporation drew its check for $9,000, and paid the note of said Leibold, which had been assumed by the corporation. This note of the corporation is the obligation which appellant Wittman now contends was not authorized or executed by the vehicle corporation, and is the note on which it subsequently paid various sums of both principal and interest, and is the note for the unpaid balance of which this action was brought.

Section 2792 of the Civil Code provides that no other consideration need exist "where a guaranty is entered into at the same time with the original obligation, or with the acceptance of the latter by the guarantee, and forms with that obligation a part of the consideration to him." Section 2806 of the same Code provides that:

"A guaranty is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor."

Section 3116 provides that:

"Every indorser of a negotiable instrument, unless his indorsement is qualified, warrants to every subsequent holder thereof, who is not liable thereon to him: First. That it is in all respects what it purports to be. Second. That he has a good title to it. Third. That the signatures of all prior parties are binding upon them." Fourth. That if dishonored, the indorser will pay the same unless exonerated under certain provisions of the Code not here applicable.

Appellant contends that the note sued on is invalid and void for many reasons: (a) Because, though signed by the president and secretary, their acts were never authorized or ratified by the directors or stockholders; (b) because contrary to public policy declared in section 2228 et seq. of the Civil Code; (c) the note is not evidentiary of any consideration flowing from the bank to the vehicle company.

[1] The note in question was authorized by the unanimous vote of the directors. No ratification was necessary. It was executed in strict conformity to the resolution passed by the directors, and the money derived from the loan was placed to the checking account of defendant corporation, and was used in the payment of an obligation assumed by the corporation as part consideration for the business and property conveyed to it by Leibold. As the governing body of the corporation, the directors were the persons, and only persons, who in their official capacity could execute the note.

[2-4] Sued as he was in his individual capacity, and being both an indorser and guarantor of the note in such capacity, appellant will not be heard to do the very things which the Code sections, supra, say he may not do. We can discover no principle of public policy violated in the transaction, nor can we see that there was a failure to show consideration flowing to the vehicle corporation. Aside from the presumption of consideration arising where the obligation is in writing, and aside from the provisions of the Code, supra, there was a consideration, in that the money received for the note was subsequently used to pay an obligation of the corporation. The genuineness of the corporation note was never questioned by the corporation, and is here admitted. The corporation recognized its validity by numerous payments made on the note, and by an acquiescence of several years.

[5, 6] Neither can we see that appellant has established his claim that the note was ultra vires in the sense that it was beyond the power of the directors to bind dissenting stockholders, or of the legal rights of creditors. The articles of incorporation empowered the corporation, among other things:

"1st. To manufacture, buy, sell, import, export and generally deal in all kinds of harness, saddlery * * * and all goods, wares and merchandise," etc. "4th. To borrow and lend money," etc. "6th. To receive, hold, store, buy and sell and generally deal in goods, wares and merchandise of any kind," etc.

The corporation was formed to conduct the same kind of business which, with the property forming part of it, Leibold conveyed to the corporation. There was express authority given by the articles to transact this business, and part of its business was to pay its obligations assumed in consideration for the property it received from Leibold. There were no dissenting stockholders or directors at the time the note was executed, nor for some months thereafter, and there is none now so far as we know, except defendant Wittman, and he it was who moved the resolution authorizing the note to be executed, and who guaranteed its genuineness, and that he would pay it if the corporation did not. Furthermore, Wittman testified that he knew, or supposed, that the note was delivered to the bank; that the corporation received credit for it, and "understood that they took up that old note with this new one." It was legal for the parties, in forming the corporation, to exchange its stock for the property conveyed to it by Leibold. Turner v. Markham, 155 Cal. 562, 102 Pac. 272. Having taken over the harness business of Leibold for the purpose of conducting it, and

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having assumed his liabilities connected with that business, it was as much within its power to pay its debts as to conduct the business for which it was formed.

[7] It is further contended that Wittman was discharged by reason of a certain agreement which it is claimed was entered into in February, 1908, between the vehicle corporation, its creditors, and Leibold. This agreement purports to be "between the California Vehicle & Harness Company, a California corporation, party of the first part, and the undersigned creditors of the said corporation, parties of the second part, and J. G. Leibold, of the city and county of San Francisco, California, party of the third part." By its terms, the first party conveyed to the third party the property of the first party in trust to collect the accounts of the corporation, to sell and dispose of the stock of goods on hand, to purchase such additional goods as were necessary for carrying on the said business, to render an account monthly of receipts and disbursements. "As soon as said party of the third part has in his hands sufficient funds wherewith to do so, a dividend of ten (10) per cent. shall be made to each one of the parties of the second part, upon the amount of their respective claims; providing, however, the interest on said claims shall be kept paid according to the terms of the respective existing contracts. * * * This agreement shall be void and of no effect unless the same be executed by all of the creditors of said corporation as the parties of the second part hereto." The court found among other facts, in respect of the agreement:

"That it is not true that during the operation of said agreement the plaintiff's rights, in respect of its original obligation sued on in this action, should cease and become suspended. That it is not true that said agreement was entered into against the will of said defendant Wittman; and in respect to the agreement mentioned and referred to in paragraph 9 of the answer of said defendant Wittman, the court finds that a certain agreement was drawn and was attempted to be executed by said California Vehicle & Harness Company and all its creditors, and that said agreement was signed by plaintiff. That said agreement specifically provided as follows, to wit: [Then follows the clause above quoted requiring all the creditors to sign.] That said agreement was not signed by all of the creditors of said California Vehicle & Harness Co., and said agreement was never executed and did not become operative."

The evidence supported this finding. But it is contended that because plaintiff signed the agreement and received payments claimed by appellant to have been made under this agreement, plaintiff is bound by it. There was evidence that a payment of $900 was made in June, 1908, shown by the indorsement on the note as on account of the principal, and this was exactly 10 per cent. of the face of the note. Whether or not it was received under the agreement did not appear, except by the fact that Leibold paid it to the bank while acting under the agreement, and by the circumstance that it was 10 per cent. of the principal of the note. The only officer of the bank called as a witness by defendant, testified:

"Q. I will ask you if it is not a fact that the bank did accept payments from Mr. Leibold on the note under that agreement? A. I could only say now after seeing the note that payments were made to the bank. By whom they were made and under what circumstances, I could not say."

Cases such as Daneri v. Gazzola, 139 Cal. 416, 73 Pac. 179, cited by appellant, do not support his contention. In the case cited, the defendants were sureties on the note; the payee agreed in consideration of part payment, and that the interest would be kept paid as it matured, to dismiss the action and extend payment one year. This agreement was carried out without the consent or knowledge of the defendants. The court held that this operated a release of the sureties. No such facts exist here. Assuming that the agreement took effect, it was merely an arrangement by which Leibold was to manage the business and pay the obligation when he could out of the earnings. No time was fixed for payments, and no extension of time given by the creditors, and there was no consideration passing to plaintiff as a creditor for the agreement. It was said in Stroud v. Thomas, 139 Cal. 274, 72 Pac. 1008, 96 Am. St. Rep. 111:

"A surety is not discharged by an extension of time to the principal debtors without consideration. Part payment of the interest or principal of the note after maturity is not a consideration for an extension of time; and the surety is not discharged by an agreement to forbear suit against the principals, founded upon such part payment, though carried out by the creditor."

Under sections 2822 and 2823 of the Civil Code, mere delay on the part of the creditors to proceed against the principal does not exonerate the guarantor, and a partial satisfaction of the obligation of the guarantor will reduce it, but will not otherwise affect the obligation.

We think, however, that as by the express terms of the agreement it was to be null and void unless all creditors signed it, the court rightly held that it never became operative.

We discover no alleged errors in rulings of the court during the trial which were prejudicial or call for consideration.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

(31 Cal. App. 636)

MATH v. CRESCENT HILL GOLD MINES CO. OF CALIFORNIA. (Civ. 1415.)

(District Court of Appeal, Third District, California. Oct. 7, 1916. Rehearing Denied by Supreme Court Dec. 4, 1916.)

1. MASTER AND SERVANT ⟹80(4)—CONTRACT OF EMPLOYMENT—PLEADING—COMPLAINT.

The first count of a complaint alleged that plaintiff agreed to work for defendant as miner

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at the rate of $3.50 a day, and that it was agreed that if plaintiff refrained from demanding payment for services until money had been realized from the mine for that purpose, he would be paid double wages, and that the mine did on or before a date stated yield sufficient sum to pay plaintiff at the rate of $7 a day, and that demand was made on defendant for a statement, which was refused. The second count sets up the employment, rendition of labor for a time stated, and "that said services are reasonably worth $3.50 a day," etc. *Held* that, as the complaint alleged that the mine did on or before a certain date produce and yield to the defendant a sufficient sum of money to pay the plaintiff for labor at the rate of $7 per day for the period of his employment, it was unnecessary to plead therein that the mine had failed within a reasonable time to produce the money with which to pay plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 113; Dec. Dig. ⟸80(4).]

2. WORK AND LABOR ⟸22—PLEADING—COMPLAINT.

In the count on quantum meruit, it was not necessary to plead that the mine had failed to produce, within a reasonable time, the money with which to pay the plaintiff, since to do so would have necessitated the pleading of an express agreement almost in its entirety, which is inconsistent with the essential theory upon which an action on an implied contract proceeds.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 41; Dec. Dig. ⟸22.]

3. WORK AND LABOR ⟸24(2)—PLEADING—ANSWER.

On a quantum meruit count the actual agreement of the parties as may be shown without pleading such agreement, as a defense to plaintiff's claim that defendant is indebted to him in a sum representing the reasonable value of the alleged services rendered defendant, since in such case the defendant is entitled to interpose any defense which, if proved, will countervail the claim that any sum is due for "reasonable value" of services.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 44, 45; Dec. Dig. ⟸24(2).]

4. TRIAL ⟸397(1)—FAILURE TO FIND MATERIAL ISSUE—PLEADING.

In an action to recover for personal services, where the court made no finding as to an allegation in the cross-petition of a claim for merchandise furnished to plaintiff, being a material issue, the judgment will be reversed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 940; Dec. Dig. ⟸397(1).]

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by Joe Math against the Crescent Hill Gold Mines Company of California. From a judgment for plaintiff, and an order denying his motion for a new trial, defendant appeals. Judgment and order reversed, and cause remanded.

J. D. McLaughlin and L. N. Peter, both of Quincy, for appellant. L. H. Hughes, of Quincy, for respondent.

HART, J. An opinion affirming the judgment and the order appealed from in this action was filed by this court on June 19, 1916. A rehearing was within due time granted on the petition of the appellant for the reason, as stated in the order granting the rehearing, that the petition called "attention to some evidence that seems to have been overlooked when the case was decided." The former opinion contained the following statement of the facts and the issues as the same are presented in the pleadings of the respective parties:

"Plaintiff worked as a miner for defendant, at its mine in Plumas county, from February 15, 1912, to October 28, 1913, a total of 600 days. In the first cause of action set up in the complaint it is alleged that plaintiff entered into an agreement with defendant whereby the former was to work as a miner at the rate of $3.50 per day, 'and as a part of said agreement it was understood and agreed between plaintiff and defendant that if plaintiff refrained from demanding any pay for his said services until a sufficient amount of money had been realized from the proceeds of said mine for that purpose, the defendant would pay plaintiff double the amount of his said wages, to wit, the sum of $7 per day.' It is then alleged that said mine 'did on or before the said 28th day of October, 1913, produce and yield to defendant a sufficient sum of money as the proceeds thereof to pay the said plaintiff for his said labor at the rate of $7 per day for the period of his employment as aforesaid.' It is also alleged that a demand was made by plaintiff on defendant for a statement of the earnings and proceeds of the mine and for payment of the amount due, but that defendant refused to comply with said demands. The receipt of $75 on account is admitted, and judgment is asked for $4,125.

"The second cause of action sets up the employment of plaintiff and his rendition of labor for 600 days, and 'that said services were and are reasonably worth $3.50 per day'; that no part thereof has been paid except the sum of $75, and judgment is demanded in the sum of $2,025.

"A demurrer to the complaint, generally and for ambiguity, uncertainty, and unintelligibility, was overruled and defendant answered: Admitted an agreement with plaintiff whereby he was to work for defendant, but denies that it was as set out in the complaint; admitted that plaintiff performed 600 days' labor, 'but denies that defendant was to pay for such work or labor, or that the plaintiff was working for defendant'; denied that the mine yielded to defendant 'a sufficient sum of money as the proceeds thereof to pay plaintiff for his said labor at the rate of $7 per day, or any other sum, or at all for his said labor'; admitted plaintiff's demand for a statement, but avers that defendant 'could not understand what kind of statement was expected to be furnished to plaintiff; defendant demanded of plaintiff that he make his demand in writing so that defendant would be enabled to comply with plaintiff's demand, but defendant denies that a statement of the moneys paid and yielded to defendant by and from the operation of the said mine * * * was refused plaintiff, or that defendant does now continue to refuse to furnish such statement to plaintiff'; admitted that no payment was made plaintiff, and alleged that none is due.

"As 'a further defense and answer,' defendant 'alleges that plaintiff was not in the employ of the defendant at any time or at all between the 19th day of February, 1912, and the 28th day of October, 1913, and alleges further that plaintiff with others was working in the said * * * mine, and was to receive as compensation for his said labor and work, his pro rata of the net profits derived from the mining and milling of the ores mined by them * * * up to the sum of $7 per day.'

"Answering the second cause of action, defendant denied the employment of plaintiff or

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that he rendered work to defendant, and repeated the allegation that plaintiff and others were to receive a pro rata of the net profits; admitted that plaintiff was paid nothing by defendant.

"A cross-complaint sets up an indebtedness by plaintiff to defendant for money loaned and goods and merchandise furnished, of the value of $98.20, and judgment is prayed against plaintiff for that amount. In an 'Answer to Amendment,' defendant denied that $75 was paid plaintiff as wages, but alleged that said sum was a loan.

"Findings were filed: That plaintiff performed 600 days' labor for defendant under an agreement that 'plaintiff should receive for his said services the sum of $3.50 per day, and to pay for his board the sum of $1 per day, and if plaintiff refrained from demanding pay for his said services until an amount of money sufficient to meet the sum had been realized from the proceeds of the operation of said mine, that plaintiff should receive the sum of $7 per day, less the said amount for board; that there was not received from the operation of said mine a sufficient amount of money to pay plaintiff for his said work; that plaintiff is entitled to receive $3.50 per day for 600 days; that defendant is entitled to credit for $75 advanced to plaintiff; that defendant is entitled to credit for board for 616 days at $1 per day,' and judgment was rendered for plaintiff in the sum of $1,409.

"The appeal is from the judgment and from an order denying defendant's motion for a new trial."

Counsel for the appellant vigorously contend in their petition for a rehearing, as likewise they argue in their briefs originally filed herein that the only permissible conclusion from the testimony of the plaintiff himself was the agreement upon which he relies here for a recovery does not require the defendant to pay him any compensation whatever until the money was taken from the mine, "and in case of failure to take it from the mine he would get $3.50 per day, and that before he could claim the latter amount he would have to allege and prove some misconduct on the part of the defendant or that the mine had failed to produce the money within a reasonable time." And it is further asserted that upon the question of what is "reasonable time" no issue was tendered by the complaint nor evidence offered or received.

The agreement not having been reduced to writing, its terms must necessarily be learned, and the intention of the parties as to its nature, scope, and effect necessarily ascertained from the evidence. We have, upon further consideration of the record, concluded that, for a reason to be hereafter explained, the judgment must be reversed. While it may technically be true that there is evidence in the record which supports the trial court's conception of the agreement, as evidenced by its findings, still, on the whole, the evidence as to the nature of the agreement or upon the question of what the parties actually intended should be the precise occasion on which the plaintiff would be entitled to demand and receive pay for his services at the rate of $3.50 per day is, as the learned trial judge in his written opinion, giving his reasons for the conclusion reached, in effect declared, unsatisfactory, and it appears to us to be so much so that, since the judgment must be reversed, a retrial of the issues of fact should be had, in which event the facts bearing upon the transaction may, it is to be hoped, the more clearly and satisfactorily be disclosed. It will, therefore, be unnecessary for us to consider in detail the evidence in this opinion.

[1, 2] As to the criticism of the plaintiff's complaint, however, it is proper that we should say that, it being alleged in the first count or cause of action therein stated that the mine "did, on or before the 28th day of October, 1913, produce and yield to defendant a sufficient sum of money as the proceeds thereof to pay the said plaintiff for his said labor at the rate of $7 per day for the period of his employment," it was obviously unnecessary to plead therein that the mine had failed, within a reasonable time, to produce the money with which to pay the plaintiff, assuming that it is true that the understanding between the parties was that the plaintiff was entitled to the payment of no compensation whatever until the mine did produce the money required to make such payment. Nor was it necessary to plead the matter as to "reasonable time" in the second cause of action, which was cast in the form of a common count, upon a quantum meruit. To have done so would have necessitated the pleading of the express agreement almost in its entirety—that is to say, it would have been necessary to plead not only the agreement to employ the plaintiff (which necessarily is pleaded in said count), but also the condition upon which he would be entitled to demand and receive his compensation. This, it seems to us, would have been inconsistent with the essential theory upon which an action on an implied contract proceeds.

[3] The plaintiff, in his second cause of action, proceeded precisely as is required where the action is in the quantum meruit form of a common count, and in such case the defendant is entitled to interpose any defense, which, if proved, will countervail the claim of the plaintiff that any sum is due and owing to him from the defendant as the "reasonable value" of services alleged to have been performed. In this case, either with or without pleading it, the question of "reasonable time" could have been introduced by the defendant as a defense to the second cause of action. In other words, the actual agreement between the parties, as the defendant understood it, could have been shown by the latter, without pleading such agreement, as a defense to the plaintiff's claim, as set forth in said cause of action, that the defendant was indebted to him in a sum representing the reasonable value of the alleged services rendered by him to and for the defendant.

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[4] As above stated, however, it will be necessary to order a reversal of the judgment, and this for the reason that the court failed to make a finding upon a material issue.

As seen, the defendant filed a cross-complaint in which it is alleged that the plaintiff is indebted to the defendant for money loaned and for goods and merchandise furnished and delivered to the plaintiff, at the latter's special instance and request, in the sum of $98.20. In his answer to the cross-complaint, the plaintiff denied the indebtedness so alleged.

There was some testimony supporting the above-mentioned allegation of the cross-complaint, and it was this evidence that this court said in the order granting the rehearing had been overlooked in the preparation of the former opinion.

The plaintiff himself testified that the defendant, through Mr. Oddie, its president and manager, had furnished him a bill of groceries, etc., amounting in value to the sum of $80, for which he had not paid. The court made no finding upon this issue.

It is, of course, well settled that if any material issue is left unfound, it is ground for reversal of the judgment. Hayne on New Trial and Appeal, Rev. Ed. p. 1317.

For the reasons herein stated, both the judgment and the order are reversed, and the cause remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

(62 Colo. 144)

FULTON IRRIGATING DITCH CO. et al. v. SANSTAD et al. (No. 7863.)

(Supreme Court of Colorado. July 3, 1916. Rehearing Denied Dec. 4, 1916.)

WATERS AND WATER COURSES ⊂=152(11) — WATER RIGHTS—DIVERSION — AMENDMENT OF DECREE.

In suit to change point of diversion of water from headgate of irrigating ditch to that of another ditch in the same water district, decree for petitioner permitting the water to be diverted on the sole condition that the decree should not be construed as giving petitioner the right to change the place of use of the water, or as impairing her right to such change pursuant to the laws of the state, was too broad, and will be amended by inserting after the words "and shall permit said quantity of water of the priority aforesaid to be diverted into the ditch through said B. ditch headgate" the words "whenever and only when said petitioner, or her successor in interest, shall request said diversion for use on said land, and such diversion shall continue only during the time when the water of said priority so diverted is used in the irrigation of said land," since the statute intends that decrees in such cases shall be entered only on such terms as shall be necessary to prevent injury to other owners of water rights.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 156; Dec. Dig. ⊂=152(11).]

En Banc. Error to District Court, City and County of Denver; Geo. W. Allen, Judge.

Suit by Matilda Sanstad and the Burlington Ditch, Reservoir & Land Company against the Fulton Irrigating Ditch Company, the Brighton Ditch Company, and the Farmers' Independent Ditch Company. To review a judgment for petitioner Sanstad, defendants bring error. Judgment reversed, with directions.

Goudy & Twitchell, of Denver, for plaintiffs in error. Milton Smith, Charles R. Brock, and W. H. Ferguson, all of Denver, for defendant in error Sanstad.

TELLER, J. This cause is before us on error to a decree changing the point of diversion of 9.133 second feet of water from the headgate of the Duggan ditch to the headgate of the Burlington ditch, both located in water district No. 2. The Duggan ditch is a short ditch, having its headgate between the headgates of plaintiffs in error and that of the Burlington ditch, which is three miles up the river. The court found for the petitioner on the question of injury to respondents by the proposed change of the point of diversion, and entered a decree accordingly. The motion of defendants in error to dismiss the writ is denied under the authority of Ft. Collins Milling & Elevator Co. v. Larimer & Weld Irrigation Co., 58 Colo. 183, 143 Pac. 1091.

Counsel for plaintiffs in error have assigned errors on several of the court's rulings, but the principal error upon which they rely is that the decree is so broad as to allow an increased use of the water by its constant, instead of occasional, diversion from the river. In other words, it is contended that the decree should be specific and allow water to be diverted into the Burlington ditch only when it is needed by Sanstad. Counsel further say that if the decree be so entered their clients would not care to litigate further the question of injury to them by the change in point of diversion.

Counsel for defendants in error contend that the decree, when properly construed, does limit the diversion to Sanstad's needs. That being the case, there is no good reason for not making the decree so specific that the officers charged with the duty of distributing water under its provisions shall have no doubt of its meaning. The statute by its terms clearly intends that decrees in such cases shall be entered only upon such terms and conditions as shall be necessary to prevent injury to other owners of water rights, and good practice requires full compliance with the provisions of the law.

The decree permits the 9.133 second feet of water to be diverted into the Burlington ditch; the only condition imposed being that the decree shall not be construed as giving to the petitioner the right to change the place

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of use of the water, or as impairing her right to such change in pursuance of the laws of this state. We are of the opinion that the decree is too broad, and that it ought to be so limited as to render unnecessary further judicial proceedings in this matter.

The cause is remanded to the district court, with directions to amend the decree by inserting after the words "and shall permit said quantity of water of the priority aforesaid to be diverted into the Burlington ditch through said Burlington ditch headgate" the following words: "Whenever and only when said petitioner, or her successor in interest, shall request said diversion for use on said land; and such diversion shall continue only during the time when the water of said priority so diverted is used in the irrigation of said land."

The judgment is reversed, with directions. The defendants in error will pay the costs in this court.

Judgment reversed.

(62 Colo. 175)

WILLIAM E. SWEET & CO. et al. v. FORD. (No. 8350.)

(Supreme Court of Colorado. July 3, 1916. Rehearing Denied Dec. 4, 1916.)

1. INJUNCTION ⟸235—LIABILITY ON EMERGENCY BOND.

Under Code Civ. Proc. § 164, providing for temporary restraining order in case of emergency upon giving emergency bond "conditioned for the payment of the sum therein mentioned to the defendant if it shall be adjudged that such emergency did not exist or that the plaintiff created, or connived at its creation, by neglect or otherwise," defendant in an injunction proceeding could not recover upon an emergency bond conditioned to "pay the sum of $1,000 to the said defendants in the event that it shall be determined and adjudged by the court, upon the hearing of said application, that the emergency did not exist, or that the plaintiff created or connived at its creation, by neglect or otherwise," by merely showing the injunction suit had been dismissed by plaintiff therein, and without other proof, or a finding by the court, that an emergency for the restraining order did not exist, or, existing, was brought about by an act or omission of or for the plaintiff, or by his knowledge.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 529–537; Dec. Dig. ⟸235.]

2. INJUNCTION ⟸252(1)—TEMPORARY ORDER —LIABILITY ON EMERGENCY BOND.

No single defendant in an injunction proceeding is entitled to the entire sum named in an emergency bond given under such statute to secure a temporary restraining order, at least against others who were served with notice and presumably submitted to it, since the sum named in the bond is treated as a penalty, or liquidated damages, and no showing is required of actual damages.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 586; Dec. Dig. ⟸252(1).]

Scott, J., dissenting.

En Banc. Error to District Court, City and County of Denver; Geo. W. Allen, Judge.

Action by H. L. Ford against William E. Sweet & Co. and others. Judgment for plaintiff, and defendants bring error. Reversed.

Pershing & Titsworth and John H. Fry, all of Denver, for plaintiffs in error. John P. Brockway, of Denver, for defendant in error.

TELLER, J. William E. Sweet & Co., a corporation, one of the plaintiffs in error, was plaintiff in a suit to enjoin the disposal of certain municipal bonds of the town of Dolores. The complaint alleged that defendants Ford and Sethman as partners had contracted with said town to construct for it a system of waterworks; that said firm had contracted with plaintiff to sell it the entire issue of bonds received for the construction of said works; that some of the bonds had been delivered to plaintiff; that said firm had assigned its contract with the town to one Dempsey, who was to finish the work on the water plant; that Ford and Sethman had repudiated the contract with plaintiff and had declared that the remainder of the bonds would be disposed of elsewhere; that plaintiff had sold all of the bonds for future delivery; and that it could not be compensated for the damages which would result to it from failure to receive the bonds purchased, because Ford and Sethman as a firm, and as individuals, were insolvent. Dempsey, the town of Dolores, and several of its officers were made defendants, as well as Ford and Sethman. An emergency bond in the sum of $1,000 was given, with the other plaintiffs in error as sureties, and a temporary injunction issued, as prayed in the complaint. It appears that Ford and Dempsey were both served with notice of the restraining order, and that Dempsey then made an arrangement with plaintiff for the delivery to it of the bonds which he was to receive for finishing the work. Shortly thereafter the plaintiff caused the suit to be dismissed, without notice to Ford. It further appears that two days after the suit was dismissed Ford filed an answer in the suit, and a motion to change the order of dismissal so that it would be an order of dismissal by the court. At the same time he gave notice that he would apply for judgment on the emergency bond. The motion for a change in the order and for judgment on the bond was denied. Ford, defendant in error here, then, as the sole plaintiff, began a suit on the bond, alleging the issue of the restraining order, the giving of the bond, that there was in fact no emergency, and that the suit had been dismissed by the plaintiff. The answer sets up the agreement with Dempsey for the purchase of the bonds coming to him, and alleges that without the restraining order such purchase could not have been made. It also alleges that the ruling on the motion to change the order of dismissal and for judg-

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ment on the bond was an adjudication of the cause on its merits. Judgment for the plaintiff in the sum of $1,000 was entered on the pleadings. The defendants in that suit bring the cause here for review.

[1] Several grounds for reversal are presented, but in our view of the case we need not consider them all. We take up first the one raised by this query:

"Can a defendant in an injunction proceeding recover upon an emergency bond given for the purpose of securing a temporary restraining order, without proof, or a finding by the court that an emergency for the restraining order did not exist, or, existing, was brought about by an act or omission of or for the plaintiff, or by his knowledge?"

The statute, section 164 of the Code, as published in R. S. 1908, which requires the emergency bond, provides that:

It shall be "conditioned for the payment of the sum therein mentioned to the defendant if it shall be adjudged that such emergency did not exist or that the plaintiff created, or connived at its creation, by neglect or otherwise."

The undertaking in the bond on which the suit was brought was that:

The obligors would "pay the sum of $1,000 to the said defendants in the event that it shall be determined and adjudged by the court, upon the hearing of said application, that the emergency did not exist, or that the plaintiff created or connived at its creation, by neglect or otherwise."

The theory of defendant in error is that the dismissal of the suit at the instance of the plaintiff is an admission that an emergency did not exist. In support of this position, counsel cites several cases, all of which are to the effect that a dismissal or a discontinuance of the suit by plaintiff has the same effect as a decision of the court that the injunction was improperly sued out. To this rule, however, there is a well-recognized exception which prevents its application in cases where the voluntary dismissal is for matters done or arising subsequent to the issue of the injunction, where the original issuance was proper. 22 Cyc. p. 1029.

The record in this case shows that the suit was dismissed after an arrangement had been made with Dempsey to sell to plaintiff all the bonds coming to him; that is, all of the issue not already delivered to plaintiff. Clearly, with this arrangement made the object of the injunction had been obtained, and there was no reason for continuing the suit. The dismissal was therefore brought about by matters arising subsequent to the issue of the injunction. Hence the cases do not apply, even if it were conceded that they are authority in any case of a voluntary dismissal of an emergency injunction issued under the statute. But we do not rest the case on this exception to a general rule. The statute plainly intends that the sum named in the bond shall be a penalty inflicted upon the obligors for aiding in securing a restraining order, ex parte, where there was no ground for its issue without notice. As might naturally be expected, this penalty is not to be imposed on a mere inference that an emergency did not exist, but only on the court's adjudging that it did not exist. By the terms of the bond the obligors became liable only in case it should "be determined and adjudged by the court, upon the hearing of said application, that the emergency did not exist," etc. It is plain that the dismissal of the suit did not meet the conditions named in the bond as the ground of liability, nor the terms of the statute which prescribes the penalty and the grounds of its imposition.

[2] It may be added that as the sum named in the bond is treated as a penalty, or liquidated damages, and no showing is required of actual damages, it would follow that no single defendant would be entitled to it all, at least as against others who were served with notice of the writ and presumably submitted to it. In this case the record shows that Dempsey was served with notice of the order, though even that was not necessary to make him subject to it if he had knowledge of its contents. It is not necessary, however, to determine who, if any one, had a right to recover, since there was no determination on the question of an emergency, the nonexistence of which is the only ground of recovery in this case. The former judgment is vacated and the opinion withdrawn.

The judgment is reversed.

Judgment reversed.

SCOTT, J., dissents.

(62 Colo. 180)

BENEDICT WAREHOUSE & TRANSFER CO. v. McKANNON PIANO CO.

(No. 8310.)

(Supreme Court of Colorado. July 3, 1916. On Rehearing, Dec. 4, 1916.)

1. WAREHOUSEMEN ⟹24(2) — LIABILITY FOR LOSS—REASONABLE CARE.

Under Laws 1911, p. 659, § 21 (Mills' Ann. St. 1912, § 7783), making warehousemen liable, in the absence of agreement only for loss or injury to goods resulting from failure to "exercise such care in regard to them as a reasonable, careful owner of similar goods would exercise," a warehouseman was not liable for damages to stored goods caused by an unprecedented cloudburst and flood, where as soon as notified of the flood by the watchman it used every reasonable effort to save the goods, and the premises in which the goods were stored had been used for storing goods of a perishable nature for 20 years previously without any loss from floods and without any water entering such premises, and it did not appear that a flood had occurred in the locality in the whole history of the city, since such a flood could not reasonably have been anticipated.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. § 49; Dec. Dig. ⟹24(2).]

2. WAREHOUSEMEN ⟹34(9)—ACTIONS—QUESTION FOR JURY.

In action against warehouseman for injury to goods, reasonable diligence and care on his part is a question to be determined by the

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jury from the surrounding circumstances where there is substantial evidence upon which to submit such issue, but in the absence of such evidence, it is a question of law for the court.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. § 84; Dec. Dig. ⊂⊃34(9).]

3. WAREHOUSEMEN ⊂⊃24(2) — LIABILITY FOR LOSS — REASONABLE CARE — FAILURE TO GUARD AGAINST INJURY.

Where a cloudburst and flood could not reasonably have been anticipated, failure of a warehouseman to take steps to prevent injury to stored goods from such a source, by storing the goods in an upper floor or by securing the placing of a culvert in a railway embankment in the vicinity, was not negligence.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. § 49; Dec. Dig. ⊂⊃24(2).]

Scott, J., dissenting.

En Banc. Error to District Court, City and County of Denver; James H. Teller, Judge.

Action by the McKannon Piano Company against the Benedict Warehouse & Transfer Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Gillette & Clark, of Denver, for plaintiff in error. Charles K. Phillipps, of Denver, for defendant in error.

GABBERT, C. J. In July, 1912, the Benedict Warehouse & Transfer Company was engaged in the business of receiving and storing goods for hire in the city of Denver. Prior to the 14th day of that month the McKannon Piano Company had stored with the warehouse company a number of pianos, which on that date were badly damaged by being flooded with water. The piano company brought suit against the warehouse company to recover their value. The trial of the cause resulted in a verdict for plaintiff, upon which judgment was rendered. The defendant brings the case here for review on error.

On motion of defendant certain portions of the original complaint were stricken. The plaintiff then filed an amended complaint which the defendant moved to strike, upon the ground that it was a departure from the cause originally pleaded. This motion was overruled. The defendant then answered, putting in issue the value of the pianos and the extent they were damaged, and by a further defense alleged that they were damaged by causes over which it had no control and for which it was not responsible, and that in storing the pianos it exercised such care as a reasonable, careful owner of similar articles would exercise. This defense was put in issue by replication. Counsel for defendant assign as errors that the amended complaint does not state a cause of action; the exclusion of testimony; that by an instruction given the burden was placed upon the defendant to acquit itself of negligence; and that the evidence fails to make a case against the defendant.

[1] By section 21, c. 226, Laws 1911 (section 7783, Mills' St. 1912), relating to warehousemen, their liability is fixed as follows:

"A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonable, careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care."

The cause was tried upon the issue of whether the defendant exercised the care imposed by law, and if the testimony establishes that defendant was not guilty of negligence, then it is not liable for the damage to the pianos, and we shall first consider that question, which, if determined in favor of defendant, renders it unnecessary to consider the other errors assigned. The warehouse of defendant is a brick structure, erected in 1891, near the Twentieth street viaduct in the city of Denver, and has been continuously used as a public warehouse for 20 years prior to the date the pianos in question were damaged. It has a basement in which these pianos were stored. The evening of July 14, 1912, this basement was filled by flood waters which practically destroyed the pianos. The part of the city in which the Benedict warehouse is located is particularly adapted for warehouse purposes by reason of trackage facilities. In the immediate vicinity a half dozen or more private warehouses of leading business concerns are located, and have been used for storage purposes from 20 to 30 years. Some of these have basements in which for many years articles that would be injured by water were stored. For many years, and with the knowledge and consent of the owners, goods of a perishable nature have been stored in the basement of the Benedict warehouse. At one time a leading dry goods establishment leased two basement compartments of the warehouse and used them for storing dry goods. At no time since the Benedict warehouse was erected have goods been injured from water in the basement nor at any time had water ever entered through the basement windows. During the entire period the locality has been occupied by warehouses, which ranges from 20 to 30 years prior to July, 1912, it appears that no flood had ever occurred in the vicinity of the Benedict warehouse. In fact, it does not appear that in the entire history of the city of Denver any flood had occurred in that locality. On the afternoon of July 14, 1912, an unusually heavy rainstorm occurred in Denver. According to the weather bureau, this rain broke all records for the heaviest fall of rain within short periods. Mr. Benedict, the manager of the warehouse company, visited the warehouse in the evening shortly after the rain ceased. He found nothing wrong. There were only the usual puddles and shallow pools of water in the vicinity which fol-

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low a heavy rain. In the early evening word was received in Denver that Cherry creek was "on a boom." The fire and police departments at once took steps to notify residents of the lowlands along the Platte bottom of the flood that was coming down Cherry creek. This stream flows into the Platte a half mile or more above the point where the Benedict warehouse is located. It was not anticipated that danger would result from the flood of the creek, except that the water coming down that stream would cause an unusual rise in the Platte. Mr. Benedict, who was at home, received word from the watchman at the warehouse about 8:15 p. m. that the fire department had been warning everybody of possible danger. He at once telephoned his foreman and started for the warehouse. He was detained because the flood was so high at the Seventh avenue bridge that the street car he was in was not permitted to cross. He and his foreman arrived in the near vicinity of the warehouse in an automobile about 9 o'clock. At this time the water around the warehouse was so deep they had to leave the machine and wade to the building. They at once undertook to remove the pianos from the basement, but within 15 minutes after they reached the warehouse the water was so deep in the basement they were compelled to abandon their efforts. It appears from the evidence that this water came from an overflow of Cherry creek, which occurred at some distance from its mouth and flowed down by the Union Station, the first floor of which was flooded to the depth of a foot or more. Between the river and the warehouse was a railroad embankment, which had been constructed about 1881. It was several hundred feet from the warehouse. This embankment obstructed the flow of the flood water to the river, and caused it to back up and accumulate so that it flowed through the basement windows.

[2] This flood had no connection with the rain in the afternoon, but was caused by a cloudburst which occurred in the upper basin of Cherry creek, many miles above the city of Denver. From the foregoing facts established by testimony which is undisputed, the question to determine is whether the defendant was guilty of negligence, or, more nearly in the language of the statute fixing the liability of warehousemen, did the defendant fail to exercise that degree of care in storing the pianos that a reasonable careful owner of similar articles would exercise? It is well settled that warehousemen are not, like common carriers, insurers of goods committed to their care and liable for all losses not occasioned by the act of God or the public enemy, but are ordinary bailees for hire, and as such bound only to common care and diligence and liable only for want of such diligence and care. Note to American Brewing Association v. Talbot, 64 Am. St. Rep. 538. What constitutes reasonable diligence and care is a question to be determined by the jury in view of the surrounding circumstances where there is substantial evidence upon which to submit such an issue, but in the absence of such evidence it becomes a question of law to be determined by the court. This brings us to the proposition of whether the defendant by the exercise of reasonable care and diligence should have anticipated that a flood might occur which would fill the basement of its warehouse. It does not appear that any floods had ever occurred in that locality. For 20 years covering the period dating from the erection of the warehouse down to the time of the flood water had not entered the basement from any source. It affirmatively appears that for a period of 30 years no damage had been caused by flood waters. In such circumstances the defendant cannot be held responsible for not anticipating a flood, unless we require such knowledge of events before they take place which no human being can either claim to possess or be held responsible for not acting upon. In cases not governed by special or more stringent rules than the one at bar the law is that mischief from a cause which in the exercise of reasonable care could not have been foreseen and anticipated cannot be made the basis upon which to predicate negligence. American Brewing Association v. Talbot, supra, 141 Mo. 674, 42 S. W. 679, 64 Am. St. Rep. 538; Backus v. Start (C. C.) 13 Fed. 69; Ray on Negligence of Imposed Duties, 133.

[3] The only evidence tending to show any apprehension of danger upon the part of defendant is the testimony of the manager of the piano company and another witness, who testified that about ten days after the flood they had a conversation with the manager (Benedict) of the warehouse company, when he took them to the railroad embankment previously mentioned and said:

"Here is where there should have been a culvert. I have been after the Burlington Railroad for three years to put a culvert in here, and I have been expecting and have known that if we ever had any heavy rains we would be flooded here; it would back up against this dike and flood us."

From this testimony the inquiry is whether it had a tendency to show that defendant by the exercise of reasonable care should have apprehended that the embankment would cause flood waters to fill the basement of the warehouse by preventing them reaching the river, or, in other words, does it tend to prove that defendant was negligent in storing the pianos in the basement of its warehouse, located in such proximity to the embankment that it would impound flood water, and thus cause the basement to be filled. Unquestionably, if it had not been for the embankment, the basement would not have been flooded, but it was not a menace or source of danger, except in case of a flood which would thereby be intercepted, and so whether defendant was negligent turns not

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upon the question of apprehension of what would occur in the event of a flood in connection with the embankment, but whether a flood should have been anticipated. It is not by inquiring into the apprehensions and fears of the manager of the warehouse company as to what might happen in case of a flood in the absence of a culvert in the embankment that the question of reasonable care is to be ascertained, but, to repeat, whether it was negligence not to have anticipated a flood. This question we have determined in the negative; consequently it was not negligence to fail to foresee the results which would follow a flood in connection with embankment. The failure to take precautions to prevent an injury which if taken would have prevented it is not negligence when the real source of the injury could not reasonably have been anticipated. American Brewing Ass'n v. Talbot, supra. And so in the case at bar, had the defendant taken the precaution to store the pianos on an upper floor, or had a culvert been constructed in the railroad embankment through which the flood waters could have escaped, they would not have been damaged. But under the ordinary rule of due caution and care this cannot be taken into account when it appears it could not be reasonably anticipated that the basement would be flooded by the overflow of Cherry creek or from any other source.

When the manager of the warehouse company and his assistants reached the warehouse, they at once took steps to remove the pianos by an elevator to the next floor. Within a few minutes they were compelled to abandon this work because the basement filled so rapidly. The motor which operated the elevator was in the basement, and the flood soon rendered it useless as a motive power. It is urged by counsel for plaintiff that placing the motor where it would be liable to be flooded was negligence. As already pointed out, it could not be reasonably anticipated that the basement might be flooded. It is also urged by counsel for plaintiff that whether the defendant had exercised due care in endeavoring to remove the pianos after learning of the situation was an issue from which the jury could determine that defendant was guilty of negligence. The heavy rain in the afternoon had not caused any flooding of the basement. After that rain ceased the manager visited the warehouse. At that time he was not aware of the flood coming down Cherry creek, which subsequently caused the damage, and knew nothing regarding it until advised by the watchman at the warehouse. The latter learned of it, so he says, about 7:30 or 8 o'clock p. m., but states that as soon as he was told the flood was coming he telephoned the manager, who says this was about 8:15 p. m., and it appears that he acted promptly in endeavoring to reach the warehouse, telephoning for assistance, and on the way picking up two employés, and at once took steps to remove the pianos.

There is testimony to the effect that a few days prior to the flood the manager of the piano company objected to having the pianos stored in the basement. This objection, however, was not upon the ground that there was any danger of a flood. From the testimony we are of opinion that the defendant was not guilty of negligence.

The former opinion is withdrawn, the judgment entered thereon vacated, and the judgment of the district court reversed, and the cause remanded for further proceedings in harmony with the views herein expressed.

Judgment reversed.

SCOTT, J., dissents. TELLER, J., not participating.

On Rehearing.

PER CURIAM. On petition for rehearing, counsel amici curia request that the opinion be modified in certain particulars because what is said regarding the flood may affect other litigation now pending. On this subject it is only necessary to say that the decision is based upon the record in the case.

Rehearing denied.

(62 Colo. 245)

MULLER v. PENN MUT. LIFE INS. CO. OF PHILADELPHIA (NATIONAL JEWISH HOSPITAL FOR CONSUMPTIVES, Intervener). (No. 8294.)

(Supreme Court of Colorado. July 3, 1916. Rehearing Denied Dec. 4, 1916.)

INSURANCE ⇐587—CHANGE OF BENEFICIARY—SIMPLE ASSIGNMENT.

Where the policy gave the insured the right to change the beneficiary in writing, providing that a change should be valid only if indorsed on the policy by the insurer at the home office, and that any assignment should be furnished the insurer and attached to the policy, a simple assignment as collateral to secure a loan, not sent to the insurer, did not affect the beneficiary's right, which could be changed only by compliance with the terms of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1469; Dec. Dig. ⇐587.]

En Banc. Error to District Court, City and County of Denver; Harry C. Riddle, Judge.

Action by Bertha S. Muller against the Penn Mutual Life Insurance Company of Philadelphia, wherein the National Jewish Hospital for Consumptives intervened. To review a judgment against her, plaintiff brings error. Reversed and remanded.

Hindry, Friedman & Brewster and C. F. Clay, all of Denver, for plaintiff in error. Morris & Grant, of Denver, for defendant in error. Joseph S. Jaffa, of Denver, for intervener.

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HILL, J. The question to be determined is whether a policy of insurance issued by the Penn Mutual Life Insurance Company to Alfred Muller (now deceased) upon his life shall be paid to his wife, Bertha S. Muller, named as the beneficiary, or to an assignee as trustee for certain creditors of the deceased. The judgment was against the widow. There is no dispute pertaining to any material fact. The real contention involves the construction of the policy. The record discloses that Mr. Muller secured this policy but a short time before his death; it bears date May 23, 1911. Upon July the 11th following he authorized his stenographer to write a letter to Mr. Alexander which reads as follows:

"Denver, Colorado, July 14, 1911.

"Mr. Hugh J. Alexander, Care of Capitol National Bank, City—My Dear Mr. Alexander: I hand you herewith four life insurance policies, assigned to you as trustee, to secure the payment of promissory notes, as per assignments herewith inclosed.

"Very truly yours, Alfred Muller.

"[Signed by the stenographer.]"

The policy in question, along with others, was transmitted to Mr. Alexander with this letter and the assignment therein referred to, which reads:

"For value received, I hereby sell, assign, transfer, and set over all my right, title, and interest whatsoever of, in, and to policy No. 558097 on the life of Alfred Muller (the insured) in the Penn Mutual Life Insurance Company of Philadelphia, unto Hugh J. Alexander, trustee, of Denver, Colorado.

"This assignment is made to secure the payment of a promissory note for $8,000, payable to the Capitol National Bank of Denver, dated July 16, 1911, and indorsed by this insured.

"Witness my hand and seal, Denver, state of Colorado, this fourteenth (14th) day of July, 1911. Alfred Muller. [Seal.]

"Witnesses:

"Edith M. Hill.

"Adelia Murphy.

"Recorded 8—7—11."

It is conceded that at the time of the delivery of this assignment and the policy in question to Mr. Alexander the insured was indebted to the intervener hospital association, or to the Capitol National Bank, or both, in excess of the amount called for by this policy. It is unnecessary to go into the complications concerning this indebtedness; as it was amply sufficient to justify the legitimate pledging of any securities which Mr. Muller might own for its payment. Mr. Muller died August 1, 1911, and neither the assignment nor the policy were delivered to the company for any indorsement thereon, or to take any action concerning until about a week after his death, and no effort was made to do so prior thereto.

The portions of the policy necessary to consider are that the company insured the life of Alfred Muller in the sum of $5,000, and promises to pay at its home office in Philadelphia unto Bertha S. Muller, his wife, if she survive him, otherwise to his executors, administrators, or assigns, the said sum insured during the continuance in force of this policy. It requires payment in advance of the premium in every year during the life of the insured, or until 20 full year premiums shall have been paid. The clause concerning change of beneficiary reads:

"The right of revocation is reserved by the insured. When the right has been reserved, the insured shall have full power while this policy is in force (subject to any previous assignment) to change the present beneficiary or beneficiaries. Such change shall be made in writing and shall be valid only upon its endorsement on this policy by the company at the home office."

It provides that the policy shall participate annually in surplus earnings, etc., also for extended insurance, paid-up insurance, loan or cash surrender value privileges, also for automatic extensions, etc., and provides further that at the expiration of the 20-year period that it shall become a full paid up policy, or at the election of the insured be subject to a cash surrender value, etc. The clause concerning assignment reads:

"Any assignment of this policy shall be furnished to the company and a duplicate thereof attached hereto. Any claim against the company arising under any assignment of this policy shall be subject to proof of interest. No assignment shall impose any obligation on this company until it has received the original thereof, nor does the company guarantee the sufficiency or validity of any assignment."

There is a line of authorities which holds that the question of notice to the company of the assignment, and the indorsement by it upon its books, is intended for the company's protection, and is a matter which concerns it and the insured only, and which can be waived. By the pleadings, the insurance company having expressed its willingness to recognize the assignment by its allegations that the policy belonged to the bank for whom Mr. Alexander was acting as trustee, we can assume that the assignment, so far as that phase of the case is concerned, had the same force and effect that it would have had had the terms of the policy concerning it been complied with. The question which then presents itself is: When the terms of the policy are considered as a whole, what passed to Mr. Alexander by virtue of this assignment? In the case of Johnson v. New York Life Insurance Company, 56 Colo. 178, at page 190, 138 Pac. 414, at page 418 (L. R. A. 1916A, 868), we had occasion to comment upon a New York Life policy quite similar in terms to the one under consideration, in which upon this question we said:

"The pertinent question is: Who was the beneficiary at the time of the death of the insured? The policy was then in force, and there was in existence a designated beneficiary named in the policy. There had been no change in this respect. No action had been taken by any one concerning its surrender or cancellation. Under such circumstances the beneficiary designated in the policy is entitled to receive the money in harmony with the terms of the contract. To hold otherwise would be inconsistent with the great weight of authority, as well as violative of well-settled principles pertaining to contracts of insurance."

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We have again given this matter careful consideration, and are of opinion that under the circumstances here disclosed Mr. Muller did not, by this assignment, make a change of beneficiary or do other than transfer his expectancy and the rights then held by him therein under the terms of the policy. It will be observed that his assignment states:

"I hereby sell, assign, transfer, and set over all my right, title, and interest whatsoever of, in, and to policy No. 558097."

It follows that the execution and delivery of this assignment did not, under the terms of the policy, operate to change the beneficiary named in the policy, and that the instrument itself exhibited no such intent, and that the insured could not, by this method, have done so had he desired. As stated in the New York Life Case, which is supported by the overwhelming weight of authority:

"In policies like this the general rule is that the beneficiary has an interest in the policy, which, while subject to be defeated by a change of beneficiary, can be defeated only in the manner prescribed in the policy, the charter or by-laws of the company, or by statute."

It is conceded that this was not done; the assignment makes no mention of an intention to change the beneficiary. It is limited by its own wording to the right, title, and interest of the insured. In such case the assignment merely transfers the then interest of the insured therein to be determined by the terms of the contract. Since our announcement in the New York Life Case, in addition to the cases therein referred to, other cases have been called to our attention which sustain this conclusion.

In Sullivan v. Maroney, 76 N. J. Eq. 104, 73 Atl. 842, the assignment and policy were both quite similar to those under consideration. In commenting at page 109 of 76 N. J. Eq., at page 844 of 73 Atl., the court said:

"The contention of the defendants, however, is that this assignment must be treated as if it effected a change of beneficiaries, and substituted in the place of the four children (the beneficiaries named in the policy) Marie Schaefer (the person named in the assignment). I cannot accede to this argument, and, in fact, do not think that there is anything to support it. The paper, in form, is an assignment. It is made by a person who has had an assignable interest, and carries that interest. The interest, as has been pointed out, was contingent, but assignable. It does not purport in any way to make a change of beneficiaries, or to affect their interests. The method of change of beneficiary is pointed out in the contract, and that method was not pursued in any respect. It is not even attempted to be shown that it was effected according to the rules of the company, as required, or that any written notice thereof was given to the company, or that it took effect by indorsement on the policy of the company, all of which are requisites. I think it entirely clear from the authorities that, where a contract of insurance is made payable to certain beneficiaries, their interests therein can only be divested in favor of other beneficiaries by changing the contract in the manner in which the contract points out that it must be changed to effect that result."

This case was reviewed and the judgment unanimously affirmed in 77 N. J. Eq. 565, wherein at page 568, 78 Atl. 150, 151, the court said:

"If it had been intended to work a change of beneficiary the method of doing so was clearly pointed out and should have been followed. The paper that was executed being not a change of beneficiary, but an assignment, and by its very terms conveying only the right, title, and interest of Mrs. Cahill, is conclusive of the intent of the parties, and should not be extended by construction."

We think this declaration specially applicable here, as well as sound, which is practically the same as announced in the New York Life Case, and call attention to the further fact that, if this assignment was intended to work a change of beneficiary the other terms of the policy in that respect were not complied with, that is, no notice was given to the company and no indorsements made, etc., until after the death of the insured. As stated in the New York Life Case, the beneficiary cannot be divested as such unless it is done in the manner prescribed in the policy, the charter or by-laws of the company, or by statute. This policy, having provided a method, states that such change shall be made in writing and shall be valid only upon its indorsement on this policy by the company at its home office. In such case, as stated in many cases, this excludes all other methods. An examination of the authorities which hold that an assignment was intended to and did cause a change of beneficiary is in cases where the policy did not provide for any particular method for making such changes, as was pointed out in Martin v. Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620, and in Atlantic Mutual Life Insurance Company v. Gannon et al., 179 Mass. 291, 60 N. E. 933.

Other cases not cited in Johnson v. New York Life Insurance Company, supra, and several which have been rendered since then, and all of which sustain the rule herein announced, are Roberts v. Northwestern Nat. Life Ins. Co., 143 Ga. 780, 85 S. E. 1043; Grand Lodge, etc., v. State Bank, 93 Kan. 310, 144 Pac. 257; Lowenstein v. Koch, 165 App. Div. 760, 152 N. Y. Supp. 506; Deal v. Deal, 87 S. C. 395, 69 S. E. 886; Farra v. Braman, 171 Ind. 529, 86 N. E. 843; Vanasek v. Western Bohemian Fraternal Ass'n, 122 Minn. 273, 142 N. W. 333, 49 L. R. A. (N. S.) 141, Ann. Cas. 1914D, 1123; Grand Lodge, etc., v. Edwards, 111 Me. 359, 89 Atl. 147; Crosby v. Mutual Ben. Life Ins. Co., 221 Mass. 461, 109 N. E. 365; Haigh v. Mentor Council No. 907, 17 Phila. (Pa.) 71; Barner v. Lyter, 31 Pa. Super. Ct. 435; Hotel Men's Mut. Ben. Ass'n v. Brown (C. C.) 33 Fed. 11.

The judgment will be reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

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GABBERT, C. J. (specially concurring). Were it not for the ruling of this court in the case of Johnson v. New York Life Insurance Company, 56 Colo. 178, 138 Pac. 414, L. R. A. 1916A, 868, I would dissent on the ground that the interest of Mrs. Muller was a mere expectancy, and that the control of the insured over the policy, he having reserved the right to change the beneficiary, was as absolute and complete as though he had been the beneficiary himself, or the policy had been payable to his estate, subject to the one limitation that a change of beneficiary on the face of the policy could only be made in the manner therein provided. The Johnson Case as well as the one at bar fails to distinguish between a policy where a beneficiary is named without power of substitution and one where the insured retains the right to change the beneficiary. In the first the beneficiary has a vested interest which cannot be divested without his consent, while in the second the interest of the beneficiary is conditional and subject to be divested without his knowledge or consent by the terms of the contract naming him as such which authorizes the insured to assign the policy. In other words, this is a condition of the contract, and his right is therefore subject to it. And so it follows that, where the insured assigns a policy of that character to a third party, the interest of the beneficiary is divested.

In this jurisdiction the rule is otherwise, as declared in the Johnson Case, which cannot be distinguished from the one at bar. However, the rule in that case worked a great injustice, and the result is the same in the case under consideration, whereas the rule to the effect that an assignment of the policy, where the insured reserves the right to change the beneficiary divests the latter of all interest, which is sustained by abundant authority, would have meted out exact justice in both cases.

The writer is authorized to state that Mr. Justice TELLER concurs in the views above expressed.

(62 Colo. 229)

DENVER & S. P. RY. CO. v. CITY OF ENGLEWOOD. (No. 8542.)

(Supreme Court of Colorado. July 3, 1916. Rehearing Denied Dec. 4, 1916.)

1. CARRIERS ⇐12(9)—REGULATION OF FARE—POWERS OF TOWN.

Rev. St. 1908, § 6676, requires town franchises to street railways to be granted only by ordinance. Public Utilities Act (Laws 1913, p. 464) § 13, requires fares to be just and reasonable. Section 14 empowers the Public Utilities Commission to adopt and regulate rates and fares. Section 21 fixes the maximum street railway fare. Section 23 authorizes the commission to change rates if they are unreasonable. The city of Englewood, when a town, enacted an ordinance fixing certain fares in return for a franchise. The company thereafter, and after enactment of the Public Utilities Act, raised its rate, duly filing it with the commission, which approved it. *Held* that, as the town had no right by its ordinance to prevent future legislative change of rates, the commission had exclusive power to fix the tariff.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 15–20; Dec. Dig. ⇐12(9).]

2. CARRIERS ⇐18(6)—REGULATION OF RATES—RIGHT TO INJUNCTION.

Since by the Public Utilities Act a review of the commission's order by the Supreme Court may be had, an interested party cannot enjoin collection of the fares fixed by the commission.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16–18, 20, 24; Dec. Dig. ⇐18(6).]

Gabbert, C. J., and Teller, J., dissenting.

En Banc. Error to District Court, Arapahoe County; H. S. Class, Judge.

Injunction by the City of Englewood against the Denver & South Platte Railway Company. After sustaining demurrer to the answer, the court rendered judgment for plaintiff on defendant's refusal to plead further, and defendant brings error. Reversed, with instructions to dismiss.

W. H. Caley, of Littleton, and F. W. Varney, of Nederland, for plaintiff in error. R. H. Blackman, of Littleton, and Crump & Allen, of Denver, for defendant in error. Fred Farrar, Atty. Gen., Frank C. West, Asst. Atty. Gen., and M. H. Aylesworth, of Denver, for Public Utilities Commission.

SCOTT, J. This is an action in injunction, and the issue was determined on the pleadings. There is no dispute as to the facts.

The complaint alleges that the city of Englewood, defendant in error, on the 6th day of December, 1906, and while it was an incorporated town, by ordinance granted to the grantors of the Denver & South Platte Railway Company, defendant in error, a franchise for the operation of a street railway upon and across certain of its streets. That section 6 of said ordinance fixed the rates of fares to be charged within said city, and further provided by reasonable regulation for the sale of coupon tickets which shall entitle passengers taking passage on the cars of said grantees, their successors or assigns, going north on said Broadway at or north of Quincy avenue, to be transported the same as regular tramway passengers, without extra fare upon the cars of the Denver City Tramway Company at Hampden avenue, and also entitling passengers going south on the cars of the Denver Tramway Company to be transported upon the cars of said grantees to the intersection of any street between Hampden and Quincy avenues, the latter inclusive avenue without additional fare, upon presentation of said coupon ticket. It was further alleged:

"That at the time of the passage of said ordinance, and the granting of said franchise to the grantors of the said defendant, the Denver City Tramway Company was engaged in operating a

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street railway as a common carrier between the city of Denver and the said Hampden avenue, at the intersection of said Hampden avenue and Broadway, in the said city of Englewood, and that thereafter the defendant company did until on or about the 28th day of October, A. D. 1914, substantially comply with the terms and conditions of said section 6 of said ordinance, and for some years thereafter did in fact provide for those seeking passage upon the cars of the said the Denver City Tramway Company, without extra charge as provided in section 6 of said ordinance."

It is then alleged that since the said 28th day of October, 1914, the defendant has refused to comply with that provision of the ordinance in the matter of providing the sale of coupon tickets entitling passengers to transportation to and from the city of Denver on the line of the Denver Tramway Company, as provided by the terms of the ordinance. The prayer was for injunction to compel the enforcement of the terms of the ordinance in the particular respect.

The answer of the defendant company admits the ordinance and the terms thereof, and alleges that from the date of the passage of the ordinance up to October 28, 1914, the defendant had given and tendered to all persons seeking passage on its cars between the point complained of free service and transfers entitling passengers to passage between such points. The answer further alleges that the defendant has sought to make arrangements with the Denver Tramway Company for the transfer of passengers taking passage upon its lines between the points set out in the complaint, and that the only provision it has been able to make is that the Denver Tramway Company shall receive five cents from all passengers so transferred and transported. It is then alleged that the defendant is a public utility and subject to the provisions of the public utility law, and further that:

"Pursuant to the provision of law in such case made and provided, it did file with the Public Utilities Commission of the state of Colorado its schedule of rates, and that its schedule of rates so filed were not suspended by the said Public Utilities Commission herein upon its own motion or upon the complaint of others for a period of 30 days, and that 30 days expired from the time of the filing the same and from the 28th day of September, A. D. 1914, and until the 28th day of October, A. D. 1914, and thereupon and pursuant to law the said rates did on the 28th day of October, A. D. 1914, go in effect and become and now are the established effective rates, fares, and charges, practices, rules, and regulations of this defendant company."

It is then said, in substance, that to comply with the ordinance in the matter complained of it must violate the public utility law as relates to the prohibition of free service or free transportation; further, that the plaintiff and all others who may claim to be injured by reason of the premises have a plain, speedy, and adequate remedy at law under the Public Utilities Law of the state.

To this answer the plaintiff filed a demurrer upon the ground that the same does not constitute a sufficient defense to the complaint. The court sustained the demurrer, and, the defendant electing to stand upon its answer, judgment was rendered in accordance with the prayer of the complaint. This judgment is before us for review.

It will be seen that the defendant company contends that its present rates of service are those fixed by the State Public Service Commission in due compliance with the statute creating such commission and prescribing its powers and duties, and the first question therefore presented in this particular is: May the commission alter a rate or regulation fixed by a franchise ordinance prior to the enactment of the Public Utilities Law.

It must be conceded that the ordinance and the acceptance thereof constituted a contract which the city and the company were at the time empowered to make. If the contract is now an enforceable one, the present action in equity was proper.

The city of Englewood was at the date of the ordinance a town operating under the general law of the state, as appears from the pleadings. Its sole power to enact such an ordinance was in section 6676, Rev. Stat. 1908, as follows:

"No franchise or license giving or granting to any person or persons, corporation or corporations, the right or privilege to erect, construct, operate or maintain a street railway, electric light plant or system, telegraph or telephone system within any city or town, or to use the streets or alleys of a town or city for such purposes, shall be granted or given by any city of the first or second class or by any incorporated town in this state in any other manner or form than by * * * ordinance passed and published in the manner hereinafter set forth."

It will thus appear that the Legislature had conferred no specific power upon the town of Englewood to enact a rate-making ordinance. The only specific power conferred upon the municipality by this section is to grant a franchise in the form of an ordinance. There does not appear a suggestion as to a rate-making power, and no such power can be inferred. It may be conceded that as between the parties such ordinance constituted a valid contract.

The question to be determined is as to the effect upon such a contract by the enactment of the public utility law (chapter 127, Laws 1913). This act is very broad, and seems to confer the absolute power to regulate, both as to rates and otherwise, all public utilities within the state, at least all such as are specified in the act, and among which are street railways. Section 13 of the act provides:

"Sec. 13. All charges made, demanded or received by any public utility, or by any two or more public utilities, for any rate, fare, product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such rate, fare, product or commodity or service is hereby prohibited and declared unlawful."

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By section 14 the Public Utilities Commission was given the power, and it was made its duty, to adopt all necessary rates and regulations of all public utilities, as follows:

"Sec. 14. The power and authority is hereby vested in the Public Utilities Commission of the state of Colorado, and it is hereby made its duty to adopt all necessary rates, charges, and regulations to govern and regulate all rates, charges and tariffs of every public utility of this state as herein defined, the power to correct abuses, and prevent unjust discriminations and extortions in the rates, charges and tariffs of such public utilities of this state and to generally supervise and regulate every public utility in this state and to do all things, whether herein specifically designated, or in addition thereto, which are necessary or convenient in the exercise of such power, and to enforce the same by the penalties provided in this act, through proper courts having jurisdiction."

Section 21 fixed the maximum rate to be charged passengers by a street railway and provides for transfers as follows:

"Sec. 21. No street or interurban railroad corporation shall charge, demand or collect or receive more than five cents for one continuous ride in the same general direction within the corporate limits of any city and county, city or town; except upon a showing before the commission that such greater charge is justified. Every street or interurban railroad corporation shall upon such terms as the commission shall find to be just and reasonable furnish to its passengers transfers entitling them to one continuous trip in the same general direction over and upon the portions of its lines within the same city and county, or city or town, not reached by the originating car."

Further powers were conferred upon the commission by section 23 as follows:

"Sec. 23. (a) Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that the rates, tolls, fares, rentals, charges or classifications, or any of them demanded, observed, charged or collected by any public utility for any service, or product or commodity, or in connection therewith, including the rates or fares for excursion or commutation tickets, or that the rules, regulations, practices, or contracts, or any of them, affecting such rates, fares, tolls, rentals, charges, or classifications, or any of them, are unjust, unreasonable, discriminatory, or preferential, or in any wise in violation of any provision of law, or that such rates, fares, tolls, rentals, charges, or classifications, are insufficient, the commission shall determine the just, reasonable or sufficient rates, fares, tolls, rentals, charges, rules, regulations, practices, or contracts to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.

"(b) The commission shall have the power, upon a hearing, had upon its own motion or upon complaint, to investigate a single rate, fare, toll, rental, charge, classification, rule, regulation, contract, or practice, or any number thereof, or the entire schedule or schedules of rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts, and practices, or any thereof, of any public utility, and to establish new rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts or practices, or schedule or schedules, in lieu thereof."

From the sections quoted, and from other provisions of the act, it fully appears that the Legislature intended to delegate to the Public Utilities Commission the administration, supervision, and regulation of all service rendered to the public throughout the state, including municipalities. Rates and regulations fixed by contract are specifically included within the powers of the commission.

From what has been said it will be seen that the town of Englewood had no express authority to fix a rate of fare, so as to limit or prohibit the assumption of such power by the Legislature. The uniform rule in this respect was stated in Home Telegraph Co. v. Los Angeles, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176, to be:

"It has been settled by this court that the state may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend during the life of the contract the governmental power of fixing and regulating the rates. Detroit v. Detroit Citizens' St. Ry. Co., 184 U. S. 368, 382 [22 Sup. Ct. 410, 46 L. Ed. 592]; Vicksburg v. Vicksburg Waterworks Co., 206 U. S. 496, 508 [27 Sup. Ct. 660, 50 L. Ed. 1102, 6 Ann. Cas. 253]. But for the very reason that such a contract has the effect of extinguishing pro tanto and undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power. Providence Bank v. Billings, 4 Pet. 514, 561 [7 L. Ed. 939]; Railroad Commission Cases, 116 U. S. 307, 325 [6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636]; Vicksburg, etc., Railroad Co. v. Dennis, 116 U. S. 665 [6 Sup. Ct. 625, 29 L. Ed. 770]; Freeport Water Co. v. Freeport City, 180 U. S. 587, 599, 611 [21 Sup. Ct. 493, 45 L. Ed. 679]; Stanislaus County v. San Joaquin C. & I. Co., 192 U. S. 201, 211 [24 Sup. Ct. 241, 48 L. Ed. 406]; Metropolitan Street Ry. Co. v. New York, 199 U. S. 1 [25 Sup. Ct. 705, 50 L. Ed. 65, 4 Ann. Cas. 381]. And see Water, Light & Gas Co. v. Hutchinson, 207 U. S. 385 [28 Sup. Ct. 135, 52 L. Ed. 257]."

In Freeport Water Co. v. Freeport, supra, it is said:

"This power of regulation is a power of government, continuing in its nature; and if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall in Providence Bank v. Billings, 4 Pet. 514, 561, 7 L. Ed. 939, 955: 'Its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.' "

In the well-considered case of Benwood v. Public Service Commission, 75 W. Va. 127, 83 S. E. 295, and reported in L. R. A. 1915C, 261, it was said:

"But the city of Benwood says it had the right given it by the legislative charter to 'contract and be contracted with.' True, this general provision usually found in municipal charters is in the charter of the city of Benwood. But that provision cannot be construed as delegating beyond legislative control the power to fix public service rates. For, as we have seen, the presumption is against such delegation of the power. The delegation 'must clearly and unmistakably appear.' It does not so appear in the general provision merely to contract and be contracted with."

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And further:

"We do not say that the contract as to rates contained in the franchise was not good as between the water company and the city as long as the Legislature did not exercise its superior and supreme power over the subject of the rates. From the general powers to establish waterworks and to contract and be contracted with, impliedly the city had the power to contract in the matter of rates for water furnished the public as long as the Legislature did not exercise its reserved power in that particular. But that implied power was inferior to the reserved power. It was subject to the right of the Legislature to prescribe different rates at any time. The Legislature, not having expressly delegated to the city power by which it could inviolably agree as to the rates, could exercise power in that particular regardless of the franchise provisions. It had withheld supreme power unto itself. Neither by the charter nor by subsequent legislation did it delegate to the city of Benwood authority to agree unalterably as to the rates for a stipulated period. The water company and the city in the making of the so-called franchise contract were bound by cognizance of the fact that their dealings were subject to future exercise of the Legislature's power over rates for water furnished the general public in the locality. Hence the franchise was made subject to what the Legislature might thereafter do as to the rates dealt with by the franchise. It was subject to the Legislature's making use of the inherent power reserved, and not exclusively delegated to the city of Benwood, to supervise all public service charges. And when the Legislature in its wisdom saw fit to exercise its reserved power of supervision over the matter of public service rates by the creation of the Public Service Commission and the delegation of the power to the commission in that behalf, the rates mentioned in the franchise became subject to supervision and regulation by the Public Service Commission. The Legislature had withheld the exercise of its power over those rates until that time. It could use the power when it pleased. No length of nonuser affected the state's right thereto. Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 24 L. Ed. 94."

It was further held in that case:

"It is most earnestly insisted on behalf of the city that the contract is inviolable, and that to uphold the powers of the Public Service Commission to the extent of allowing the commission to change the rates would in effect abrogate the contract, contrary to constitutional inhibitions against the enactment of any law impairing the obligation of a contract In the light of what we have said, this position cannot be sustained. Nothing that was binding in the contract will be impaired. By it the state was not bound. The contract related to a subject-matter belonging to the state. The state had not given the city the power or agency to contract away its right thereto for a given time. The contract, having been entered into without express legislative authority, was permissive only. It was conditioned upon the exercise of the sovereign power over the subject-matter. All this the parties to the contract were bound to know when they entered into it. There can be no impairment of the contract by the act of the state in claiming its own, when it is not bound by the contract. The supervision and regulation of the rates by the state, through the Public Service Commission, do not take from either of the parties to the contract any right which they had thereunder. Such supervision and regulation does not therefore impair the obligation of a contract. Home Telep. & Teleg. Co. v. Los Angeles, supra; State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D, 78 [L. R. A. 1915C, 287]; Knoxville Water Co. v. Knoxville, 189 U. S. 434, 23 Sup. Ct. 531, 47 L. Ed. 887; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; Wyandotte County Gas Co. v. Kansas, 231 U. S. 622, 34 Sup. Ct. 226, 58 L. Ed. 404; Dawson v. Dawson Teleph. Co., 137 Ga. 62, 72 S. E. 508."

The doctrine announced in that case is a fair statement of the overwhelming weight of judicial opinion.

The case of State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D, 78, and also reported in L. R. A. 1915C, p. 287, contains an exhaustive review of the authorities on this subject. See, also, Milwaukee Electric Ry., Light & Power Co. v. Railroad Comm., 238 U. S. 174, 35 Sup. Ct. 820, 59 L. Ed. 1254. This doctrine has been recognized by this court in the case of Wolverton v. Mountain States Tel. Co., 58 Colo. 58, 142 Pac. 165, Ann. Cas. 1916C, 776, wherein it was said:

"And it is now held that, even in case of such contracts with public utilities for specific rates and for definite periods of time, these are subject to legislative acts of regulation. Louisville & Nashville Ry. v. Mottley, 219 U. S. 467 [31 Sup. Ct. 265], 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; Southern Wire Co. v. St. Louis, etc., Co., 38 Mo. App. 191."

[1, 2] We must hold, therefore, that at the time of the adoption of the ordinance in question, the town of Englewood was without express legislative power to fix rates or regulations for public utilities, and that its contract with the defendant company was subject to the legislative power afterward asserted by the enactment of the public utilities statute.

It follows, therefore, that the power to regulate the rates of the public utility in question is vested by the act exclusively in the Public Utilities Commission. The law fully provides that every order or decision made by the commission may be reviewed by the Supreme Court upon the application of either party, or of any person pecuniarily interested in the utility, for the purpose of having the lawfulness of the order or revision determined. Hence, and for the reasons stated, the plaintiff below had by reason of the provisions of the public utility act a plain, speedy, and adequate remedy at law for the determination of its grievance.

It will be noted that the town, now city, of Englewood is a municipality deriving its municipal powers from legislative grant. Whether or not the rule here announced may be applied in the case of an ordinance by a municipality operating under article 20 of the Constitution, and conducting its municipal affairs under constitutional powers and limitations, without the intervention of legislative acts, is a different and more difficult question, which we do not determine.

The judgment is reversed, with instruction to dismiss the proceeding.

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GABBERT, C. J. (dissenting). The majority opinion is based upon three propositions: First, that by the Public Utilities Act power is conferred upon the Public Utilities Commission to change the rates for carrying passengers fixed by contract; second, that the railway company having filed with the commission its schedule of rates, which were not suspended by the commission upon its own motion or upon the complaint of others for 30 days, the same became effective; and, third, that by the act in question the city has a plain, speedy, and adequate remedy at law by a proceeding before the commission. From each of these I dissent.

1. It is said specific power is not conferred upon the city of Englewood to enact a rate-making ordinance, and therefore rates fixed by the ordinance granting the railway company a license to construct and maintain a street railway upon its streets may be changed by the Utilities Commission. In the first place the question of rates for transportation over the line of the railway company is not involved, and in the second place express power is conferred upon the city to fix rates which may be charged by a street railway company to which a franchise is granted. The provisions of the ordinance which the railway company seeks to be relieved from does not relate to rates which it may charge for transportation over its own line, but to the provision whereby it was required to sell coupon tickets which would entitle persons taking a car going north from a specified point to passage on the line of the Denver City Tramway Company into the city of Denver, and also entitle persons going south on the cars of the tramway company to be transported over the line of the railway company to a street designated in the city of Englewood. This is in no sense a charge for transportation over the line of the railway company. The fare over its line has always been five cents, and its effort is not to increase or change rates, but to be relieved from its contract, whereby it was required to furnish transportation over the line of the tramway company in the instances named. But conceding, for the sake of the argument, that rates are involved, the cases cited in support of the proposition that authority is not conferred upon the city of Englewood to fix rates are not in point. Our statutes and the Constitution confer upon the city the power to fix rates as a condition upon which a franchise to operate a street railway over its streets is granted. Section 6676, Revised Statutes 1908, quoted in the majority opinion, must be read in connection with the section following, whereby it is provided that a corporation desiring to secure a franchise from a city or incorporated town must publish a notice of its intention to apply to the corporate authorities for the passage of an ordinance granting such franchise, which notice must specify the terms upon which such franchise is desired. This means that the franchise can only be granted upon terms, and necessarily confers upon the municipal authorities the express power to contract with the corporation seeking the franchise by specifying the terms upon which it is granted. So that, when a corporation accepts a franchise imposing terms, it thereby enters into a contract the municipal authorities are authorized to make, which cannot be abrogated by any act of the Legislature that would impair the obligation of such contract. In addition, we have a constitutional provision (section 11 of article 15) which provides:

"No street railroad shall be constructed within any city, town or incorporated village, without the consent of the local authorities having * * * control of the street or highway proposed to be occupied by such street railroad."

From this provision it follows that, when a street railway cannot be constructed over the streets of a city without the consent of the municipal authorities, the latter have the express power to specify the terms and conditions upon which it may be constructed and maintained.

2. Conceding that power is vested in the Utilities Commission to change a rate fixed by contract, this cannot be accomplished in the manner attempted by the railway company; i. e., by posting notice of such change with the commission. A change in a contract rate can only be made by a utility corporation making application to the commission for such change, on notice to the parties interested, after a hearing whereby all parties are afforded an opportunity to be heard and a change allowed by an express order of the commission to that effect.

3. The act does not require the city to apply to the commission to have its contract with the railway company enforced. It has never been modified. It is in full force and effect, and the only remedy open to the city is by an action in the district court to compel the railway company to comply with the terms of its contract.

The result of the conclusion announced by the majority opinion is sufficient to demonstrate without further argument that it is wrong. The railway company was granted the privilege of occupying the street of the city upon terms with which it now refuses to comply, and yet continues to occupy the street. One of the considerations which moved the municipal authorities to grant a franchise to the railway company has been taken away, and it is permitted to exercise a privilege which it must be conclusively presumed would never have been granted except for such consideration.

The judgment of the district court should be affirmed.

TELLER, J., concurs.

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(62 Colo. 226)

BARNARD v. CORLETT. (No. 8606.)

(Supreme Court of Colorado. Oct. 2, 1916. Rehearing Denied Dec. 4, 1916.)

1. REPLEVIN ⟸88—DAMAGES.
In actions for taking and detaining personal property, where no question of fraud, malice, oppression, or willful wrong either in taking or detention intervenes, the measure of damages is the value of the property at the time of the taking or the conversion or illegal detention, the time to be determined by the court.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 305, 306; Dec. Dig. ⟸88.]

2. REPLEVIN ⟸75—DAMAGES.
Where defendant, giving redelivery bond, retained possession of hay replevined, and fed it to stock, thereby so converting it to his own use that redelivery was impossible, the damages of the plaintiff owner were the value of the hay at the time of the conversion.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 343–348; Dec. Dig. ⟸75.]

3. APPEAL AND ERROR ⟸1070(1)—HARMLESS ERROR—VERDICT IN REPLEVIN.
Notwithstanding Code Civ. Proc. § 220, as to verdict in replevin, a verdict for plaintiff assessing his damages in a certain sum was not prejudicial to defendant, where defendant admitted the value of the hay at the time of conversion was the sum named, because not merely finding the value, and in the alternative as required by Code Civ. Proc. §§ 220, 246.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4231, 4233; Dec. Dig. ⟸1070(1).]

Error to Teller County Court; Daniel A. Ferguson, Judge.

Action by H. Corlett against W. H. Barnard. Judgment for plaintiff, and defendant brings error. Affirmed.

Action in replevin. Judgment for plaintiff. Defendant brings the case here on error.

Corlett, defendant in error, who was plaintiff below, became the owner by purchase from one Bastian of 13½ tons of hay, which is the subject of this controversy. Thereafter Barnard, plaintiff in error, through some supposed right which he thought at the time he had, took possession of and baled the hay. Corlett then sued out in the justice court a writ of replevin under which an officer took possession of the hay, but upon the giving within time of the statutory bond redelivered it to Barnard, who fed it to his stock. On the trial in the justice court Barnard offered to let judgment enter against him for $135, which offer was rejected, and plaintiff recovered judgment for $270. On appeal to the county court Barnard renewed his offer, which was again rejected. In the county court the jury, instead of finding the issues in favor of plaintiff and fixing the value of the property, returned a general verdict in his favor and assessed his damages at $270. Upon this verdict the court entered judgment in which it fixed the value of the hay at $20 a ton.

The principal points upon which plaintiff in error seems to rely for a reversal is the action of the court in instructing the jury that they should fix the value of the property taken as of January 20, 1914, the date of its detention by defendant when the writ was served, and the form of verdict returned by the jury.

Robert Graham, of Cripple Creek, for plaintiff in error.

GARRIGUES, J. (after stating the facts as above). [1, 2] It is urged that the time at which the value of the property should be fixed is a question of fact for the jury. This is not the law. In actions for taking and detaining personal property, where no question of fraud, malice, oppression, or willful wrong either in the taking or detention intervenes, the measure of damages is the value of the property at the time of the taking, or the conversion, or illegal detention; and this is a rule of law to be decided by the court. Wells on Replevin (2d Ed.) § 546. Barnard did not permit plaintiff to retain possession of the property under the writ served January 20, 1914, but gave a redelivery bond, retained possession, and by feeding the hay to his stock so converted it to his own use that it was impossible thereafter to make a redelivery, and the only question on the trial was the value of the hay at the time of the conversion. Under the circumstances of this case, it was not improper for the court to instruct the jury to find the value as of that date.

[3] The court sent out with the jury two forms of verdict—one finding generally for the plaintiff, leaving the amount of damages blank to be filled in by the jury; the other finding the issues generally for defendant. The jury returned a verdict for plaintiff and assessed his damages at $270. It is urged this was error, that the verdict should have been in conformity with the provisions of section 220 of the Code, and that, instead of assessing damages, the jury should only have fixed the value of the property, and that the judgment should have been in the alternative in conformity with section 246 of the Code. If this was error, it in no manner prejudiced any right of the defendant. There was but one question to determine under the facts of the case, which was the value of the hay at the time of the conversion. No special damages were alleged or sought to be recovered. All the jury did in fact was to find the issues for plaintiff and fix the value of the property. Defendant admitted the taking, and offered to pay $10 a ton for the hay, which plaintiff claimed to be of the value of $20 a ton. Defendant further admitted that the hay did not belong to him, and testified that he either had to feed it to his stock or pay $20 a ton for another supply of similar quality to take its place. In other words, he admitted that at the time of the conversion the value of the hay was $20 a ton, and under no possible construction of the

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evidence could the jury have properly fixed it at less. The property, being no longer in existence, could not be redelivered, and to have entered an alternative judgment would have been a useless formality. The verdict and judgment are unquestionably just and in the proper amount, and we must decline to reverse the case on a purely technical error which in no way affects the merits of the controversy.

The judgment is affirmed.

Affirmed.

GABBERT, C. J., and SCOTT, J., concur.

(62 Colo. 146)

SHEMWELL v. PEOPLE. (No. 8505.)

(Supreme Court of Colorado. June 5, 1916. Rehearing Denied Dec. 4, 1916.)

1. FALSE PRETENSES ⟸53—TRIAL—VERDICT.

In a prosecution for obtaining property by false pretenses, where the first count of the information charged the offense generally denoted "false pretenses," verdict finding the defendant guilty "of obtaining money by false pretenses, as charged in the first count of the indictment," was not insufficient as ambiguous because the jury undertook to name the offense and called it "obtaining money by false pretenses" instead of "false pretenses."

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 65; Dec. Dig. ⟸53.]

2. FALSE PRETENSES ⟸53—TRIAL—VERDICT —"PROPERTY."

In a prosecution for obtaining property by false pretenses, verdict finding defendant guilty "of obtaining money by false pretenses as charged in the first count of the information herein," finding the value of the "property" so obtained to be $5,000, was not inconsistent with the evidence that defendant had procured both money and property by his pretenses; whether the jury did or did not include the money with the property in their finding of value of the property did not render the verdict inconsistent with the evidence, because "money" is "property."

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 65; Dec. Dig. ⟸53.

For other definitions, see Words and Phrases, First and Second Series, Property.]

3. FALSE PRETENSES ⟸49(1) — TITLE TO LAND.

In a prosecution for obtaining property by false pretenses, it was not necessary for the people to prove, as in larceny, title in another to the land which defendant falsely represented he owned; it being sufficient if the evidence established that defendant had no title himself.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 62; Dec. Dig. ⟸49(1).]

4. FALSE PRETENSES ⟸32 — INFORMATION — CHARGE.

An information for obtaining property by false pretenses which alleged that defendant claimed to own and have the right to sell and convey the land described in his warranty deed given for money and hotel furniture charged that defendant represented that he owned the property, and, as owner, had the right to sell and convey, not two separate things, which the people had the burden of proving, that defendant did not own the land, and that, not being the owner, he had no authority from the owner to convey.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 42–44; Dec. Dig. ⟸32.]

5. FALSE PRETENSES ⟸38—DUTY TO PRESENT EVIDENCE.

In a prosecution for false pretenses, if the information charged two separate things, first, that defendant did not own the land to which he gave deed, and, second, that he had no authority from the owner to convey it, it was defendant's duty to present evidence in support of his contention that he was authorized to convey.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 50–53; Dec. Dig. ⟸38.]

6. FALSE PRETENSES ⟸12—OBTAINING PROPERTY—STATUTE—"BILL OF SALE"—"OBTAIN."

Under Laws 1891, p. 125, § 4, denouncing the offense of obtaining property by false pretenses, where defendant, by representing that he owned land and so was authorized to convey, secured money and a bill of sale to hotel furniture, he "obtained" the furniture within the statute, since a "bill of sale" is an instrument used to evidence the transfer of personalty, and, as between the parties, title to the furniture passed on delivery of the bill of sale.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 16; Dec. Dig. ⟸12.

For other definitions, see Words and Phrases, First and Second Series, Bill of Sale; Obtain.]

7. FALSE PRETENSES ⟸47 — MATERIAL EVIDENCE.

In a prosecution for obtaining property by false pretenses by giving a deed to land not owned by defendant for money and a bill of sale covering hotel furniture, testimony of witnesses that defendant had stated to them that he was going to move the furniture to his hotel in the mountains, given on rebuttal of defendant's testimony on cross-examination denying such statements, was not immaterial, being statements claimed to have been made by defendant tending directly to support the people's contention that a prior written contract between defendant and the defrauded party was abandoned by mutual consent, and an oral agreement made.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 60; Dec. Dig. ⟸47.]

8. CRIMINAL LAW ⟸683(2) — INTRODUCTION OF EVIDENCE ON REBUTTAL—DISCRETION OF COURT.

Whether the trial court should have permitted certain evidence to be introduced on rebuttal was a matter within its sound discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1615; Dec. Dig. ⟸683(2).]

9. CRIMINAL LAW ⟸1168(2)—INTRODUCTION OF EVIDENCE ON REBUTTAL INSTEAD OF IN CHIEF—PREJUDICE.

In a prosecution for false pretenses, where defendant denied on cross-examination that he had stated to certain persons that he was going to move the furniture to which he had obtained bill of sale to his hotel in the mountains, the introduction on rebuttal, instead of in chief, of testimony of such persons that defendant made such statements, did not prejudice defendant's rights.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3124, 3129–3136; Dec. Dig. ⟸1168(2).]

10. FALSE PRETENSES ⟸52—INSTRUCTION.

In a prosecution for false pretenses, an instruction that, if the jury found beyond a reasonable doubt that defendant did, with intent to cheat or defraud, falsely pretend and represent that he owned and had full power to convey certain land, etc., and that, if defendant, by means of such false pretenses, did obtain money or goods of some value, defendant was guilty, which instruction reiterated twice with regard to the false pretenses "if you find that he did make them," was not improper as not tying

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the obtaining of the property up with the intent to cheat and defraud, since "intent to cheat and defraud," occurring at the beginning, ran through and related to all the instructions.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 64; Dec. Dig. ⇐52.]

11. False Pretenses ⇐5 — Gist of Offense—Intent in Obtaining—Statute.

It is the obtaining of property by means of false pretenses with intent to cheat and defraud the other party that constitutes the gist of the offense of false pretenses denounced by Laws 1891, p. 125, § 4.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 3; Dec. Dig. ⇐5.]

Error to District Court, City and County of Denver; J. W. Sheafor, Judge.

J. H. Shemwell was convicted of obtaining property by false pretenses, and he brings error. Judgment affirmed.

Harry S. Silverstein, of Denver, for plaintiff in error. Fred Farrar, Atty. Gen., and Ralph E. C. Kerwin, Asst. Atty. Gen., for the People.

GARRIGUES, J. The evidence shows that in the fore part of March, 1914, one George W. Gardner held a lease upon and conducted the Harvard Hotel in Denver; that the furniture and personal property in the hotel belonged to him and was worth some $15,000 or $20,000, upon which the owner of the building held a chattel mortgage to secure the payment of a note for $5,100, and to whom he also owed some $1,800 or $2,000 for rent then due. Gardner told Cogdell and Roberts, real estate agents in Denver, that if they had an opportunity, they might trade his equity in the hotel furnishings for land, and March 13, 1914, Cogdell took defendant Shemwell, who claimed to own 160 acres of land with water in Conejos county, worth $12,000, up to look over the hotel property with a view of making a trade. Shemwell represented that the land was free and clear of all liens, that he owned it, and that the title was good. The next day, March 14th, a written contract was entered into and signed between Gardner and Shemwell at the real estate office, in which Gardner agreed to convey the furniture and personal property of the hotel to Shemwell for the 160 acres of land and water, Shemwell to assume the chattel mortgage on the furniture, and Gardner to pay the rent up to the 1st of April and give Shemwell his note for $1,500 due in one year, secured by a trust deed back on the 160 acres of land, also to secure for Shemwell from the landlord an extension of the hotel lease and a renewal of the chattel mortgage for three years; each party to deposit with the real estate firm as earnest money $500 in cash. Gardner deposited his $500 in cash, but Shemwell gave them his check for that amount, which was returned marked "Short." On the 16th the landlord promised he would accept Shemwell as a tenant, extend the lease, and renew the chattel mortgage; but on the 17th changed his mind and refused to do so. This rendered the written contract impossible of performance, it was mutually abandoned, no action was ever taken under it and it has no importance in the case except in explanation of the transaction. The following day, the 18th, at the request of Shemwell, the parties met in the real estate office, where it was mutually agreed that, so far as the written contract was concerned, the trade should be abandoned and declared off. Shemwell insisted, however, that he wanted the furniture and would trade the land for it, subject to the chattel mortgage; but did not want the lease or a renewal of the chattel mortgage, as he did not care to operate the hotel. He stated that he had a certified check for $5,250, with which he would either pay off the mortgage or let it go to foreclosure sale, bid in the property, and move it to his hotel at Carlsbad in the mountains. A new oral agreement was entered into under the terms of which Shemwell made, executed, and delivered to Gardner his warranty deed for the 160 acres of land and water, in consideration for which Gardner made and delivered to him a bill of sale of all the hotel furniture and chattel property subject to the mortgage which Shemwell assumed and agreed to pay. In addition to this and as a part of the consideration, Gardner gave Shemwell his note for $1,500 due in one year from date, secured by a deed of trust back on the land, and also agreed that Shemwell should have the $500 deposited by Gardner with the real estate firm; the intent and purpose being to place in Shemwell the means of paying off the $2,000 which Gardner owed for rent, so that Shemwell could take the furniture free from the landlord's lien. All the papers necessary to consummate the transaction were duly executed, exchanged, and delivered; and Gardner, supposing it was a closed transaction, sent the deed to Conejos county for record—of which Shemwell was then informed—and delivered the bill of sale, trust deed, and note to Shemwell, telling him that he delivered to him the possession of the hotel. Shemwell requested Gardner to return and take possession of the hotel property for him and remain in charge until the 1st of April.

Shemwell did not own the land, and Gardner obtained no title by virtue of the Shemwell deed or from any other source. The legal title, it seems, stood in one Eaton, and Shemwell had no authority to execute a deed for him, and in fact did not pretend to do so, as the warranty deed was executed in his own name, and not for or on behalf of Eaton or any one else. His representations that he owned the land, that it was free and clear of all liens and incumbrances, and that he had a good title, were false. On the 19th Eaton, Shemwell, and Cogdell met in one of the banks in Denver, where Shemwell

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attempted to have Eaton quitclaim the land to Gardner, which Eaton agreed to do in consideration of the payment to him of $2,000. Shemwell then represented that he had a Kansas City check or draft for $1,500 that he would turn over, which, with the $500 held by Cogdell, would make up the $2,000 required by Eaton, but on examining the check Eaton discovered that, while the figures were $1,500, the writing was $15. He and Shemwell then entered into an escrow agreement by which Eaton executed a deed to Gardner for the land, and Shemwell indorsed to Eaton the $1,500 note and trust deed given him the day before by Gardner, and these papers, together with the abstract of title to the land, which Eaton held, were placed in an envelope and left with the bank, with directions that upon the deposit of $500 to Eaton's credit, it should deliver the note and trust deed to him and turn over his deed, with the abstract, to Gardner.

After the trade was closed between Shemwell and Gardner on the 18th, as mentioned, Gardner took no part in the subsequent transactions and knew nothing of them. Subsequent to the exchange of papers in the real estate office on that date Gardner returned to the hotel, took possession for Shemwell, and remained in charge for him until March 23d, when the landlord took possession under the chattel mortgage and advertised the property for sale. On March 25th Shemwell, representing that Gardner wanted to get a loan on the land, obtained possession of the abstract without complying with the escrow agreement. He then exhibited it to Cogdell and represented to him that the agreement had been carried out; that the Eaton deed to Gardner had been sent to Conejos county for record; that he (Shemwell) wanted to pay off the chattel mortgage and move the hotel property to Carlsbad, but that the expense of foreclosure had been so great that, in addition to his $5,250 check, he would need the $500 held by Cogdell, and asked Cogdell to turn it over to him, which was done. The Eaton deed had not been taken out of escrow; neither was Gardner attempting to get a loan on the land. Shemwell obtained possession of the abstract by misrepresentations, and when the escrow agreement was not complied with, Eaton withdrew and destroyed his deed.

The result of these dealings was that Shemwell obtained $500 of Gardner's money, together with a bill of sale conveying to him Gardner's right in the hotel property, and Gardner received nothing.

May 11, 1914, Gardner, after ascertaining that he had obtained no title to the land, because Shemwell had none, laid the matter before the district attorney, who filed an information against Shemwell, the first count of which charges, in substance, that, with intent to cheat and defraud Gardner, Shemwell did falsely and feloniously pretend and represent to Gardner that he (Shemwell) owned and had full power, right, and authority to sell and convey the 160 acres of land in Conejos county, together with the water of the value of $12,000, which he offered to sell, bargain, and exchange to Gardner for $500 in money and the furniture, goods, chattels, and personal property situated in the Harvard Hotel, of the value of $15,000 subject to a chattel mortgage of $5,100, and that Gardner, believing the said false and felonious pretenses and representations made by Shemwell, and relying thereon, and being induced and deceived thereby, did pay over and deliver to Shemwell the sum of $500 in money, and did also convey and deliver to him the furniture situated in the Harvard Hotel of the value of $15,000 of the personal property, goods, and chattels of Gardner, and that Shemwell did falsely, feloniously, designedly, and knowingly, by means of said false pretenses, obtain from Gardner $500 in money, and the furniture of the Harvard Hotel of the value of $15,000 of the personal property of Gardner, whereas in truth and in fact Shemwell was not the owner of the 160 acres of land nor the water right, nor any interest therein, and had no right, power, or authority to sell and convey the same, all of which he (Shemwell) at the time of making thereof knew to be false, felonious, and untrue.

The jury returned the following verdict:

"We, the jury find the defendant, J. H. Shemwell, guilty of obtaining money by false pretenses as charged in the first count of the information herein, and find the value of the property so obtained to be $5,000."

The statute (section 4, p. 125, Sess. Laws 1891) provides:

"If any person or persons shall knowingly and designedly, by any false pretense or pretenses, obtain from any other person or persons any chose in action, money, goods, wares, chattels, effects or other valuable thing whatever, with intent to cheat or defraud any such person or persons of the same, every person so offending shall be deemed a cheat, and upon conviction, shall, where the property obtained is over the value of twenty dollars, be imprisoned in the penitentiary not to exceed ten years; and where the value of the property obtained is twenty dollars or less, be fined in any sum not exceeding one thousand dollars, or imprisoned in the county jail not to exceed six months, or both; and in all cases where the value of the property obtained is twenty dollars or less, justices of the peace within their several counties, shall have jurisdiction of the above offense, subject to the right of appeal, as provided by law."

2. Complaint is made that the verdict is special, that it does not find all the essential elements necessary to constitute the crime charged, and that it is inconsistent with the evidence.

[1, 2] The verdict is not incomplete, nor is it a special verdict. It is general, with an attempt to name the offense. Usually crimes are denoted by some word having a well-defined meaning, as murder, rape, mayhem, burglary, larceny, forgery, and the like, and where the crime charged is so designated, it is customary, though not necessary, to insert the name in the verdict. We find that

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Cyc., the Pacific Digest, Mills' Colorado Digest, Courtright's Colorado Digest, Bouvier's Law Dictionary, and Ruling Case Law designate the crime here charged as "false pretenses," while Modern American Law calls it "obtaining property by false pretenses." So the offense appears to have a well-defined name in the law books, although one will often hear it called "obtaining money under false pretenses."

Had the jury found defendant guilty as charged in the first count of the information, without attempting to name or denote the offense, the verdict would have been technically correct. But, as it is, there is no confusion or ambiguity in the verdict. The intention of the jury is plainly manifested. They found defendant guilty under the first count of the information, which charged the offense generally denoted "false pretenses." Because the jury undertook to name the offense and called it "obtaining money by false pretenses," instead of "false pretenses," is of no consequence, can be treated as surplusage, does not affect the intent of the jury, and in no way prejudices the substantial rights of the defendant. West v. People, 156 Pac. 139. Neither is there any discrepancy between the verdict and the evidence. The trouble with counsel's contention in this regard lies in the fact that he does not recognize money as property. The gist of the offense was obtaining from Gardner, with intent to cheat and defraud him, his money and hotel furniture, both of which were property, by false pretenses. In case of a conviction, the jury were required to find the value of the property so obtained. It is clear from the verdict that they did not find him guilty of obtaining the money only, and if they did not include it in the value of the property obtained, that is a matter of which the defendant cannot complain. Whether they did or did not include the money with the furniture in their findings of value of the property so obtained does not render the verdict inconsistent with the evidence, because both are property, and the evidence sustains the verdict either with the money included or excluded.

[3-5] 3. It is charged that Shemwell represented that he owned, and had full power, right, and authority to sell and convey the land, and it is urged in argument that the prosecution failed to prove that he did not own the land, and that he had no authority from the owner to convey it. It was not necessary for the people to prove title in another, as in larceny. It was sufficient if the whole evidence on the trial established that defendant had no title in himself when he gave Gardner the warranty deed, and this clearly appeared. In fact, he admitted on the witness stand that he had no title, but claimed authority from Eaton, who held the title, to execute the deed for him. It is argued in this connection that the information charges two separate things which the people had the burden of proving beyond a reasonable doubt: First, that the defendant did not own the land; and, second, not being the owner, that he had no authority from the owner to convey the property. We cannot place such a construction upon the information. It alleges that defendant claimed to own, and have the right to sell and convey the land described in his warranty deed, and the only legitimate inference that can be drawn from such an allegation is that he represented that the title to the property was in him, and that by virtue of his ownership of the property he had full power, right, and authority to make, execute and deliver a warranty deed to Gardner. So we think but one thing was charged in the information, viz.: That defendant represented that he owned the property, and as owner had the right to sell and convey it. But if we concede defendant's contention as to the charging part, it was his duty to present the evidence, if any he had, in support of the contention that he had such authority, and if upon a consideration of all the evidence on the trial the jury had a reasonable doubt of his guilt, it was their duty to acquit him. He presented no such evidence. The deed was executed for himself, not for another; he claimed to be the owner, not acting for the owner, and the evidence shows that he did not own the property, and there is no testimony that he had authority from the owner to make and deliver the deed.

[6] It is contended in argument that the evidence fails to show that Shemwell obtained anything. The hotel property was exchanged for the land, and it was the intent of the parties that the exchange should take effect, not in the future, but immediately upon the delivery of the bill of sale and deed. The deal must be treated the same as if it were a cash transaction in which there was an absolute sale of the hotel furniture. A bill of sale is an instrument used to evidence the transfer of personal property, and as between the parties to this transaction Gardner's title in the personalty passed to the defendant on the 18th of March, upon the delivery of the bill of sale. 35 Cyc. 336; Williston on Sales, § 343; Brill v. Christy, 7 Ariz. 217, 63 Pac. 757; Tome v. Dubois, 6 Wall. 548, 18 L. Ed. 943; Haines v. McKinnon, 35 Ore. 573, 57 Pac. 903.

Under the facts and circumstances as disclosed by the evidence in this case, we think the defendant obtained the hotel furniture from Gardner within the meaning of the criminal statute.

[7-9] 5. Defendant was asked on cross-examination whether or not he had told certain persons who asked him what he was going to do with the furniture he had purchased, that he had a check for $5,250 with which he was going to pay off the chattel mortgage and move the furniture to his hotel

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at Carlsbad in the mountains, or that he might let it go to chattel mortgage sale and run it up to $10,000 on the landlord, and then let him have it and pocket the difference. He denied making these statements, and said that he did not own such a hotel in the mountains or anywhere else. Over defendant's objection these persons to whom such statements were alleged to have been made were permitted on rebuttal to testify that they had had such conversations with him and to relate them in detail. It is here urged that this was prejudicial error, because it is said to be an attempt to impeach the defendant on an immaterial matter, and because the witnesses were permitted to relate the alleged conversations instead of having the questions which were propounded to defendant read to them and being required to answer whether they had had such conversations with him or not. This evidence was not immaterial. They were statements claimed to have been made by the defendant, a party to the action, which tended directly to support the contention of the people that the written contract was abandoned by mutual consent and an oral agreement entered into on the 18th day of March. The people could have introduced evidence of these alleged statements of the defendant in chief. The fact that they did not and that defendant on cross-examination denied having made such statements did not destroy or change the substantive character of this evidence. Whether the court should have permitted it to be introduced on rebuttal was a matter that lay within its sound discretion, and, unless such discretion was abused so as to prejudice the rights of the defendant, it would not be reversible error. We cannot see how, under the circumstances of this case, the introduction of this evidence on rebuttal, instead of in chief, in any manner prejudiced the rights of the defendant.

[10, 11] 6. The court instructed the jury that, if they found and believed from the evidence beyond a reasonable doubt that the defendant did, with intent to cheat or defraud Gardner, falsely pretend and represent to him that he (Shemwell) owned and had full power, right, and authority to sell and convey the land, and offered to bargain, sell, and exchange it to Gardner for $500 in money, and the Harvard Hotel furniture, of the value of $15,000, or some value, and Gardner, believing said false pretenses and representations so made by the defendant, "if you find that he did make them, and, relying thereon and being induced thereby, did pay over and deliver to the defendant $500 in money of the value of $500, or some value, and did also convey and deliver to him the hotel furniture of the value of $15,000, or some value, the personal property of Gardner, and that the defendant did by means of said false pretenses aforesaid obtain from Gardner $500 in money of the value of $500 or any other sum of some value and the hotel furniture of the value of $15,000, or of some value, the personal property of Gardner, and that in truth and in fact defendant was not the owner of the land and had no right, power, or authority to sell and convey it, all of which representations and pretenses defendant at the time of making thereof, if he did make them, knew to be false and untrue, then you should find defendant guilty as charged in the first count of the information; otherwise you should acquit him." This instruction appears to be substantially a repetition of the information. Complaint is made that it does not tie the obtaining of the property from Gardner up with the intent to cheat and defraud him of the same; that is to say, the intent to cheat and defraud, as the instruction is worded, relates to the representations and not to the obtaining of the property; also that repeating the identical language of the information, which charges the facts to be true, has the appearance in the instruction of telling the jury that certain facts charged in the information are true. The statute defining the offense of false pretenses provides that, if any person shall knowingly and designedly by false pretenses obtain from another person any property with intent to cheat or defraud such person of the same, he shall be guilty of the offense, and there is no doubt it is the obtaining of Gardner's property by means of false pretenses, with intent to cheat and defraud him of the same, that constitutes the gist of the offense, and if the jury were misled and did not so understand the instruction, the cause should be reversed. It tells the jury that, if they find and believe from the evidence on the trial beyond a reasonable doubt that defendant, with intent to cheat and defraud Gardner, did by certain false pretenses obtain from him the property, they should convict, otherwise acquit, the defendant. We think the phrase "with intent to cheat and defraud Gardner," occurring at the beginning, runs through and relates to all of the instruction, and while it might have been clearer if the intent had been more closely identified with the obtaining of the property, there can be no doubt the jury understood the obtaining of the property by false pretenses must have been with the intent to cheat and defraud the owner. With regard to the false pretenses, the court inserted twice in the instruction complained of "if you find that he did make them," which in a large measure answers the criticism of the instruction. Had the court told the jury that the burden of proof was upon the people to establish by the evidence on the trial beyond a reasonable doubt the material allegations of the complaint, and then explained to them what the material allegations were that had to be so established, it would, no doubt, have been better. We do not think, however, that the jury were mis-

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led by this instruction, or understood from it that they were relieved from the duty of finding from the evidence that every material allegation was established beyond a reasonable doubt, before they could convict. They must have understood that, in order to arrive at a verdict of guilty, they had to find and believe from the evidence beyond a reasonable doubt that the defendant obtained the property from Gardner by means of false pretenses, with intent to cheat and defraud him.

The judgment will be affirmed.

Affirmed.

GABBERT, C. J., and SCOTT, J., concur.

(40 Nev. 135)

JENSEN v. DISTRICT COURT OF SEVENTH JUDICIAL DIST., IN AND FOR ESMERALDA COUNTY et al. (No. 2233.)

(Supreme Court of Nevada. Nov. 29, 1916.)

CRIMINAL LAW ⊂=260(4) — CONVICTION — NOTICE OF APPEAL—SUFFICIENCY—STATUTE.

Rev. Laws, § 7513, provides that, on appeal from a conviction before a justice, appellant shall file with the justice and serve upon the district attorney a notice, setting forth the character of the judgment and his intention to appeal therefrom. A notice of appeal was addressed to the district attorney and to an acting justice of the peace, stating that defendant intended to appeal, and did thereby appeal, from a conviction in the justice court of receiving and buying personal property from an intoxicated person, and from the judgment and sentence of the justice court imposing a fine, and in the alternative an imprisonment, upon questions of both law and fact. *Held*, that the notice of appeal was sufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 569–571, 573–575, 577; Dec. Dig. ⊂=260(4).]

Original proceeding in mandamus by Claus P. Jensen against the District Court of the Seventh Judicial District of the State of Nevada, in and for the County of Esmeralda, and Hon. J. Emmett Walsh, Judge of said court. Writ issued.

Adams F. Brown, of Goldfield, for petitioner. M. A. Diskin, of Goldfield, for respondents.

NORCROSS, C. J. This is an original proceeding in mandamus. Upon a trial before the justice of the peace of Goldfield township, petitioner, on the 11th day of March, was convicted upon a misdemeanor charge, and ordered to appear for sentence on the 13th day of March following. On the day appointed, sentence was imposed to the effect that petitioner be fined in the sum of $100, and that he pay the costs accrued. On the 15th day of March following, petitioner filed and served a notice of appeal in words and figures following:

"In the Justice's Court of Goldfield Township, in the County of Esmeralda and State of Nevada. State of Nevada, Plaintiff, v. Claus P. Jensen, Defendant. Notice of Appeal. To the State of Nevada, Plaintiff Above Named, and to Its Attorney, M. A. Diskin, District Attorney of Said Esmeralda County, and to Alfred French, Acting Justice of the Peace of Goldfield Township Aforesaid, in the County of Esmeralda and State of Nevada: You and each of you will please take notice that Claus P. Jensen, the defendant in the above-entitled action, intends to appeal, and that he does hereby appeal, to the district court of the Seventh judicial district of the state of Nevada, in and for the county of Esmeralda, from the judgment of said justice's court made on the eleventh day of March A. D., 1916, finding this defendant guilty of the offense of receiving and buying certain personal property from persons who were in an intoxicated condition, and from the judgment and sentence of said court passed upon this defendant on the thirteenth day of March A. D. 1916, under which it was ordered, adjudged, and decreed by the court that for said offense the defendant be fined in the sum of one hundred dollars and all costs, and if any part of said fine and costs be not forthwith paid, then he be imprisoned in the county jail of Esmeralda county, state of Nevada, one day for each two ($2.00) dollars of the fine not paid.

"This appeal is taken on questions of both law and fact.

"Dated at Goldfield, Nevada, this fifteenth day of March, A. D., 1916.

"Adams F. Brown, Attorney for Defendant."

Upon motion of the district attorney, the appeal was dismissed for want of jurisdiction to entertain the appeal. This proceeding is to compel the respondent court to reinstate the appeal and try the case. It was the contention of counsel for respondent in the court below, and now in this court, that the appeal was not duly perfected because of alleged defects in the notice and undertaking. As the sufficiency of the undertaking only goes to the question of the right of the petitioner to be released from custody or to a stay of proceedings under the judgment pending the appeal (Rev. Laws, § 7513), we are of the opinion that it is unnecessary to refer to that document. The jurisdiction of the district court to entertain the appeal is governed by the filing and service of the notice of appeal. By Rev. Laws, § 7516, it is provided that:

"An appeal duly perfected * * * may be dismissed on either of the following grounds:

"1. For failure to take the same in time.

"2. For failure to appear in the district court when required."

The dismissal was not based on either of these grounds, but presumably upon the ground that the appeal was not duly perfected. Assuming that this is a proper matter of inquiry, we turn to the provision of the statute (section 7513, supra), which reads:

"The party intending to appeal must file with the justice, and serve upon the district attorney a notice entitled in the action, setting forth the character of the judgment, and the intention of the party to appeal therefrom to the district court."

The notice of appeal in question is entitled in the action; sets forth the character of the judgment and the intention to appeal therefrom to the district court; was filed with the justice and served on the district attor-

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ney. This is all that is required. Counsel for respondent indulges in the supertechnical contention that the notice refers to two judgments, and does not describe any offense known to the law. The fact that the offense is not described in the notice with the fullness requisite in a criminal complaint is immaterial. The purpose of the notice is merely to acquaint the justice, the district attorney, and the district court that an appeal is taken.

"The justice must, within ten days after the notice of appeal is filed, transmit to the clerk of the district court all papers relating to the case and a certified copy of his docket." Rev. Laws, § 7514.

If the notice is not as lucid as it might be, a reference to the complaint and to the justice's docket is all that is necessary to make the whole matter clear.

The writ will issue as prayed for.

McCARRAN and COLEMAN, JJ., concur.

(53 Mont. 66)

ROBITAILLE v. BOULET. (No. 3705.)

(Supreme Court of Montana. Nov. 20, 1916.)

1. APPEAL AND ERROR ⟸758(1)—BRIEF—SUFFICIENCY.
Where appellant's only contention was that the evidence was insufficient to sustain the findings, his appeal will not be dismissed, though his brief did not comply with rule 10, subd. 3b (123 Pac. xii), in not setting forth any specifications of errors.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3093; Dec. Dig. ⟸758(1).]

2. MORTGAGES ⟸32(2)—WHAT CONSTITUTE—INTENTION OF PARTIES.
Whether a deed absolute on its face was a mortgage depends on the intention of the parties.
[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 85; Dec. Dig. ⟸32(2).]

3. APPEAL AND ERROR ⟸901 — REVIEW — FINDINGS OF FACT.
One attacking on appeal findings of fact by the trial court has the burden of showing that the evidence preponderated against the findings.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1771, 3670; Dec. Dig. ⟸901.]

4. APPEAL AND ERROR ⟸1011(1)—REVIEW—FINDINGS.
A finding of fact by the trial court on conflicting testimony will, as the credibility of witnesses is for the trier of facts, be upheld on appeal.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⟸1011(1).]

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

Action by Mose Robitaille, as administrator of the estate of Frank Robitaille, against J. W. Boulet. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Affirmed.

E. F. O'Flynn, of Butte, for appellant. William Meyer, of Butte, for respondent.

HOLLOWAY, J. On September 27, 1909, Frank Robitaille, by a deed absolute in form, conveyed to J. W. Boulet a ranch, consisting of approximately 1,100 acres, situated at Feely Station in Silver Bow county. In June, 1912, Robitaille died, and the administrator of his estate instituted this suit to have the deed declared to be a mortgage, to secure an accounting of rents and profits, and to redeem the property. The only material issue raised by the pleadings is whether the conveyance was intended to evidence an absolute sale or security for a debt. The trial resulted in favor of defendant, and plaintiff appealed from an order denying him a new trial.

1. On the Motion to Dismiss.

[1] In the preparation of his brief, counsel for appellant apparently made no effort to comply with rule 10, subdivision 3b, of the rules of this court (123 Pac. xii). There are not any specifications of errors, but since there is but a single contention made, viz. that the evidence is insufficient to sustain the findings, we overlook the shortcomings of counsel in this instance in order to reach the merits of the controversy. The motion to dismiss is overruled.

2. On the Merits.

[2-4] The solution of the question presented depends altogether upon the intention of the parties to the transaction of September 27, 1909. 27 Cyc. 1007. The evidence offered by the plaintiff tended to prove that the transaction had its inception in an application by Robitaille to Boulet for a loan; that Robitaille was in financial straits and pressed by a creditor who had a mortgage upon his ranch; that Boulet gave to Robitaille an agreement of some sort, by the terms of which the ranch could be repurchased at the end of one year for a fixed sum; that Robitaille retained possession of the ranch; that for the subsequent years the ranch was assessed to Robitaille; that Robitaille made payments of considerable sums to Boulet after the transaction; that a contemporaneous agreement with reference to Robitaille's personal property lends aid to plaintiff's theory; and that the ranch was reasonably worth a very much greater sum than passed as the consideration for the deed. These facts and circumstances, if standing alone and unexplained, would warrant a finding that the deed was intended as a mortgage to secure an existing indebtedness. Murray v. Butte-Monitor Tunnel Min. Co., 41 Mont. 449, 110 Pac. 497, 112 Pac. 1132.

Unfortunately for plaintiff, the facts and circumstances enumerated above do not stand alone, and are not unexplained. Moreover, in this court, plaintiff must sustain the burden of showing that the evidence preponderates against the trial court's findings (Gibson v. Morris State Bank, 49 Mont. 60, 140 Pac.

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76). The evidence as a whole is in sharp conflict as to the character of the possession by Robitaille after September 27, 1909, as to who defrayed the expense of operating the ranch and improving it, as to who paid the taxes, and as to the value of the ranch at the time the deed was given. Defendant offered evidence to the effect that Robitaille's application for a loan was rejected altogether; that the transaction was a sale outright; that for a valuable consideration, subsequently passed to him, Robitaille surrendered his contract to repurchase; that the transaction relating to the personal property was independent of the one relating to the real estate; that after September 27, 1909, Robitaille frequently disclaimed any interest in this ranch, and finally made homestead entry on 160 acres of government land located near by. An explanation of the payments made by Robitaille to Boulet, after September 27, 1909, was also tendered.

The trial court, with the witnesses before it, and therefore in a better position than are the members of this court to pass upon their credibility and the weight to be given to the testimony, accepted defendant's theory of the transaction, and found that the deed was intended to evidence an absolute sale, and was not intended as a mortgage to secure an indebtedness. Having accepted defendant's evidence as true, that finding is amply supported by the record. Morrison v. Jones, 31 Mont. 154, 77 Pac. 507.

Appellant has failed to sustain the burden of showing that the evidence preponderates against the findings, and for this reason the order is affirmed.

Affirmed.

BRANTLY, C. J., and SANNER, J., concur.

(52 Mont. 601)

HERLIHY v. DONOHUE et al. (No. 3849.)

(Supreme Court of Montana. Nov. 10, 1916.)

1. MILITIA ⟸19—DESTRUCTION OF PROPERTY BY OFFICERS OF—PRIMA FACIE CASE.

Where plaintiff alleged and proved his ownership of liquors, their destruction by defendants, officers of the state militia, without his consent, and his damages consequent upon the act, he made out a prima facie case.

[Ed. Note.—For other cases, see Militia, Cent. Dig. §§ 43, 44; Dec. Dig. ⟸19.]

2. MILITIA ⟸19—DESTRUCTION OF PROPERTY—CIVIL LIABILITY.

In an action against officers of the state militia for destruction of a stock of liquors, where defendants admitted plaintiff's ownership of the property and their destruction of it, they rendered themselves liable in nominal damages at least, unless they could offer legal justification for their act.

[Ed. Note.—For other cases, see Militia, Cent. Dig. §§ 43, 44; Dec. Dig. ⟸19.]

3. PLEADING ⟸78—CONFESSION AND AVOIDANCE—STATUTE.

Under Rev. Codes, § 6540, subd. 2, providing that the answer must contain a statement of any new matter constituting a defense or counterclaim, the defense of justification for an illegal act must be specially pleaded, as at common law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 158, 159; Dec. Dig. ⟸78.]

4. CONSTITUTIONAL LAW ⟸320 — DUE PROCESS—RIGHT TO HEARING.

Where the Governor declared a county to be in a state of insurrection on account of labor troubles, and a militia officer ordered the closing of saloons in a city, before any punishment could be inflicted upon a saloon keeper for disobeying the order, notice to him of the charge against him, opportunity for him to prepare and present his defense, and an adjudication of his guilt by some competent tribunal were indispensable.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 771, 778; Dec. Dig. ⟸320.]

5. MILITIA ⟸19—CIVIL LIABILITY OF OFFICERS—DESTRUCTION OF PROPERTY—MILITARY NECESSITY.

Officers of the state militia, who destroyed a saloon keeper's stock of liquors for violation of the closing order of the officer commanding in the district, declared to be in a state of insurrection on account of labor troubles, could not justify their act as a military necessity where the liquors were not needed for or devoted to the use of the troops, and the destruction was not necessary to prevent the liquor falling into the hands of the enemy; no state of war existing.

[Ed. Note.—For other cases, see Militia, Cent. Dig. §§ 43, 44; Dec. Dig. ⟸19.]

6. CONSTITUTIONAL LAW ⟸81 — "POLICE POWER" OF STATE—DESTRUCTION OF PRIVATE PROPERTY BY MILITIA OFFICERS.

Where a county was declared to be in a state of insurrection on account of labor troubles, but rioters in a city were not threatening to break into a saloon to obtain intoxicants, so that destruction of its stock was not necessary to prevent excesses, such destruction by militia officers for violation of their commanding officer's order that saloons should close, except from 8 a. m. until 7 p. m., was not a valid exercise of the state's "police power," its power to regulate and control every act or thing within its jurisdiction which tends to subvert the government, injure the public, destroy the morals of the people, or disturb the peace and good order of society, delegated by the Governor, the supreme executive power of the state, to the militia.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. ⟸81.

For other definitions, see Words and Phrases, First and Second Series, Police Power.]

7. MILITIA ⟸19—CIVIL LIABILITY OF OFFICERS — RELIANCE ON ORDER OF SUPERIOR — DESTRUCTION OF PROPERTY.

Where a militia officer, during labor troubles, ordered the closing of saloons, except between 8 a. m. and 7 p. m., under penalty of destruction of the stock of liquors, and a saloon keeper failed to observe the order, subordinate militia officers, who merely followed their superior officer's commands in destroying the offending saloon keeper's stock, were not subject to civil liability, since the order for the destruction of the property was one which the commanding officer might lawfully have made had the circumstances of the case warranted it, and, as it was valid on its face, the subordinate officers could not refuse obedience until they had investigated the legality of the order.

[Ed. Note.—For other cases, see Militia, Cent. Dig. §§ 43, 44; Dec. Dig. ⟸19.]

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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Action by Dennis Herlihy against Dan J. Donohue, Wade Gobel, William M. Morse, and others, wherein, on the death of Herlihy, Michael Herlihy, as executor of his estate, was substituted as plaintiff. From a judgment for plaintiff, the named defendants appeal. Judgment against defendant Donohue affirmed, and cause remanded, with directions to enter judgment, dismissing the action as against defendants Gobel and Morse.

J. B. Poindexter and W. H. Poorman, both of Helena, and Jesse B. Roote, of Butte, for appellants. M. J. Doepker, Edwin M. Lamb, and Maury, Templeman & Davies, all of Butte, for respondent.

HOLLOWAY, J. On September 1, 1914, the Governor of this state issued a proclamation declaring the county of Silver Bow in a state of insurrection. A portion of the organized militia under the command of Maj. Dan J. Donohue, with Wm. Morse and Wade Gobel, subordinate officers, was ordered to the scene of the trouble for the declared purpose of restoring peace and good order and rehabilitating the civil authority in that county. Upon taking command of the troops, Maj. Donohue issued an order, closing saloons and other places where intoxicating liquors were for sale. This order was thereafter modified so as to permit such places to be open for business from 8 a. m. until 7 p. m. daily. On September 19th Maj. Donohue ordered Morse, Gobel, and certain enlisted men to take from the saloon of Dennis Herlihy the stock of liquors therein and destroy the same, and, the order having been executed, this action in trespass was brought to recover actual damages to the amount of the value of the property destroyed, and punitive damages in the sum of $1,000.

The complaint alleges the ownership and value of the property, the trespass and destruction of the property, and that the defendants acted wrongfully and with malice. The answer consists of a general denial and certain affirmative allegations, which set forth the proclamation of the Governor, the original and amended order by the commanding officer, and allege that the plaintiff, Dennis Herlihy, while the amended order was in full force and effect and with knowledge of such order, willfully violated the same by opening his saloon and dispensing intoxicating liquors within the prohibited hours on September 17th; that at the time there was great disorder in Silver Bow county; that the commanding officer—

"had reason to believe and to expect that certain of the insurrectionists in said county, and lawbreakers therein, would cause riots to occur, and do violence to both property and human life; that in view of these facts said commanding officer of said military forces believed that it was imperatively necessary to forbid the sale or distribution or giving away of intoxicating liquors later than 7 o'clock in the evening and before 8 o'clock in the morning; and, in order to prevent the plaintiff herein from furnishing liquors to persons within the hours during which persons were forbidden to sell or furnish liquors to others, the said commanding officer, with certain of his subordinate officers and soldiers, destroyed the said stock of liquors belonging to the plaintiff herein as a necessary measure to prevent drunkenness, breaches of the peace, and rioting, and as an example to other retail liquor dealers, to prevent them, as well as the plaintiff herein, from either selling or giving away intoxicating liquors later than 7 o'clock in the evening and before 8 o'clock in the morning."

The reply admits the official character of each of the defendants; admits that the proclamation, the order, and amended order were issued; that the appealing defendants destroyed the property in question, and denies all other facts pleaded by way of defense. After issues were joined, but before trial, Dennis Herlihy died, and the executor of his last will was substituted as a party to the action. Upon the trial plaintiff abandoned his claim for punitive damages, made out a prima facie case in other respects, and called Maj. Donohue as a witness to prove the destruction of the property. On cross-examination counsel for defendants sought to prove the facts pleaded in the answer and denied by the reply, but the offered evidence was excluded as not within the range of proper cross-examination. In their case in chief, defendants again offered the same character of evidence, but it was objected to upon the following, among other, grounds:

"That there is no plea in the answer that the destruction of the property or any of the property was at all necessary to prevent the increasing or spreading out of the insurrection or to aid in suppressing any insurrection."

The objection was sustained, and the evidence was excluded. The court dismissed the action as to certain other defendants originally joined, and directed a verdict in favor of plaintiff and against these appealing defendants, leaving to the jury for determination the amount of compensatory damages only. From a judgment entered upon a verdict for plaintiff, this appeal is prosecuted. The correctness of the trial court's ruling in excluding defendants' offered evidence is the question presented for review.

[1, 2] The right of a person to acquire, hold, and protect property, to be secure in his possession of it against unreasonable seizure, and to retain it until deprived of it by due process of law, is, as among English-speaking people, as old as the common law itself. Its origin antedates by many years the guaranty contained in Magna Charta. The right itself was the inheritance of our people who inhabited the territory acquired from Great Britain at the close of the Revolution, and was adopted by the people of the territory of Montana by its first legislative assembly, and was continued in force thereafter. It is now embodied in the Bill of Rights (article 3 of our state Constitution). When, therefore, plaintiff alleged and proved his ownership of the property, its destruction by these defendants

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without his consent, and his damages consequent upon that act, he made out a prima facie case. Indeed, in the light of the pleadings, little proof was required from plaintiff, for by their admission of plaintiff's ownership and their destruction of the property, defendants rendered themselves liable in nominal damages at least, unless they could offer legal justification for their act. The answer, considered in its entirety must be viewed as in the nature of a confession and avoidance—an admission of the destruction of private property and an attempt to justify it.

[3] That it is possible for a set of circumstances so to combine as to present a legal justification for the act of a public officer in destroying private property against the will of the owner and leaving the owner remediless cannot be gainsaid. The contention made in the trial court and here is that, though these defendants might possibly have set forth facts sufficient to constitute a defense they failed to do so; in other words, that the facts pleaded do not constitute a justification for the destruction of plaintiff's property. That a defense of this character must be specially pleaded was the rule at common law. It is also the rule in most of the states where the Code system prevails, and in this jurisdiction by statute. Subdivision 2, § 6540, Revised Codes.

[4, 5] Let it be conceded in the first instance that the order of Maj. Donohue, closing the saloons from 7 p. m. until 8 a. m. daily, had the force and effect of a statute, and that for a violation of that order any reasonable punishment might have been inflicted, still we cannot concede to the organized militia, or to any department of our government, or to any function of government, the right to convict and punish without notice, a hearing, or an adjudication. Before any punishment could be inflicted upon Herlihy, notice of the charge against him, an opportunity for him to prepare and present his defense, if any he had, and an adjudication of his guilt by some competent tribunal were indispensable. It is nowhere contended that Herlihy pleaded guilty, while the charges preferred against him in the answer are denied in the reply. The answer fails to allege that Herlihy was accused, notified, tried, or convicted before his property was confiscated; and, in the absence of these necessary allegations, the question of the extent of the punishment which might have been inflicted does not arise. Under this answer the destruction of the property cannot be justified as a penalty imposed for a violation of the order. Neither can it be justified as "a military necessity." The stock of liquors was not needed for, nor devoted to, the use of the troops. A state of war did not exist, and the destruction of the property was not necessary to prevent it falling into the hands of the enemy.

[6] The defense must rest upon the theory that the order was a reasonable and necessary police regulation and the destruction of the property a valid exercise of the state's police power. The order in question as amended would read as follows:

"(5) All saloons and places where intoxicating liquors are sold at retail as a beverage will be closed at once and kept closed (except from 8 a. m. until 7 p. m. daily) until further orders. The stock of liquors of any person or persons violating this rule will be destroyed and all violators severely punished."

By section 5, article 7 of the Constitution, the supreme executive power is vested in the Governor, who is charged with the duty to see that the laws are faithfully executed. Section 6 provides the means available to the executive, when necessary, to execute the power or perform the duty devolved upon him:

"The Governor shall be commander-in-chief of the militia forces of the state, * * * and shall have power to call out any part or the whole of said forces to aid in the execution of the laws, to suppress insurrection or to repel invasion."

When the organized militia was called into the service of the state in 1914, it but performed the function of the strong arm of the executive by which he could aid in executing the law or in suppressing the insurrection. Independently of the executive it had no power or authority, except possibly with reference to its own internal affairs. It acted as an executive agency, subject to the orders of the Governor and bound by the authority which he might lawfully exercise. The Governor is at all times amenable to the Constitution and laws of the state. They are the charters of his powers, and in them he must find the authority for his official acts. While he may not exceed their bounds in any instance, he may invoke any remedy provided by them for the purpose whenever the exigencies of a particular case call for it. One of the instrumentalities, the use of which is sanctioned by the law for the preservation of peace and good order, is the police power of the state; and, while no court or text-writer has assumed to define with accuracy the limits of the power, it may be said generally that the state may regulate or control every act or thing within its jurisdiction which tends to subvert the government, to injure the public, to destroy the morals of the people, or to disturb the peace and good order of society. That the state may enforce a proper police regulation by the imposition of fine or imprisonment, or both, is conceded generally. That within the narrow limits of actual and pressing necessity private property may be taken and destroyed for the public good scarcely admits of debate. The most common illustration of this is the demolition of a building to prevent the spread of a conflagration. But in every instance where such a right has been exercised and questioned, the decision upholding the right makes it clear beyond controversy

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that only the most overriding necessity will justify or excuse the officer ordering such destruction.

It is not alleged that the rioters in Butte were threatening or about to break into Herlihy's saloon to obtain intoxicating liquors, and that destruction of the stock was necessary to prevent the excesses which might reasonably be expected to follow the free access of disorderly disposed persons to the liquors. It is not pretended that the arrest and imprisonment of Herlihy and the closing of his place of business during the insurrection would not have been equally efficacious as a means of preventing drunkenness, disorder, or rioting. Under constitutional government such as ours, the destruction of private property without compensation to the owner must be the last resort, available only in the presence of imminent and overwhelming necessity which brooks no delay. In failing to allege facts sufficient to disclose such necessity, the answer fails to make out a justification for the trespass, and for this reason the offered evidence was properly rejected.

[7] 2. Upon the trial, evidence was introduced to the effect that defendants Morse and Gobel were concerned in the destruction of the property to the extent only that they obeyed the order of their superior officer. This was not controverted, and may be accepted as an established fact.

The circumstances under which a subordinate military officer may be acquitted for acts otherwise wrongful, upon the score that he merely obeyed a command from one over him in authority, have received much consideration. The authorities are not agreed upon the question presented here, and a review would be of little, if any, aid. To permit an inferior military officer to stop and question the validity of every command of his superior would, at once, destroy discipline, and convert an army into a debating society without a monitor or referee. The same Constitution which guarantees the security of life and property provides for organized military forces in this state. When our people adopted the Constitution with its reference to the militia, they must have had in contemplation militia organized, officered, and disciplined as such forces were generally at the time. An army without discipline is a mob. The highest duty of the soldier is to obey, for upon obedience all discipline must depend. Necessity is the foundation for organized military forces, and to the extent that necessity requires it, obedience to orders is demanded. But necessity can never require obedience to an order manifestly illegal or beyond the authority of the superior to give, and therefore reason and common sense seem to justify the rule that the inferior military officer may defend his act against civil liability by reference to the order of his superior, unless such order bears upon its face the marks of its own invalidity or want of authority. If the order is one which the superior might lawfully make, the inferior cannot refuse obedience until he shall have investigated the surrounding circumstances and determined for himself that they justify the order in the particular instance. If, on the other hand, the order is so palpably illegal or without authority that any reasonably prudent man ought to recognize the fact, obedience thereto furnishes no excuse for a wrongful act, even though disobedience may subject the offender to punishment at the hands of a military tribunal.

In the present instance the order for the destruction of the property was one which Maj. Donohue might lawfully have made, if the circumstances of the case warranted it, and since it was valid on its face, the subordinate officers could not refuse obedience until they instituted and carried on their own investigation to ascertain whether the surrounding circumstances justified it. They could rely upon its apparent validity and justify their acts in obeying it. We believe the views expressed are in harmony with enlightened reason, and best serve the double purpose of securing private rights and protecting subordinate military officers in the execution of the duty which they may be called upon to perform.

The judgment against the defendant Donohue is affirmed. The cause is remanded to the district court, with directions to enter judgment, dismissing the action as against defendants Morse and Gobel. The respondent may recover one-half of his trial court costs and one-half of his costs on appeal from the defendant Donohue. The defendants Morse and Gobel may recover from respondent one-half of the trial court costs incurred by the appealing defendants, and one-half of the costs incurred by appellants on appeal.

BRANTLY, C. J., and SANNER, J., concur.

(49 Utah, 6)

STATE v. ELMER. (No. 2906.)

(Supreme Court of Utah. Nov. 16, 1916.)

CRIMINAL LAW ⊂=780(3) — INSTRUCTIONS — ACCOMPLICE'S TESTIMONY.

An employé of defendant testified, in a prosecution for cattle theft, that when directed by defendant to get up three red cows, he drove three cows marked similarly to those claimed to have been stolen, to a point near defendant's place, and that when asked if everything was all right, defendant nodded in the affirmative. There was no other evidence to connect defendant with the theft of the cattle, and there was evidence that the employé acted with guilty knowledge if he was not the sole thief. *Held*, that defendant was entitled to a charge that if the employé was an accomplice, then defendant could not be convicted because there was no evidence, save that of the accomplice, to connect defendant with the crime, and a charge that, if the employé was an accomplice, his testimony

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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required corroboration before a conviction could be had was erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1861; Dec. Dig. ⊂⊃780(3).]

Appeal from District Court, Duchesne County; A. B. Morgan, Judge.

Clark Elmer was convicted of cattle theft, and he appeals. Reversed and remanded.

J. A. Wilson and John T. Pope, both of Vernal, for appellant. A. R. Barnes, Atty. Gen., and E. V. Higgins and G. A. Iverson, Asst. Attys. Gen., for the State.

STRAUP, C. J. The defendant was convicted of stealing three cows, and appeals. Among other assignments, it is contended that the evidence is insufficient to connect him with the commission of the offense, and that the court erred in refusing to charge as requested by him.

The defendant lived at Randlett. The owner testified that he had about 125 head of cattle ranging near the Wells, about 15 or 20 miles from Randlett, marked with two waddles on the neck and a dewlap, some branded, "87W" and some, diamond X dot; and that in February of 1915, he lost 9 head from the range.

Another witness for the state, a Mr. Curtis, testified that in February of that year he, for a few days, was in the defendant's employ, hauling hay; that the defendant told him to go to the Wells and get 3 red cows, and that he, in obedience to the request, went to the Wells, and there, within a few miles, took from a herd of about 20 head of cattle 3 red cows, marked with two waddles and a dewlap. He did not testify as to the brands. He further testified that he drove the three cows to a bend in the Duchesne river several miles from the defendant's place, and there left them, and informed the defendant where they were. He testified that he was not certain that he had the right cows, but afterwards asked the defendant if "everything was all right," and that the defendant answered by nodding his head. What was done with or what became of the cows left by Curtis at the bend of the river was not shown. None of them were shown to have come into the defendant's possession, or that he had anything whatever to do with them. Except as testified to by Curtis, there was no evidence to connect the defendant with the commission of the offense. Some evidence was adduced to show that he sold the carcass of a cow in February to a nearby dealer in meats. But it was indisputably shown that that cow was rightfully purchased by him from an Indian, and was not the subject of the larceny. That was testified to by a government's Indian agent, with whose consent the cow was purchased by the defendant from the Indian, and was also indisputably shown by other testimony. Though Curtis, in the taking of the cows, should be regarded as having acted in good faith and without guilty knowledge, yet, even in that view, it is doubtful whether the evidence is sufficient to connect the defendant with the commission of the offense. There, however, is evidence to justify a finding that Curtis, in the taking, acted with guilty knowledge, and if he was not the sole thief, yet participated in the commission of the offense as an accomplice, and thus was himself subject to prosecution for its commission. That is evidenced from his knowledge that cattle were ranging at or near the Wells, his manner of taking, driving, and leaving them, and his conduct when informed that he was accused of the theft, and that the officers were looking for him, the particulars of which need not here be related. In view of this the defendant proposed requests to charge that, if the jury found Curtis was an accomplice, then the defendant could not be convicted, for the reason that there was no evidence without the aid of the testimony of the accomplice to connect the defendant with the commission of the offense. The court refused that, and charged the jury that if they found Curtis was an accomplice, his testimony required corroboration before a verdict of guilty was justified. Thus the court left it to the jury to determine, in the event they found Curtis was an accomplice, whether there was corroborating evidence or circumstances, independently of the testimony of the accomplice, to connect the defendant with the commission of the offense. It is very clear there is no such evidence. The defendant, therefore, was entitled to the request, and the court erred in not giving it. In view of this it is unnecessary to express an opinion upon other questions presented. Let the judgment be reversed, and the case remanded for a new trial. Such is the order.

FRICK and McCARTY, JJ., concur.

(22 N. M. 285)

STATE v. BELISLE. (No. 1880.)

(Supreme Court of New Mexico. Nov. 21, 1916. Rehearing Denied Dec. 21, 1916.)

(Syllabus by the Court.)

1. HOMICIDE ⊂⊃142(7) — INDICTMENT — VARIANCE.

Evidence examined, and *held* to show no variance between the allegation of the indictment that the weapon employed was unknown and the proof adduced by the state.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 256; Dec. Dig. ⊂⊃142(7).]

2. CRIMINAL LAW ⊂⊃829(1)—INSTRUCTIONS—REQUESTS.

Courts are not bound to give instructions, which, even if correct, are merely cumulative, and state in another form a proposition of law already given to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⊂⊃829(1).]

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Appeal from District Court, Colfax County; T. D. Leib, Judge.

Thomas J. Belisle was convicted of voluntary manslaughter, and appeals. Affirmed.

E. C. Crampton and Morrow & Alford, all of Raton, for appellant. H. S. Bowman, Asst. Atty. Gen., for the State.

ROBERTS, C. J. Appellant was indicted by the grand jury of Colfax county for the murder of William C. Payne. The indictment was in the usual form of a first degree indictment, but did not designate the instrument employed in the killing, charging, however, that the homicide had been perpetrated "with a certain deadly weapon, the exact size, kind, and description of which is to these grand jurors unknown." Appellant was brought to trial upon this indictment, and the jury returned a verdict finding him guilty of voluntary manslaughter. From the judgment pronounced upon the verdict, he prosecutes this appeal.

[1] The first question presented is alleged error upon the part of the trial court in not sustaining appellant's motion for an instructed verdict made at the close of the state's case in chief and renewed at the close of the whole case. The ground of said motion was that there was a variance between the allegations of the indictment and the proof, in that the indictment charged that the weapon was unknown, whereas the proof showed that the homicide was perpetrated by means of a pitchfork.

No person, other than the defendant and the deceased, was present at the time of the homicide, and the witnesses for the state testified that blood was found upon the handle of a pitchfork found near the body of the deceased, and also that there was blood upon the neck yoke, attached to the tongue of a wagon by a wire; also blood splotches were found in various places upon the ground near the scene of the encounter.

Appellant testified as a witness in the case, and stated that he struck the deceased over the head with the handle of the pitchfork in question. Appellant contends that it was the duty of the state to show that the weapon alleged in the indictment to have been used in perpetrating the assault was unknown to the grand jury, and could not have been known by reasonable exertion and diligence.

It is true, as appellant contends, that the evidence on behalf of the state pointed strongly to the fact that the appellant had used the pitchfork in assaulting the deceased, but this was due solely to the fact that blood was found on the handle thereof. Blood was likewise found upon a neck yoke, but this was wired to the tongue of a wagon; hence appellant argued this instrument could not have been employed. We think, when all the evidence offered on behalf of the state is considered, the weapon employed by appellant in effecting the death of the deceased is still a matter of doubt. Of course, when we turn to the testimony of the defendant, the matter is cleared up, and the fact is established that he used the pitchfork, but the grand jury had no right to call him as a witness. That body apparently had before it all the witnesses, save the defendant, who knew anything about the transaction, and after all the witnesses had detailed all the facts of which they were cognizant, the question of the weapon used was still in doubt, but pointing more or less strongly to the fact that the pitchfork had been employed. If appellant's contention were correct that the allegation is material and the proof must correspond therewith, had the grand jury alleged that the pitchfork was employed, the appellant could easily have secured his acquittal by testifying that he used the neck yoke or some other instrument, and convincing the jury of the truth of such fact.

The case of State v. Klasner, 19 N. M. 474, 145 Pac. 679, does not support appellant's contention. In that case it affirmatively appeared by the evidence offered on behalf of the state that the grand jury could readily have ascertained the name of the true owner. Such fact was a matter of record, and did not, as here, depend upon circumstantial evidence, which might have been easily explained away by the defendant. Hence we conclude that the trial court properly overruled the motion for an instructed verdict.

[2] Appellant complains of the refusal of the court to give each of his tendered instructions, reading as follows:

"The courts instructs you that a man need not wait until the blow is actually struck before he has a right to act upon appearances and defend himself. It is enough if he honestly believes, and has reason to believe, from the attitude, conduct, and manner of the deceased, that he was in danger of his life, or of great bodily harm.

"The court instructs you that in determining whether the circumstances existed that would justify the defendant in inflicting the wound upon William C. Payne which subsequently resulted in his death, you must determine that fact from the condition and circumstances that surrounded the defendant at the time and place of the trouble as they reasonably appeared to him at that time; that is, by placing yourself, in your own minds, as far as may be possible from the evidence, under the same circumstances in which the defendant was placed at the time of the killing, taking into consideration as far as the evidence may enable you to do so the temperament of the defendant, and his moral and physical courage, or the lack thereof."

The court of its own motion instructed the jury as follows:

"You are further instructed that a person acting in the lawful defense of himself need not be in actual imminent danger of his life, or great bodily harm, before he may slay his assailant. It is sufficient if in good faith he had a reasonable belief, from the facts as they appeared to him at the time, viewed from his standpoint, that he was in such imminent peril. It is not enough, therefore, that he should merely believe he is in such imminent peril. He must have

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reasonable cause for so believing. Whether or not he had a reasonable cause for so believing is for you to determine from all the facts and circumstances given in evidence. If you should believe from the evidence that the defendant did not have a reasonable cause to so believe, you cannot acquit him on the grounds of self-defense, although you may believe he really thought himself in danger."

From the quoted instruction given by the court, it will be seen that the substance of both the requested instructions was given by the court to the jury. "Courts are not bound to give instructions, which, even if correct, are merely cumulative." Miera v. Territory, 13 N. M. 192, 81 Pac. 586. The requested instructions only stated, in a different form and manner, the substance of the ones given by the court, in so far as the instructions were applicable to the evidence; hence the court did not err in refusing them.

We have not been able to find in the transcript of testimony any evidence whatever bearing upon the temperament of the defendant, or his moral and physical courage, or lack thereof, save some conflict of character witnesses, as to his reputation for peace and quietude.

The court's instructions 16 to 20, inclusive, fully covered the law of self-defense applicable to the facts in this case. Of course, in this case, as in all others where the question of self-defense arises, the instructions relating to the exercise of the right might have been couched in various forms, each of which would have stated the law correctly. Where the court fully explains to the jury, in the instructions given, the law of self-defense applicable to the facts in the case, it is not required, at the request of the defendant, to restate the same propositions in different words. To so hold would enable a defendant in such a case to secure an unfair advantage by having the court repeat to the jury in different words a proposition once clearly stated so many times that the jury might become confused as to the issues and incline to the belief that the court was of the opinion the defendant had acted only in self-defense.

Finding no error in the record, the judgment will be affirmed; and it is so ordered.

HANNA and PARKER, JJ., concur.

(61 Okl. 243)

EDWARDS v. SOVEREIGN CAMP, WOODMEN OF THE WORLD. (No. 8015.)

(Supreme Court of Oklahoma. Nov. 14, 1916.)

(Syllabus by the Court.)

INSURANCE ⇐815(3)—ACTIONS ON POLICIES —PLEADING—WAIVER OF CONDITIONS.

A waiver of the conditions of an insurance policy, in order to be available to the beneficiary in an action thereon, must be specifically and distinctly pleaded; and, if not so pleaded, evidence thereof is not admissible at the trial.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1997; Dec. Dig. ⇐815(3).]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Bryan County; Jesse M. Hatchett, Judge.

Action by Carrie Edwards (née Holland) against the Sovereign Camp, Woodmen of the World, on an insurance certificate. From a judgment for defendant, plaintiff appeals. Affirmed.

Porter Newman and V. C. Phillips, both of Durant, for plaintiff in error. Maxey & Brown, of Muskogee, for defendant in error.

BURFORD, C. Plaintiff sued upon a benefit insurance certificate issued to her former husband, in which she was named as beneficiary. The petition alleged compliance with the terms and conditions of the certificate. Defendant answered, denying generally the allegations of the petition, and further alleging certain breaches of the certificate and of the laws of the order applicable thereto. Plaintiff replied by a general denial of new matter. At the trial it clearly appeared that deceased was in default of dues upon the certificate for such a period that, by the constitution and laws of the order, made a part of the certificate by its terms, the certificate had lapsed. It also clearly appeared that under the applicable laws of the order reinstatement could be had only upon payment of the amount due and the delivery to the clerk of the camp of a written statement and warranty signed by the member, to the effect that he was then in good health and not addicted to the excessive use of narcotics or intoxicants. These matters were undisputed. There was dispute as to whether deceased had, subsequent to his suspension, paid his dues, but there was no dispute that he had not furnished the certificate as to health, etc. Plaintiff offered evidence tending to establish a waiver of this requirement by the local officers, acquiesced in by the Sovereign Camp. This was excluded, and a verdict for defendant directed. From the judgment rendered pursuant to such verdict, plaintiff appeals.

It does not seem to be necessary to pass upon the power of the officers to waive the delivery of the health certificate, inasmuch as plaintiff pleaded no waiver. It has been so often decided by this court that it should now be familiar law that a waiver must be pleaded by the party relying thereon, and, if not so pleaded, evidence to establish it is inadmissible. A few of such decisions by this court are: Hartford Fire Ins. Co. v. Mathis, 157 Pac. 134; Fidelity Mut. Life Ins. Co. v. Dean, 156 Pac. 304; A., T. & S. F. R. Co. v. Lynn, 154 Pac. 658; Modern Woodmen v. Weekley, 42 Okl. 25, 139 Pac. 1138; Nance v. Okl. Fire Ins. Co., 31 Okl. 208, 120 Pac. 948, 38 L. R. A. (N. S.) 426; Blakemore v. Johnson, 24 Okl. 544, 103 Pac. 554; Cooper v. Flesner, 24 Okl. 47, 103 Pac. 1016, 23 L. R. A.

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(N. S.) 1180, 20 Ann. Cas. 29; Tonkawa Milling Co. v. Tonkawa, 15 Okl. 672, 83 Pac. 915.

Under these decisions the trial court was correct in excluding the evidence of waiver and without it, there being no dispute as to a breach of the terms of the certificate, he was also correct in directing a verdict.

Plaintiff also complains of the overruling of her motion for new trial, upon the ground of newly discovered evidence. Without reviewing the motion in detail, it suffices to say that it does not show any diligence exercised in securing the evidence said to be newly discovered, nor does it appear, in view of Exhibit B of the record, that it would avail plaintiff anything if introduced upon a new trial.

Judgment affirmed.

PER CURIAM. Adopted in whole.

(61 Okl. 304)

J. H. COX & CO. v. FISHER et al.

(No. 8027.)

(Supreme Court of Oklahoma. Nov. 14, 1916.)

(Syllabus by the Court.)

1. GUARDIAN AND WARD ⟸30(1) — POWERS OF GUARDIAN—SUPPORT AND MAINTENANCE OF WARD.

A father, who has been appointed guardian for his minor children, is entitled to their custody, services, and earnings, and is charged with the duty of supporting and educating them in a manner suitable to their circumstances; and, when he cannot reasonably afford to support and educate them, and they possess property, the income of which will do so, he may, under the direction of the county court, apply such income to the support and education of such minors; and where such income is insufficient for their support and education, the proceeds of the sale of their real estate may be used for such purpose, under the direction and specific authorization of the county court.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 116–127, 129, 130, 132–135; Dec. Dig. ⟸30(1).]

2. GUARDIAN AND WARD ⟸30(1) — POWERS OF GUARDIAN—SUPPORT AND MAINTENANCE OF WARD.

Where the father, as such guardian, purchased merchandise for the support of his minor children, upon the promise to pay for same out of the proceeds of the sale of the minors' lands, ordered sold by the county court for their education and support, *held*, that no lien or charge was thereby created against such funds, and payment for the merchandise could not be enforced against the same, without specific authorization therefor by the county court.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 116–127, 129, 130, 132–135; Dec. Dig. ⟸30(1).]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Adair County; John H. Pitchford, Judge.

Action by J. H. Cox & Co. against O. E. Fisher and others. From a judgment sustaining a demurrer on behalf of all defendants except Ed Le Master and against defendant Le Master for the amount sued for, plaintiff appeals. Affirmed.

R. Y. Nance, of Stilwell, for plaintiff in error. Seymour Riddle, of Vincennes, Ind., A. D. Bennett, of Vinita, and Joe M. Lynch, of Stilwell, for defendants in error.

GALBRAITH, C. The plaintiff in error commenced this action in the justice court against the defendants in error, being the guardian, the father, and three minors, on two accounts for merchandise charged to have been sold and delivered to the father while he was the legal guardian of the minors, and for their support. The father admitted liability; the guardian, for himself and his wards, denied liability. The justice rendered a joint and several judgment against all of the defendants for the amount claimed. An appeal was prosecuted to the district court, where a general demurrer was interposed by the guardian on behalf of himself and his wards. This demurrer was sustained, and the action dismissed as to the guardian and the wards, and judgment was rendered against the father, Ed Le Master, for the amount claimed.

[1, 2] It is argued on behalf of the plaintiffs in error that the father was the legal guardian of the minors at the time the merchandise was purchased, and that he represented to the vendor that the merchandise was necessary for the support of the minors, and that he would pay for it out of the proceeds of the sale of some of the minors' lands that had then been authorized to be sold by order of the county court for the purpose of the education and support of such minors; that the lands were sold and the proceeds collected by the father as guardian; that the accounts had been presented to him, and he had refused to pay; that the father had been removed as guardian, and Fisher had been appointed and qualified as his successor, and the proceeds of the sale of the lands turned over to Fisher; that the accounts had been presented to Fisher, and he had refused to either pay or allow the same. This was the substance of the allegations of the petition attempting to state a cause of action against the guardian and the minors. These facts were not sufficient to state a liability against them, or either of them. The father, under the law, had the right to the custody and services of the minors, and it was his duty to support them out of his own estate. Where the father was unable to do this, he might apply to the county court for an order to apply the income of the minor's estate to his support, or the court, where the necessity arises, might order the land of the minor sold for his education and support, but in no case could the father create a lien against the estate of the minor, or fix a charge against the proceeds of the sale thereof in the absence of specific authorization therefor by the county court. Section 4368, Rev. Laws 1910, provides:

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"The father of a legitimate unmarried minor child is entitled to its custody, services and earnings; and he cannot transfer such custody or services to any other person, except the mother, without her written consent, unless she has deserted him, or is living separate from him by agreement. * * *"

Section 4367, Rev. Laws 1910, provides:

"The parent entitled to the custody of child must give him support and education suitable to his circumstances. * * *"

Section 4376, Rev. Laws 1910, provides:

"If a parent neglects to provide articles necessary for his child who is under his charge, according to his circumstances, a third person may in good faith supply such necessities and recover the reasonable value thereof from the parent."

In Donnell v. Dansby, 159 Pac. 317, this court, referring to the above sections of the statute, said:

"The father was entitled to the custody, services, and earnings of plaintiffs during their minority (section 4368, Rev. Laws 1910), and was charged by law with the duty to support and educate them in a manner suitable to their circumstances (section 4367); and, if he could not reasonably afford to maintain and educate them, in keeping therewith, he might, under the direction of the county court, defray the expense of such maintenance and education from the income of their individual property (section 6535), but the authority given by this section does not authorize the payment thereof from the corpus of the estate, in other words, from the capital. Being entitled to the services and earnings of the plaintiffs, and the duty to educate and maintain them being imposed upon him by law, and not having made any claim for such allowance in his lifetime, the sureties in this action cannot make such claim for him. To have entitled him to credit, the expenditures must have been made under the direction of the county court, and no claim is made that such authority was obtained."

The judgment of the trial court was right, and is therefore affirmed, with costs.

PER CURIAM. Adopted in whole.

(61 Okl. 250)

BISHOP-BABCOCK-BECKER CO. v. HYDE. (No. 8005.)

(Supreme Court of Oklahoma. Nov. 14, 1916.)

(Syllabus by the Court.)

1. APPEARANCE ⇐9(7), 14 — GENERAL APPEARANCE—GIVING BOND.

The giving of a bond by defendant to discharge a garnishment, conditioned to pay any judgment which may thereafter be rendered against defendant, constitutes a general appearance to the action, and converts it from an action in rem to one in personam.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 51, 67; Dec. Dig. ⇐9(7), 14.]

2. APPEARANCE ⇐9(7) — GENERAL APPEARANCE—GIVING BOND.

Defendant executed a bond to discharge a garnishment, conditioned to pay any judgment which might be rendered against it, gave and filed a notice of the giving of such bond, and requested and obtained an order of court, discharging the garnishee. It also entered into and filed a stipulation between the plaintiff and defendant for additional time to answer. *Held*, that by these acts the defendant entered a general appearance to the action.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 51; Dec. Dig. ⇐9(7).]

3. CORPORATIONS ⇐516 — AMENDMENT — GROUNDS.

Where a corporation is properly before the court to answer a petition which names it correctly, but wrongly alleges the state of its incorporation, an amendment of the petition so as to properly describe such corporation, already in court, is justified.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2029, 2046; Dec. Dig. ⇐516.]

Commissioners' Opinion, Division No. 2. Appeal from Superior Court, Muskogee county; H. C. Thurman, Judge.

Action by Homer C. Hyde against the Bishop-Babcock-Becker Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Franklin & Carey, of Muskogee, for plaintiff in error. Blakeney & Maxey, of Muskogee, for defendant in error.

BURFORD, C. Homer C. Hyde brought this action for damages for breach of warranty in the sale of a soda fountain. The defendant named in the title of the petition was "Bishop-Babcock-Becker Company, a corporation." The material allegations of the petition here in question were that:

"The defendant is a corporation duly incorporated under and by virtue of the laws of the state of Texas, that defendant is successor to the said L. A. Becker Company, accepting all liabilities of the said L. A. Becker Company."

The purchase of the fountain from L. A. Becker, the execution of the contract of purchase and warranty, the breach and damages resulting therefrom, are then alleged. Garnishment summons was issued to certain garnishees entitled against "Bishop-Babcock-Becker Company," and return was made on at least one of such summons, admitting liability to "Bishop-Babcock-Becker Company." A stipulation was then filed, to the effect that "defendant in the above-entitled cause" might have ten additional days in which to answer. This was signed by attorneys for plaintiff and "Ralph P. Welch, Attorney for Defendant." Later the following answer was filed:

"Homer C. Hyde, Plaintiff, v. Bishop-Babcock-Becker Company, a Corporation, Defendant. Answer. Comes now the Bishop-Babcock-Becker Company, a corporation, of Texas, and for answer to the petition of plaintiff filed herein denies each and every material allegation therein contained. Bishop-Babcock-Becker Company, Ralph P. Welch, Attorney for Defendant."

Meanwhile a bond to discharge the garnishment, conditioned "that we will, on demand, pay to said plaintiff the amount of said judgment in this action, with all costs, not exceeding in any event the sum of $2,485," was executed and filed by "the Bishop-Babcock-Becker Company, E. T. Sargent, Asst. Treas.," and a surety. Notice was given by

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"attorneys for defendant" and an order procured from the court, discharging the garnishees, which recited that it is made upon "application of the defendant for a discharge of the garnishees herein," and that it appeared to the court that "defendant has filed a bond in this cause according to law, * * * to discharge said attachment. The filing of the bond and making of this order were prior in time to the filing of the answer. Upon a trial upon these pleadings it appeared that there were two corporations of similar name: One "Bishop-Babcock-Becker Company" successor to L. A. Becker Company, having its principal office at Cleveland, Ohio, of which corporation one E. T. Sargent was assistant treasurer—the state of incorporation is not shown by the record, but in the briefs is assumed to be Ohio—the other "Bishop-Babcock-Becker Company, of Texas," the words "of Texas" being an integral part of the corporate name. This corporation had its principal office at Dallas, and is apparently conceded not to have been the successor of or liable for the debts or defaults of the L. A. Becker Company. E. T. Sargent is not shown to have had any official position with the Texas corporation. It was insisted at the trial that it was the Texas corporation which had appeared and filed its answer. There was no service of summons upon any one personally or by publication. It seems that Ralph P. Welch, the principal counsel, had corresponded about the case with both corporations, but had been referred to the Cleveland office of the Ohio corporation, and had received his instructions from the Ohio corporation and had been paid by it. At the trial plaintiff asked leave, obtained permission, and did amend his petition so as to recite that defendant was "a corporation, known as the Bishop-Babcock-Becker Company, with its principal office and place of business in the city of Cleveland, Ohio, and who succeeded to the properties and business of L. A. Becker Company, and Bishop-Babcock-Becker Company, and assumed all the debts and liabilities of each of said consolidated companies." Judgment was rendered against "Bishop-Babcock-Becker Company, a corporation, with its principal office at Cleveland, Ohio." The Ohio corporation later moved to set aside the judgment on the ground that it was void for lack of service upon or appearance by it in the action. This was heard and supported by testimony. Movant attempted to show that the garnishees owed the Texas, and not the Ohio, corporation, but as to the garnishee who answered, Evans Drug Company, the proof failed through lack of knowledge of the witness. The trial court denied the motion to vacate, and movant thereupon perfected its appeal to this court.

[1, 2] Two questions seem to be decisive of the clause: First, was there a general appearance by the Ohio corporation? Second, was it the corporation sued? The latter involving the question of whether or not the amendment above referred to was justified. We think both questions must be resolved in the affirmative. It must at all times be borne in mind that the two corporations did not have the same name, since it clearly appears that the words "of Texas" were part of the corporate name of the Texas corporation. Bearing this distinction in mind, it seems the suit was entitled against the "Bishop-Babcock-Becker Company" which was the Ohio corporation. The summons in garnishment was issued to ascertain if debts were due "Bishop-Babcock-Becker Company." That corporation executed the dissolving bond on the garnishment. This clearly, since the officer who signed its name was not an officer of the Texas corporation. That the Ohio corporation then considered itself the defendant must be taken from its action in giving the notice of the bond, since it is there recited that "defendant has this day filed a bond." So the "defendant" moved to discharge the garnishment. Only the name of the state of incorporation was wrongly stated in the petition. This was descriptive only, and is somewhat counteracted by the other descriptive allegation, to the effect that the corporation sued was the one which succeeded to the liabilities of the L. A. Becker Company, from whom the fountain was purchased. Very evidently the plaintiff intended to sue the Ohio corporation. Likewise evidently the Ohio corporation regarded itself as defendant, at least in the proceedings to discharge the garnishment. Did its acts constitute a general appearance to the action? In determining this question we leave out the effect of the answer. It is too ambiguous to justify its interpretation unless necessary. In it the words "of Texas" are apparently used descriptively and not as an integral part of the corporate name. The signature is that of the Ohio corporation, and not that of the Texas company. It is plausibly insisted that it is the act of the Ohio and not the Texas corporation, since the attorney who signed it for the corporation is shown to have represented the Ohio, if not both the corporations. But, waiving this, there appear to be other acts, any one of which might, under proper circumstances, and all of which, taken together, clearly do constitute a general appearance. In the first place the stipulation to extend time and its filing in court and tacit acceptance by the court would, under many authorities, constitute a general appearance. See the cases cited in R. C. L. 229, 230, C. J. 844, 845, and Standard Ency. Prac. 495. Again it appears that the Ohio corporation sought the action of the court upon a discharge of the garnishment. The jurisdiction of the court was thus not invoked upon a motion alone challenging that jurisdiction, but upon a motion calling for the exercise of jurisdiction. The rule in this

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state in this regard is stated and previous authorities cited in the late case of City Natl. Bank v. Sparks, 151 Pac. 225, not yet officially reported. Finally the Ohio corporation made and executed the bond to discharge the garnishment. Section 4838, Rev. Laws 1910, provides in part:

"The defendant may, at any time after the garnishment affidavit is filed, and before judgment, file with the clerk of the court an undertaking, executed by at least two sureties, resident freeholders of the state, to the effect that they will, on demand, pay to the plaintiff the amount of the judgment which may be recovered against such defendant in the action, with all costs not exceeding a sum specified."

It is provided, in section 4839 following, that after the giving of such bond "all garnishees shall be discharged, and the garnishment proceedings [shall be] deemed discontinued."

It would seem under these statutes the giving of such a bond by "the defendant" must operate as a general appearance by him. Otherwise a very anomalous condition must result. Where such an action is started against a nonresident, as to whom personal service cannot be had, jurisdiction obtained through garnishment proceedings is solely in rem—against the property. Under the statute the giving of a discharging bond "discontinues" the garnishment proceedings. Unless, therefore, the giving of the bond operates as a general appearance, allowing the action to be continued in personam, the nonresident defendant, by giving the bond, could abate the action in rem, and, personal service being impossible, the plaintiff would be left with a cause of action but no means of enforcing it. This, we think, was hardly contemplated by the lawmakers. The giving of the bond must therefore operate as a general appearance to the action. Upon somewhat analogous statutes in regard to replevin it has been held by this court that the giving by the defendant of a bond to deliver the property replevied and pay all costs and damages that may be awarded against him operates as a general appearance in the action. Fowler v. Fowler, 15 Okl. 529, 82 Pac. 923; McCord-Collins Co. v. Dodson, 32 Okl. 561, 121 Pac. 1085; Ferguson v. McKee, 33 Okl. 332, 125 Pac. 458. So, too, in regard to attachment bonds, it was held as early as Barry v. Foyles, 1 Pet. 311–315, 7 L. Ed. 157, by Chief Justice Marshall, that the giving of a bond in discharge of the attachment, conditioned to pay the judgment if awarded, operated as a general appearance. In Butcher v. Cappon & Bertsch Co., 148 Mich. 552, 112 N. W. 110, 12 Ann. Cas. 169, it is said:

"The dissolution of the attachment by giving the statutory bond, to pay any judgment which may be recovered in the suit commenced by said writ of attachment, operated as an appearance, and converted the suit from an action in rem into an action in personam."

See, also, Winter v. Union Packing Co., 51 Or. 97, 93 Pac. 931, where the distinctions between a forthcoming and a discharging bond and the effect of filing same are considered and cases therein cited. See, also, 6 C. J. 336, 337, and 6 Cyc. 686, where many pertinent cases to like effect are cited.

Upon the particular question of filing a bond to discharge a garnishment, People v. Cameron, 2 Gilman (7 Ill.) 468, and Carpenter, Baggett & Co. v. Miller, 2 Ala. App. 373, 56 South. 845, appear to be in point, holding that the giving of a bond to discharge the garnishment and to pay any judgment awarded operates as a general appearance.

[3] Irrespective, therefore, of the filing of the answer and prior thereto, the Ohio corporation whose officer executed the discharging bond, had entered a general appearance in this cause. We have then a case against a corporation, rightly named, with such corporation properly in the action and within the jurisdiction of the court, and the plaintiff seeking to amend his petition so as to properly describe the defendant company. It must be apparent that, where there are two corporations of the same name, incorporated in different states, and upon an allegation of incorporation in a certain state the corporation of that state is brought in by appearance or otherwise, the plaintiff could not, by amendment, change his allegation as to the state of incorporation, and justify a judgment against the other corporation of the same name, which had neither been summoned nor appeared. Thus a suit against the A Company of Texas, as to which that company alone appeared, could not, by amendment, be changed to a suit against the A Company of Ohio, and judgment rendered against such A Company of Ohio without process to or appearance by the latter company. But suppose, as here, the suit be against the A Company of Texas, and the A Company of Ohio is lawfully summoned to appear thereto. May not the pleader amend so as to properly describe the party already in court as defendant to his suit? We think so. Further, in the case at bar, the names of the corporations were not identical. It is simply a case of the pleader suing the Ohio corporation and with the Ohio corporation rightfully before the court then seeking, by amendment, to properly describe it. No case has been cited holding such an amendment not justified. On the other hand, cases of misnomer corrected by amendment are numerous in the books. We conclude, therefore, that the petition as properly amended was against the Ohio corporation, and that such corporation was within the jurisdiction of the trial court by general appearance, and that all the requisites of jurisdiction to render a judgment in the original cause were present.

The trial court, therefore, properly overruled the motion to set that judgment aside for lack of jurisdiction.

Judgment affirmed, with costs.

PER CURIAM. Adopted in whole.

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(61 Okl. 254)

HAGEL v. GRIFFIN et al. (No. 7481.)

(Supreme Court of Oklahoma. Nov. 14, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⟸773(2)—BRIEFS—FAILURE TO FILE—DISMISSAL.

Appeal dismissed for failure of plaintiff in error to file brief in compliance with the rules of this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108; Dec. Dig. ⟸773(2).]

Commissioners' Opinion, Division No. 3. Error from District Court, Ottawa County; Preston S. Davis, Judge.

Action by William Hagel against Victor Griffin and another. Judgment for defendants, and plaintiff brings error. Dismissed.

JOHNSON, C. This appeal was taken by plaintiff from a judgment in favor of defendants. The appeal was filed in this court on May 11, 1915. It was submitted on April 16, 1916, and the appeal was dismissed on account of failure of plaintiff in error to file brief. On April 27, 1916, the dismissal was set aside, and the appeal reinstated. The cause was set for oral argument in this court upon September 7, 1916, and continued by agreement until October 2, 1916.

Counsel did not appear to argue the case, and no briefs have been filed by either plaintiff in error or defendants in error. Plaintiff in error will be held to have abandoned his appeal; and the appeal should be dismissed for failure to file brief and want of prosecution.

PER CURIAM. Adopted in whole.

(61 Okl. 247)

FIRST NAT. BANK OF CHECOTAH v. LEWIS. (No. 8028.)

(Supreme Court of Oklahoma. Nov. 14, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⟸1001(1) — REVIEW—QUESTIONS OF FACT—VERDICT.

In a case at law, this court will not set aside the verdict of a jury upon the weight of the evidence; there being some evidence reasonably tending to support the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928-3933; Dec. Dig. ⟸1001(1).]

Commissioners' Opinion, Division No. 2. Appeal from District Court, McIntosh County; T. P. Clay, Judge.

Action in conversion by Oscar Lewis, as guardian of Frank T. Lewis, against the First National Bank of Checotah. Judgment for plaintiff, and defendant appeals. Affirmed.

J. B. Lucas and B. H. Tabor, both of Checotah, for plaintiff in error.

BURFORD, C. The sole question raised in the brief of plaintiff in error is the insufficiency of the evidence to support the verdict rendered herein. The case turned upon the question of whether the bank had notice prior to taking a certain mortgage that the property alleged to be converted belonged to the minor, Frank T. Lewis. Upon this question the guardian was positive that there was such notice, the president of the bank was equally positive that there was not. This was the only evidence upon that point. There were some circumstances proven tending to impeach the guardian's veracity and good faith. The jury, however, believed him and the trial judge, whose duty it was to set aside the verdict, unless, after weighing the evidence, he believed the verdict to be right under the evidence and the law, sustained the verdict, rendered judgment upon it, and refused a new trial. It is axiomatic in this jurisdiction that in a suit at law this court will not set aside the verdict of a jury upon the weight of the evidence, there being some evidence reasonably tending to support the verdict. After an examination of the record, as well as counsel's brief, we are unable to say that there is no such evidence in this cause.

Judgment affirmed.

PER CURIAM. Adopted in whole.

(61 Okl. 263)

PERRY, County Treasurer, et al. v. CARSON. (No. 3432.)

(Supreme Court of Oklahoma. Nov. 14, 1916.)

(Syllabus by the Court.)

1. EQUITY ⟸46—JURISDICTION—REMEDY AT LAW.

Relief will not be granted by a court of equity where at the time there is a plain, specific, and adequate remedy at law.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 151, 152, 157, 159-163; Dec. Dig. ⟸46.]

2. TAXATION ⟸608(9)—ASSESSMENT—REMEDIES FOR WRONGFUL ASSESSMENT.

Whenever the statutes of the state provide a mode by which appeals may be taken from the assessment of equalization of property, that remedy is exclusive. Resort cannot be had to equitable remedies.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1238; Dec. Dig. ⟸608(9).]

3. TAXATION ⟸608(10)—ASSESSMENT—REMEDIES FOR WRONGFUL ASSESSMENT.

Article 9, c. 81, Sess. Laws, 1907—08, providing for the listing and assessing of omitted property, known as the Tax Ferret Law, provides a remedy by appeal to the county court from the final action of the county treasurer upon any assessments of omitted property made thereunder to the party aggrieved, and where the aggrieved party neglects or refuses to avail himself of the remedy provided by statute for the correction of error of which he complains, the court is without jurisdiction to exercise its equitable powers by restraining the collection of taxes due under such assessment.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1239; Dec. Dig. ⟸608(10).]

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Commissioners' Opinion, Division No. 1. Error from Superior Court, Pottawatomie County; George C. Abernathy, Judge.

Action by E. T. Carson against W. C. Perry, County Treasurer, and others. Judgment for plaintiff, and defendants bring error. Reversed, with instructions.

Chas. West, Atty. Gen., C. J. Davenport, Asst. Atty. Gen., C. P. Holt, of Shawnee, and Hoffman & Foster, of Chandler, for plaintiffs in error. Blakeney, Maxey & Miley, of Muskogee, for defendant in error.

RUMMONS, C. This action was instituted in the superior court of Pottawatomie county by the defendant in error, hereinafter styled the "plaintiff," against the plaintiffs in error, hereinafter styled the "defendants," to enjoin the collection of certain taxes assessed against the plaintiff under the Tax Ferret Law, upon property which had been omitted from taxation in previous years and discovered by the tax ferret. The defendants demurred to the petition of plaintiff, which demurrer was overruled and exception allowed. At the commencement of the action a temporary injunction was granted, which, upon trial, was made permanent. The defendants in due time moved for a new trial, which motion being overruled, and having duly excepted, they bring this cause here to reverse the judgment of the trial court.

The principal contention of defendants is that the petition of the plaintiff and the evidence offered at the trial does not warrant the interposing of the equitable remedy of injunction, for the reason that the plaintiff had a complete and adequate remedy at law.

It is contended on behalf of the plaintiff that the evidence discloses that one C. H. Pittman was employed under authority of article 9, c. 81, Session Laws 1907–08, to assist the county officers of Pottawatomie county in discovering and placing on the tax rolls omitted property; that, pursuant to said employment, said Pittman alleged that he had discovered certain omitted property belonging to the plaintiff, and so reported to the county treasurer; that the county treasurer failed and neglected to give to the plaintiff the ten days' notice in which to file objections to the assessing of such property, as required by said act of the Legislature. It appears, however, that the plaintiff did file objections to the assessment of the property claimed to have been omitted from taxation. Plaintiff contends that the proceeding taken to assess said property and place it upon the tax rolls are wholly void, in that the county treasurer did not pass personally upon the objections made by plaintiff, but submitted the same to the said tax ferret, Pittman, and, acting upon his recommendation, spread said assessment upon the tax rolls.

Plaintiff contends that the proceeding which resulted in the assessment of taxes, sought to be enjoined against him, were wholly void, and therefore that injunction was his proper remedy.

The provisions of the act of the Legislature, material for our consideration, are as follows:

"The board of county commissioners of any county in this state may contract with any person or persons to assist the proper officers of the county in the discovery of property not listed and assessed as required by existing laws, and fix the compensation not to exceed twenty-five per cent. of the taxes recovered under this act. Before listing and assessing the property discovered, the county treasurer shall give the person in whose name it is proposed to assess the same, ten days' notice thereof by registered letter, addressed to him at his last known place of residence, fixing the time and place when objections in writing to such proposed listing and assessment may be made. An appeal may be taken to the county court from the final action of the treasurer within ten days by giving notice thereof in writing and filing an appeal bond as in cases appealed from the board of county commissioners to the district court."

We are unable to agree with the contention of plaintiff that the proceeding resulting in the assessment of taxes complained of were void, for the reason that the statute gave the county treasurer jurisdiction to act upon the report of the tax ferret and the objections filed thereto. Plaintiff, having filed objections, thereby appeared before the county treasurer and cannot complain of want of notice. If the treasurer had jurisdiction to act upon his objections, the fact that he may have acted without considering the evidence, and upon the judgment of another, would constitute an erroneous proceeding only, and not a void one, had the statute above quoted required the treasurer to hear evidence, which it does not. However, it appears from the record in this case that the plaintiff agreed and consented that the valuation of the property upon which the assessment was made, as made by the county treasurer, was correct.

The statute under which this assessment was made provides:

"An appeal may be taken to the county court from the final action of the treasurer, within 10 days."

It thus appears that if the county treasurer acted upon insufficient evidence, or upon no evidence, as contended in the brief of plaintiff, the Legislature had provided a means of review of the action of the county treasurer of which plaintiff might avail himself.

[1, 2] It has been repeatedly held by this court "that relief will not be granted by a court of equity, where at the time there is a plain, specific, and adequate remedy at law," and, "where the statutes provide a plain, specific, and adequate remedy for the correction of erroneous assessments, a court will not exercise its equity powers by restraining the collection of taxes due under an alleged error in assessment, where the complaining party neglects or refuses to avail

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himself of the remedy provided by statute for the correction of the error of which he is complaining." Fast v. Rogers, 30 Okl. 289, 119 Pac. 241.

[3] Again, in Williams v. Garfield Exchange Bank of Enid, 38 Okl. 539, 134 Pac. 863. it is held:

"Whenever the statutes of a state provide a mode by which appeals may be taken from the assessment or equalization of property, that remedy is exclusive. Equitable remedies cannot be resorted to."

Under these authorities, it is apparent that the only remedy of plaintiff against the action taken by the county treasurer consisted in appeal to the county court under the provisions of the statutes, and that he was not entitled to maintain an action of injunction to restrain the collection of the taxes levied against him.

The trial court therefore erred in granting a permanent injunction restraining the collection of said taxes, and this cause should be reversed and remanded to the trial court, with instructions to dismiss the petition of plaintiff

PER CURIAM. Adopted in whole.

(61 Okl. 274)

SMITH v. ALDRIDGE. (No. 7809.)

(Supreme Court of Oklahoma. Nov. 15, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⟸847(2), 1009(2)—REVIEW—SCOPE AND EXTENT—INSTRUCTIONS—QUESTIONS OF FACT.

In cases of purely equitable cognizance, the verdict of a jury is only advisory; and, where the court adopts such verdict, instructions given to the jury will not be reviewed upon appeal. In such cases, if the judgment of the court is sustained by the evidence, the same will be approved here.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3368-3371, 3971; Dec. Dig. ⟸847(2), 1009(2).]

Commissioners' Opinion, Division No. 3. Error from District Court, Seminole County; Tom D. McKeown, Judge.

Action by E. C. Aldridge against T. H. Smith. Judgment for plaintiff, and defendant brings error. Affirmed.

Cobb & Cobb and J. A. Baker, all of Wewoka, for plaintiff in error. Pryor & Stokes, of Wewoka, for defendant in error.

HOOKER, C. The defendant in error filed this action in the district court of Seminole county seeking to recover the possession of the real estate involved here, and quiet his title thereto. And in the petition in said action it is alleged that one Lina was a Seminole allottee, and as such allottee this real estate was allotted to her; that she died on the 31st day of July, 1911, leaving no children, never having been married, and leaving as her sole and only heir at law her mother, one Hannah, who on the 4th day of September, 1911, conveyed this real estate by warranty deed to him; and that by virtue of said deed he was the owner of the said real estate, but that the title thereto was clouded by a deed made by one Chilly Ross to T. H. Smith, which deed had been filed for record.

It appears from the record that the plaintiff in error contends that Chilly Ross and Lina some time prior to her death entered into a common-law marriage, and that Lina at the time of her death was the common-law wife of Chilly Ross, and that Chilly Ross as her husband inherited one-half of this land, and that he having purchased the interest of Chilly Ross therein was the owner of a one-half undivided interest in said property. This was denied by the defendant in error.

Under the authorities of this court, this action was one of equitable cognizance, and, although the trial court submitted the cause to a jury, the verdict of the jury was only advisory to the court. The trial court here adopted the verdict of the jury as its view and conclusion. It is unnecessary to consider any alleged errors in the instructions to the jury, as the court's judgment, coinciding with the judgment of the jury, eliminates the same from our consideration. The issue involved was whether the relation that existed between Lina and Chilly Ross was meretricious or marital. The jury and the trial court, after hearing the evidence, reached the conclusion that the relation of husband and wife did not exist between these two people, and the defendant in error was successful in the lower court. We cannot say that the opinion of the court is against the weight of the evidence when we consider the reprehensible conduct of Chilly Ross in deserting his alleged common-law wife upon her deathbed, his failure to attend her funeral, his failure or refusal to pay for her burial expenses, his expressed doubt as to the paternity of their child, and his admission that he procured the marriage license, which is somewhat indicative that he did not rely upon the common-law relation. To give to him the relation of a common-law husband when his responsibilities are ended by the death of his common-law wife, which he denied in her lifetime, in order that he might inherit her property, would in our judgment be an insult to the marriage relation and place a premium upon illicit cohabitation. In her lifetime he was cruel, inhuman, and beastly towards her. His acts constitute the best index of the intention of his cohabitation, and his conduct towards her speaks with more force and character than his words, and, while it is the expressed policy of the law of this court to adopt that view of relations of this character which will uphold marriages and make cohabitation of this character lawful, still, under the evidence here, the behavior of Chilly Ross be-

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lies the marital relation and indicates exclusively a lustful indulgence.

As we view the evidence, the weight of the same supports the judgment of the trial court, and this cause is affirmed.

PER CURIAM. Adopted in whole.

(61 Okl. 256)

NATIONAL COUNCIL KNIGHTS AND LADIES OF SECURITY v. OWEN.
(No. 8071.)

(Supreme Court of Oklahoma. Nov. 14, 1916.)

(Syllabus by the Court.)

1. INSURANCE ⟸723(5)—CONTRACT—APPLICATION—HEALTH OF INSURED.

The fact that an applicant for life insurance is temporarily indisposed at the time of making the application will not avoid the policy, if the illness is not of a character to permanently affect his health, or render him more susceptible to the attack of disease, although he represents in the application that he is in good health at the time.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1863; Dec. Dig. ⟸723(5).]

2. INSURANCE ⟸825(2)—FRATERNAL BENEFIT INSURANCE—ACTIONS—QUESTIONS FOR JURY.

The truth or falsity of warranties in an application for insurance, where there is a conflict in the evidence, is a question of fact for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. ⟸825(2).]

3. INSURANCE ⟸723(5)—APPLICATION—"DISEASE."

Where, by the terms of a policy of life insurance, the answers to the questions by the applicant are made warranties, and the applicant answers "no" to certain questions relative to "disease" of specific bodily organs, *held*, that the term "disease," within the intention of the parties to the contract, does not include slight or temporary ailments of such organs, and that, the testimony being in conflict as to the breach of such warranties, a question is presented for the determination of the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1863; Dec. Dig. ⟸723(5).

For other definitions, see Words and Phrases, First and Second Series, Disease.]

Commissioners' Opinion, Division No. 2. Error from District Court, Grady County; Will Linn, Judge.

Action by Lula Owen against the National Council Knights and Ladies of Security. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 149 Pac. 231.

S. C. Durbin, of Chickasha, for plaintiff in error. Riddle & Hammerly, of Chickasha, for defendant in error.

GALBRAITH, C. The defendant in error, Lula Owen, sued the plaintiff in error, the National Council Knights and Ladies of Security, on a benefit certificate issued to her late husband, Edward G. Owen, during his lifetime and payable to her at his death. It was alleged in the petition that this certificate, for a valuable consideration, had been issued on October 13, 1910, in the sum of $3,000, payable to the plaintiff as surviving widow, in the event of the death of the insured, and that Edward G. Owen died on the 16th day of November, 1910, and that the policy provided that if the death of the assured occurred within six months of the date of issuance of certificate then the same might be discharged on the payment of 60 per cent. of the face thereof, and that the plaintiff had complied with all the conditions of the policy to be kept and performed by the beneficiary, and that the same was in full force and effect on the date of the death of the assured, and that demand for payment had been made, and that $1,800 was due thereon; that no part of the same had been paid. The action was commenced on the 27th day of April, 1911. The society denied liability on the ground that the assured had made false statements in his application for the certificate, and that such statements being false, under the terms of the contract, rendered the certificate void. There was a trial to the court and jury, and a judgment rendered in favor of the plaintiff, which, on appeal to this court, was reversed for errors at the trial. See National Council Knights and Ladies of Security v. Owen, 149 Pac. 231. On the second trial the plaintiff again recovered judgment, and the cause is here again for review.

The answer of the society raised but one defense; that is, the breach of warranties made by the assured in his application for the certificate. It is contended that in the application for the certificate the following questions were asked and answers given:

"Have you or have you ever had any of the following diseases or symptoms or any disease of the following named organs?" To which the applicant answered "No," as follows:

"Kidneys, disease of"—"No."

"Liver, disease of"—"No."

"Loss of consciousness"—"No."

And further:

"Is there anything to your knowledge or belief in your physical condition, family history or habits tending to shorten your life, which is not distinctly set forth above?" To which the applicant answered, "No."

And also:

"Have you had any illness, constitutional disease or injury during the past five years requiring the services of a physician or surgeon?" To which the applicant answered, "No."

And it is alleged that each of the answers made by the applicant to the questions were false, and that:

"The said Edward G. Owen had been treated for disease of the kidneys within a few days prior to the signing of said application, and had been treated for loss of consciousness, and had been unconscious for a period of two or more days within three weeks before the date of making the application, and had been informed by his family physician that his physical condition was such as to end his life within three or six months. By reason of such representations and false statements and answers, and breach of such

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warranties, said certificate was of no effect and void."

[1] A reply was filed denying that any false answers were made to the questions, and alleging that there had been no breach of the warranties in the contract of insurance. It seems that the argument of the plaintiff in error on this branch of the case is fully answered by the court in Continental Casualty Co. v. Owen, 38 Okl. 107, 131 Pac. 1084, which was an action by the defendant in error on an accident policy issued and delivered to the said Edward G. Owen, wherein the court says, in the first paragraph of the syllabus, as follows:

"In an action on an accident insurance policy, there was a sharp conflict in the evidence as to whether the insured was suffering from acute or chronic nephritis about 30 days prior to the issuance of the policy. A physician who was called into the case at that time, and who attended the insured until a few days prior to his death from an accidental gunshot wound inflicted about 30 days after the issuance of the policy, testified that he found the insured suffering from an acute attack of nephritis; that he responded readily to treatment for that disease, and within a few days commenced to show marked improvement; that within two or three weeks he was practically restored to health; that 'his color was as good and he was as healthy looking as anybody during the latter part of the time I was treating him'; and that an examination of the urine and the symptoms indicated that his recovery was complete. Held, that whether the insured was suffering from a 'defect in the body,' within the meaning of that phrase in a statement of the insured indorsed on the policy to the effect that he had no 'defect in body,' was a question for the jury."

[2] In the case at bar there was likewise a sharp conflict in the testimony as to the physical condition of the applicant at the time of making the application for the certificate, and a few weeks prior thereto. According to some of the physicians testifying, he was stricken with a fatal disease of the kidneys and liver, and could only possibly live a very few months at the best. While the testimony of other physicians, especially that of the examining physicians for the society, was to the effect that the trouble was a temporary ailment which yielded readily to treatment, and that the assured was in ordinary health at the time the application was signed, and that he, as examining physician for the society, after a thorough examination of the applicant, recommended the issuing of the certificate, and that the assured did not die of a disease but on account of a gunshot wound. In this state of the evidence, the question of the falsity of the answers returned to the questions was peculiarly one for the jury.

Again, complaint is made of two instructions of the court to the jury, one being instruction No. 5, wherein the court presents to the jury the theory of the plaintiff, and the burden of this complaint being that it does not also state the theory of the defendant. Inasmuch as this instruction is followed by Nos. 6 and 7, in which the theory of the defendant is fully set out to the jury, it seems that this objection is not well taken. As was said by this court in Grant v. Milam, 20 Okl. 672, 95 Pac. 424:

"It is not required that the entire law of the case shall be stated in a single instruction, and it is therefore not improper to state the law as applicable to particular questions or particular parts of the case in separate instructions, and if there is no conflict in the law as stated in different instructions, and all the instructions considered as a series present the law applicable to the case fully and accurately, it is sufficient."

See, also, G., C. & S. F. R. Co. v. Taylor, 37 Okl. 99, 130 Pac. 574; First National Bank v. Ingle, 37 Okl. 276, 132 Pac. 895; and Chickasha Street Ry. Co. v. Marshall, 43 Okl. 193, 141 Pac. 1172.

[3] Again, complaint is made of instruction No. 8, which reads as follows:

"You are instructed, gentlemen of the jury, that to constitute a disease, under the terms of the application as used, would not include merely a temporary ailment which would not affect the general health."

The third paragraph of the syllabus of Mutual Life Ins. Co. v. Morgan, 39 Okl. 205, 135 Pac. 279, seems to support the law as announced in this instruction as follows:

"The fact that an applicant for life insurance is temporarily indisposed at the time of making the application will not avoid the policy, if the illness is not of a character to permanently affect his health, or render him more susceptible to the attack of disease, although he represents in the application that he is in good health at the time."

In Des Moines Life Ins. Co. v. Clay, 89 Ark. 230, 116 S. W. 232, the Supreme Court of Arkansas say:

"The court instructed the jury that the question quoted above had reference to only such diseases as affect the general health and are serious in their nature, and not to temporary or trivial ailments. That instruction was correct and declared the law in accordance with the decisions of this court. Assurance Society v. Reutlinger, 58 Ark. 528, 25 S. W. 835; Mutual Reserve Fund v. Farmer, 65 Ark. 581, 47 S. W. 850; Franklin Life Ins. Co. v. Gallighan, 71 Ark. 295, 73 S. W. 102, 100 Am. St. Rep. 73. The evidence was sufficient to justify a finding by the jury that there was no breach of warranty and that appellant is liable on the policy."

In Corbett v. Met. Life, 37 App. Div. 152, 55 N. Y. Supp. 775, it is said:

"A temporary ailment, from which a person recovers, cannot be considered a disease, within the meaning of a life insurance policy."

In Manufacturers' Accident Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581, Judge Taft, speaking for the Circuit Court of Appeals, said on this question:

"The court told the jury that, in determining the question whether the insured was or was not afflicted with any disease or bodily or mental infirmity, they were to inquire whether he had some specific ailment; that it would not come within the scope of this warranty that he might, like other men or the generalty of men, have been subject to occasional attacks of the kinds that are specified, 'but there must have been some specific determination towards such condition of the body, or some part of it, as would amount to a disease or a bodily infirmity.'

"It seems to us that the court accurately stat-

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ed the legal effect of the contract contained in the application and the policy. An anæmic murmur, it was admitted, indicated no structural defect of the heart, but arose simply from mere temporary debility or weakened condition of the body. We do not think that this comes within the definition of 'bodily or mental infirmity,' as the term is used in the application. The statement in the application by the insured did not, either in his contemplation or that of the company, refer to any mere temporary ailment or indisposition which did not tend to weaken and undermine the constitution at the time of taking membership. Pudritzky v. Supreme Lodge, 76 Mich. 428, 43 N. W. 373; Brown v. Insurance Co., 65 Mich. 306, 32 N. W. 610 [8 Am. St. Rep. 894]; Insurance Co. v. Daviess' Ex'x, 87 Ky. 541, 9 S. W. 812; Life Ins. Co. v. Francisco, 17 Wall. 672 [21 L. Ed. 698]."

And again in the course of the opinion it is said:

"We are therefore finally brought to the question what the words 'disease and bodily infirmity' include. We think the charge of the court below upon this point must be sustained. In a broad, generic sense, any temporary trouble by reason of which a man loses consciousness is a disease. It is a condition of the body not normal, and produced by the imperfect working of some function, but as the imperfect working is not permanent, and the body returns at once, or in a short period of time, to its normal condition, it does not rise to the dignity of a disease. A fainting spell produced by indigestion or a lack of proper food for a number of hours, or from any other cause which would not indicate any disease in the body, but would show a mere temporary disturbance or enfeeblement, would not come within the meaning of the words 'disease and bodily infirmity,' as used in this policy.

"It is a well-settled rule in the construction of insurance policies of this character, which the insured accepts for the purpose of covering all accidents, to construe all language used to limit the liability of the company, strongly against the company. Policies are drawn by the legal advisers of the company, who study with care the decisions of the courts, and, with those in mind, attempt to limit as narrowly as possible the scope of the insurance. It is only a fair rule, therefore, which courts have adopted, to resolve any doubt or ambiguity in favor of the insured and against the insurer."

In Sovereign Camp of Woodmen of the World v. Jackson, 157 Pac. 92, it is said:

"The words 'in good health' do not imply physical perfection and freedom from all the ailments that flesh is heir to. To be not in good health within the meaning of the policy must be such physical condition as to materially affect the risk, or such that, if the company had known the condition of the insured, it would not have delivered the policy. The fact that a man has the incipient elements of disease (the seeds of death) in him, which may or may not shortly spring up into fatal disease, does not mean that he does not fulfill the meaning of the term 'in good health.' To be in 'good health' is a comparative term, and a man with a slight cold, such as to cause no apprehension of anything serious, can accept a policy of insurance 'in good health' without being considered to have prepetrated any fraud upon the company or to have rendered his insurance contract void by reason of a violation of its terms."

The foregoing authorities sustain the contention that this instruction is a fair statement of the law applicable to the question under consideration. We do not think that a temporary ailment of the kidneys or other bodily organs can be considered a disease within the contemplation of the parties to the contract and within the terms as used in the application. The disease herein referred to is evidently some affliction of a serious, permanent nature, and does not include a slight or temporary affliction. At least, there was ample evidence in the record to take this question to the jury. The jury by its verdict found that the affliction was of a temporary and not a permanent nature, and that therefore there was no breach of the warranties as contended by the plaintiff in error.

Upon the whole record, it seems that a fair trial was had in this case and a just verdict returned. There is, however, one slight error in instruction No. 5, and in the judgment, in this, that the court instructed the jury that if they found for the plaintiff below they should calculate interest from February 1, 1911, and the judgment rendered on the verdict was accordingly entered. There was nothing in the record to justify such direction, although in the petition interest was prayed for from February 1, 1911, but under the terms of the certificate the claim did not mature until proof of death had been furnished. Section 5 of the benefit certificate reads as follows:

"No action in any court can or shall be maintained on this certificate until after the proof of death, and claimant's right to benefits, as provided in the laws of the order, have been filed with the National Secretary and passed upon by the National Executive Committee, nor unless brought within one year from the date of death of the member."

The action was commenced within one year after the death of the member, but there is no testimony in the record as to when the proofs of the death were furnished.

"Interest is the compensation allowed for the use or forbearance, or detention of money, or its equivalent." Section 1002, Rev. L. 1910.

Until the claim matured on this certificate, no interest could be calculated thereon; that is, prior to that time there could be no "forbearance or detention of money." There is no testimony in the record to show that the claim matured or became due and payable on or before February 1, 1911. It may be presumed that the proofs of death were furnished before suit was filed. Since the furnishing of such proof was a condition precedent to the maintenance of the suit, it may be that interest should be calculated on the claim from the date of the filing of suit, and not from the date judgment was rendered. In any event, there is nothing in the record to justify the instruction that interest should be calculated from February 1, 1911.

The defendant in error should therefore be required to file a remittitur of all interest included in the judgment prior to April 27, 1911, the date of filing the suit, and evidence the same by the certificate of the clerk of the trial court, and, on presenting such

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evidence to this court, the judgment appealed from should be affirmed.

PER CURIAM. Adopted in whole.

(61 Okl. 244)

FARMERS' PRODUCT & SUPPLY CO. v. BOND. (No. 7835.)

(Supreme Court of Oklahoma. Nov. 14, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⟸1068(4)—HARMLESS ERROR—INSTRUCTION.
Instructions and refusal of instructions on plaintiff's damages in the event he prevails are immaterial, where he does not prevail.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4228; Dec. Dig. ⟸1068(4); Trial, Cent. Dig. § 558.]

2. WITNESSES ⟸268(8) — IMPEACHMENT — CROSS-EXAMINATION.
Where an attachment affidavit states grounds of attachment, which the pleadings show to be false, and which are conceded by the parties to be untrue, and the maker of the affidavit is upon the witness stand for the plaintiff, it is not error to permit a cross-examination of the witness as to the falsity of the statements in such affidavit. Record examined, and *held*, there is no error shown in reference to the permitting of such cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 940; Dec. Dig. ⟸268(8).]

3. APPEAL AND ERROR ⟸757(3) — RECORD—QUESTIONS PRESENTED FOR REVIEW.
Where a party complains on account of the admission or rejection of testimony, and does not set out in his brief the full substance of the testimony to the admission or rejection of which he objects, and does not state any specific objections thereto, but merely states that the lower court erred as will be seen at certain pages of the case made, this court will not investigate such complaint to find error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 392; Dec. Dig. ⟸757(3).]

4. APPEAL AND ERROR ⟸692(1)—RECORD—QUESTIONS PRESENTED FOR REVIEW.
In order for this court to consider the effect of the refusal of an offer of testimony, the party offering such testimony is required to incorporate into the record a showing as to what such testimony would be, if admitted. Otherwise, this court cannot pass upon the admissibility of such evidence, and must assume that there was no error in its refusal by the lower court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2905, 2906; Dec. Dig. ⟸692(1).]

5. APPEAL AND ERROR ⟸1058(2)—REVIEW—HARMLESS ERROR — EXCLUSION OF EVIDENCE.
Error in the exclusion of the testimony of a witness is harmless, where such witness has already testified to the facts upon which his testimony is again offered, or where he is afterwards permitted to testify fully with reference to such facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4201; Dec. Dig. ⟸1058(2).]

6. ADMISSION AND EXCLUSION OF TESTIMONY —NONPREJUDICIAL ERROR.
Record examined, and *held*, that in this case there is no prejudicial error in the admission and exclusion of testimony objected to, and that the verdict is supported by the evidence.

Commissioners' Opinion, Division No. 3. Error from District Court, Blaine County; James B. Cullison, Judge.

Action by the Farmers' Product & Supply Company against Albert Bond. Judgment for defendant, and plaintiff brings error. Affirmed.

Wm. O. Woolman, of Watonga, for plaintiff in error. Foose & Brown, of Watonga, for defendant in error.

JOHNSON, C. This was a suit by the Farmers' Product & Supply Company, a corporation, plaintiff in error, against Albert Bond, defendant in error, to recover the sum of $974.32, damages for breach of a partly executed oral contract to sell wheat. Plaintiff alleged that on July 11, 1914, defendant orally agreed to sell to plaintiff, and plaintiff agreed to buy of defendant, 4,000 bushels of wheat, at the price of 64 cents per bushel, to be delivered on or before August 15, 1914; that the time of delivery was extended by agreement until September 1, 1915; and that defendant failed to deliver 2,564 bushels of the wheat. Plaintiff sued for the difference between the contract price of the undelivered wheat, and its value at the time of the alleged breach of the contract. Defendant contended: (1) That after he had delivered a part of the wheat, and prior to the final date for delivery under the contract, plaintiff refused to take any more wheat from defendant and rescinded the contract, which was acquiesced in by defendant; and (2) that at the time of the making of the contract it was understood between the parties that he (defendant), in the sale of some 933 bushels of the contracted wheat, was not acting for himself, but as the agent of a third party; and that, if the court should find that the contract had not been abandoned by plaintiff, judgment should not be rendered against him for damages for a failure to deliver that part of the wheat in reference to the sale of which he was acting only as an agent. The jury returned a general verdict for defendant, judgment was rendered accordingly, motion for new trial was overruled, and plaintiff appeals. The agency feature of defendant's contention was not included in the original answer, but was inserted with leave of court by amendment during the progress of the trial.

[1] Five of the specifications of error, argued by plaintiff in error, go to the allowance by the lower court during the trial of the amendment to the answer of defendant so as to set up the question of agency, and to the giving and refusal of instructions pertaining to the agency question. The amendment of the pleadings, and the giving and refusal of instructions, complained of, only pertained to the agency issue, and were not such matters as could have affected the

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consideration by the jury of the general issue of rescission of the contract by plaintiff. The two issues were entirely distinct. If the jury found that plaintiff had himself rescinded the contract, the question as to whether defendant acted as the agent for another in the sale of a part of the wheat was necessarily eliminated from their consideration. The issue of agency only went to the measure of damages, and could only have been considered by the jury in arriving at the amount of damages, if they had first found for plaintiff upon the general issue of a breach of the contract by defendant. The verdict was a general one against plaintiff; and therefore the jury necessarily found that there had been no breach of contract by defendant as to any of the wheat; and the dissection of the contract into two parts, one pertaining to wheat sold by defendant in his own behalf and another to wheat sold by him as agent, was a province which it was not necessary or proper for the jury to invade. The acts of the lower court, complained of, and pertaining to the agency issue, therefore were without harm to the rights of the plaintiff; and if, in this connection, there be errors, they are without prejudice. Dunham v. Holloway, 3 Okl. 244, 41 Pac. 140; Wertz v. Barnard, 32 Okl. 426, 122 Pac. 649; Howard v. Rose Township, 37 Okl. 153, 131 Pac. 683; Martin v. C., R. I. & P. Ry., 7 Okl. 452, 54 Pac. 696; Eddy v. La Fayette, 163 U. S. 456, 16 Sup. Ct. 1082, 41 L. Ed. 225.

[2] Plaintiff in error contends that there was misconduct in defendant and his counsel in the manner of asking certain questions of one Thom, a witness for plaintiff; that the questions so asked were insinuating and insulting to the witness, and tended unduly to discredit him before the jury; and that the court erred in its control of this examination.

It seems that, at the institution of the suit, the witness Thom had procured an attachment to be issued against the property of defendant and had sworn to the attachment affidavit, which was upon one of the printed forms in use in the state in such cases, which when not altered to fit the particular occasion, contains various charges of fraud, misdemeanor, and felony. In executing the affidavit the witness made no change in its form; and the affidavit, as sworn to by the witness, charged that the defendant was a foreign corporation, was converting his property in fraud of his creditors, had absconded with the intention to defraud his creditors, had committed a felony, had committed a misdemeanor and various acts of fraud, and that the suit was brought for damages arising from the seduction of a female. The suit was about wheat, and the defendant evidently resented his miscellaneous arraignment. Apparently this objection had some foundation. The witness was not as careful in his oath to the affidavit as the circumstances evidently required. The grounds of attachment and the testimonial conservativeness and scruple of the witness were issues in the case. The various blanket charges of the attachment affidavit were evidently too broad, and stated facts not true. Full cross-examination of the witness with reference to the grounds of attachment was unquestionably permissible. The court exercised a control over the cross-examination, which was more favorable to plaintiff than to defendant. Questions of defendant were excluded, which appear to us to have been permissible; and we do not find any questions, permitted by the court, which exceeded the bounds of legitimate cross-examination. The manner of counsel in the examination does not appear in the record, but was passed upon by the lower court in its ruling upon the motion for a new trial. The lower court witnessed the proceedings, and we will not interfere with his estimate of them. We find no error in this assignment.

The next assignment of error is that the lower court erred in rejecting the testimony of two witnesses for plaintiff, to wit, that of one Clark and one Garriott.

Plaintiff in error does not point out any such rejection of the testimony of the witness Clark, nor does he discuss at all any such action of the court. Upon the other hand, the record indicates that this witness testified fully.

[4] As to the witness Garriott, the record is not sufficient to sustain the assignment. When the witness was offered by plaintiff, being in rebuttal, the court stated that the examination of the witness would be restricted to the question of agency, and plaintiff excepted to this ruling. The court then stated that counsel might make his offers of testimony, and the offers would be passed upon; but that he would not permit the witness to be examined upon "this ink proposition," although the offer of the testimony would be permitted. The court declined to allow plaintiff to make the offer of the testimony in open court in the presence of the jury, and requested counsel to reduce his offer to writing, which counsel stated he would do. Neither the brief of plaintiff in error, nor the record, discloses that counsel requested to be allowed to dictate the offer into the record in the absence of the jury, or that he made the offer in writing. Not knowing, therefore, what the testimony would have been, if received, we are unable to say whether or not it would have been admissible, or whether there was error in its rejection. Offutt v. Wagoner, 30 Okl. 458, 120 Pac. 1018; Muskogee Elec. Trac. Co. v. Staggs, 34 Okl. 161, 125 Pac. 481; Turner v. Moore, 34 Okl. 1, 127 Pac. 487.

The tenth specification of error, argued by plaintiff in error, deals with alleged errors in the admission and exclusion of evidence. The argument of this specification points out questions, answers, rulings of the court,

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and exceptions, occurring during the giving of the testimony of witness Thom, for plaintiff, and of the defendant, Bond. All of this testimony, in reference to which specific objections are made, went solely to the question as to whether the defendant, Bond, was acting as the agent of the third party, Wagner, in selling a part of the wheat. The objections as to the Bond testimony were upon the ground that the agent was not competent to testify to the agency, and to the contention that the question of agency was not properly in the case. We have disposed of the latter question upon the assignment as to error in allowing the amendment to the answer. In the case of Whitcomb v. Oller, 41 Okl. 331, 137 Pac. 709, this court said:

"Agency and the extent of authority may be proved by the testimony, though not by the declarations of the agent."

We think there was no error in the admission of the Bond testimony, complained of.

[5] As to the effect of the admission and exclusion of the testimony of Thom, complained of in the brief, the occurrences complained of took place in the plaintiff's case in rebuttal. After that time, the court allowed the plaintiff to reopen his case, Thom was again placed upon the stand, and testified fully, covering all of the facts, questions as to which were excluded in the examination referred to in the assignment. Thom was on the witness stand four times, and covered very much the same ground several different times. The objections, which were sustained by the court, and which are complained of, went to the claim of defendant that the questions were repetitions and leading and called for conclusions. The objections seem to have been well founded; and, if not, any error in the rulings was cured by the subsequent admission of the testimony.

[3] In his brief, plaintiff in error further deals thus with this specification, viz.:

"Specification No. 10 involves the alleged errors of the court in the admission and rejection of evidence, as will more fully appear by a reference to the case made at pages commencing with the last question on page 197 and continuing through pages 198, 199, and to the end of the direct examination of the witness Pendergraft. * * * We think also there was error in the matter of rejecting evidence found on pages 282, 283, 284 and 285 of the case-made, which we think to be very prejudicial and such error as vitally affected the plaintiff in its cause."

No quotation of the record is made, and no argument or authorities given, and plaintiff in error does not point out how he is aggrieved at the portion of the record referred to. The rule of this court (section 25 of this court's rules) is that, where a party complains on account of admission or rejection of testimony, he shall set out in his brief the full substance of the testimony to the admission or rejection of which he objects, stating specifically his objection thereto. We therefore do not consider the alleged errors, referred to in the above excerpt from the brief of plaintiff in error.

[6] The ninth specification of error by plaintiff in error is that the verdict is contrary to the law and the evidence. Plaintiff in error does not argue this assignment, except by reference to the argument of the other specifications, hereinabove referred to; and submits no abstract of the evidence. We have examined the record, and in our opinion there is ample evidence to support the verdict, and we do not find where the jury violated its instructions.

The remaining assignments are that the verdict is contrary to the law, and that the court erred in overruling the motion of plaintiff for a new trial. The specifications, upon which these assignments are based, have already been covered in this opinion.

We find no prejudicial error in the record, and conclude that the judgment of the lower court should be affirmed.

PER CURIAM. Adopted in whole.

(61 Okl. 299)

RAWLINGS v. UFER. (No. 8035.)

(Supreme Court of Oklahoma. Nov. 21, 1916.)

(Syllabus by the Court.)

1. TRIAL ⟸156(2)—TAKING CASE FROM JURY —DEMURRER TO EVIDENCE.

The test applied to the demurrer to the evidence is that all the facts which the evidence in the slightest degree tends to prove, and all inferences or conclusions which may be reasonably and logically drawn from the evidence, are admitted, and the court cannot weigh conflicting evidence, but must treat that as withdrawn which is most favorable to the demurrant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 355; Dec. Dig. ⟸156(2).]

2. EVIDENCE ⟸411—PAROL EVIDENCE AFFECTING WRITINGS—CONTRACT PARTLY IN WRITING.

Where an oral contract is partially reduced to writing, and the writing evidencing it is not a complete and final statement of the entire transaction, parol evidence not inconsistent with such written contract is admissible to show the full agreement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1889; Dec. Dig. ⟸411.]

3. CONTRACTS ⟸279(1) — PERFORMANCE — TENDER—WAIVER.

When the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1233-1240; Dec. Dig. ⟸279(1).]

4. BROKERS ⟸63(1).—COMPENSATION — PERFORMANCE OF CONTRACT—TENDER.

In a suit by a real estate broker to recover a commission under a contract to procure assignments of certain leases for a stipulated price, the title conveyed by said leases to be approved by the purchaser's attorney, where it is shown that assignments of such leases for the price fixed and made to the party contemplated in

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the broker's contract were procured and tendered during the course of preparation of abstracts of title to the land owned thereby, and the broker's client absolutely and wrongfully signified his refusal to accept said assignments upon grounds not related to the title and without mention thereof, *held* that, in order to recover his commission, the broker is not required to adduce proof that proper abstracts showing good title to the leases so offered to be assigned were tendered to his client or approved by his client's attorney.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 79, 81, 94–96; Dec. Dig. ⟸63(1).]

5. Brokers ⟸88(1)—Actions for Compensation—Sufficiency of Evidence.

Evidence examined, and *held* sufficient as against a demurrer thereto to establish a cause of action.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 128, 129; Dec. Dig. ⟸88(1).]

Commissioners' Opinion, Division No. 2. Appeal from Superior Court, Tulsa County; M. A. Breckenridge, Judge.

Action by R. C. Rawlings against F. B. Ufer. From a judgment sustaining a demurrer to plaintiff's evidence, he appeals. Reversed and remanded for new trial.

Randolph, Haver & Shirk and R. L. Imler, all of Tulsa, for plaintiff in error. Philip Kates and Wm. Blake, both of Tulsa, for defendant in error.

BURFORD, C. [1] Plaintiff sued defendant for a real estate commission. The trial court sustained a demurrer to his evidence, and he appeals. The sole question is whether or not the evidence, as against a demurrer, was sufficient to sustain a cause of action. Upon a demurrer to the evidence the court cannot weigh conflicting evidence, but must consider all evidence as withdrawn which is most favorable to demurrant and determine whether or not liability is proven upon all the facts which the evidence favorable to demurrer in the slightest degree tends to prove and all inferences or conclusions which may reasonably and logically be drawn therefrom. See Rose v. Woldert Grocery Co., 154 Pac. 531; Rogers Lumber Co. v. Judd Lumber Co., 153 Pac. 150; Marshall Mfg. Co. v. Dickerson, 155 Pac. 224; Anderson v. Kelly, 156 Pac. 1167, and cases there cited. Viewed in this light, it may be said that the evidence established the following state of facts: Ufer approached Rawlings and sought Rawlings to procure certain leases, saying, "Can't you buy these leases for me?" Rawlings replied that he was representing the seller. Ufer then said, "Why can't you act for me?" Rawlings answered that if Ufer would pay him he would "cut loose" from the owner of the lease and represent Ufer. After some conversation in regard to the lease and the commission Ufer said, "If you will buy them at my price I will give you 10 per cent.," and that "I will give you $6,000 for that acreage and give you 10 per cent." A list was then produced upon which Ufer checked off the leases he wanted and indorsed thereon, "Will give $6,000 cash, subject to my attorney approving title, total 383 acres, 10 per cent. commission." Ufer also instructed Rawlings to have the deal closed at Tulsa. Rawlings thereupon got into communication with the owner of the leases and advised him that he (Rawlings) was now representing a client desiring to buy and who would pay him for his services. It seems that the same parties who owned the leases desired by Ufer also owned others in the vicinity, and as an inducement to sell Rawlings held out to the seller, without them disclosing his name, that his client was a large and successful operator, "one of the biggest oil men down there," and that, if the seller would accept the $6,000 offered, such sale to his client of acreage in that vicinity would increase the value and salability of the other leases held by the seller, by reason of the fact that so large an operator was interested in that locality. The offer was accepted by the seller, and an assignment of the leases forwarded to the Exchange National Bank of Tulsa attached to a draft for $6,000. Ufer was notified, and met one of the sellers at Tulsa, but upon discovering that the assignment was made to him insisted that the papers be sent to the American National Bank of Sapulpa, and that the assignment be made to one Jackson; as he (Ufer) would not have his name appear in the transaction. The owners refused to make the transfer to Jackson, because "we didn't know Mr. Jackson. We didn't know him as an oil man, or as being in the oil business. We did know Mr. Ufer by his reputation, and we wanted him to have the stuff, and not Mr Jackson or any other one at that time"—and because "we thought it would be better for our leases to have a man like Mr. Ufer own some stuff in there." Shortly thereafter the sellers sold the leases to other parties. Rawlings demanded his commission, and, being refused, brought suit.

[2] Considering the testimony above, we think it a fair conclusion that the contract between Ufer and Rawlings was that the leases were to be produced for and assigned to Ufer for a consideration of $6,000 for the leases and an additional $600 commission to Rawlings. If the written memorandum be regarded as ambiguous in regard to whether or not the commission to be paid was over and above the $6,000 price, then parol evidence was admissible to explain it, and a fair inference may be drawn from plaintiff's testimony that the true construction of the contract was that the commission was not included in the purchase price of $6,000. If the memorandum be regarded as incomplete, then parol testimony not inconsistent with the memorandum was admissible to show the full agreement. As was said by the court in Smith v. Bond, 155 Pac. 1116:

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"Where an oral contract is partially reduced to writing, and the writing evidencing it is not a complete and final statement of the entire transaction, parol evidence not inconsistent with such written contract is admissible to show the full agreement."

To the same effect is Holmes v. Evans, 29 Okl. 373, 118 Pac. 144, where it was said:

"While a written contract cannot be contradicted by parol evidence, it is permissible, where the writing does not purport to set out the entire contract to show by parol other stipulations, not inconsistent with those expressed. Where a contract rests partly in parol, that part which is in writing is not to be contradicted by parol evidence."

[4] The evidence in this case shows that until after the assignment was executed Rawlings' sole dealings were with Ufer. Jackson was not mentioned. Ufer asked Rawlings, "Why can't you act for me?" and "You buy the leases for me?" So, too, Rawlings testified that Ufer instructed him to close the sale at Tulsa. The written memorandum contained nothing in regard to these matters. Under the testimony we think a fair inference might be drawn that the assignment was to be to Ufer, and not to any one else, and that the sale was to be closed at Tulsa.

In this view of the contract, drawn, as above stated, solely from the contract and the testimony most favorable to plaintiff, did Rawlings show such compliance therewith as would justify a recovery of his commission? Defendant in error insists that he did not upon three grounds: First, that the delivery of the assignment to the Exchange National Bank of Tulsa "only amounted to committing them to the case of his (the seller's) own agent, and this in no way constituted a delivery of the lease to Mr. Ufer"; second, that it is not shown that any abstracts of title were submitted by the seller or approved by Mr. Ufer's attorney; third, that there is no competent testimony that Ufer ever refused to take the leases. As to the first contention, no actual delivery to Mr. Ufer was necessary to be shown in order to sustain this action. Delivery was not to be made, except simultaneously, with payment of the purchase price. It was only necessary to show (there being no question of a contract to sell in writing raised in this case) that the seller was ready, willing, and able to deliver in accordance with the terms of the contract between Mr. Ufer and Rawlings, provided none of those terms had been waived or dispensed with by the conduct or otherwise of Ufer, or of both parties. Assuming that the Exchange National Bank was the agent of the seller, nothing is here shown by the plaintiff's most favorable testimony, or in fact by any testimony, giving Ufer the right to dictate whom the seller should employ as his agent to complete the sale, except that the transaction should be closed at Tulsa. The fair inference from the testimony is that the assignments of the leases were delivered to the Exchange National Bank at Tulsa for delivery to Ufer upon payment of the purchase price. This sufficiently shows a present willingness and ability to deliver. It was within the seller's province to designate his own agent at Tulsa without interference from Ufer, and no proof of actual delivery was necessary.

Upon the second point the testimony does not show the delivery or tender of any abstracts of title for examination, although it does show that the sellers expected to furnish them. That in the ordinary course of carrying out the contract they should do so, and that the abstracts should show good title and be approved by Mr. Ufer's attorney, is all fairly inferable from the contract. The plaintiff asserts that performance of this portion of the contract was rendered unnecessary by Ufer's conduct in refusing absolutely to take the assignments made to him, and insisting upon their being made to Jackson. This involves the third contention of defendant, as to whether there was any competent testimony that Ufer refused the assignments made to him. Upon the latter point the witness Glover, who was part owner of the leases, and went to Tulsa to see Mr. Ufer in regard to closing the sale of them to him, testified:

"A. Well, I met Mr. Ufer and told him that I had been asked to come up there and give an assignment for the leases, that the assignment was in the bank, and he said he didn't want the assignments to come through this bank, and that it was not for him, it was for Mr. Jackson, and had me call up Mr. Stephens [the owner of the leases] and ask Mr. Stephens to ask the bank to turn over the assignments to me unopened, which was done, and I told Mr. Stephens over the phone that this assignment was to be made to Mr. L. B. Jackson, at Sapulpa, and Mr. Stephens didn't want to do that. * * * Q. You may state whether or not you or Mr. Stephens or both of you refused to execute the assignment to Mr. Jackson. A. Yes, sir; we refused to make an assignment to Mr. Jackson, because we didn't know Mr. Jackson. Q. I will ask you to state whether or not Mr. Ufer at that time made any request or statements with reference to making this assignment of these leases to Mr. Jackson. A. Nothing more than he said he didn't want the assignment made to him; he wanted it made to L. B. Jackson of Sapulpa. * * * Q. Did the defendant, Mr. Ufer, at the time you went to see him about taking up these assignments make any objection to taking them up except that they were made to him instead of being made to Mr. Jackson? A. No, sir; that was his only objection."

The witness Stephens testified very definitely as to Mr. Ufer's refusal to accept the assignment to himself. Upon cross-examination, however, he stated that the matters as to which he testified were not within his own knowledge, but came to him through Mr. Glover, and upon motion the trial court struck out his previous testimony in this regard. However, upon redirect examination he testified as follows:

"Did Mr. Ufer ever admit to you in conversation with you that he had refused to accept the assignment of the lease here involved in this lawsuit in his own name? Yes, sir."

There was also introduced a letter, Exhibit E, to which an objection was made and sus-

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tained, but the defendant later withdrew the objection. It stands here, therefore, as admitted without objection. The letter was from Stephens to Rawlings, and is in part as follows:

"Mr. Glover, who is interested with me in the Pawnee county leases, called on Mr. Ufer for the purpose of making arrangements for the transfer of the leases. Mr. Ufer informed him that the purchase had not been made for him, but for a man named Jackson, who is a resident of Sapulpa, and that under no consideration would he had his name connected with the transaction, nor would he, as he expressed it, 'be known in the transaction for $10,000,' and insisted that the transfer be made to Mr. Jackson. One of the most important considerations which moved me to accept Mr. Ufer's offer for the leases was the consideration that a man well known as a successful operator in the Mid-Continent field had shown his confidence in that locality by having invested his money there, and I felt that, following his lead, others would be prompted to buy in the same vicinity at higher prices than we might obtain had the same block of leases been sold to a man not known outside his own town. We had already sold leases in that locality to two separate interests, one of which was scarcely known, and the other not at all among oil men, and those sales have given us no advantage whatever in the way of attracting the notice of the public to our remaining leases, hence my willingness to sell to Mr. Ufer, and hence my unwillingness to sell to Mr. Jackson."

This evidence was clearly sufficient to at least raise an issue of fact as to whether Ufer had refused to take the assignments made to him and refused to complete the transactions entirely unless the assignments were made to Jackson. Nowhere in the testimony is there any reference to any objection by Mr. Ufer on account of lack of abstracts or failure of title. Under these circumstances was it necessary to sustain plaintiff's case to have adduced testimony that abstracts were prepared and offered for examination?

[3] It is familiar law that a tender is unnecessary when it is reasonably certain that the offer will be refused. The rule is stated in Hills v. National Albany Exchange Bank, 105 U. S. 321, 26 L. Ed. 1052, as follows:

"It is a general rule that when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused."

This doctrine is adopted and approved by this court in St. L. & S. F. R. Co. v. Richards, 23 Okl. 256, 102 Pac. 92, 23 L. R. A. (N. S.) 1032; Creek Land & Imp. Co. v. Davis, 28 Okl. 579, 115 Pac. 468; and Young v. Blackert, 151 Pac. 1057.

If, as shown in this record, Mr. Ufer would not "be known in the transaction for $10,000," we think it might be fairly said that it was reasonably certain he would not have accepted the assignments made in his name, even if accompanied by proper abstracts of title approved by his attorney. Clearly, in the first instance, Ufer was not bound to accept assignments of leases upon titles so defective that his attorney could not conscientiously approve them, but if, before that point in the transaction had been reached, Ufer refused absolutely and wrongfully to take the assignment upon grounds not related to the title, and without raising that objection, the furnishing of evidence of such title was waived.

[5] We conclude that as against a demurrer to the evidence the plaintiff's proof was sufficient to sustain a cause of action and that the court erred in sustaining such demurrer.

The cause should be reversed, with directions to the trial court to set aside the order sustaining the demurrer to plaintiff's evidence and to grant a new trial.

PER CURIAM. Adopted in whole.

(61 Okl. 255)

KESTERSON & TELLE v. MARLOW.

(No. 8019.)

(Supreme Court of Oklahoma. Nov. 14, 1916.)

(Syllabus by the Court.)

1. BAILMENT ⟸14(1) — BAILEE FOR HIRE — DUTY OF CARE.

The bailee for hire must use at least ordinary care for the preservation of the thing bailed. Section 1109, Rev. Laws 1910.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 45–48, 52–55; Dec. Dig. ⟸14(1).]

2. BAILMENT ⟸14(1) — BAILEE FOR HIRE — DUTY OF CARE.

Where the owner of a moving picture show moves a piano into his building for use therein, pays the owner thereof a salary to operate it, and a rental for the use of it, he is a bailee for hire of such piano, and is bound to exercise ordinary care for the preservation of it and is liable in damages for a failure in such duty.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 45–48, 52–55; Dec. Dig. ⟸ 14(1).]

Commissioners' Opinion, Division No. 2. Error from District Court, Atoka County; J. H. Linebaugh, Judge.

Action by Grace Marlow against Kesterson & Telle, begun in justice court and appealed by defendants to district court. There was judgment for the plaintiff, and defendants bring error. Affirmed.

J. G. Ralls and J. H. Gernert, both of Atoka, for plaintiffs in error. Humphreys & Cook, of Atoka, for defendant in error.

GALBRAITH, C. Grace Marlow, the defendant in error, sued Kesterson & Telle, the plaintiffs in error, for damage to her piano which she alleged was caused by negligence in failing to take proper care of the piano while in their possession. The action was tried to a jury in a justice of the peace court, and a verdict returned for the plaintiff. On appeal to the district court another jury returned a verdict in her favor for $75. To review the judgment rendered upon this last verdict an appeal has been perfected to this court.

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The facts, briefly stated, are as follows: Miss Marlow entered into a contract with one James, the proprietor of a moving picture show, at Atoka, to furnish music for the show on the following terms, namely, that she would furnish her own piano and operate it for $1 per night for her services and $1 per week for the use of the piano, payable at the end of each week. After this arrangement had been in effect for several months, James sold the show to the plaintiffs in error, they taking charge January 1, 1913. It is not clear that the plaintiffs in error made a new contract with Miss Marlow, but she understood from James that she was to continue to render the same services to them that she had rendered under James' management, and on the same terms. She rendered the services and collected the compensation at the end of each week, and continued to do this from January 1st until September 19th, when the show closed. When the plaintiff in error took charge of the show, the piano was in the building where the show had been given, and it remained there until March, when the show was removed into an airdome owned by the plaintiffs in error. They moved the piano from the building and placed it in a shed room erected in the airdome for it and the moving picture machine. Owing to the faulty construction of this shed, and while therein, the piano was more or less exposed to the elements, the sunshine and the rain, greatly to its injury. It was a secondhand piano, having been in use for some five years, and had been moved from town to town a number of times. The defendant in error paid $275 for it and sold it for $2.50, after this lawsuit was commenced. When moved to the airdome, it was in fairly good condition for a moving picture show piano, and, when the show closed in September, it was so deteriorated in value that it was practically worthless. After the show had closed, Miss Marlow requested Kesterson to move the piano to her home. He refused to do so, saying that it was her piano and she might do what she pleased with it. She said that it would cost $2.50 to have it moved and that, at that time, it was not worth that sum.

[1, 2] There is a sharp conflict in the testimony as to whether the plaintiff in error made an express contract with Miss Marlow for the hire of the piano, but in the view we take of the case this is not important. There is no conflict in the testimony to this extent, that the plaintiffs in error moved the piano into this building and paid rental for the use of it for many weeks, during which time it was damaged by being exposed to the elements.

The controlling question in this lawsuit is: Whose duty was it to care for the piano while it was in the airdome? On the one hand, it is contended that it was under the owner's control, and that if it was injured it was her own fault, and she alone is responsible for it. On the other hand, it is claimed that the piano was hired to the owners of the show, and that they placed it in their building and were required to use at least ordinary care to protect it from injury by the elements, and that they failed in this duty, and therefore are liable.

It being admitted that the plaintiffs in error paid rental for the use of the piano and that they placed it in their own building in order that it might be used for their show, under section 1108, Rev. L. 1910, it would seem that they were bailees for hire, and under section 1109, Rev. L. 1910, they were bound to take ordinary care for the preservation of the piano while in their building for this purpose. See Vogel & Son v. Braudrick, 25 Okl. 259, 105 Pac. 197. Whether they failed in this duty or not, and the extent of the injury occasioned thereby, were questions of fact for the jury to determine. The court in the instructions fairly covered the law applicable to the issues raised by the pleadings and the evidence, and advised the jury that the plaintiffs in error were only bound to use ordinary care, and if they failed in this duty they were liable for the injury to the piano that reasonably resulted on account thereof. The jury by their verdict found that there had been a failure in this duty and fixed the amount of the damages, and, there being evidence reasonably tending to support the verdict, the same ought to be sustained.

The judgment is therefore affirmed.

PER CURIAM. Adopted in whole.

(49 Okl. 446)

COSS et al. v. STERRITT. (No. 5707.)

(Supreme Court of Oklahoma. June 29, 1915. On Rehearing, Nov. 5, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⟸568—PARTIES—NECESSARY PARTIES—DEFENDANTS IN ERROR.

Where a judgment is joint, all persons against whom it is rendered and would necessarily be affected by a reversal must be served with the case-made, unless the same be waived, and given notice of the time and place of settling and signing the case-made, unless the same be waived, or they appear, and must be made parties to the appeal; and when such presentation is not made and such notice is not given, nor the same waived, nor an appearance made, and such parties are not made parties to the appeal, this court is without jurisdiction to hear such attempted appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2523–2529; Dec. Dig. ⟸568.]

2. APPEAL AND ERROR ⟸644(2) — RECORD — OBJECTIONS—WAIVER.

After a case-made has been settled and signed, and the time in which an appeal to this court may be taken has expired, a necessary party to the appeal, who was not presented

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with the case-made within the time fixed by the trial court, and was not given notice of the time and place for settling and signing such case-made, cannot waive such failure to serve case-made and notice of settling and signing same, so as to give this court jurisdiction of such attempted appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2795, 2796, 2798; Dec. Dig. ⊂=644(2).]

Commissioners' Opinion, Division No. 1. Error from District Court, Murray County; R. McMillan, Judge.

Action by T. A. Sterritt against Virgil R. Coss and others. Judgment for plaintiff, and defendants, except defendant Zora Daniel, bring error. Dismissed.

This is an appeal attempted to be prosecuted by plaintiffs in error from a joint judgment rendered against Zora Daniel and others, to recover certain lands described in the petition, and to remove cloud from title thereto.

On the 29th day of August, 1913, said joint judgment was rendered, and some of the parties plaintiff in error given 60 days in which to prepare and serve case-made in this case. The case-made was settled and signed by the trial judge on the 14th day of October, 1913; but said case-made was not presented to said Zora Daniel, nor was the notice of the place and time in which said case-made would be settled and signed by the trial judge served upon said Daniel, nor did she appear or waive such notice. The record also fails to show that summons in error ever issued to or was served upon said Daniel or that she ever waived the same; nor is said Daniel made a party to this appeal.

On the 15th day of March, 1915, defendant in error filed a motion to dismiss this appeal—

"upon the ground that said Zora Daniel was a party defendant in the trial court, duly served with summons, and was a party to said joint judgment, and is a necessary party to this appeal, and without joining herein the said Zora Daniel, who is a necessary party to this appeal, and she not having been served with the case-made filed herein, and not having waived such service, nor appeared at the signing and settling thereof, and not having been served with summons herein, and the time within which said things must be done having expired, therefore this court has no jurisdiction to hear and determine this cause."

On the 23d day of April, 1915, more than 18 months after said case-made was settled and signed, there was filed in this court a paper, signed by Zora Daniel, reciting that:

"She hereby enters her general appearance in the above-entitled case and waives the failure to serve upon her the case-made and summons in error, and failure to notify her of the time and place of signing and settling said case-made, and hereby waives any and all informalities and irregularities, if any, in the service, signing, and settling of said case-made and the filing of same, together with the petition in error with the Supreme Court of the state."

Burwell, Crockett & Johnson, of Oklahoma City, for plaintiffs in error. George M. Nicholson, of Sulphur, and Gray & McVay, of Oklahoma City, for defendant in error.

COLLIER, C. (after stating facts as above). The only question here under review is the motion to dismiss this appeal. It is positively shown that this is an appeal from a joint judgment rendered against said Zora Daniel and others, that she was not presented with the case-made, and no notice was given her of the time and place said case-made would be settled and signed, and that she never appeared or waived such notice, nor was she made a party to this appeal, nor was summons in error issued to or served upon her, or that she waived any of said requirements.

[1, 2] In Southwestern Surety Ins. Co. v. Litty Going et al., 150 Pac. 488, recently decided, but not yet officially reported, it is held:

"A case-made, settled and signed without service of notice, stating the time and place in which the presiding judge will be asked to settle and sign the same upon all of the opposite parties, and without their appearance, either in person or by attorney, and without their waiver of such notice, is a nullity, and confers no jurisdiction on this court to decide any question thereunder."

See, also, Moore v. Howard Mer. Co., 40 Okl. 491, 139 Pac. 524.

The attempted correction of the failure to present the said Zora Daniel with said case-made, to give her notice of the time and place at which the case-made herein would be signed and settled, she not having waived the same or made an appearance at the signing and settling of said case-made, and the failure to make her a party to this appeal by the said instrument signed by her and filed in this court, cannot avail to overcome said laches of attorneys for plaintiffs in error and give this court jurisdiction to decide any question involved in this attempted appeal.

In American Nat. Bank of McAlester et al. v. Mergenthaler Linotype Co., 31 Okl. 633, 122 Pac. 507, Chief Justice Turner, speaking for the court, said:

"The judgment being joint, all persons against whom it was rendered and who would necessarily be affected by a reversal must be made parties to this proceeding. Wedd v. Gates et al., 15 Okl. 602, 82 Pac. 808; Strange et al. v. Crismon, 22 Okl. 841, 98 Pac. 937; Weisbender et al. v. School District, 24 Okl. 173, 103 Pac. 639; James S. Hughes, Special Adm'r, v. A. L. Rhodes, 25 Okl. 172, 105 Pac. 650. * * * Being a necessary party to the appeal, he or his attorney should have been served with the case-made or a copy thereof, and, not being so served, we are without jurisdiction to review the judgment complained of. Humphrey v. Hunt, 9 Okl. 196, 59 Pac. 971; Spaulding Manufacturing Co. v. W. H. Dill et al., 25 Okl. 395, 106 Pac. 817. Being jurisdictional, it cannot be waived. Atkins v. Nordyke, 60 Kan. 354, 56 Pac. 533. For this reason the subsequent amendment by leave of the petition in error so as to make Hinds a party upon which a summons issued for him which was returned indorsed: 'I, W. G. D. Hinds, the within-named defendant in error, hereby accept service of the within summons in error and do hereby waive formal service of said summons in error upon me by the sheriff, and I do hereby waive all formalities of making and serving case-made upon me, and do hereby consent that the cause may be submitted for trial in the Supreme Court

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upon petition in error filed by plaintiffs in error and upon original pleadings and other records of the lower court and the evidence taken in the lower court in said cause, all of which are contained in the case-made, and agree that the case may be submitted upon said case-made now filed. W. G. D. Hinds, Defendant in Error. At Muskogee, November 5th, 1909"—availeth nothing."

In Kansas City, M. & O. Ry. Co. v. Williams, 33 Okl. 202, 124 Pac. 63, the same doctrine is announced as in the American National Bank of McAlester et al. v. Mergenthaler Linotype Co., supra, wherein it is said:

"And this too, although, as here, after the time for the service of the case-made on McGee, plaintiffs in error have amended their petition in error by making McGee a party defendant in error in this court, and he has entered his appearance and waived service of the case-made, for the reason that a failure to serve the case-made upon McGee within the time allowed defeats the jurisdiction of this court and prevents a review of the judgment, although he subsequently appeared in this court and waived service of the case-made."

It follows that this appeal should be dismissed.

PER CURIAM. Adopted in whole.

On Rehearing.

TURNER, J. Stating the facts more fully: On July 1, 1912, T. A. Sterritt, in the district court of Murray county, sued Zora Daniel, Virgil R. Coss, W. D. Smead, E. K. Gaylord, and W. R. Main in ejectment and to clear his his title to a certain tract of land described as, "The west half of the northeast quarter and the east half of the southeast quarter of the northwest quarter of section 27, township 1 south, range 3 east of the Indian base and meridian, containing 100 acres more or less, and being the entire homestead allotment of William Hendrix, Choctaw Indian, being enrolled as less than a half-blood," alleging that he held the legal and equitable title thereto by virtue of a certain warranty deed made, executed, and delivered to him by William Hendrix and Evelina, his wife, on July 27, 1908, but which he says by mistake of both parties thereto and the scrivener was made to read, "The east half of the northeast one-fourth," etc., of said section, which land, he further says, was no part of said allotment and no part of any land belonging to said Hendrix; that the patent to his homestead was at that time duly recorded, and it was the intention of all parties to said deed to thereby convey said homestead to plaintiff; that after said deed was duly recorded, to wit, on May 8, 1909, defendant Zora Daniel, with knowledge thereof and that the same conveyed or was intended to convey the title to said homestead, procured a deed thereto, as described in said patent, from said Hendrix and wife, and, after mortgaging the same to Coss, who assigned the same to Smead, by warranty deed, on April 15, 1910, conveyed all but 20 acres thereof to defendant Gaylord, who, by his tenant, Main, together with Zora Daniel, is now in possession of said allotment, claiming title. Plaintiff further alleged that at the time of the execution and delivery to him of said deed Gaylord had notice of plaintiff's deed from the Hendrix, and in effect that the Daniel's deed was procured in fraud of his rights, and that Gaylord at the time he took his deed had knowledge of and participated in the fraud. He prayed judgment against each of the defendants for possession and damages for withholding the same, and that all of said deeds to defendants be set aside and canceled as a cloud upon his title. Daniel and Smead made default. Upon issue joined, by answer of the other defendants and reply, there was trial to the court, and judgment for plaintiff granting him sweeping relief and taxing defendants with the cost.

After motion for a new trial filed and overruled, Coss, Gaylord, and Main bring the case here without joining either Zora Daniel or Smead as parties plaintiff or defendant. The cause is now before us on motion to dismiss for want of necessary parties. There can be no doubt but that this is a joint judgment. Adams v. Higgins, 147 Pac. 1011; Springfield et al. v. Thompson et al., 149 Pac. 1093; Boyd et al. v. Robinson et al., 149 Pac. 1146; Billy v. Unknown Heirs, etc., 35 Okl. 430, 130 Pac. 533; Appleby v. Dowden, 35 Okl. 706, 132 Pac. 349.

Aside from Smead being a necessary party in the court below, Zora Daniel is a necessary party to this appeal. We say she is a necessary party not only for the reason that her deed from Hendrix and wife, under which she claimed title to all the land in controversy and right of possession to the 20 acres to which she still retained title, had been set aside, but for the further reason that she still retained an interest in that part of the subject-matter of the suit by reason of her covenant of warranty contained in her deed conveying 80 acres thereof to Gaylord. This is in keeping with our holding in Crow v. Hardridge, 43 Okl. 463, 143 Pac. 183. There in the syllabus we said:

"In a suit to set aside one deed on the ground of the minority of the grantor and for fraud in the grantee, and another on the ground that his grantee took title to the land with knowledge of and participated in the fraud, both the grantor and grantee in the second deed are necessary parties to a suit to clear both deeds as a cloud on plaintiff's title and necessary parties in this court to review a judgment granting such relief."

Being relied on in the briefs, as the soundness of the opinion in that case is assailed on this rehearing, we say that, as the same is in keeping with the best-considered cases, we adhere to it. Whether Zora Daniel is a necessary party either in the trial court or here turns upon the question whether she has parted with her interest in the subject-matter of the suit. That she has not is evidenced

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not only by the fact that at the time of the rendition of the judgment in question she was in possession of 20 acres of the land in controversy, claiming title thereto by virtue of a deed which was set aside, but by the further fact that, as to the remaining 80 acres, in the event her deed conveying the same to Gaylord was set aside, she would be liable to answer him on her warranty. 16 Cyc. 188, says:

"* * * One who has parted with his interest in the subject-matter must nevertheless be made a party where plaintiff's success in a controversy with his successor would require the adjustment of equities between such former owner and the successor. * * * In order to accomplish the object of completely adjudicating the controversy and of rendering the performance of the decree perfectly safe to those compelled to obey it, it is frequently necessary to bring in as a party one against whom or whose interest plaintiff seeks no relief, but against whom the principal defendant would have a demand in the event of plaintiff's success."

6 Cyc. 322, under the heading of Cancellation of Instruments, says:

"The grantor, if not a plaintiff in the suit, should be joined as defendant. * * * All persons claiming under the deed, or holding the title to a part of the land conveyed, are properly joined, though each defendant may have a separate interest in the fruits of the fraud in which they combined * * *"—citing House v. Mullen, 22 Wall. 42, 22 L. Ed. 838.

In Hannibal & St. J. R. Co. v. Nortoni, 154 Mo. 142, 55 S. W. 220, in the syllabus it is said:

"The maker of a deed which is a fraud on the rights of the true owner is a necessary party, as well as the grantee, in a suit to set it aside."

In Busby v. Littlefield, 31 N. H. 193, the bill alleged that plaintiff had conveyed by mistake more land than was intended; that the land had been conveyed by warranty deed from his grantee to a third party and by the latter to defendant, who took with notice of the mistake. The object of the bill was to compel defendant's release. It was held the warrantors were necessary parties for defendant's protection.

In Hill v. Lewis, 45 Kan. 162, 25 Pac. 589, the syllabus reads:

"In an action to set aside certain conveyances of real estate, it was alleged that the plaintiffs, L. and husband, owned and resided on a tract of land as their homestead, and that, while so occupying it, the husband executed a conveyance of the same to H., without the consent of his wife; that subsequently H. and his wife, Lydia H., executed a deed with the mutual covenants of warranty to P. The action to set aside both of these conveyances was brought against H. and P., without joining as a defendant Lydia H., one of the grantors of P. Held, that she is a necessary party in the action to cancel the deed in which she joined as grantor, and that the petition disclosed upon its face a defect of parties defendant."

We see no need of multiplying authorities upon a point so well settled. But see Florida Land Rock Phosphate Co. v. Anderson, 50 Fla. 501, 39 South. 392; Detwiler v. Louison, 18 Ohio Cir. Ct. Rep. 434; Fraser, Adm'r, v. Passage et al., 63 Mich. 551, 30 N. W. 334; Nouvet v. Heirs of Armant, 12 La. Ann. 71; Long v. Barnes, 13 La. Ann. 392; Hutchinson v. Johnson, 19 La. Ann. 141; Thornton v. Gaar, 87 Va. 315, 12 S. E. 753; Henderson v. Henderson, 9 Grat. (Va.) 394; Cook v. Lake, 50 App. Div. 92, 63 N. Y. Supp. 818; Davis v. Rogers, 33 Me. 222; Oliver v. Clifton, 59 Ark. 187, 26 S. W. 817; Getzelman v. Blazier, 112 Ill. App. 648; Donovan v. Champion et al., 85 Fed. 71, 29 C. C. A. 30; Ayres v. Polsdorfer, 105 Fed. 737, 45 C. C. A. 24; Jones v. Wilson, 69 Ala. 400; S. Blum & Co. v. Wyly, 111 La. 1092, 36 South. 202; Farmers' & Merchants' Bank v. City of Detroit, 12 Mich. 445; Pappenheimer v. Roberts, 24 W. Va. 702; Cancellation of Instruments, 4 R. C. L. § 29; 19 Century Digest, Equity, § 250.

For the reason that Zora Daniel is not named in the petition in error as either a party plaintiff or defendant in error, and was not served with case-made as stated in the main opinion, this case is ruled by the Linotype Company Case there cited and Rev. Laws 1910, § 6559, has no application.

The original opinion is adhered to, and the cause stands dismissed. All the Justices concur.

(61 Okl. 275)

DAVIS v. DAVIS. (No. 7317.)

(Supreme Court of Oklahoma. Nov. 21, 1916.)

(Syllabus by the Court.)

1. DIVORCE ⟸231—"ALIMONY."

"Alimony" is defined to be an allowance which a husband or a former husband may be forced to pay to his wife or former wife, living legally separate from him, for her maintenance.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 658–661, 664; Dec. Dig. ⟸231.

For other definitions, see Words and Phrases, First and Second Series, Alimony.]

2. DIVORCE ⟸232—SEPARATE MAINTENANCE—RIGHT OF WIFE.

If the wife choose to live separate and apart from the husband, there being no reasonable cause for her abandonment of her husband, he cannot legally be required to contribute to her maintenance, nor can alimony in any form be granted her.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 662; Dec. Dig. ⟸232.]

3. DIVORCE ⟸252—SEPARATION—DIVISION OF PROPERTY.

Where, in an action by a wife against her husband to obtain a divorce and alimony, the court finds that the wife is not entitled to a divorce or alimony and both are refused, the court is authorized under section 4966, Rev. Laws 1910, to make such order as may be proper for the equitable division of the property then owned by them, taking into consideration the time and manner of its acquisition.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 713–715; Dec. Dig. ⟸252.]

Commissioners' Opinion, Division No. 4. Error from District Court, Marshall County; Jesse M. Hatchett, Judge.

Action by Mittie Davis against W. Lee

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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Davis. From the judgment, both parties bring error. Modified and affirmed.

McPherren & Cochran, of Durant, and F. E. Kennamer, of Madill, for plaintiff in error. Hatchett & Ferguson, of Durant, for defendant in error.

MATHEWS, C. The parties will be designated as in the trial court. This is a divorce action by the plaintiff based upon the allegations of extreme cruelty, gross neglect of duty, and other matters, and concluding with a prayer for divorce, custody of the children, and division of the property.

The case was tried to the court, who made the following findings:

"(1) That the allegation in plaintiff's petition to the effect that the defendant was guilty of cruel treatment toward plaintiff is not established by the evidence.

"(2) That the allegation of the petition of the plaintiff to the effect that the defendant was addicted to the use of drugs of any kind is not established by the evidence.

"(3) That the allegation of the amendment to the petition of the plaintiff that the defendant was guilty of adultery is not established by the evidence.

"(4) That the plaintiff left the home of the plaintiff and defendant without sufficient cause.

"(5) That the defendant provided well for his family, and after the separation and up to the trial at the last term of this court the defendant voluntarily paid to the plaintiff for the support of herself and children the sum of $30 per month, and has thereafter paid said sum upon the order of the court.

"(6) That the defendant at the trial expressed himself as willing to receive the plaintiff back to their home, and it is the opinion of this court that they ought to still be living together.

"The court found further that the plaintiff is not entitled to the decree of divorce upon the proof in this case, and that the plaintiff is entitled as to alimony the sum of $600, to be paid in six months from this date, and the undivided one-half interest of the plaintiff, W. Lee Davis, in [description of land omitted], subject to a mortgage debt thereon in the sum of $900, with interest, which the plaintiff, Mittie Davis, is to assume and pay. Defendant excepts to the finding as to alimony.

"That the plaintiff is entitled to the custody of the three children, Bernice, Earl, and —— Davis, and the sum of $30 per month, to be paid by the defendant, W. Lee Davis, on the 1st of each month, to the plaintiff, Mittie Davis, for the support of the said children. Defendant excepts."

The judgment was in accord with the findings, and the defendant brings his appeal from said judgment, and the plaintiff her cross-appeal from that part of the judgment denying her a divorce. In regard to the cross-appeal of plaintiff we deem it unnecessary to review the evidence in this opinion, but we have carefully read the entire record, and fully indorse the conclusion of the trial court that plaintiff was not entitled to a decree of divorce. The trial court had the opportunity of observing the conduct and demeanor of the parties while upon the witness stand, and hearing them and their witnesses testify, and was in a much better position to weigh the evidence than we are, and his conclusion must control here when the evidence clearly does not preponderate against it.

It is defendant's contention that the trial court, having found that the allegations of the petition were not proven, erred: (1) In awarding the plaintiff alimony while the plaintiff wrongfully lived apart from the defendant; and (2) in awarding the care, custody, and control of the children to plaintiff.

The proposition whether or not the trial court has the authority in a divorce action to refuse a decree of divorce and to grant one of the complaining parties a distribution of the property or the care and custody of the children born to the marriage seems never to have been passed on by this court, and as far as we have been able to discover is here for the first time as an original proposition.

It is evident that the judgment of the trial court is not founded upon section 4969, Rev. Laws 1910, because this section relates to the procedure when the divorce is granted. It is equally evident that it was not based upon section 4975, as this section has to do with actions brought for alimony without praying for a divorce. The judgment therefore cannot be sustained unless section 4966 authorizes it, which is as follows:

"4966. When the parties appear to be in equal wrong the court may in its discretion refuse to grant a divorce, and in any such case or in any other case where a divorce is refused, the court may for good cause shown make such order as may be proper for the custody, maintenance, and education of the children, and for the control and equitable division and disposition of the property of the parties, or of either of them, as may be proper, equitable and just, having due regard to the time and manner of acquiring such property, whether the title thereto be in either or both of said parties."

We find no fault with defendant's assertion that a wife voluntarily living apart from her husband cannot compel him to support her or exact alimony of him unless such separation is caused by the misconduct of the husband. We agree that it is the duty of the wife to live with the husband at the place and in the home selected by him, which he has the sole right, within reasonable limitations, to choose, and if without good cause she departs therefrom, she forfeits her legal claim to support from him while residing elsewhere than with him. The technical term for support for the wife while living separate and apart from her husband is alimony—temporary alimony before the divorce is granted and permanent alimony after the decree.

[1] In the case of Poloke v. Poloke, 37 Okl. 70, 130 Pac. 535, Ann. Cas. 1915B, 793, alimony is defined as follows:

" 'Alimony' is an allowance which the husband pays, by order of the court, to his wife for her maintenance while living separate from him, where no suit is brought for divorce, or during the pendency of a divorce suit, or after the divorce is granted."

This allowance termed "alimony" may be made in a bulk sum in property or money,

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or in money payments to be made at certain definite periods.

[2] Defendant has cited the following cases in support of his contention that the court erred in decreeing certain property and the care and custody of the children to plaintiff after denying her a divorce: Bensen v. Bensen, 20 Cal. App. 462, 129 Pac. 596; Volkmar v. Volkmar, 147 Cal. 175, 81 Pac. 413; McMullin v. McMullin, 123 Cal. 653, 56 Pac. 554; Peyre v. Peyre, 79 Cal. 336, 21 Pac. 838; Hagle v. Hagle, 74 Cal. 608, 16 Pac. 518; Johnston v. Johnston, 54 Kan. 726, 39 Pac. 725; Latham v. Latham, 30 Grat. (Va.) 307; Griffin v. Griffin, 8 B. Mon. (Ky.) 121; Woolfolk v. Woolfolk, 96 Ky. 657, 29 S. W. 742; Springer v. Springer (Ky.) 54 S. W. 710; Davis v. Davis, 75 N. Y. 221.

An examination of all of the above-cited cases show that they had to do with alimony and separate maintenance, and simply hold that, if the wife choose to live separate and apart from the husband, there being no reasonable cause for her abandonment of her husband, he cannot be required to contribute to her maintenance, nor can alimony in any form be granted her. Section 4975 specifically provides that alimony without a divorce may be obtained only for the same causes for which a divorce may be allowed. Birdzell v. Birdzell, 33 Kan. 433, 6 Pac. 561, 52 Am. Rep. 539.

[3] In the judgment in the case at bar the tract of land and money decreed plaintiff was specified as "alimony," but it is plainly apparent that this is a misnomer; for the judgment is in fact nothing but an attempt to divide the property of plaintiff and defendant and an effort to provide for the payment of a certain sum each month for the support and maintenance of their children.

Our divorce laws and procedure were adopted from the state of Kansas, and while the propositions under consideration do not appear to have been construed by our own courts, yet the Supreme Court of that state has done so in numerous opinions. The case of Bowers v. Bowers, 70 Kan. 164, 78 Pac. 430, was an action for divorce and division of property, and at the trial the court sustained a demurrer to the evidence as against plaintiff's claim for a divorce, and subsequently heard further testimony, and entered judgment making a division of a tract of land owned in the name of the defendant. The contention of defendant on appeal in that case was stated as follows:

"It is urged by defendant that the proceedings of the court in taking testimony in the matter of a division of property, after having sustained a demurrer to the evidence, was unauthorized; that the court had lost jurisdiction to proceed with a further hearing of the case. It is further urged by defendant that whether the allowance to plaintiff be designated alimony, or a division of property, it was error to grant it; that, since by statute (Gen. Stat. 1901, § 5144) the grounds for which alimony may be awarded are the same as the grounds for which the court may grant a divorce, the decision of the court in sustaining the demurrer to plaintiff's evidence constituted a finding by the court that no grounds had been proved for which alimony could be awarded plaintiff. It is also urged by defendant that the statute contemplates a division of property only when both plaintiff and defendant are in equal wrong and a divorce for that reason is refused, and that, the testimony of defendant not having been heard, the court could not find that defendant was in the wrong."

The following extract from the opinion shows the holding of the court:

"It is clear that under section 5136, in any case where a divorce is refused, the court is authorized to make such order as may be proper for the control and equitable division of the property of the parties, or the property of either of them. Nor is there in this section a conflict with the provisions of section 5144 of the statute, which provides that alimony shall be awarded for the same causes for which a divorce may be granted. In enacting the two sections the Legislature undoubtedly had in view the distinction recognized between alimony and an equitable division of property. The principal distinction appears to be that alimony has for its basis maintenance only, while a division of property has for its basis the giving to each party the portion of the property justly and equitably due, without regard necessarily to the necessities of the case."

It will be noted that sections 5136 and 5144 of the Kansas statute referred to above are the same as sections 4966 and 4975, respectively, of our statute. In the case of Kjellander v. Kjellander, 92 Kan. 42, 139 Pac. 1013, the action was for a divorce, alimony and custody of the minor child of the parties. The trial resulted in a refusal of a decree of divorce, but the property was divided and the custody of the child awarded to one of the parties, and the judgment was affirmed therein, the court therein saying:

"In an action for a divorce where the divorce was refused and the property divided, it was within the discretion of the trial court as to which party should be awarded the care and custody of the minor child."

The case of Johnson v. Johnson, 57 Kan. 343, 46 Pac. 700, was also for divorce, alimony, and custody of the child of the parties, and the court therein held:

"Where, in an action brought by a wife against her husband to obtain a divorce and alimony, the court finds that she is not entitled to a divorce, it is error to allow the wife permanent alimony in the form of a quarterly allowance for the support of herself and minor child. In such a case, where the husband appears and contests the wife's right to a divorce, the power of the court over the property of the parties is limited to that owned by them at the time the judgment is rendered; and as to such property it may make an order for the equitable division and disposition of it between them."

It will be observed that in the case last cited it is held that when the decree of the court is based on section 5138 (same as section 4966, Rev. Laws 1910), that the court has authority to make all necessary and proper orders for a division of the property owned by the parties at the time the decree was rendered, but that the court could not reach out and compel the payment of certain stipulated sums in the future. The court, further discussing the proposition, said:

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"The distinction between an allowance of alimony and a division of property is discussed at length and clearly recognized in the case of Bacon v. Bacon, 43 Wis. 197. In 2 Am. & Encyc. Law, 92, 'alimony' is thus defined: ' "Alimony" is an allowance which by order of court the husband, or former husband, is compelled to pay to his wife, or former wife, from whom he has been legally separated or divorced, for her support and maintenance.' The foundation for its allowance is the duty of the husband to provide for the wife's support; and where a divorce or separation occurs because of his fault, the duty of providing for her maintenance continues, and the court by an allowance of alimony compels its performance. A division of the property of the parties is an essentially different thing. No matter which party may be at fault, nor what the decision of the court on the merits, of an application for a divorce, the court may for good cause make an equitable division and disposition of the property of the parties. In doing this the power of the court extends only over the property of the parties owned by them at the time the order is made. It cannot reach into the future and bind subsequent earnings or accumulations of either party." Birdzell v. Birdzell, 33 Kan. 433, 6 Pac. 561, 52 Am. Rep. 539; Van Brunt v. Van Brunt, 52 Kan. 380, 34 Pac. 1117; Johnston v. Johnston, 54 Kan. 726, 39 Pac. 725; Raper v. Raper, 58 Kan. 590, 50 Pac. 502.

We believe the above-cited cases set out the correct interpretation of our divorce statutes so far as they relate to the questions at issue, and it appears to us that equity and sound justice sustain such a construction. While it is the duty of the wife to reside with the husband and to bear with his shortcomings and endure the same as long as possible, yet no law prescribes that she must do so, and when she chooses to abandon him, if his own conduct does not cause such an abandonment, then his legal duty to longer maintain her is ended, but if property has been acquired during their wedded life by their joint effort, she has a vested interest in such property which she does not forfeit even though her course cannot be justified, and she is entitled to her proper share of such property. As to what proportionate share should be decreed her it is impossible to lay down any definite rule, but it rests to a large extent in the sound discretion of the court, taking into consideration when and how such property was acquired. But she has no right by her conduct in abandoning her husband without justifiable cause in any way or for any purpose to bind him for sums to be paid in the future. Her only right in such cases is to have a fair and equitable division of the property then owned by them, taking into consideration the time and manner of acquisition of the same.

From the above it follows that the judgment of the trial court should be modified by striking therefrom that portion providing for the payment of the sum of $30 per month to the plaintiff for the support of the children, and the judgment so modified should be affirmed.

PER CURIAM. Adopted in whole.

(61 Okl. 265)

WAYNE COUNTY NAT. BANK v. KNEELAND et al. (No. 7528.)

(Supreme Court of Oklahoma. Nov. 14, 1916.)

(Syllabus by the Court.)

1. BILLS AND NOTES ⟸378—ALTERATION—EFFECT AS TO BONA FIDE HOLDER.

Prior to the passage of the Negotiable Instruments Law (effective June 10, 1909 [Laws 1909, c. 24]), a material alteration of a promissory note by the payee, without the consent of the maker, avoided it against such maker, even in the hands of a holder in due course.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 985-992; Dec. Dig. ⟸378.]

2. ALTERATION OF INSTRUMENTS ⟸2—MATERIALITY—TEST.

The test as to whether an alteration of a note is material does not depend upon the consequent increase or decrease of the maker's liability, but upon whether the instrument has the same operation and effect after the alteration that it had before.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 1-4; Dec. Dig. ⟸2.]

3. ALTERATION OF INSTRUMENTS ⟸25—ESTOPPEL ⟸107 — EQUITABLE ESTOPPEL — PLEADING—NECESSITY.

If the holder of an instrument materially altered without the knowledge or consent of the maker relies upon a subsequent ratification by or estoppel in pais against such maker, the ratification or estoppel must be pleaded.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 216-229; Dec. Dig. ⟸25; Estoppel Cent. Dig. § 297; Dec. Dig. ⟸107.]

Commissioners' Opinion, Division No. 3. Error from District Court, Alfalfa County; J. C. Robberts, Judge.

Action by the Wayne County National Bank against G. N. Kneeland and others. Judgment for defendants, and plaintiff brings error. Affirmed.

H. J. Sturgis, of Enid, for plaintiff in error. Parker & Simons and Garber & Kruse, all of Enid, for defendants in error.

BLEAKMORE, C. The parties appear, and are referred to here as in the trial court. On March 22, 1914, defendants executed and delivered to Bell Bros. six promissory notes each for the principal sum of $1,000. Plaintiff subsequently became the holder thereof, and in December, 1908, commenced action thereon in the court below. Defendants answered, alleging among other defenses as to each of said notes that:

"After these defendants had made, executed, and delivered said note, the same was fraudulently and materially changed and altered in this, to wit: That the word 'eight' has been added and written in said note immediately above the word 'six,' which word 'six' was erased at the time of the execution and delivery of said note by these defendants, said change and alteration having the effect of making said note one drawing interest at 8 per cent. per annum, while the note as signed and delivered by these defendants drew no interest, and that said alteration was made without the knowledge or con-

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sent of these defendants, and for the purpose of defrauding them."

To the foregoing defense plaintiff replied by way of general denial. There was trial to a jury, resulting in verdict and judgment for defendants, and plaintiff has appealed.

As presenting an epitome of the evidence, we quote from the brief of plaintiff as follows:

"It would not be possible, in a brief of this character, to set out this testimony in full or even an abstract thereof. It will be sufficient to show the general character of this testimony, as the several witnesses substantially agreed in their testimony. The first witness offered by the defendant, J. J. McCully, testified, in substance: That in the spring of 1904 one W. C. Ditmars came to Helena with two horses that were kept at his barn, and sought to negotiate the sale of them to the farmers living in that vicinity. A preliminary contract was presented to these farmers for signature, in which they agreed to take stock to the amount of $200 each, the purchase price of each horse being $3,000. This preliminary contract provided that the notes should be $1,000 each, due in two, three, and four years, with interest at eight per cent.; that after the necessary signatures had been obtained to the preliminary contract, notes were presented to the subscribers for their signature, and that the notes at the time of signature, where the word 'six' appeared printed in the body of the notes, and provided for interest at the rate of 6 per cent. per annum, had been erased, and there was no rate of interest written above it, and that in the conversation preliminary to the execution of the contracts and notes Ditmars and Samuel Bell had both stated that the notes were to be without interest; that he signed the note at the office of George Kneeland, one of the defendants; that he examined the note at the time and that the word 'eight' was not written therein. Other of the defendants who testified say that the notes did not contain the word 'eight' written above the erasure signed by them at their homes when presented by Mr. Ditmars in company with the defendant Geitgey and the defendant Zimmerman. The defendants also offered the testimony of one M. W. Denninger, who testified substantially that he was the cashier of the bank at Helena for some time after the execution of these notes, and that some time in the summer of 1904 these notes were presented to him at his bank by W. C. Ditmars, for the purpose of having the bank purchase them; that at that time the notes did not bear any rate of interest, and were then in the possession of Ditmars. The plaintiff offered the testimony of Samuel Bell, who testified that he wrote the body of the notes; that he prepared them at the request of Ditmars and Geitgey, and that the same were prepared for the preliminary contracts which had been signed by the purchasers; that that contract provided that the rate of interest should be 8 per cent., and the time to be two, three, and four years instead of one, two, and three years, as was his custom in the sale of horses of this class; that he erased the word 'six' and wrote the word 'eight' above it in each of said notes, and that after their execution they were left in the hands of Ditmars and two of the defendants, Geitgey and Zimmerman, who were entitled to a commission out of the proceeds of the notes for effecting the sale, and that the same were not delivered to him until nine or ten months afterwards, when they were delivered to him at Wooster, Ohio, and that at the time they were received they provided for interest at the rate of 8 per cent. per annum; that after the notes were prepared by him they were delivered to Ditmars, Geitgey, and Zimmerman to procure the signatures of the purchasers; that he saw the notes after they were executed, and they were then in the same condition that they are at this time."

Plaintiff complains of the giving of the following instructions:

"You are instructed that if you find by a preponderance of the evidence in this case that when the notes sued on were originally executed and delivered to Bell Bros., the word 'six' had been erased or crossed out in such a way as to leave the notes to read 'with interest at per cent. per annum,' and that after the execution and delivery of said notes they were altered or changed without the knowledge, authority or consent of the defendants, so as to read 'with interest at eight per cent. per annum,' such a change would be a material alteration, and said notes would be void in the hands of the plaintiff, and your verdict should be for defendants."

[1] Prior to the passage of the Negotiable Instruments Act (effective June 10, 1909), a material alteration of a promissory note by the payee, without the consent of the maker, avoided it as against the maker, even in the hands of a bona fide holder without notice of such alteration. See Citizens' Bank of Ramona v. Grant, 152 Pac. 1082 (not yet officially reported), where the authorities are collated.

[2] The test as to whether an alteration of a note is material does not depend upon whether it increases or decreases the maker's liability, but upon whether the instrument has the same operation and effect after the alteration as it had before. Citizens' State Bank of Ramona v. Grant, supra; Commonwealth v. Baughman, 27 Okl. 175, 111 Pac. 332; International Bank of Coalgate v. Mullen & Mullen, 30 Okl. 547, 120 Pac. 257, Ann. Cas. 1913C, 180; German-American v. Hennis, 153 Pac. 671 (not yet officially reported).

Plaintiff insists that if there was an alteration of the note, it was not the act of the plaintiff or its assignor, but that of a stranger, amounting to a mere spoliation, and recovery may still be had according to the original terms of the instrument. There can be no contention as to who changed the notes from their original form and wrote therein the word, "eight," as Bell, a member of the payee firm, testified that he himself so altered the same. In Commonwealth Nat. Bank v. Baughman, supra, it is said:

"The jury was instructed that if, after the execution of the note, the alleged alteration was made by any person without the knowledge or consent of defendant, such alteration vitiated the note. This stated the rule too broadly to the extent that it declares that a material change made in the note by any person vitiates it. The rule prevailing in the courts of the United States is that, if a stranger without any complicity with the payee or holder of the note changes its terms, such change is a spoliation, and does not vitiate the note. It is only when the terms of the note are changed by a party thereto that the same may be termed an alteration, and result in avoiding the note. Andrews v. Calloway, 50 Ark. 358, 7 S. W. 449; Daniel on Negotiable Instruments, par. 1373. We do not think, however, that the error committed in this instruction was prejudicial, for there was no contention about who made the change in the terms of the note. All the evidence is that the word 'ten' was struck out by Generes, the payee, and the word 'eight' inserted by him. The conflict

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in the testimony is as to when said change was made. The evidence of plaintiff is that it was before the execution of the note, and the evidence of the defendant is that it was done afterwards. There was no contention by either party that the change was made by a stranger to the note."

Upon the foregoing authority we are constrained to hold that the giving of the above instruction did not constitute prejudicial error.

[3] Plaintiff also insists that by making certain payments on the notes—some of which were applied to the satisfaction of interest at the rate of 8 per cent. per annum—and by retaining possession of the horse, for the purchase price of which the notes in suit were given, defendants waived the right to rely upon an alteration of such notes, and must be held to have ratified and adopted the same as altered. It will be noted, in this regard, that neither in its petition nor reply did the plaintiff plead any facts or circumstances tendering such issue of ratification or estoppel. Recovery was sought on the notes in their original, unaltered form, as they were alleged to have been executed by defendants. The alteration thereof was specifically set forth and relied upon as a defense in the answer, and was denied by the reply. There was no offer by the plaintiff at the trial to amend the petition or reply so as to present the question of ratification or estoppel. And in its brief plaintiff states:

"The only question presented to the jury was whether there had been a material alteration of the notes after their execution and delivery to Bell Bros."

In 1 R. C. L. 1050, it is stated:

"If the holder of an instrument materially altered without the knowledge or consent of the maker relies upon a subsequent ratification by or estoppel in pais against, such maker, the ratification or estoppel must be pleaded."

We regard this as a correct statement of the rule applicable. Capital Bank v. Armstrong, 62 Mo. 59; Erickson v. Bank, 44 Neb. 622, 62 N. W. 1078, 28 L. R. A. 577, 48 Am. St. Rep. 753.

"In order for a party to avail himself of the doctrine of estoppel as constituting a part of his cause of action or defense, he should plead the facts constituting the estoppel." Nance v. Okl. Fire Ins. Co., 31 Okl. 208, 120 Pac. 948, 38 L. R. A. (N. S.) 426.

Plaintiff also complains of the giving and refusal of certain instructions. It is not deemed necessary to set forth the charge of the court, nor the instructions requested by plaintiff and refused. It is sufficient to say that we have carefully examined the same, and hold that those given fairly stated law, and there was no error in the refusal to give those requested.

Again, it is contended by plaintiff that it is entitled to a reversal of the judgment herein on account of the misconduct of opposing counsel in making improper statements to the jury. It does not appear that objection to such remarks was made at the time, or that the attention of the trial court was directed thereto. Under such circumstances, plaintiff, having failed seasonably to object to such conduct in the trial court, will not be permitted to predicate error thereon in this proceeding. Kaufman v. Boismier, 25 Okl. 252, 105 Pac. 326; Coalgate Co. v. Bross, 25 Okl. 244, 107 Pac. 425, 138 Am. St. Rep. 915.

An examination of the entire record discloses no error prejudicial to the rights of plaintiff.

The judgment should therefore be affirmed.

PER CURIAM. Adopted in whole.

(61 Okl. 270)

RUCKER et al v. MASON et al. (No. 7429.)

(Supreme Court of Oklahoma. Nov. 15, 1916.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT ⟸195(2)—RENTS — ABANDONMENT OF PREMISES — REDUCTION OF DAMAGES.

If a tenant wrongfully abandons leased premises before the expiration of the term, the landlord may give notice to the tenant of his refusal to accept the surrender or abandonment thereof, when such notice can be given, and he may take possession of the premises for the purpose of protecting and preserving them, and he may sublet the same for the unexpired term of the lease for the benefit of the lessee to reduce his damages.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 792, 793; Dec. Dig. ⟸ 195(2).]

2. LANDLORD AND TENANT ⟸232 — BREACH OF CONTRACT—DAMAGES.

In an action for the breach of a lease contract, the contract itself must furnish the measure of damages, and the amount recovered cannot, except in cases where recovery may be had for exemplary damages and penal damages, and in sections 2871 and 2878, Rev. Laws 1910, exceed the amount the party could have gained by a full performance of the lease contract on both sides.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 935–939; Dec. Dig. ⟸ 232.]

Commissioners' Opinion, Division No. 2. Error from District Court, Tulsa County; H. B. Scheaffer, Judge Pro Tem.

Action by F. M. Rucker and another, copartners under the firm name and style of Rucker Bros., against J. P. Mason and others. Judgment for defendants, and plaintiffs bring error. Reversed and remanded for new trial.

Adams & Wills, of Claremore, and Randolph, Haver & Shirk, of Tulsa, for plaintiffs in error. Charles B. Rogers and Fred A. Fulghum, both of Tulsa, for defendant in error E. M. Brown.

BRUNSON, C. The parties to this lawsuit stand in the same relative position here as they did in the trial court, and for convenience they will be designated here as they were there.

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This action was filed in the district court of Tulsa county on the 20th day of March, 1912, for damages. It appears that the plaintiffs on the 27th day of October, 1909, leased the Hotel Rucker in Claremore, Okl., by a written lease for a term of five years from and after the 1st day of January, 1910, to the defendants J. P. Mason and E. M. Brown at a rental to be paid in advance on the first day of each month as follows: For the first six months $300 per month; for the second six months $325 per month; for the second year $350 per month; for the third year $400 per month; for the fourth year $450 per month; and for the fifth year $475 per month. The defendants in the lease agreed to furnish and equip the hotel throughout at their own expense in a modern and up-to-date manner, and to maintain it in such condition during the life of the lease. And they did so furnish and equip it. They occupied and operated it from the 1st day of January, 1910, up to the 1st day of December, 1911, when they abandoned it, at which time the plaintiffs served a written notice on them, which, by its terms, notified them that the plaintiffs refused to accept possession of the hotel or relieve the defendants from any rights, liabilities, or responsibilities as set out and specified by the terms of the lease contract, and that the plaintiffs would continue to look to and hold them for the payment of the rents and the faithful performance of all the terms and conditions of the lease, and that they would be asked to respond to them in damages for any and all loss which they may suffer by reason of their failure to comply with the terms and conditions set out in said lease; that the hotel and premises were at their disposal under the terms of the lease, and that the plaintiffs were willing and ready to perform all the covenants, agreements, and stipulations contained in the lease; that the plaintiffs would make such use of the hotel as they were able; and that they would lease the same for the balance of the term covered by the lease contract for the benefit of the defendants and for the purpose of reducing their damages.

It is alleged that while the lease contract was signed only by the plaintiffs and the defendants J. P. Mason and E. M. Brown, that the defendant B. C. Beane was at the time of the execution of said lease or later became a party thereto, and a state of facts is pleaded which it is contended is sufficient to establish the same liability against him as against the other defendants.

The defendants E. M. Brown and B. C. Beane filed separate motions to make the original petition more definite and certain, and also filed separate demurrers, which motions and demurrers were sustained in part and overruled in part, and exceptions were duly saved, whereupon an amended petition was filed, and other demurrers filed by said defendant which were overruled in part and sustained in part, and exceptions saved, whereupon a second amended petition was filed. There was also filed a first and a second supplemental petition.

In the first cause of action in the second amended petition it is alleged that at the time of the abandonment of the leased premises on the 1st day of December, 1911, there was due and owing as rents, under the terms of the lease, the sum of $2,027.84, and interest thereon, and judgment is asked for that amount.

In the second cause of action in said petition it is alleged that after the abandonment of the hotel and the serving of said notice on the defendants, the plaintiffs took possession of the same and continued in charge thereof from the 1st day of December, 1911, until the 2d day of January, 1912, during all of which time they were endeavoring to lease the same to other parties for the remainder of the term covered by said lease, and that on the 2d day of January, 1912, they succeeded in leasing the same to W. H. Evarts and John S. Watson for and on behalf of the defendants for the remainder of the time covered by the lease; that they went into the possession of the same and operated it until about the 1st day of March, 1912, when they abandoned it; and that after giving defendants credit for all rents received by the plaintiffs from the hotel, up to the 1st day of March, 1912, the defendants were liable to the plaintiffs for rents under the terms of the lease contract in the sum of $1,500, and interest thereon, and judgment is asked for that amount and interest.

In the third cause of action in said petition it is alleged that the plaintiffs during the time they were in possession of the leased premises from the 1st day of December, 1911, to the 1st day of March, 1912, for the purpose of diminishing the liability of the defendants to the plaintiffs and for the purpose of continuing, maintaining, and protecting the business established therein, the cost and expenses to which they were put exceeded all income and revenues derived therefrom in the sum of $417.75, and judgment is asked for that amount.

In the fourth cause of action of said petition it is alleged that the plaintiffs during the time they were in possession of the leased premises from the 1st day of December, 1911, to the 1st day of March, 1912, for and on behalf of said defendants, paid the sum of $111.56 taxes levied against the hotel furniture and equipment belonging to the defendants located on said premises, and that in order to prevent a sale and removal of the same therefrom they were forced to pay the same, and judgment is asked for that amount and interest.

A demurrer was sustained to the third and fourth causes of action, and exceptions duly saved.

On the 21st day of April, 1913, the plain-

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tiffs filed their first supplemental petition, and in the first cause of action therein it is alleged that the rents which had accrued under the terms of said lease from the 1st day of April, 1912, to the 1st day of April, 1913, amounted to the sum of $5,134.70, and that the defendants are indebted to the plaintiffs for said amount as rents under the terms of said lease, but that they have wholly neglected and failed to pay the same, and judgment is asked for that amount, with interest thereon.

In the second cause of action in said supplemental petition it is alleged that while in possession of said leased premises from the 1st day of April, 1912, to the 1st day of April, 1913, and for the purpose of diminishing the liability of the defendants, the cost and expenses to which they were put exceeded the income therefrom in the sum of $1,844.90, and judgment is asked for that amount, with interest thereon. The defendant B. C. Beane interposed a demurrer to said supplemental petition, and the court overruled the demurrer to the first cause of action, but sustained it as to the second cause of action, and exceptions were duly saved.

On the 13th day of April, 1914, the plaintiffs filed their second supplemental petition, and the allegations in the first cause of action of the same are practically the same as the allegations in the first cause of action in the first supplemental petition, except that they ask for judgment for the rents accruing under the lease contract from the 1st day of May, 1913, to the 1st day of April, 1914, which it is alleged amounts to $5,676.10, and they ask judgment for that amount, with interest thereon. And the allegations in the second cause of action therein are practically the same as the allegations in the second cause of action in the first supplemental petition, with the exceptions that they ask for $1,844.90 damages, with interest thereon. A demurrer was filed to the second supplemental petition. The court overruled it as to the first cause of action, but sustained it as to the second cause of action, and exceptions were duly saved.

The separate answer of B. C. Beane is: (1) A general denial; and (2) it is affirmatively alleged that the defendants were evicted by the plaintiffs from the leased premises on or about the 1st day of December, 1911, and that since said date the plaintiffs have been wrongfully in possession of the same without the consent or acquiescence of the defendants.

The separate answer of E. M. Brown is: (1) A general denial; and (2) it is admitted that the defendants abandoned the leased premises on or about the 1st day of December, 1911, and that the plaintiffs took possession of the same; and (3) it is alleged that the plaintiffs operated and conducted the hotel, and that the earnings therefrom over and above the expenses of operating it exceeded the amount of the rents as provided for under the terms of the lease.

The Hon. L. M. Poe, district judge, being disqualified, the Hon. H. B. Scheaffer, a member of the bar, in good standing, of Tulsa county, was agreed upon as judge pro tempore to try the case.

The trial of the cause resulted in a verdict and judgment for the plaintiffs, and against the defendants J. P. Mason and E. M. Brown in the sum of $3,584.28, and also a verdict and judgment against the plaintiffs and for the defendant B. C. Beane. In due time a motion for a new trial was filed by the plaintiffs, overruled and exceptions saved, and the case is now before us on appeal. Upon the conclusion of the evidence, the defendants filed a demurrer thereto, and the court instructed the jury as follows:

"You are instructed that plaintiffs cannot recover in this case against the defendants for any rents accruing after the abandonment of Evarts and Watson as alleged in the second count of plaintiffs' second amended petition herein."

[1] And this action of the court is assigned as error. The error complained of in the case arises out of the holding of the trial court that the acts and conduct of the plaintiffs subsequent to the abandonment of the leased premises by Evarts and Watson amounted to an acceptance of the abandonment of said hotel by the defendants; that these acts and conduct in law amounted to an acceptance of such abandonment, and the plaintiffs were therefore precluded from recovering the rentals stipulated and provided for in the lease contract, from and after the 1st day of March, 1912. And it is earnestly insisted that in this the court committed prejudicial error.

The evidence discloses that the plaintiffs not only served the notice on the defendants upon their abandonment of the leased premises, but in keeping with the terms of said notice, leased said hotel to Evarts and Watson for the rest of the time covered by said lease contract, and that after they abandoned it and on or about the 26th day of October, 1912, they entered into another lease contract with Snell and Remler, and that soon thereafter they too abandoned said hotel. There is a stipulation in the lease contract with Evarts and Watson, and also the lease contract with Sneel and Remler to the effect that the lease was entered into for one purpose and only one purpose, namely, to mitigate the damages to which the defendants were liable to the plaintiffs under the terms of said lease contract.

The testimony also discloses that the plaintiffs wrote many letters endeavoring to release the premises; that they also advertized extensively for a tenant; and that all of the plaintiffs' acts, according to the testimony, show that they were studiously trying to avoid releasing the defendants from the stipulation set forth in said lease contract.

In the case of Higgins v. Street, 19 Okl. 45,

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92 Pac. 154, in the body of the opinion it is said:

"A lease in writing constitutes a written contract, and the lessee cannot surrender it or be released from its terms without the consent of the lessor, and it is absolutely essential to the termination of the term that both the lessor and the lessee agreed to the surrender. * * * Stewart v. Sprague [71 Mich. 50], 38 N. W. 673; Bourdereaux v. Walker, 78 Ill. App. 63; Milling v. Becker, 96 Pa. 182; Lane v. Nelson, 167 Pa. 602, 31 Atl. 864; Scheelky v. Koch, 119 N. C. 80, 25 S. E. 713; Livermore v. Eddy, 33 Mo. 547; Detroit Pharmacal Co. v. Burt, 124 Mich. 220, 82 N. W. 893; Jones on Landlord and Tenant, § 539."

It seems to be a general rule of law laid down in this jurisdiction that when a tenant abandons the premises the landlord, at his election, has three remedies: (a) The landlord may enter the premises at once, terminate the lease contract, and recover the rents due up to the time of the abandonment; or (b) he may suffer the premises to remain vacant and sue on the contract for the entire rents; or (c) he may give notice to the defendant of his refusal to accept a surrender and sublet the premises for the unexpired term of the lease contract for the benefit of the defendant to reduce his damages. The plaintiffs in the instant case adopted the last remedy and gave notice to the defendants in writing that they refused to accept a surrender of the premises, but that they would take possession of the premises and sublet the hotel for the unexpired term of the lease for the benefit of the defendants to reduce their damages.

The defendants J. P. Mason and B. C. Beane have not filed briefs in this case, and have not otherwise appeared in this court, but the defendant E. M. Brown has filed a brief in which he contends that his position as to the abandonment of the premises is sustained by the decision of this court in the case of Hargrove et al. v. Bourne, 150 Pac. 121. In that opinion Mr. Justice Hardy used the following language:

"It is true that after premises are wrongfully abandoned by the tenant the landlord may take possession of the premises for the protection and preservation thereof, in which case his measure of damages would be the agreed rental as fixed by the terms of the contract; or he may let the premises stand vacant, and in that event would be entitled to collect the rent according to the terms of the lease; or he may give notice to the tenant of his refusal to accept a surrender, when such notice can be given, and sublet the premises for the unexpired term for the benefit of the tenant to reduce the damages."

It is true that this court held in that case that the plaintiff was not entitled to recover, but the facts in this case are quite different from the facts in the case at bar. No notice was served on the lessee as in this case; the premises were not sublet as here, and no attempt was made so to do.

The rule of law applicable to this case is well stated in 24 Cyc. 1373, which reads as follows:

"An express agreement to accept the premises need not be shown, but the landlord's consent may be implied from circumstances and from the acts of the parties. There must, however, be some unequivocal act on the part of the landlord which unmistakably evinces an intention on his part to terminate the lease and the relationship of landlord and tenant."

In Underhill on Landlord and Tenant, vol. 2, § 728, a discussion of the resumption of possession by landlord as an acceptance of a surrender, we find this language:

"The mere going into possession of the premises by the landlord after the tenant has moved out, before the expiration of the term, is usually not an acceptance of the surrender. The intention of the landlord in re-entering and the motives with which this act was accompanied are very material. * * * Of course, if a landlord, within a short time after the tenant has gone out, shall take possession of them without anything being brought home to the tenant to show that the intent of the landlord is to hold him for the rent, a slight presumption of an intention on the part of the landlord to accept the surrender may arise which is for the landlord to rebut by proof of facts and circumstances which will show a contrary intention. * * * If the landlord takes possession and charge of the property after the tenant has abandoned it merely to protect it from injury, or if, knowing that the tenant does not mean to return, he rents it on account of the tenant, these acts may not show an acceptance of the surrender on his part, but if, after an abandonment, he takes possession and rents the premises on his own account, this is conclusive evidence of a surrender." Armour Packing Co. v. Des Moines Pork Co., 116 Iowa, 723, 89 N. W. 196, 93 Am. St. Rep. 270; White v. Berry, 24 R. I. 74, 52 Atl. 682; Aberdeen Coal & Mining Co. v. City of Evansville, 14 Ind. App. 621, 43 N. E. 316; Duffy v. Day, 42 Mo. App. 638; Williamson v. Crossett, 62 Ark. 393, 36 S. W. 27; Terstegge v. First German Mutual Benev. Soc., 92 Ind. 82, 87, 47 Am. Rep. 135; Whitman v. Louten, 3 N. Y. Supp. 754; Haynes v. Aldrich, 133 N. Y. 287, 31 N. E. 94, 28 Am. St. Rep. 636; Hays v. Goldman, 71 Ark. 251, 72 S. W. 563.

It is evident to our minds that from the facts disclosed in this case that the plaintiffs did not evidence any intention on their part of accepting a surrender or an abandonment of the hotel by the defendant, but on the other hand the evidence shows that it was their manifest intention not to accept a surrender of the premises, or release the defendant from the payment of rents or the performance of conditions and stipulations set forth and contained in said lease contract. It is clear to our minds that the court committed prejudicial error in giving said instruction.

[2] It is contended that the trial court erred in sustaining a demurrer to the causes of action in the second amended petition and in the supplemental petitions wherein the plaintiffs seek to recover the taxes they paid on the defendants' furniture located in the hotel, and also wherein they seek to recover as damages the losses sustained by them while operating the hotel. It is contended that the lease contract is something more than a mere lease contract; that aside from the mere rentals to be derived from the hotel

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under the terms of the lease contract, it was a distinct and integral part of the consideration moving from the plaintiffs to the defendants that said hotel should be furnished, equipped, and maintained as a hotel, and maintained as a going concern, during the entire time covered by the lease contract; that it was the right and purpose of the plaintiffs under the law not only to preserve the tangible property, but to preserve any and all things which constituted a part thereof, as for instance, the peculiar business that had been established therein, to the end that their investment should develop into and assume a permanent and stable character as a hotel and be so regarded by the public, and in support of this contention the plaintiffs rely upon the following provisions of said contract, to wit:

"Said building and premises to be used, occupied, and operated by the lessees as a hotel, to be furnished, equipped, and maintained throughout by the lessees at their own cost in a modern and up-to-date manner, and to be maintained in such condition during the life of this lease, natural wear and tear of building and damages caused by the elements excepted."

It is shown that the defendants complied with the provisions of the contract in this: That they furnished and equipped the premises as a hotel in a modern and up-to-date manner and operated it for about 23 months, and when they abandoned it they left such furniture and equipment in the hotel and on the premises, and so far as the record discloses they are still in the hotel and on the premises. It is not contended that the defendants breached their contract in failing and refusing to furnish and equip the hotel in a modern and up-to-date manner, but it is contended that the plaintiffs are entitled to have the hotel maintained and operated as a going concern under the terms of this lease contract; that the plaintiffs did so maintain and operate it after they took possession thereof; and that they are entitled to recover as damages the expenses they incurred while so operating and maintaining the hotel over and above the income therefrom.

We are not able to place the construction on the contract contended for, because from a careful reading of it we are not able to say that it was within the contemplation of the parties, that it was a part of the consideration of the contract that the hotel should be maintained as a going concern during the whole life of the lease, but on the other hand we believe a better interpretation of the language is, that it places a limitation upon the use of the property. We do not believe that plaintiffs are entitled to recover damages for fancied or probable advantages that might be derived from maintaining the hotel as a going concern during the whole life of the lease for such profits would be conjectural and speculative in their nature and would depend upon the chance of the business and perhaps other contingencies, and besides it is not shown that the hotel as a going concern had any value, but on the other hand the evidence does show that the expense of operating it exceeded the income derived therefrom, both before and after it was abandoned by the defendants.

We believe that the measure of the damages in the instant case is fixed by the statute (section 2889, Revised Laws of 1910), which reads as follows:

"Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except in cases where recovery may be for exemplary damages and penal damages, and in sections 2871 and 2878."

It will be noted that by these provisions of the statute the primary purpose of awarding damages is to compensate the party injured, but the damages are limited, except in certain cases, to the compensation the injured party could have gained by a full performance of the contract by both parties; and hence from the facts as shown by this record we conclude that the lease contract itself furnishes the measure of damages, and that the plaintiffs' recovery is limited to the rentals as fixed by the lease contract. See Hargrove et al. v. Bourne, supra. The court did not err in sustaining the demurrers to said causes of action.

This cause is reversed and remanded to the trial court, with directions to set aside the judgments heretofore rendered by him, and to grant a new trial.

PER CURIAM. Adopted in whole.

(61 Okl. 250)

CHILSON v. McFARLAND. (No. 7850.)

(Supreme Court of Oklahoma. Nov. 14, 1916.)

(Syllabus by the Court.)

CORPORATIONS ⊂⊃244(1) — STOCKHOLDERS — LIABILITY.

Syllabus in cause No. 7851, Frank M. Chilson, Trustee in Bankruptcy of Alderson Coal Company, v. J. E. Cavanagh, 160 Pac. 601, adopted.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 960, 961, 964, 977; Dec. Dig. ⊂⊃ 244(1).]

Commissioners' Opinion, Division No. 3. Error from District Court, Pittsburg County; R. W. Higgins, Judge.

Action by Frank M. Chilson, trustee in bankruptcy of Alderson Coal Company, against F. J. McFarland. Judgment for defendant, and plaintiff brings error. Affirmed.

Wm. H. Fuller and George M. Porter, both of McAlester, for plaintiff in error. Gordon & McInnis, of McAlester, for defendant in error.

JOHNSON, C. The opinion by this court on October 17, 1916, in case No. 7851, Frank M. Chilson, Trustee in Bankruptcy of Alderson Coal Company, v. J. E. Cavanagh, 160 Pac. 601, is decisive of the issues involved here; and under that authority this cause should be affirmed.

PER CURIAM. Adopted in whole.

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(58 Okl. 683)

In re COURTHOUSE OF OKMULGEE COUNTY. (No. 8445.)

(Supreme Court of Oklahoma. Nov. 14, 1916.)

(Syllabus by the Court.)

1. COUNTIES ⊂=58—COUNTY BOARD—"DECISION"—REVIEW.

The decision of a board of county commissioners, made in determining the proper location of a county courthouse and jail, and which involves a selection between different sites, being judicial in its nature, is a "decision" from which an appeal will lie to the district court, pursuant to section 1640, Rev. Laws 1910, as amended by Act March 11, 1915 (Sess. Laws 1915, c. 117, p. 205).

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 76–80; Dec. Dig. ⊂=58.

For other definitions, see Words and Phrases, First and Second Series, Decision.]

2. CONSTITUTIONAL LAW ⊂=67 — COUNTIES ⊂=58—"JUDICIAL POWER"—"JUDICIAL ACT"—"MINISTERIAL."

"Judicial power" is authority to hear and determine, where the rights of persons or property, or the propriety of doing an act, is the subject-matter of adjudication; and a "judicial" act involves the exercise of judgment or discretion. But where the law enjoins a duty, prescribing and defining the time, manner, and occasion of its performance, with such certainty that nothing remains for judgment or discretion, the duty and act is each ministerial.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 123; Dec. Dig. ⊂=67; Counties, Cent. Dig. §§ 76–80; Dec. Dig. ⊂=58.

For other definitions, see Words and Phrases, First and Second Series, Judicial Act; Judicial Power; Ministerial.]

3. COUNTIES ⊂=58—COUNTY BOARD—APPEALS FROM DECISIONS—NOTICE.

In a proceeding had before the board of county commissioners, involving a contest between the owners of property offered as a donation for a courthouse site, an appeal prosecuted from the action of the board by the county attorney in the name of the county, upon the written demand of 15 freeholders, as authorized in amended section 1640 and section 1641, Rev. Laws 1910, does not require that notice thereof be served upon or given the owners of the site selected.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 76–80; Dec. Dig. ⊂=58.]

(Additional Syllabus by Editorial Staff.)

4. WORDS AND PHRASES — "QUASI JUDICIAL DUTY."

A quasi judicial duty is one lying in the judgment or discretion of an officer other than a judicial officer, and the function is termed "quasi judicial" when such an officer is charged with looking into, and acting upon facts not in a way which the law specifically directs, but after a discretion in its nature judicial.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Quasi Judicial.]

Error from District Court, Okmulgee County; Ernest B. Hughes, Judge.

In the matter of location of a courthouse in Okmulgee County. From a judgment dismissing an appeal from a decision of the Board of County Commissioners locating the site for a county courthouse, the County and certain taxpayers bring error. Reversed and remanded.

Wm. M. Matthews, of Okmulgee, for plaintiffs in error. Merwine & Newhouse and Jos. W. Childers, all of Okmulgee, and West & Hagan, of Oklahoma City, for defendants in error.

SHARP, J. May 4, 1916, by a vote of two to one, the county commissioners of Okmulgee county selected as a site for the county courthouse about to be constructed in the city of Okmulgee, Okmulgee county, certain lots in block 110 of said city, owned by James Parkinson, J. D. Brazeel, and Anne Thomas, respectively, and by the same vote declined to consider and accept as a site for said courthouse certain lots in block 59 of said city. These tracts are designated in the record and the briefs of counsel as the Parkinson and Baker sites, and we shall so refer to them. Within 20 days of the action of the board, upon written demand of 75 freeholders of Okmulgee county, the county attorney of said county prosecuted an appeal from the decision of the board of county commissioners in the selection of the Parkinson site, which said appeal was in due time lodged in the district court. Notice of appeal was served upon one member of the board of county commissioners. Thereafter the board of county commissioners, and Parkinson, Brazeel, and Thomas, filed their respective motions to dismiss the appeal prosecuted by the county attorney for and on behalf of the said freeholders, on the grounds: (1) That no notice of an appeal had been served on either Parkinson, Brazeel, or Thomas; and (2) that the action of the board, in selecting a site for the location of the courthouse, was not an appealable order.

The power of the board of commissioners to act, and the regularity of its proceedings, are not brought in question. It appears from the transcript of the proceedings had before the board of county commissioners: That on the 1st day of May, 1916, a body known as the citizens' advisory board held a meeting for the purpose of selecting a free site for the courthouse and jail. That on said date there had been filed with the county commissioners deeds and abstracts for two lots or parcels of ground, in response to a notice given by said board that all persons offering free sites should file their deeds with the county clerk by 2 o'clock p. m. on said 1st day of May. The sites proposed were as follows: The Parkinson site, situated at the corner of Seminole and Seventh streets; and the Stuart site, situated at the corner of Fifth street and Central avenue. That on said date, between the hours of 2 o'clock and 3 o'clock p. m., both the owners of the Parkinson site and the Stuart site offered to enlarge the respective sites donated by them, but before a vote was taken thereon one Baker

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tendered to the advisory board a tract of land at Grand avenue and Fifth street. After said advisory board viewed and inspected said latter site, on a second ballot being taken, the same was unanimously chosen as the courthouse site. Thereafter said Baker, being the owner of said lands so selected, offered and tendered to the county commissioners a deed and abstract covering and embracing the tract of land selected by the advisory committee. Thus it appears that at the time the board acted there was presented to it for its consideration and choice both the Parkinson and Baker sites. From the memorandum of the proceedings had by the board at its meeting of May 4th it seems that said body refused to consider the Baker site, because the offer was filed "one day late in the county clerk's office." The demand served upon the county attorney by the said freeholders contains a recital that prior to the decision by said board there had been filed with the county clerk of Okmulgee county a petition protesting against the selection of the Parkinson site, and against the county commissioners making the selection of any site on said date, because of what was claimed to be a much more advantageous and desirable site offered by Baker, and that said protest was by said commissioners overruled, disallowed, and rejected in all things.

[1] The statute by which we are to determine the right of the county attorney to prosecute an appeal, as was done in the case at bar, is section 1640, Rev. Laws 1910, as amended by the act of March 11, 1915 (Sess. Laws 1915, c. 117, p. 205), which reads:

"From all decisions of the board of commissioners, upon matters properly before them, there shall be allowed an appeal to the district court by any persons aggrieved, including the county by its county attorney, upon filing a bond with sufficient penalty, and one or more sureties to be approved by the county clerk, conditioned that the appellant will prosecute his or her appeal without delay, and pay all cost that he or she may be adjudged to pay in the said district court; said bond shall be executed to the county, and may be sued in the name of the county upon breach of any condition therein: Provided, that the county attorney, upon the written demand of at least fifteen (15) freeholders of the county, shall take an appeal from any action of the board of county commissioners when said action relates to the interests or affairs of the county at large or any portion thereof, in the name of the county, when he deems it to the interest of the county so to do; and in such case no bond shall be required or given and upon serving the notice provided for in the next section the county clerk shall proceed the same as if a bond had been filed."

It is said by counsel for defendants in error that the word "decisions," found at the beginning of said section, refers only to decisions that are judicial or of a judicial character, and not merely to those that are ministerial, and that, where it is provided in said section that the county attorney upon demand of the required number of freeholders shall take an appeal from "any action" of the board of county commissioners, the rule ejusdem generis is applicable, and that the words "any action" refer to a "judicial decision."

[2] It is unnecessary that we should at this time determine whether or not an appeal will lie to the district court from a purely ministerial act of the board of county commissioners when prosecuted by the county attorney, or the constitutionality of said provision; for, in our opinion, the action of the board in making a decision between contending forces and in determining the site for the courthouse was of a judicial character, or what is commonly termed "quasi judicial." The right to select a courthouse site includes, necessarily, the power to decide that one site is more suitable than another; to take evidence if necessary, and adjudicate upon the merits of the different locations.

[4] A quasi judicial duty is one lying in the judgment or discretion of an officer other than a judicial officer. When such an officer is charged with looking into and acting upon facts not in a way which the law specifically directs, but after a discretion in its nature judicial, the function is termed "quasi judicial." An act is judicial when it requires the exercise of judgment or discretion by one or more persons, or by a corporate body when acting as public officers in an official character, in a manner which seems to them just and equitable. State ex rel. Board of Liquidation v. Briede, 117 La. 183, 41 South. 487; Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65; Malmo v. Commissioners, 72 Conn. 1, 43 Atl. 485; People v. Board of Supervisors, 35 Barb. (N. Y.) 408; Throop on Public Officers, § 553. The location, size, availability, and suitableness of the Parkinson site called for the exercise of judgment and discretion, as did the right of the board to consider and decide whether or not it would take into consideration the Baker site, or make an independent selection. We know judicially that in the matter of selecting sites for courthouses and jails many things are to be taken into consideration. The question is not to be determined alone by the present population, but by the future prospective growth of the seat of local government. Molacek v. White, 31 Okl. 693, 122 Pac. 523. The size of the grounds, the public convenience, the character of adjacent property, freedom from exposure to fire, and sanitary advantages, all form important factors and call for the exercise of sound business judgment on the part of those officials in charge of the affairs of the county at large. As there was vested in the board the power of choice and selection between the respective sites, the solution of a public question involving a controversy in which citizens differed, and which it was incumbent upon the board to decide, the duty resting upon them was not ministerial; for a ministerial act is one which an official performs in a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own

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judgment upon the propriety of the act being done. Marcum v. Lincoln, 42 W. Va. 263, 26 S. E. 281, 36 L. R. A. 296; Burnam v. Terrell, 97 Tex. 309, 78 S. W. 500; Rainey v. Ridgeway, 151 Ala. 532, 43 South. 843; Sullivan v. Shanklin, 63 Cal. 247; Mississippi v. Johnson, 4 Wall. 475, 18 L. Ed. 437; Mechem on Public Officers, par. 657.

What we have said in respect to the quasi judicial acts of the board of county commissioners is not to be construed as holding that such boards in this jurisdiction are not included within the provision of section 1, art. 7, Constitution, vesting the judicial power of the state in the courts named therein, "and such other courts, commissions or boards" as may be established by law. Whether the board of county commissioners come within the meaning of this section of the Constitution, is unnecessary to the decision of the present case.

[3] Sec. 1640, supra, differs not materially from section 37, art. 9, c. 22, of the Statutes of 1893, before the court in County Commissioners v. Haines, 4 Okl. 701, 46 Pac. 561, where it was held that the board of county commissioners, in determining that stock should not be restrained, acted judicially, and that an appeal to the district court would lie in such case. That an appeal from the action of the board of county commissioners will lie, where the decision or order appealed from is judicial in its nature, is recognized in Territory ex rel. Ridings, Co. Atty., v. Neville, 10 Okl. 79, 60 Pac. 740. In that case it was held that the duty devolved upon the commissioners did not call for the exercise of judgment or discretion, but was one purely administrative in its nature, and ministerial in its character. In Smith v. Board of Commissioners, 26 Okl. 819, 110 Pac. 669, the plaintiffs in error were taxpayers of Rogers county, and brought a suit in the district court, seeking an injunction against the board of county commissioners enjoining them from letting a contract for the construction of a bridge at a certain point across the Verdigris river. It was contended by the defendants in error that an injunction should not be granted because the plaintiffs in error had an adequate remedy at law; that is, by the statute granting to taxpayers (now freeholders) the right of an appeal from any action of the board of county commissioners affecting the interest or affairs of the county at large. The contention was sustained and the injunction denied, because it was said the plaintiffs had a complete and adequate remedy at law, under the provisions of section 1690, Comp. Laws 1909. It may be noted that the latter section is identical with section 1640, Rev. Laws 1910. The decision of the court was rested upon the opinion of the Supreme Court of Dakota Territory in Wood et al. v. Bangs, 1 Dak. 179, 46 N. W. 586. In the opinion, attention was called to the fact that the statute last cited, governing appeals from the action or decision of county boards of commissioners, was substantially the same as that in force in Dakota Territory (chapter 9, art. 7, § 610, Code 1887). Learned counsel for defendants in error call attention to the fact that the opinion in Wood et al. v. Bangs was rendered in 1875, or long prior to the 1887 compilation of the Dakota statutes. The statute referred to in the Dakota opinion is section 31, c. 4, Laws 1868–69. From the opinion of the court and a manuscript copy of the act we are informed that the 1869 statute provided for an appeal to the district court of the county from a decision of the county commissioners, upon all matters properly before them by any person aggrieved, upon the giving of the bond required. The provision authorizing an appeal by the county attorney upon written demand of taxpayers or freeholders of the county from any action of the board of county commissioners, when said action relates to the interests or affairs of the county at large, or any portion thereof, does not appear to have been at the time of the decision a part of the statute law of Dakota Territory, and hence was not before the court for consideration. But the statute construed was less comprehensive in respect to the right of appeal than section 610 of the 1887 statute, adopted with unimportant modifications by the first Legislative Assembly of the territory of Oklahoma (section 37, art. 6, c. 24, Stat. Okl. 1890). Hence we think the force of the opinion as an authority is not destroyed, but, on the other hand, contains a sound exposition of the law.

In Parker et al. v. Board of County Commissioners of Tillman County, 41 Okl. 723, 139 Pac. 981, the right of appeal from the decisions of a board of county commissioners, involving the exercise of judicial power and discretion, is expressly recognized. Section 7609, Rev. Laws 1910, required that the board of county commissioners should provide all roads improved under the provisions of art. 1, c. 73, Rev. Laws 1910, with suitable bridges of a permanent and substantial character. In the view of the court, the action of the commissioners in building the bridge on the section line was purely ministerial, though the opinion appears to be rested largely upon the informality or insufficiency of the objections urged by certain taxpayers. In the course of the opinion it is said:

"That the board of county commissioners in designating the point for the bridge in question were merely exercising an administrative or governmental function, imposed upon them by the law, and that, such being the case, their ignoring or overruling a verbal protest expressed by these individuals did not constitute action and decision upon matters properly before the board from which an appeal would lie to the district court."

The earlier opinion of Smith v. Board of Commissioners, supra, is not cited or referred to in the opinion of the court, and from a careful reading of the latter opinion we are convinced that there was no intention to

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disturb the rule therein announced. Keeping in mind the precise question decided, we think the court in that case reached a correct conclusion, assuming that the bridge was to be constructed on a road improved, as required by the statute.

The appeal prosecuted by the county, upon the written demand of 75 freeholders, clearly relates to the interests or affairs of the county at large, and is prosecuted as required, in the name of the county. Without intending any expression of opinion as to the action of the board, we think it clear that the freeholders have brought themselves within the protection given them by the statute. To conclude otherwise would be to render meaningless the authority conferring upon the required number of freeholders the right to demand an appeal, where the public interests are involved, and leave to the whims or caprices of the governing body of the county the final determination of many questions of great public importance. It was in such situations that the statute was intended to afford relief.

Upon the question of the right of Parkinson, Brazeel, and Thomas to service of notice of the appeal to the district court, urged in this court by the board of county commissioners, it may be observed that the motion to dismiss on this ground was by the court expressly overruled, and that no appeal from said judgment has been prosecuted. However, aside from the question of practice involved, we do not consider them necessary parties, and fully concur in the judgment of the trial court denying the motion to dismiss on the ground of want of notice.

Section 1640, Rev. Laws 1910, requires that appeals from the decisions of boards of county commissioners shall be taken within 20 days after the decision of the board, "by serving a written notice on one of the board of county commissioners." This was done. But it is said that notice should have been served on James Parkinson, J. D. Brazeel, and Anne Thomas, the donors of the free site. We do not think so. That the donation of Parkinson, Brazeel, and Thomas was accepted by the board of commissioners did not vest in them a personal right requiring notice to them of the appeal. The question involved the interests and affairs of the county at large, though at the same time it may have incidentally affected the property owners named, as well as others. The contest was between the board of county commissioners, on the one hand, and the county attorney in the name of the county, on the other hand. It concerned the public interests of the county, and not a mere personal advantage to some of its property owners. It was the board of county commissioners that was called upon to defend its action, and not the owners of affected property. No determination of a private right was involved. In theory, at least, Parkinson, Brazeel, and Thomas were interested only as citizens, in the matter of the location of the courthouse. It is doubtful that they could even by contract acquire a private right in such public matters. Their interest was that of citizens desirous of promoting what to them appeared to be the public interests of the county at large. Being so confined in interest, notice to them was unnecessary. The action of the county attorney in prosecuting the appeal is conclusive upon the question that he deemed it to the interest of the county so to do. The case is not ruled by the opinion in Board of County Com'rs v. Beaver County ex rel. Spohn, Co. Atty., 45 Okl. 526, 146 Pac. 434, holding that, when the county attorney, at the request of taxpayers of the county, appeals from an order of the board of county commissioners allowing a claim against the county, notice to the claimant of said appeal is necessary to give the district court jurisdiction of the matter appealed from, as in the case at hand, the right of claimants upon a personal claim against the county is not involved.

From what we have said it is obvious that the trial court erred in dismissing the appeal prosecuted by the county attorney from the action of the board of county commissioners.

The judgment of the trial court is therefore reversed, and the cause remanded, with instructions to the trial court to proceed in the hearing of said appeal, as provided in section 1644, Rev. Laws 1910. All the Justices concur.

(61 Okl. 290)

BELLEVUE GAS & OIL CO. et al. v. CARR.

(No. 8183.)

(Supreme Court of Oklahoma. Nov. 21, 1916.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS ⟸816(3)—ACTIONS FOR INJURIES ON STREETS—"ALLEY."

The word "alley," when used in a pleading in connection with the word "streets," and concerning the plat of a town, will be taken to mean one of the public ways of the municipality, unless the word "private" is prefixed or the context requires that a different meaning be assigned to the term.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1713; Dec. Dig. ⟸ 816(3).

For other definitions, see Words and Phrases, First and Second Series, Alley.]

2. MUNICIPAL CORPORATIONS ⟸763(1), 788(1), 821(16)—DUTIES OF—CARE.

(a) A municipal corporation must exercise ordinary care to know the condition of its public ways, and to keep them free from danger to those using the same.

(b) Actionable negligence arises only upon a breach of duty, and the duty itself in such case does not arise until the municipality has had sufficient notice, actual or constructive, that its public way is in an unsafe condition.

(c) The existence of facts constructively equivalent as a matter of law to actual notice

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of unsafe condition is ordinarily a question for the determination of the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1612, 1641, 1646, 1652, 1750; Dec. Dig. ⊂⊃763(1), 788(1), 821(16).]

3. GAS ⊂⊃17—DUTY OF CARE.

While not an insurer against unforeseen and unavoidable accidents, yet a company using the public ways of a municipality for its gas pipes in conducting its business is required to exercise the highest degree of care, and to maintain its pipes and other appliances in the best possible condition to render its business safe, and is required to use a degree of care, caution, and circumspection in keeping with the dangerous character of its business.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 14; Dec. Dig. ⊂⊃17.]

4. MUNICIPAL CORPORATIONS ⊂⊃1040 — ACTION AGAINST—PRESENTATION OF CLAIMS.

Section 603 of the Revised Laws of 1910, requiring the filing of an itemized, verified statement of an unliquidated claim with the city council for audit, as a condition precedent to a recovery of costs against the municipality, refers to cities only, and has no application to incorporated towns.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2213, 2214; Dec. Dig. ⊂⊃1040.]

5. APPEAL AND ERROR ⊂⊃1004(1)—VERDICT—AMOUNT—PERSONAL INJURIES.

A verdict will not be set aside, in a case of tort, for excessive damage, unless it clearly appear that the jury committed some gross and palpable error or acted under some improper bias, influence, or prejudice, or totally mistook the rules of law by which the damages are regulated.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944, 3946; Dec. Dig. ⊂⊃1004(1).]

6. DAMAGES ⊂⊃216(1)—PERSONAL INJURIES—INSTRUCTIONS.

Instructions complained of examined, and *held* free from reversible error.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548, 549; Dec. Dig. ⊂⊃216(1).]

Commissioners' Opinion, Division No. 4. Error from District Court, Oklahoma County; John W. Hayson, Judge.

Action by D. C. Carr against the Bellevue Gas & Oil Company, a corporation, and the Town of Mounds, a municipal corporation. Judgment for plaintiff, and defendants bring error. Affirmed.

John G. Ellinghausen and C. W. Lively, both of Sapulpa, for plaintiff in error Town of Mounds. Rossiter & Wright, of Okemah, for plaintiff in error Bellevue Gas & Oil Co. R. K. Robertson and Burford, Robertson & Hoffman, all of Oklahoma City, for defendant in error.

EDWARDS, C. For convenience and brevity the defendant in error will be referred to as the plaintiff, the plaintiff in error Bellevue Gas & Oil Company as the Gas Company, and the defendant the town of Mounds as town of Mounds.

The plaintiff, while engaged as a scavenger and while traveling along an alley in the town of Mounds, on the night of July 13, 1915, with a lantern accidentally ignited the gas from a leaky pipe of the defendant Gas Company, causing an explosion by which he was burned and injured. The defendants were sued jointly; the plaintiff alleging that his injuries were caused by the carelessness and negligence of both of said defendants, the negligence of the defendant Gas Company in maintaining the defective gas pipe from which large quantities of natural gas was escaping, and the defendant the town of Mounds in permitting said pipe line to remain in said condition with notice thereof. The case was tried to a jury and a verdict returned against the defendants jointly, in the sum of $4,000, upon which verdict judgment was entered. Both defendants appeal.

The town of Mounds urges three assignments of error, as follows: (1) The plaintiff failed to allege or prove that the alley in which he was injured was such an alley as made it the duty of the town of Mounds to guard persons traveling therein against injury. (2) Instructions No. 15 and No. 17 impose upon the town of Mounds a greater burden for the protection of persons on public streets and highways than the law requires. (3) Instruction No. 16, in regard to notice, enlarges the duties and responsibilities of municipal corporations toward persons injured by defects such as the one complained of in this action.

The defendant Gas Company urges four assignments of error, as follows: (1) The judgment and verdict is excessive. (2) The court erred in giving instruction No. 21. (3) The court erred in giving instructions Nos. 8, 13, and 15. (4) The court erred in refusing to give request for instruction No. 10 of the defendant Gas Company.

The assignments will be considered in the order presented.

[1] Upon the first assignment urged by the town of Mounds it is contended that there is no allegation or proof that the alley in which plaintiff was injured is a public alley, and for that reason the action cannot be maintained against the town of Mounds. That a city or town is not compelled to open for public use all the streets or alleys within the corporation limits but in order to render the town liable it must be pleaded and proved that the alley complained of is in fact a public highway, citing 28 Cyc. 833, 834; Beach on Public Corporations, § 1449; Michaelson v. City of Charleston, 71 W. Va. 35, 75 S. E. 151; Childrey v. City of Huntington, 34 W. Va. 457, 12 S. E. 536, 11 L. R. A. 313; City of Topeka v. Cook, 72 Kan. 595, 84 Pac. 376; 28 Cyc. 1363 (II).

There was no motion to make the petition more definite and certain nor demurrer thereto, nor any request to the trial court to define

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the word "alley," as used therein. The word "alley" seems to have been used in the Constitution, and frequently in the laws of this state in reference to cities and towns to designate one of the public ways of a municipality. The word "alley" has been defined as a narrow street. Asbury v. Kansas City, 161 Mo. App. 496, 144 S. W. 127. And when the term is used without the prefix "private," it is to be deemed a public alley. Flaherty v. Fleming, 58 W. Va. 669, 52 S. E. 857, 3 L. R. A. (N. S.) 461; Burton Co. v. City of Chicago, 236 Ill. 383, 86 N. E. 94, 15 Ann. Cas. 965; Talbert v. Mason, 136 Iowa, 373, 113 N. W. 918, 14 L. R. A. (N. S.) 878, 125 Am. St. Rep. 259; McQuillin on Municipal Ordinances, § 563; Elliott on Roads and Streets, § 24; City of Osage City et al. v. Larkin et al., 40 Kan. 206, 19 Pac. 658, 2 L. R. A. 56, 10 Am. St. Rep. 186. The allegation and proof that the injury was sustained by plaintiff while traveling along an alley connecting two of the streets in the town of Mounds, sufficiently fixes the character of the alley as one of the public ways of the town of Mounds.

[2] The next contention of the town of Mounds is that the court erred in giving instructions Nos. 15 and 17. Instructions Nos. 15 and 17 are as follows:

(15) "You are instructed that a person handling an inherently dangerous instrumentality, such as natural gas is required to use a high and great degree of care and diligence in order that no injury may be occasioned therefrom. By great care or high degree of care is meant that care or diligence usually exercised by persons about their own affairs of great importance under like or similar circumstances."

(17) "You are instructed that one handling a dangerous commodity, such as natural gas, is not an insurer against unforeseen and unavoidable accidents, but in using the public streets and alleys of a town for its pipes and appliances in conducting its business, is required to exercise a high degree of care and caution, and to use due care and caution to maintain the best possible condition, the best appliances practicable in order to render its business safe to the general public, and to use such degree of care and caution and circumspection as is in keeping with the dangerous character of the commodity handled."

It is insisted by the town of Mounds that the use of the words, "a high and great degree of care and diligence," impose too great a burden upon the defendant. Also the defendant Gas Company, in its third assignment, urges that the giving of instruction No. 15 is error, particularly when considered in connection with instructions Nos. 8 and 13, which latter instructions, however, it admits state the law correctly, citing City of Woodward v. Bowder, 149 Pac. 138; Foster v. Kansas City, 114 Mo. App. 728, 90 S. W. 751; Thompson on Negligence, vol. 8, §§ 5953–5958; Rockford Gaslight, etc., Co. v. Ernst, 68 Ill. App. 300; Smith v. Boston Gaslight Co., 129 Mass. 318; Emerson v. Lowell Gaslight Co., 3 Allen (Mass.) 410; Triple-State, etc., Co. v. Wellman, 114 Ky. 79, 70 S. W. 49, 1 Ann. Cas. 64.

The instructions 15 and 17 above quoted are not particularly applicable to the cause of action pleaded against the town of Mounds, inasmuch as they are directed to the duty owed by one handling an inherently dangerous instrumentality, and it is not contended the town of Mounds was so engaged. If the town of Mounds is liable it is for failure on its part to keep the alley in question in a reasonably safe condition for one traveling thereon. Town of Fairfax v. Giraud, 35 Okl. 659, 131 Pac. 159; Cleveland Trinidad Paving Co. v. Mitchell et al., 42 Okl. 49, 140 Pac. 416. But in so far as the defendant Gas Company is concerned, it was proper for the court to instruct the jury as to the degree of care required of one transporting a dangerous instrumentality as natural gas. In 12 R. C. L. § 46, p. 905, it is said:

"It is a well-established rule that a higher degree of care and vigilance is required in dealing with a dangerous agency than in the ordinary affairs of life or business which involve little or no risk of injury to persons or property, and in view of the highly dangerous character of gas and its tendency to escape, a gas company must use a degree of care to prevent the escape of gas from its pipes commensurate to the danger which it is its duty to avoid, and if it fails to exercise this degree of care and injury results therefrom, the company is liable, provided the person suffering the injury either in person or in property is free from contributory negligence. While no absolute standard of duty can be prescribed, it has been held that every reasonable precaution suggested by experience and the known danger of the escape of gas ought to be taken. The company is bound to adopt and use appliances by which it can regulate and keep under control such a volatile and explosive substance, and to inclose or protect these appliances so as to render them reasonably secure and ready for use."

In the case of Koelsch v. Philadelphia Co., 152 Pa. 355, 25 Atl. 522, 18 L. R. A. 759, 34 Am. St. Rep. 653, we take the following excerpt:

"The definitions of negligence which have been attempted imply that a higher degree of care and vigilance is required in dealing with a dangerous agency than in the ordinary affairs of life or business, which involve little or no risk of injury to persons or property. While no absolute standard of duty in dealing with such agencies can be prescribed, it is safe to say, in general terms, that every reasonable precaution suggested by experience and the known dangers of the subject ought to be taken. This would require, in the case of a gas company, not only that its pipes and fittings should be of such material and workmanship, and laid in the ground with such skill and care, as to provide against the escape of gas therefrom when new, but that such system of inspection should be maintained as would insure reasonable promptness in the detection of all leaks that might occur from the deterioration of the material of the pipes, or from any other cause within the circumspection of men of ordinary skill in the business. Something like this was said in Kibelo v. Philadelphia, 105 Pa. 41, and in Holly v. Boston Gaslight Co., 8 Gray (Mass.) 123, 69 Am. Dec. 233, and Smith v. Boston Gaslight Co., 129 Mass. 318; and the principle is recognized in many kindred cases. It requires nothing unreasonable—it does not require that the company shall keep up a constant inspection all along its lines, without reference to the existence or nonexistence of

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probable cause for the occurrence of leaks or escape of gas."

In a note to the case, Consolidated Gas Co. v. Connor et al., 32 L. R. A. (N. S.) 809, we find the following:

"Gas being an extraordinarily dangerous element, an extraordinarily high degree of skill and care is exacted, and the rule of ordinary care with respect to its transmission is adjusted, in view of its known dangers and probable entailments, by a standard of care proportionate to the probable dangers."

And in the case of Hashman v. Wyandotte Gas Co., 83 Kan. 328, 111 Pac. 468, it is said:

"Natural gas being inflammable and highly explosive, those who transport it are held to the exercise of great care and are required to lay and maintain pipes that are safe and secure for transporting gas, and to carefully overlook and inspect the pipes to keep them in a safe condition, and to detect and repair any leaks or defects in them."

See, also, Sipple v. Laclede Gaslight Co., 125 Mo. App. 81, 102 S. W. 608; Hartman v. Citizens' Natural Gas Co., 210 Pa. 19, 59 Atl. 315; Greaney v. Holyoke Water Power Co., 174 Mass. 437, 54 N. E. 880; Stoner v. Pennsylvania Fuel Supply Co., 40 Pa. Super. Ct. 599.

[3] This court, in the case of Ladow v. Oklahoma Gas & Electric Co., 28 Okl. 15, 119 Pac. 250, says:

"While not an insurer against unforeseen and unavoidable accidents, an electric light company using the public streets of a municipality for its poles, wires, and appliances, in conducting its business, is required to exercise the highest degree of care, and to maintain in the best possible condition the best appliances known to the science, to render its business safe, and to use a degree of care, caution, and circumspection in keeping with the dangerous character of its business."

This latter case dealt with the use of electricity, but the principle stated is equally applicable in a case involving natural gas, for in some aspects natural gas is even more dangerous than electricity, among which is the fact that electricity is conveyed by visible objects as poles and wires, generally where they may be seen and recognized, while the channels of natural gas are generally hidden and accidents therefrom result without warning. Those engaged in distributing this dangerous substance are properly required to exercise a high degree of care and caution commensurate with the known or probable dangers which may arise from any defect in the methods or appliances employed. There was no error in giving instructions Nos. 15 and 17 above complained of.

The town of Mounds also alleges that there is error in No. 16 of the court's instructions to the jury. Instruction No. 16 is as follows:

"In this case you are instructed that in order to impute knowledge of the condition of the escaping gas to the defendant, the town of Mounds, it would be necessary for the plaintiff to establish by a preponderance of the testimony that the defendant, town of Mounds, had actual or constructive notice of the particular defect causing the injury complained of. Actual notice would mean the actual knowledge of any officer or agent of the town of Mounds that such defect existed. Constructive notice, so far as this case is concerned, would be imputed if you find from the evidence that the alley at or prior to time the injury occurred was unsafe and defective, and that the plaintiff was injured by reason of said unsafe and defective alley, and that a sufficient length of time had elapsed between the time when said alley became defective and unsafe and the date of the injury to the plaintiff for the said defendant town of Mounds by the exercise of reasonable diligence, to have discovered the defects in said alley or street."

It is settled law in this state that a city or town is not liable for injuries due to defects in its highways of which it has no notice, actual or constructive. City of Woodward v. Bowder, 149 Pac. 138; Town of Norman v. Teel, 12 Okl. 69, 69 Pac. 791; City of Guthrie v. Finch, 13 Okl. 496, 75 Pac. 288, Town of Fairfax v. Giraud, supra; Cleveland Trinidad Paving Co. v. Mitchell et al., supra. This notice may be either actual or constructive, and the sufficiency of such notice is a question of fact to be determined by the jury under all the circumstances of the particular case, and if the defective condition or danger has existed for such a period of time that the city authorities by the exercise of ordinary care and diligence must have known of the existence of the danger and could have guarded the public against it and failed to do so, the city will be liable. City of Woodward v. Bowder, supra; City of Lawton v. Hills, 156 Pac. 297, not yet officially reported. An examination of the record discloses that there was sufficient evidence upon the question of constructive notice to submit the issue to the jury. One of the witnesses testified that gas had been escaping from the pipe at the points where the explosion took place for about a year, at times making a whistling noise, sufficient to be heard a distance of 80 feet away; that a ditch to repair the pipe had been dug exposing the pipe for some time; that a part of the time the ditch was filled with water and the escaping gas made a bubbling or boiling sound that could be heard some distance away; and that the smell of the escaping gas was noticeable at nearby houses. This, with the other evidence on this point, made it the duty of the court to submit the matter to the jury. The instructions complained of state the law correctly.

[4] In conclusion the town of Mounds contends that for failure of the plaintiff to file a claim for damages against it with its town council before commencing suit, the plaintiff is not entitled to recover costs. Section 603, Revised Laws of 1910, provides that no costs shall be recovered against a city in any action brought against it for an unliquidated claim unless such claim, fully itemized and verified, has been presented to the city council to be audited. This section of the statute applies, however, to cities and not to incorporated towns such as the defendant town of Mounds. In the case of incorporated towns there is no statute requiring a claim

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to be filed with its board of trustees before suit as a condition of taxing cost. The statute relied upon is not applicable, and the contention therefore not tenable.

[5] The defendant Gas Company as its first assignment urges that the injury sustained by plaintiff is only temporary, and the judgment and verdict are excessive. With this contention we cannot agree. We have carefully examined the evidence touching upon the injury sustained by the plaintiff, and while the judgment is large, we cannot say that the size of the judgment indicates that the jury acted under any improper bias or were influenced by passion or prejudice or mistook the rules of law by which the damage was regulated, and where same do not appear this court will not disregard the jury's verdict. C., R. I. & P. Ry. Co. v. Pitchford, 44 Okl. 197, 143 Pac. 1146; C., O. & G. Ry. Co. v. Burgess et al., 21 Okl. 653, 97 Pac. 271; St. Louis & S. F. Ry. Co. v. Richards, 23 Okl. 256, 102 Pac. 92, 23 L. R. A. (N. S.) 1032.

[6] It is next insisted that the court erred in giving instruction No. 21. In No. 21 the court instructs the jury that in determining the amount the plaintiff should recover it may take into consideration the amount necessarily expended for a cure or attempted cure of his injuries, the reasonable or probable cost of the necessary future treatment of his injuries, if any. It is argued that there is no evidence upon which to predicate this instruction, and the record is challenged to sustain this contention. An examination of the record, however, discloses that there is evidence by the witness, Dr. Taylor, as to the amount of such charges, which evidence, we apprehend, was overlooked by counsel in preparing its brief upon this point, and for this reason the contention is not well taken.

The third assignment of defendant Gas Company goes to the correctness of instructions Nos. 8, 13, and 15 of the court's charge, which assignment has been heretofore considered and disposed of with the second assignment of the defendant town of Mounds.

The fourth and last assignment refers to the refusal of the court to give request No. 10 of defendant Gas Company. This requested instruction is loosely worded and is no more than a statement that if the jury find for the plaintiff they must take into consideration the nature of plaintiff's injuries and award no more damage than plaintiff has actually sustained. The material parts of this request were covered by the court's general instructions, and there was no error in the refusal of the court to embody this in the court's charge.

Finding no error that would warrant a reversal, the cause is affirmed.

PER CURIAM. Adopted in whole.

(61 Okl. 259)

NEWS-DISPATCH PRINTING & AUDITING CO. v. BOARD OF COM'RS OF GRADY COUNTY. (No. 7854.)

(Supreme Court of Oklahoma. Nov. 14, 1916.)

(Syllabus by the Court.)

COUNTIES ⟸113(1)—COMMISSIONERS—POWERS OF.

Where the statutes have created two administrative offices, with co-ordinating powers and duties, in the absence of express authority so to do, there is no implied authority in one office to contract with private individuals to perform service which it is the express statutory duty of the other office to perform. The statute, which created the office of state examiner and inspector and imposed upon that office the duty to examine the books and accounts of all or any officers or custodians of the various funds of a county, upon request of the county commissioners of any county, etc., was intended for the benefit of the counties of the state; it is the duty of the office of the state examiner and inspector to conduct such county audit upon such request; the county commissioners have no implied authority to employ a private individual to conduct such audit; and a contract between a board of county commissioners and a private individual for such purpose is ultra vires and void.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174, 176; Dec. Dig. ⟸113(1).]

Commissioners' Opinion, Division No. 3. Error from District Court, Grady County; Will Linn, Judge.

Action by the News-Dispatch Printing & Auditing Company against the Board of County Commissioners of Grady County. Judgment for defendants, and plaintiff brings error. Affirmed.

Oscar Simpson, of Chickasha, and J. S. Thompson and G. N. Longfellow, both of Oklahoma City, and Pat Nagle, of Kingfisher, for plaintiff in error. John H. Venable and Allen K. Swan, both of Chickasha, for defendants in error.

JOHNSON, C. During the month of December, 1914, the board of county commissioners of Grady county entered into an agreement with the News-Dispatch Printing & Auditing Company, by the terms of which the auditing company was engaged to audit the books and accounts of the clerk of the district court and county clerk of said county, the county to pay for the services of one expert accountant to be furnished by the auditing company at the rate of $10 per day and traveling expenses, the audit to be completed within 30 days, or as soon thereafter as practicable. After the accountant furnished by the auditing company had worked 15 days, the county board ordered the work stopped, and notified the company that performance of the contract could not proceed, for the reason that the board had received advice that the contract for the audit was not within the powers of the board, and consequently not legal. The work was stopped; and the auditing company later filed its claim with the county for the work done,

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expenses, and for 40 additional days that the auditor would have been paid for if he had been allowed to complete the contract. The claim was disallowed, and this suit was brought by the auditing company for the items covered by the claim. The lower court sustained the demurrer of the board to the petition, one of the grounds of demurrer being that the county board had no authority under the law to enter into the alleged contract; and the auditing company has appealed to this court.

The question involved is whether a board of county commissioners may legally employ the services of an accountant, other than the state examiner and inspector and his deputies, to audit the books and accounts of county officers and custodians of county funds. The statute creating the office of state examiner and inspector, after providing for the duties of such officer with reference to the books and accounts of state officials, contains this provision, viz.:

"*Duties and Powers.* * * * In addition to the above-prescribed duties, upon request of the county commissioners of any county, or upon request to the Governor, signed by five per cent. of the legal voters of any county, and by order of the Governor, the state examiner and inspector shall examine or cause to be examined by duly appointed deputy or deputies, the books and accounts of all or any of the officers or custodians of the various funds of the county; and payment for such examinations shall be made out of the contingent fund of the county so examined at the same salary and expenses provided herein for deputy examiners. The state examiner and inspector shall have power to appoint additional special deputies for this purpose: Provided, that no deputy shall examine the books or records of the county of his residence. * * *" Section 8119, Revised Laws of 1910.

Section 1600, Revised Laws 1910, confers the following power upon boards of county commissioners, to wit:

"To audit the accounts of all officers having the care, management, collection or disbursement of any money belonging to the county, or appropriated for its benefit."

Section 1601, Revised Laws 1910, provides:

"The board of county commissioners is hereby vested with full power to inquire into and investigate the accounts, disbursements, bills and expenses of any county, district, or township officer, and to that end may subpœna witnesses," etc.

It is the contention of defendants in error that under these statutes, while the county commissioners have authority to provide for the auditing and examination of county records, they are confined to the employment of the state examiner and inspector or deputies from his office, and cannot legally contract with a private individual or corporation to do that work. It is contended by plaintiff in error that while the law provides that the county commissioners may call upon the state examiner and inspector to make the audit, yet the language here employed does not compel them to do so, but leaves them free to act in accordance with their own discretion in choosing employés or agents to perform the service.

It may first be said that a county is an involuntary political and civil subdivision of the state, created by statute to aid in the administration of governmental affairs, and possessed of a portion of the sovereignty. All the powers with which it is intrusted are the powers of the sovereignty which created it, and all the duties with which it is charged are the duties of the sovereignty. It is only liable for such obligations as the Legislature has imposed, or authorized it to create, or such as are necessarily incident to the object of its creation. And the board of county commissioners can exercise such powers only as are conferred upon it by the Constitution or the statutes, or such as may arise by necessary implication from an express grant. Board v. Watson, 7 Okl. 174, 54 Pac. 441; Tulsa St. Ry. Co. v. State, 26 Okl. 559, 110 Pac. 373; Allen v. Board, 28 Okl. 773, 116 Pac. 175.

Such power as the county commissioners have to choose an agency for the service under consideration must be found in the statutes hereinabove quoted. Sections 1600 and 1601 undoubtedly confer authority upon the board to audit, inquire into, and investigate the accounts of county officers, and this authority includes, not alone the power to approve or disapprove, audit, and investigate the reports of such officers, but the power to procure an expert audit of the county records. Section 8119, quoted supra, provides an instrumentality for the exercise of the latter power, viz., the services of the state examiner and inspector, and his duly authorized deputies. It becomes necessary to determine whether this instrumentality is exclusive. It has been said by this court:

"It is a familiar rule of construction, as laid down in the syllabus of United States v. Weld, McCahon, 185 (Kan. Dassler's Ed.) 591 (Fed. Cas. No. 16,660), that: 'When one person, or class of persons, is named in a power of attorney, or an act of the lawmaking power, as being authorized to do a certain thing therein named, all other persons are thereby excluded from doing the same thing as effectually as if they were positively forbidden.'" State ex rel. Haskell, Governor, v. Huston et al., 21 Okl. 782, 97 Pac. 982; Osage & Oklahoma Co. v. Millard (not yet officially reported), 145 Pac. 798.

With reference to the power of the county board to employ agents, Cyc., vol. 11, p. 473, lays down the general rule as follows:

"With these limitations, county boards or courts have power to appoint such agents, officers, and servants as may be required for county purposes, *and which are not otherwise* provided for by law or by the state Constitution." (Emphasis ours.) Chase v. Board, 37 Colo. 268, 86 Pac. 1011, 11 Ann. Cas. 483; Stringer v. Franklin County, 58 Tex. Civ. App. 343, 123 S. W. 1168; Wilhelm v. Cedar Co., 50 Iowa, 254; Ringgold Co. v. Allen, 42 Iowa, 697.

In the case of State v. Goldthait, 172 Ind. 210, 87 N. E. 133, 19 Ann. Cas. 737, the Supreme Court of Indiana said:

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"A contract with a county for the performance by a third person of duties which are imposed by law on a public officer is void as against public policy."

In the case of Stringer v. Franklin Co., supra, the Supreme Court of Texas said:

"Where the law imposes on an officer the performance of acts as a part of his official duties, the commissioners' court of the county is without authority to contract with any other person to perform such services."

It is said by the plaintiff in error that the law does not impose upon the state examiner and inspector the duty to audit the county records, *except upon the request* of the county commissioners, that such duty only arises upon such request, and that the making of such request lies in the discretion of the county board. Section 1556 of Revised Laws, which was in force in the territory of Oklahoma, provides:

"The county attorney shall give opinion and advice to the board of county commissioners and other civil officers, of his county *when requested by such board or officers*, upon all matters in which the county is interested," etc.

In the case of the Board of County Commissioners of Logan County v. Jones, 4 Okl. 341, 51 Pac. 565, in a discussion of the power of the county board to employ an attorney at law to perform duties imposed by the statute upon the county attorney and Attorney General, referring to the statutes imposing such duties, it was said:

"By these statutes the Legislature has made ample provision for an attorney for both the county, and, in fact, each and every county, and the territory. It is the duty of the county attorney to perform all legal services for the county and territory within his county, and in cases in which the territory or county is interested which have been taken from his county on change of venue. It is the duty of the Attorney General to prosecute and defend all cases, civil and criminal, in the Supreme Court where the territory is interested as a party. The Legislature has given to the county commissioners no authority whatever to employ any other attorney than the one who is employed by law to represent the public interests, and a contract made for such purpose is ultra vires and void."

In the case of Clough & Wheat v. Hart, 8 Kan. 487, quoted with approval by the Oklahoma Territorial Supreme Court in the Jones Case, supra, holding a contract for the employment of an attorney to perform services for the county to be void, it was said:

"The county attorney is elected by the people of the county and for the county. Gen. Stat. pp. 283, 135. He is the counsel for the county, and cannot be superseded or ignored by the county commissioners. His retainer and employment is from higher authority than the county commissioners. The employment of a general attorney for the county is not by law put into the hands of the county commissioners, but is by law put into the hands of the people themselves. The county attorney derives his authority from as high a source as the county commissioners do theirs, and it would be about as reasonable to say that the county attorney could employ another board of commissioners to transact the ordinary business of the county as it is to say that the county commissioners can employ another attorney to transact the ordinary legal business of the county. Both would be absurd. It is the duty of the county attorney to give legal advice to the county commissioners, and not theirs to furnish legal advice to * * * him."

In the case of Brome v. Cuming County, 31 Neb. 362, 47 N. W. 1050, the Supreme Court of Nebraska used this language:

"The Legislature has made ample provision for protecting the interests of the county and state by furnishing proper legal counsel. The statute having pointed out the mode of procuring counsel for the county, it is exclusive of all others. The services rendered by the plaintiff in error for which he claims compensation in this case are precisely what the law required the county attorney to perform. The employment was without authority of law, and no recovery can be had."

See 11 Cyc. 472, and cases there cited.

While the duties of the office of county attorney are dealt with in most of the cases referred to, the analogy is clear. The principle of lack of authority to ignore or disregard the statutory duties of one officer, or to replace him, applies as well to any other officer deriving his powers and duties from the same source. In the kingdom of natural law, every body improperly functions when its co-ordinate parts do not work with that harmony designed by the Creator. In the realm of mechanics, no machine may properly perform when its various parts do not work together with that co-operative precision which meets the creative intention of the inventor. In each instance, if any part of the whole fails to receive the prescribed co-ordination of any other part, such failure not alone interferes with the operation of the principal unit, but with the successful operation of both the part which does not receive, and the part which is not permitted to give, co-operation. This law of co-ordination likewise controls human organization, including government; and under its rule, each part of administrative governmental machinery must accept and give the co-operative action contemplated in the plan of the legislative creation and growth of the whole. The rule that one officer cannot supplant another in the performance of his duty, by necessity arises from this law of co-ordination.

The law, which created the office of state examiner and inspector, made it mandatory upon that officer, upon request of the county commissioners, or upon the order of the Governor at the request of a certain per cent. of the voters of a county, to perform the duties sought to have been obtained of another in this case. It fixed his remuneration, to be paid out of the county treasury. It gave him official powers not had by an individual auditor, and fixed penalties for violations of his prerogatives. It required of him a large official bond for the faithful performance of his duties. It did everything necessary to make of his office a co-ordinating instrumentality in the performance of the duty of the county commissioners to procure an audit of the county records. These actions of the legislative power were not

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without meaning; and it was evidently the intention that the created instrumentality should be used. It was necessary to vest somewhere the discretion to determine when the necessity of its use arises; and this discretion was vested in the county commissioners, and in the Governor acting upon the petition of a per centum of the voters. It is the duty of the county attorney to give legal advice to the county officers, *upon request of such officers*; and yet it is held that, when the necessity arises, he must be called into service, and cannot be supplanted. The call of the state examiner and inspector to the service of the county is based upon exactly the same condition, the *request* of the county officials. The predicate of co-ordination is the same as to both offices, and the conclusion necessarily is the same.

Plaintiff in error cites the case of Board of Com'rs v. Davie, 27 Colo. App. 501, 150 Pac. 324, in which the Supreme Court of Colorado held valid, under the statutes of that state, a contract by county commissioners with a private individual to audit the county records, to the exclusion of the state examiner. That decision specifically stated that the examination of county records by the public examiner, as provided for by the statute of that state, was manifestly for the use of the state; that under the statute the expense of the examination was paid by the state; that the county commissioners were given no authority to direct the state examiner to make the audit; and that the commissioners were not bound by, nor charged with notice of, the report when made. That decision was based, also, upon a decision of the Supreme Court of California, upholding a contract for a similar audit by private individuals, the latter decision being based upon the fact that the law prescribed no other means by which the result could be accomplished. As already pointed out, our statute provides a means for the result, and the lack of statutory co-ordination between the office of the state examiner and the county authorities, which existed under the Colorado statute, does not exist under our statute, but is specifically cured.

In the case of Chase v. Board, 37 Colo. 268, 86 Pac. 1011, 11 Ann. Cas. 483, where the statutory co-ordination existed between offices, the Supreme Court of Colorado held to the principle we have laid down, in holding invalid a contract by the county with a tax ferret to list omitted property, upon the ground that this duty was vested in the tax assessor, saying:

"If the power to do the very thing which this contract attempts to give to plaintiffs has been by statute conferred upon other public officers, as it is altogether plain has been done, certainly this negatives the existence of an implied power in the board of commissioners to do that thing."

Our statute gives to the county commissioners the authority to audit the accounts of county officers, and under certain circumstances they may require expert assistance. Where expert assistance is required, the statute has furnished it in the instrumentality of the office of the state examiner and inspector. The statutory instrumentality is sufficient to meet all requirements; and where the means provided by the statute are sufficient, there is clearly no implied authority to discard their use and contract for the use of other means. If the implied authority to use other means existed prior to the statute creating the office of state examiner and inspector, the plain creation of another sufficient statutory instrumentality is sufficient to work a repeal.

Other questions are raised in the case, but the decision as to the validity of the contract fully determines the appeal.

The lower court was correct in holding the contract of plaintiff to be ultra vires and void, and in sustaining the demurrer to the petition; and its judgment should be affirmed.

PER CURIAM. Adopted in whole.

(61 Okl. 294)

HOOD v. WOOD. (No. 7686.)

(Supreme Court of Oklahoma. Nov. 21, 1916.)

(Syllabus by the Court.)

1. FRAUD ⟸11(1) — ACTIONS — REPRESENTATIONS.

In a transaction involving the sale of stock in a corporation, representations as to the financial condition of the company, the volume of its business, the amount of its income and expenses, the value of its stock, and its immediate financial prospects are all matters peculiarly within the knowledge of the company, and, when made with the view to induce another to subscribe therefor, are representations of matters of fact, and not expressions of opinion, and such representations so made, and when relied upon by the purchaser of said stock, if false, constitute actionable fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 12; Dec. Dig. ⟸11(1).]

2. FRAUD ⟸11(2)—REPRESENTATIONS.

A representation as to value is usually regarded as an expression of opinion, but, where false and made by one as an inducement to another, who is ignorant thereof, to enter into a contract, and is relied upon to the detriment of the latter, may be made the basis of an action for damages consequent upon fraud and misrepresentation.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 13; Dec. Dig. ⟸11(2).]

3. FRAUD ⟸22(1)—ACTIONS—DEFENSES.

One who relies upon a material representation which is false is not always precluded from recovering damages by reason of the fact that he had the opportunity to investigate for himself, and did not do so.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 19, 20, 22, 23; Dec. Dig. ⟸22(1).]

4. CORPORATIONS ⟸80(12)—SALES OF STOCK —RESCISSION—RELIEF.

Under section 986, Revised Laws of 1910, one seeking a rescission is only required to restore everything of value, and under the facts of this case it is *held* that the party seeking

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a rescission of the contract is entitled to the relief sought.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 264; Dec. Dig. ⊂⊃80(12).]

Commissioners' Opinion, Division No. 3. Error from District Court, Alfalfa County; J. C. Robberts, Judge.

Action by Laura A. Nuckles Wood against E. E. Hood, trustee of the Shawnee Life Insurance Company, a corporation, dissolved. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Lydick & Eggerman, of Shawnee, and Titus & Talbot, of Cherokee, for plaintiff in error. Owen & Hill and W. E. Wiles, all of Cherokee, and E. S. Hadley, of Wichita, Kan., for defendant in error.

HOOKER, C. It appears from the evidence in this case that the plaintiff, Mrs. Wood, in 1910 lived near Cherokee, Alfalfa county, Okl., and that she was at that time a widow having no one to advise her with reference to investments, and that one J. C. Parker, who was an agent of the Shawnee Life Insurance Company, approached her on a number of occasions for the purpose of inducing her to subscribe for stock in the Shawnee Life Insurance Company, and after much persuasion upon his part and many representations as to the value of said stock he finally sold her 40 shares for $1,000 in cash, and 50 shares for $1,250, the payment of which was secured by a mortgage upon the real estate involved in this action. The evidence discloses that Mrs. Wood had implicit confidence in the statements made by the agent of the company as to the value of said stock. And the evidence further discloses that the statements made by Parker to her which induced her to make this investment were falsely and fraudulently made, in that Parker represented to her that the company had sold $400,000 in cash of its stock, and that the actual cash value of the stock was $25 per share, and that the same was rapidly rising in value, and that the company would pay a dividend of at least 10 per cent. the first year, and by the use of the dividends she could readily pay the interest upon the note and mortgage executed by her as the purchase price of said stock, and with the dividends therefrom she could eventually pay the entire indebtedness.

It further appears that a few months after the stock in the Shawnee Life Insurance Company had been delivered to her an agent of the Shawnee Life Insurance Company and another came to her home and represented to her that the stockholders would all lose their money unless they consented to a transfer of the stock in the Shawnee Life Insurance Company for stock in the Amalgamated Insurance Corporations, and that the Shawnee Life Insurance Company was in a failing condition, and in order to save anything for the stockholders it was necessary for this transfer to be made, and that, believing said statement to be true, she consented to said transfer, and received 90 shares of stock in the Amalgamated Insurance Corporations, which she alleges to be of no value and worthless, and she tenders the same into this court for the use and benefit of the Shawnee Life Insurance Company. That the representations and statements made by the agents of the Shawnee Life Insurance Company as to the financial standing of this company, and as to the value of its stock at the time she purchased the same, were false, must be admitted. That these statements induced her to part with the possession of her hard-earned money and to purchase additional stock, securing the same by a mortgage upon her property, cannot be denied, and the fact that she invested virtually all of her savings in this transaction conclusively demonstrates that the agent of the company pictured the opportunity for her to make money by this investment so easily and so marvelously that she yielded to the seductive influence of the agent's conversation and suffered the same to control and dictate to her business judgment.

The trial court found all of these representations to be falsely and fraudulently made by the company and its agents with the sole view and purpose of deceiving and defrauding this woman out of her earnings, and that the exchange of stock in the Shawnee Life Insurance Company for stock in the Amalgamated Insurance Corporations was but a part and parcel of this one great scheme concocted by the company and its agents to defraud people by the wholesale who might invest in this enterprise. We cannot say that the judgment of the court is against the weight of the evidence. The method of transacting business disclosed by this evidence demonstrates that the Shawnee Life Insurance Company was not a legitimate enterprise, nor was its business conducted upon that high plane which should characterize the business methods of a safe and sound financial institution of this character.

It is asserted here that defendant in error cannot succeed for the following reasons: First, that her cause of action is barred by the statute of limitations; second, that she failed to return what she had received, and therefore she was not entitled to rescind; third, no actionable fraud was shown by the evidence nor alleged in the pleadings.

[1-4] The first two contentions of plaintiff in error are decided adversely to it by this court in Shawnee Life Insurance Company v. Taylor, 160 Pac. 622, not yet officially reported, which case involved every issue of the instant case, wherein it was held:

First: "Construing the allegations of the petition together with a view to substantial justice, it may fairly be inferred that this exchange of stock was a part of the original scheme to defraud, and was intended to complicate the transaction and render recovery more difficult, which it did, as we shall see. We are therefore of

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opinion that the court did right when he, in effect, held that the statute began to run against the action, not from November 12, 1910, the date when the 325 shares of stock in the defendant company were sold and the deeds executed conveying the land in exchange therefor, but from the date when that stock was exchanged for stock in the Amalgamated Corporations, and hence the court did not err in overruling the demurrer to the petition."

Second: "And in May or June following plaintiffs were induced by the president of defendant company and another to exchange the remainder of their 325 shares of stock for stock in the same company, which nobody claims to be of any value whatever. Upon this evidence it is urged that the court erred in decreeing a rescission of the sale and a cancellation of the deeds, which he did, because, they say, while plaintiffs properly pleaded a tender of the stock received in exchange, which was ordered turned over to defendant company, yet, as the evidence discloses that they had parted with the title and possession of all the 325 shares sold them by the defendant company, and could not restore it, and thus put defendant company in statu quo, the court had no right to decree as he did. * * *

"And so we might hold, were it not for the fact that the stock of the defendant company, which cannot be restored, we repeat, was of no value. As it is only everything of value that plaintiffs were bound to restore, the court did not err in decreeing a rescission of the contract of sale and a cancellation of the deeds and mortgages complained of, and, in effect, clearing the title of the plaintiffs to the property, especially as the court at the same time ordered turned over to the defendant company the stock of the Amalgamated Company taken in exchange for their stock."

With reference to the contention that no actionable fraud was alleged or proven, it might not be amiss to say that the trial court found the issues in favor of the defendant in error, and ordered the cancellation of the mortgage and deed named herein, upon the sole ground that the same were without consideration, and that the representations made by the Shawnee Life Insurance Company and its agents to the defendant in error were false and fraudulent, and make for the purpose of deceiving them. The doctrine of this court is that the findings of the trial court will not be disturbed on appeal where the evidence reasonably tends to support such findings. The evidence here conclusively establishes that the defendant in error was overpersuaded and overreached by the company and its agents, and as a result thereof she parted with the earnings and savings of a lifetime, and in return therefor received stock in this company which was absolutely worthless. The defendant in error was without business experience, and entertained no conception of the enterprise in which she became interested, but yielded to the siren song coolly and deliberately sung by the Shawnee Life Insurance Company and its agents, and she was thereby defrauded and deprived of her property. The agents of this company told her of the fabulous wealth she could acquire by investing in the stock of this company, what a great and glorious financial institution it was, how well and how successfully it was being operated, how valuable the stock was and how rapidly this stock would rise in value, and how easy it would be for her to become rich by investing in the same. These statements were false, and were fraudulently made, and constantly and incessantly made to the defendant in error until they had extracted from her all of her available cash, and she had pledged to them all of her property, and then in a short time thereafter, in order to complicate the situation and make it more difficult for her to recover her property from the company, the Shawnee Life Insurance Company, and others, induced her to exchange her stock for stock in another company, which she did. She did not reap the dream of boundless wealth contemplated by her at the time of this investment, but, according to the evidence, she now faces the ashen gray of poverty at that time of life when the light lingers after the sun is down. It would be placing a premium upon dishonesty and a reward to culprits for the court to say that the defendant in error was not entitled to recover because she had made this exchange of stock. The evidence conclusively establishes a positive, clear, and an actionable case of fraud.

In the case of St. L. & S. F. Ry. Co. v. Reed, 37 Okl. 355, 132 Pac. 357, it is said:

"That a representation within the meaning of the law of fraud is anything short of a warranty, which proceeds from the action or conduct of the party charged, and which is sufficient to create upon the mind a distinct impression of fact conducive to action. The gist of false misrepresentation is the producing of a false impression upon the mind of the other party, and if this result is actually accomplished the means of accomplishing it are immaterial."

In the case of Miller v. Wissert, 38 Okl. 811, 134 Pac. 63, it is said:

"The rule is that if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact which he is in good faith bound to disclose, this is evidence of an equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and, if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff. * * *

"False representations of a vendor as to the quantity of a tract of land he offers for sale are not mere matters of opinion, but are material, and he cannot avoid their consequences merely because the vendee might have ascertained their falsity by a survey of the land or by reference to official plats and records."

In Gannon et al. v. Hausaman, 42 Okl. 41, 140 Pac. 407, 52 L. R. A. (N. S.) 519, it is said:

"A false and fraudulent representation, by one who assumes to have personal knowledge, to the purchaser of real estate, that there is no incumbrance thereon, upon which representation the purchaser relies and acts to his injury, will sustain an action for the tort, although the purchaser might have discovered the fraud by searching the public records. A man cannot state falsely to another in such cases and then complain because he was believed."

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In Stevens v. Reilly, 156 Pac. 157, it is said:

"No man should be permitted to complain, or take advantage of the fact that another has too confidently relied on the truthfulness of the statements he has himself made."

In Boehme v. Broadway Theater Co. (Wash.) 157 Pac. 219, it is said:

"The claim that whatever representations were made by appellants were mere expressions of opinion, upon which respondent has no right to rely, is untenable. The financial condition of the company, the volume of its business, the amount of its income and expenses, and what these had been in the past were all matters peculiarly within the knowledge of the appellants, and not easily ascertainable by respondent. We have frequently held that representations as to such matters are representations as to matters of fact, and, if false, and made with knowledge that they were being relied upon by the other party, constitute actionable fraud."

In Christenson v. Koch, 85 Wash. 472, 148 Pac. 585, it is said:

"Ordinary prudence does not require a person to test the truthfulness of representations made to him by another as of his own knowledge, with the intent that they shall be believed and acted upon, even though the party to whom such representations are made may have an opportunity to ascertain the truth for himself."

In Werline v. Aldred, 157 Pac. 305, this court said:

"A representation as to value is usually regarded as an expression of opinion, but where made by one as an inducement to another, who is ignorant thereof, to enter into a contract, and is relied upon to the detriment of the latter, the same may be made the basis of an action for fraud and misrepresentation."

And it is further said in this opinion that:

"One who relies upon a material representation which is false is not precluded from recovering damages by reason of the fact that he had the opportunity to investigate for himself and did not do so."

In Gwinn v. Ford, 158 Pac. 536, the Supreme Court of Washington said:

"Representations by the seller of corporate stock to the buyers that he was intimately acquainted with the affairs of the company, had inside information from which he knew that the stock was of greater value than the price at which it was selling, that it would rise within a few days, knew where it could be sold in a short time for a marked increase, and that a profit could be realized by a mere loan on the buyers' credit, were representations of matters of fact rather than of matters of opinion."

In Howe v. Martin, 23 Okl. 561, 102 Pac. 128, 138 Am. St. Rep. 840, it is said:

"A party is guilty of fraud and deceit where, with intent to induce another to enter into a contract, he makes a positive assertion, which is material, in a manner not warranted by his information, or where he is not shown to have reasonable grounds for believing it true, where the assertion so made is not true, even though believed by the party making it. In such a case the definite assertion as a fact of that which is untrue, concerning that which the party has no knowledge, is tantamount in its effects to the assertion of something which the party knows to be untrue."

The lower court found that the discovery of the fraud was not complete until after the exchange of stock, and that brings the same within the time in which the action may be maintained, and, as there is evidence supporting this view, we cannot disturb the same here.

The judgment of the lower court is affirmed.

PER CURIAM. Adopted in whole.

(61 Okl. 297)

HOOD v. FORD et al. (No. 7344.)

(Supreme Court of Oklahoma. Nov. 21, 1916.)

Commissioners' Opinion, Division No. 3. Error from District Court, Alfalfa County; James B. Cullison, Judge.

Action by E. Ford and Matilda J. Ford against E. E. Hood, trustee of the Shawnee Life Insurance Company, a corporation, dissolved. There was judgment for plaintiffs, and defendant brings error. Affirmed.

Lydick & Eggerman, of Shawnee, and Titus & Talbot, of Cherokee, for plaintiff in error. Owen & Hill and W. E. Wiles, all of Cherokee, and E. S. Hadley, of Wichita, Kan., for defendants in error.

HOOKER, C. Under the authority of the Shawnee Life Insurance Co. v. Taylor (No. 5898) 160 Pac. 622, and E. E. Hood, Trustee, v. Wood (No. 7686) 161 Pac. 210, this case is affirmed.

PER CURIAM. Adopted in whole.

(61 Okl. 298)

HOOD v. MITCHELL. (No. 7685.)

(Supreme Court of Oklahoma. Nov. 21, 1916.)

Commissioners' Opinion, Division No. 3. Error from District Court, Alfalfa County; J. C. Robberts, Judge.

Action by Maud M. Mitchell against E. E. Hood, trustee of the Shawnee Life Insurance Company, a corporation, dissolved. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Lydick & Eggerman, of Shawnee, and Titus & Talbot, of Cherokee, for plaintiff in error. Owen & Hill and W. E. Wiles, all of Cherokee, and E. S. Hadley, of Wichita, Kan., for defendant in error.

HOOKER, C. Under the authority of the Shawnee Life Insurance Co. v. Taylor (No. 5898) 160 Pac. 622, and E. E. Hood, Trustee, v. Wood (No. 7686) 161 Pac. 210, this case is affirmed.

PER CURIAM. Adopted in whole.

(61 Okl. 298)

HOOD v. HOLCOMB et al. (No. 7688.)

(Supreme Court of Oklahoma. Nov. 21, 1916.)

Commissioners' Opinion, Division No. 3. Error from District Court, Alfalfa County; J. C. Robberts, Judge.

Action by Lydia M. Holcomb and B. A. Holcomb against E. E. Hood, trustee of the Shawnee Life Insurance Company, a corporation, dissolved. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

Lydick & Eggerman, of Shawnee, and Titus & Talbot, of Cherokee, for plaintiff in error. Owen & Hill and W. E. Wiles, all of Cherokee, and E. S. Hadley, of Wichita, Kan., for defendants in error.

HOOKER, C. Under the authority of the Shawnee Life Insurance Company v. Taylor (No.

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5898) 160 Pac. 622, and E. E. Hood, Trustee, v. Wood (No. 7686) 161 Pac. 210, this case is affirmed.

PER CURIAM. Adopted in whole.

(61 Okl. 298)

HOOD v. SPANGLER et al. (No. 7687.)

(Supreme Court of Oklahoma. Nov. 21, 1916.)

Commissioners' Opinion, Division No. 3. Error from District Court, Alfalfa County; J. C. Robberts, Judge.

Action by Fannie Spangler and others against E. E. Hood, trustee of the Shawnee Life Insurance Company, a corporation, dissolved. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

Lydick & Eggerman, of Shawnee, and Titus & Talbot, of Cherokee, for plaintiff in error. Owen & Hill and W. E. Wiles, all of Cherokee, and E. S. Hadley, of Wichita, Kan., for defendants in error.

HOOKER, C. Under the authority of the Shawnee Life Insurance Company v. Taylor (No. 5898) 160 Pac. 622, and E. E. Hood, Trustee, v. Wood (No. 7686) 161 Pac. 210, this case is affirmed.

PER CURIAM. Adopted in whole.

(61 Okl. 298)

HOOD v. HOLCOMB et al. (No. 7689.)

(Supreme Court of Oklahoma. Nov. 21, 1916.)

Commissioners' Opinion, Division No. 3. Error from District Court, Alfalfa County; J. C. Robberts, Judge.

Action by John W. Holcomb and Mary A. Holcomb against E. E. Hood, trustee, etc. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

Lydick & Eggerman, of Shawnee, and Titus & Talbot, of Cherokee, for plaintiff in error. Owen & Hill and W. E. Wiles, all of Cherokee, and E. S. Hadley, of Wichita, Kan., for defendants in error.

HOOKER, C. Under the authority of the Shawnee Life Insurance Company v. Taylor (No. 5898) 160 Pac. 622, and E. E. Hood, Trustee, v. Wood (No. 7686) 161 Pac. 210, this case is affirmed.

PER CURIAM. Adopted in whole.

(61 Okl. 253)

APACHE STATE BANK v. VOIGHT. (No. 8228.)

(Supreme Court of Oklahoma. Nov. 15, 1916.)

(Syllabus by the Court.)

1. COURTS ⟸1—"JURISDICTION"—NATURE OF JURISDICTION.

"Jurisdiction" is the power of courts and judicial officers to take cognizance of and to hear and determine the subject-matter in controversy between parties to a proceeding pending, and to adjust or exercise judicial power over them.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1-4, 6-9, 91-106; Dec. Dig. ⟸1.

For other definitions, see Words and Phrases, First and Second Series, Jurisdiction.]

2. COURTS ⟸37(1) — JURISDICTION—RAISING OF QUESTION.

The question of jurisdiction is primary and fundamental in every case, and cannot be waived by the parties or overlooked by the court. It is the bounden duty of the court to examine into its jurisdiction, whether raised by any party or not, and sua sponte to determine its own jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 147, 151; Dec. Dig. ⟸37(1).]

Commissioners' Opinion, Division No. 4. Error from County Court, Caddo County; C. R. Johnston, Judge.

Action by the Apache State Bank against William Voight. There was a judgment for defendant, and plaintiff brings error. Reversed, with directions.

A. J. Morris, of Anadarko, for plaintiff in error. Bristow & McFayden and C. H. Carswell, all of Anadarko, for defendant in error.

EDWARDS, C. This action was instituted by the plaintiff in error, plaintiff below, in the county court of Caddo county, on August 8, 1914, to recover judgment upon a promissory note in the sum of $150, with interest at 10 per cent. from June 10, 1914, and $15 attorney's fees. The defendant, for answer admitted the execution of the note, but set up as a defense certain alleged fraudulent representations by which the note was procured. Upon the issue framed a trial was had to a jury, and a verdict and judgment in favor of the defendant in error, defendant below. Within due time the cause was appealed to this court.

[1, 2] Section 12, art. 7, of the Constitution of this state confers upon county courts certain jurisdiction until otherwise provided by law, and section 1816 of the Revised Laws of 1910 provides:

"The county court * * * shall have concurrent jurisdiction with the district court in civil cases in any amount over two hundred dollars and not exceeding one thousand dollars, exclusive of interest. * * *"

Construing this provision of the Constitution and section 1816, supra, together, it is evident that county courts of this state have no jurisdiction in civil cases involving $200 or less. Musser et ux. v. Baker et al., 158 Pac. 442 (No. 7484), not yet officially reported; Model Clothing Co. v. First National Bank, 160 Pac. 450 (No. 8255), not yet officially reported; Underwood Typewriter Co. v. March, 160 Pac. 594 (No. 7727), not yet officially reported.

The case in the lower court seems to have been tried without the question of jurisdiction of the county court having been raised, and the question is not raised by the parties in this court, but since the question of jurisdiction is primary and fundamental in every case, it cannot be waived by the parties or overlooked by the court. It is the duty of this court to examine into its jurisdiction, whether raised by any party or not, and sua

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sponte to determine whether or not it has jurisdiction. Kennan v. Chastain, 157 Pac. 326, not yet officially reported.

The case is therefore reversed and remanded, with instructions to the lower court to dismiss the action for want of jurisdiction.

PER CURIAM. Adopted in whole.

(61 Okl. 269)

HEDRICK et al. v. KABITT. (No. 7845.)

(Supreme Court of Oklahoma. Nov. 15, 1916.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE ⟸154 — APPEAL — PERFECTION.

The provision of section 5465, Rev. Laws of 1910, directing how an appeal may be taken from the justice of the peace court to the district, county, or superior court, is directory, and not mandatory; and, where the party appealing from the justice court prepares an appeal bond therein, naming the court to which said appeal is to be taken, and the justice's transcript is duly lodged therein, said appeal is duly perfected, and it was error to dismiss the same for the reason that no order or direction was given to the justice, by the party appealing, of the court, other than the bond itself.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 520; Dec. Dig. ⟸154.]

Commissioners' Opinion, Division No. 3. Error from District Court, Craig County; Preston S. Davis, Judge.

Action by Charles Kabitt against Becky Hedrick and another, begun in justice's court and appealed by defendants to the district court. The appeal was quashed, and defendants bring error. Reversed and remanded, with directions.

A. R. Lamb, of Coffeyville, Kan., for plaintiffs in error.

HOOKER, C. On December 25, 1913, Charles Kabitt filed his bill of particulars against Becky Hedrick and A. A. Hedrick as defendants before E. H. Johnson, a justice of the peace of Craig county, praying for a judgment against them in the sum of $39.50. Upon January 8, 1914, a trial was had before a justice of the peace and without a jury, and a judgment was rendered in favor of the plaintiff, Kabitt, and against the defendants above named, for the sum prayed for. Thereafter, on the 13th day of January, 1914, the said defendants below presented to the justice of the peace an appeal bond, which was in proper and statutory form, which bond by its terms directed that the appeal be taken to the district court of Craig county. This bond was duly signed and acknowledged before the justice of the peace and approved by him, and said appeal was duly filed in the district court of Craig county, together with all of the papers and files and justice's transcript as provided by statute. On the 16th day of April, 1914, the plaintiff below moved the district court to quash the appeal, for the reason that, at the time said defendants attempted to appeal from the final judgment of the justice of the peace rendering such judgment, they did not advise the justice of the peace of the court to which the appeal was to be taken. The court heard the testimony upon this issue and sustained the motion.

It appears from an examination of the record before us that the appeal bond in question directs that the appeal shall be taken to the district court of Craig county, and it further appears that the transcript of the justice's proceedings on appeal therefrom was duly filed in the district court of Craig county, together with all of the pleadings, documents, etc., had in said justice court. Under section 5465, Revised Laws of 1910, an appeal from a justice of the peace may be had to the district, superior, or county court, and the party appealing shall advise the justice of the court to which the appeal is to be transferred, and it is the duty of the justice of the peace to perfect said appeal to the court to which he is ordered and directed by the party appealing, and to enter upon his docket an order, specifying the court having jurisdiction of such appeal, and the appeal bond shall also designate the court to which the appeal is to be taken. The trial court held this provision of the statute mandatory, and dismissed the appeal, for the reason that no verbal order or written direction was given by the party appealing from the justice of the peace court to the district court, designating the court to which said appeal should be taken, other than the bond itself. In our opinion this provision of the statute is merely directory; and, where the bond prepared by the party appealing from a judgment of the justice of the peace designates the court to which said appeal is to be taken, and the transcript and pleadings in conformity thereto are filed in said court, there is a substantial compliance with the statute, and it is error to dismiss the appeal where these things have been done. This court in the case of Noel v. Salter, 157 Pac. 133, said:

"It is contended that the appeal is not complete with the filing and approval of the appeal bond, but that it is necessary for the party appealing to advise the justice to which court the appeal is to be transferred; that it is as much the duty of the appellant to advise the justice of this fact as it is to file the bond, and neither the one nor the other completes the appeal, the two conjoint acts being required to complete such appeal. In this reasoning we cannot agree. The bond provided for an appeal to the county court. The transcript of the justice court shows that the cause was certified to the county court, where the papers were afterwards filed. Whether the appellant formally requested, independent of the conditions of the bond, that the cause be sent to the county court is not shown by the record. He may have so requested, but it is unnecessary for us to decide the question in this action. The bond was a sufficient advice, and the court was not misled

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by a failure to formally state to which court he desired an appeal. The designation of the court to which an appellant desires to have his cause transferred on appeal under this section is merely directory, and not mandatory; and, where the bond contains the name of the court to which the appeal be taken, and the cause is certified and lodged in such court, there has been a sufficient compliance with the statute."

It therefore follows that the motion to dismiss the appeal filed in the district court of Craig county was improperly sustained, and this cause is therefore reversed and remanded, for proceedings consistent with this opinion.

PER CURIAM. Adopted in whole.

(61 Okl. 247)

CLEMENTS et al. v. JACKSON COUNTY OIL & GAS CO. et al. (No. 7998.)

(Supreme Court of Oklahoma. Nov. 14, 1916.)

(Syllabus by the Court.)

1. GUARANTY ⇐14—REQUISITES—CONSIDERATION.
A contract of guaranty not entered into at the same time as the original obligation or its acceptance by the guarantee must be supported by a consideration distinct from that of the original obligation.
[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 13, 20; Dec. Dig. ⇐14.]

2. CONTRACTS ⇐309(1) — PERFORMANCE—IMPOSSIBILITY.
To bring a contract within the rule of impossibility of performance it must appear that the thing to be done cannot by any means be accomplished.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1444–1446; Dec. Dig. ⇐309(1).]

3. CONTRACTS ⇐258—RESCISSION—GROUNDS—INABILITY TO PERFORM.
An allegation that a party to a contract "did not have funds" to make the payments required thereunder is not alone sufficient to support a rescission of such contract by the other party.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1152; Dec. Dig. ⇐258.]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Jackson County; Geo. C. Crump, Judge.

Action by W. P. Clements and another against the Jackson County Oil & Gas Company and others. From a judgment sustaining a general demurrer to the petition on behalf of the individual defendants, plaintiffs appeal. Affirmed.

S. B. Garrett, of Altus, for plaintiffs in error. Everett Petry, of Altus, for defendants in error.

BURFORD, C. The petition here involved alleged that on the 29th day of October, 1914, the plaintiffs entered into a contract with the Jackson County Oil & Gas Company, a corporation, for the drilling of a deep well. The original contract is attached to the petition as an exhibit. In so far as its terms are applicable here it provided that the plaintiffs in consideration of the transportation of their tools and rig from Electra, Tex., to Altus, Okl., the payment of certain sums of money, and the assignment of an undivided one-half interest in certain leases, should drill a well to a depth of 1,000 feet. The contract further provided:

"It is further and mutually agreed that after the completion of said well to a depth of 1,000 feet if first party shall desire to have said well drilled to a greater depth and shall so notify second parties within two days after the completion to a depth of 1,000 feet, then such additional drilling shall be done on the following terms."

The terms provided were that the Oil & Gas Company should pay $250 for the use of sufficient casing to drill the well to a depth not to exceed 1,500 feet, and $250 more if the well should be drilled to 2,000 feet. The Oil & Gas Company was also to pay for the additional drilling at $3.50 per foot, settlement to be had when the drilling was done, if the well should not go deeper than 1,500 feet. The petition also alleged that the well was drilled to a depth of 1,000 feet, which was reached on or about January 16, 1915, and that payments were then made in accordance with the terms of the contract, and—

"that when the plaintiff reached a depth of 1,000 feet the said Jackson County Oil & Gas Company did not have funds with which to proceed to a lower depth, and did not notify the plaintiff to proceed to drill to a lower depth."

It was further alleged that with the consent of the Oil Company the following instrument in writing was executed by its directors, the individual defendants:

"Know all men by these presents, that whereas the Jackson County Oil & Gas Company, a corporation, entered into a certain contract with W. P. Clements and W. E. Green, bearing date of October 29, 1914, for the drilling of a deep well near the town of Altus, in Jackson county, Oklahoma, to a depth of 1,000 feet, and wherein it was further agreed that said well should be drilled such additional depth as might be required by the Jackson County Oil & Gas Company, and whereas 1,000 feet have been completed and said Jackson County Oil & Gas Company has required the said W. P. Clements and W. E. Green to drill said well an additional depth of 200 feet: Now, therefore, in consideration of the drilling of said well to said additional depth of 200 feet the undersigned directors of said Jackson County Oil & Gas Company do hereby jointly and severally bind and obligate themselves to pay to the said W. P. Clements and W. E. Green the sum of $700 for said drilling as agreed in the original contract above referred to, less the sum paid by the Jackson County Oil Company, upon the contract price of drilling said additional depth of 200 feet.

"Witness our hands this 16th day of January, 1915." [Signatures of Individual Defendants.]

The petition sets out that the well was completed to a further depth of 200 feet, and that no payment had been made, though demanded, except $68 paid by the Oil Company. Prayer was for judgment against the Oil Company for $882, being $700 for drilling and $250 for use of casing, less the amount paid, and against the individual defendants for $700 agreed to be paid in the contract of

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January 16th. To this petition a general demurrer by the individual defendants was sustained, and plaintiffs, electing to stand upon their petition, bring the cause here for review.

[1] The contract of January 16th is assumed by the parties to be one of guaranty, and will be so considered here. It is so treated in the briefs and in the petition, since the liability of the Oil Company is declared upon, thus negativing the idea that the parties treated the original contract as abandoned and proceeded with the drilling upon a new and independent contract with the individual defendants. The trial court held that from the face of the petition it appeared that there was no consideration for the contract of guaranty made by the individual defendants. We have, with extreme reluctance, in view of the strong moral obligation which, so far as the petition discloses, rests upon the defendants to do what they contracted, come to the conclusion that the decision of the trial court was correct. As was said by Mr. Justice Swayne, in the case of The Harriman, 9 Wall. 161, 19 L. Ed. 629, often quoted since:

"It is the province of courts to enforce contracts—not to make or modify them."

We are not justified in setting aside the established principles of judicial decision and the settled provision of statutory law in order to do what may at first blush appear to be justice in the individual case.

A good consideration is defined by our statute to be (Rev. L. 1910, § 926):

"Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, *to which the promisor is not lawfully entitled*, or any prejudice suffered or agreed to be suffered by such person, *other than such as he is at the time of consent lawfully* bound to suffer, as an inducement to the promisor. * * *" (Italics ours.)

Section 927:

"An existing legal obligation resting upon the promisor, or a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise."

Referring first to section 927, no legal obligation antedating the execution of the contract of guaranty, such as creating debts beyond the subscribed capital stock or the like, is pleaded, nor does there appear to have been any moral obligation antedating the execution of the guaranty. That arose *on* the guaranty, if at all, and could not be a consideration for it.

Construing section 926, it seems that in so far as that section is concerned the plaintiffs were already bound to drill the well to an additional depth of 200 feet, upon being notified by the company to do so within two days after the completion of the well to a depth of 1,000 feet, and to wait for their pay for such additional drilling until the additional 200 feet had been drilled. Their promise to do, therefore, what they were already bound to do could not be any consideration for any new or additional promise upon the part of the Oil Company. It was so held by this court in Eastmand Land & Inv. Co. v. Long Bell Lbr. Co., 30 Okl. 555, 120 Pac. 276. Whether or not a promise to perform an existing contract with a third person (in this case the Oil Company) will afford a consideration for the promise of another (in this case the individual defendants)—a question held in the affirmative in England, but much mooted in America (section 9, Cyc. 354, and cases cited)—is, so far as contracts of guaranty are concerned, concluded by our statute. Rev. L. 1910, § 1028, provides:

"Where a guaranty is entered into at the same time with the original obligation, or with the acceptance of the latter by the guarantee, and forms, with that obligation, a part of the consideration to him, no other consideration need exist. *In all other cases there must be a consideration distinct from that of the original obligation.*"

It is apparent that the contract of January 16th was executed long after the original contract was made, and that it must, therefore, be supported by a consideration "distinct from that of the original obligation." Bank of Carrollton v. Latting, 37 Okl. 8, 130 Pac. 144, 44 L. R. A. (N. S.) 481. No such consideration is shown in the contract or alleged in the petition; indeed, the consideration recited is simply that the plaintiffs will drill the additional 200 feet upon the terms and in the manner in which they originally contracted. It is suggested, however, that the petition shows a right to rescind existing in the plaintiffs at the time the guaranty was executed, and that a waiver of this right was a sufficient consideration to support the contract. This contention must be sustained, if at all, upon one of two allegations in the petition: First, that the Oil Company gave no notice to continue the drilling within the time limited in the contract; or, second, that the Oil Company "did not have funds with which to proceed to a lower depth."

As to the first ground, although it is alleged in the body of the petition that the Oil Company "did not notify plaintiffs to proceed to drill to a lower depth," the guaranty itself, upon which the action against the individuals is and must be based, recites that:

"Said Jackson Oil & Gas Company has required that W. P. Clements and W. E. Green drill said well an additional depth of 200 feet."

Furthermore the petition recited that the well was completed to a depth of 1,000 feet on or about January 16, 1915. The guaranty was executed on that day. At the time of the execution of the guaranty, therefore, the time within which the Oil Company could give the notice to continue had not expired, and no right to rescind or declare the contract at an end for failure to give the notice could yet have arisen.

[2, 3] As to the second ground it has been

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frequently held in the case of sales of personal property that where the property is yet undelivered the seller may rescind upon the buyer becoming insolvent. Rappleye v. Racine Co., 79 Iowa, 220, 44 N. W. 363, 7 L. R. A. 139; Crummey v. Raudenbush, 55 Minn. 426, 56 N. W. 1113; Anderson v. Read, 106 N. Y. 333, 13 N. E. 292; Diem v. Koblitz, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531; Ullman v. Babcock, 63 Tex. 68; Hunter v. Talbot, 3 Smedes & M. (Miss.) 754; Blaxam v. Danders, 4 Barn. & Cress. 941; 35 Cyc. 253, and cases cited. So, too, it has been held with reference to contracts for labor or construction, for which payment is to be made in installments, that a failure and inability to pay an installment will authorize the other party to refuse to incur the possibility of further loss by performing that part of the contract yet executory (Mugan v. Regan, etc., Co., 48 Mo. App. 461; Canal Co. v. Gordon, 6 Wall. 561, 18 L. Ed. 894; Phillips, etc., Co. v. Seymour, 91 U. S. 646, 23 L. Ed. 341; Bennett v. Shaughnessy, 6 Utah, 273, 22 Pac. 156); but the decisions first above referred to seem to be peculiar to the law of sales, and the plaintiffs do not come within the second line of cases cited, since here there has been no default in any payment due at the time the guaranty was executed. Whether or not the doctrine of these cases should be extended to cases where it clearly appears that a party would be *unable* to pay the next installment due, it is not necessary for us to decide for the reason that there is no such allegation in the petition. It is not even alleged that the company was insolvent. Nor will insolvency of one party always release the other (Florence Mining Co. v. Brown, 124 U. S. 385, 8 Sup. Ct. 531, 31 L. Ed. 424), for the promisor may be able, regardless of insolvency, to perform the act or make the payment required of him. Thus an individual insolvent might have enough exempt property and funds to complete a contract made by him, or if a bankrupt, his receiver or trustee deeming the contract profitable may elect to carry it out by using available funds, or borrowing by certificate or the like. A simple allegation, therefore, that the Oil Company "did not have funds" is not sufficient to authorize the conclusion that the plaintiffs had a right to rescind under section 984 of the Code, which allows a party to rescind if the "consideration, before it is rendered to him, fails in a material respect from any cause." The allegation is not that the Oil Company was without funds to carry out its part of the contract and could not obtain them. For aught that appears here the company may have had assets upon which it could borrow, it may have had unsold but salable stock, it may have collectable but unpaid stock subscriptions. If contracts could be repudiated upon the mere allegation that the other party had no funds there would, indeed, be much consternation in the business world, for it is common knowledge that many persons worth large amounts and with extensive borrowing power may be at some times without funds and yet far from insolvent and far from unable to meet their contractual payments. Impossibility of performance must be more definitely stated than was here alleged to authorize a court to say that a right to rescind a contract is given. Nor are we without precedent in these conclusions. Berry v. Wells et al., 43 Okl. 70, 141 Pac. 444, presented stronger allegations of impossibility than the case at bar, but it was held that the contract there involved was not impossible of performance. The rule laid down by Mr. Elliott in his work on Contracts, § 224, was there quoted and approved:

"To bring the case within the rule of dispensation it must appear that the thing to be done cannot by any means be accomplished, for if it be only improbable or out of the power of the obligor, it is not deemed in law impossible."

We find no error in the record. Judgment affirmed.

PER CURIAM. Adopted in whole.

(61 Okl. 287)

MORRISON v. W. L. GREEN COMMISSION CO. (No. 8072.)

(Supreme Court of Oklahoma. Nov. 21, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⟸339(3)—TIME FOR TAKING PROCEEDINGS — REVIEW OF ORDER ON DEMURRER.

By reason of section 5255, Rev. Laws 1910, as amended by act of February 14, 1911 (Laws 1911, c. 18s), this court cannot consider the question whether the district court erred in sustaining a demurrer to two counts of defendant's answer stating separate grounds of defense to the action, when the petition in error and case-made are filed in this court more than six months after the ruling of the court was made sustaining such demurrer, notwithstanding the fact that the proceeding was begun within six months from the date of the order of the court overruling the motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1883, 1887; Dec. Dig. ⟸339(3).]

2. CONTRACTS ⟸303(1) — BREACH — EXCUSE FOR NONPERFORMANCE—EVIDENCE.

In an action for damages for breach of contract it is not error in the trial court to exclude testimony offered on behalf of the defendant which does not tend to show the right to rescind the contract by him, or that the contract was impossible of performance, but merely tends to show that the performance was more expensive or more difficult.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1409; Dec. Dig. ⟸303(1).]

Commissioners' Opinion, Division No. 2. Error from District Court, Grant County; W. M. Boles, Judge.

Action by the W. L. Green Commission Company against C. G. Morrison, doing busi-

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ness as the Morrison Bros. Mills. Judgment for plaintiff, and defendant brings error. Affirmed.

Sam P. Ridings, of Medford, for plaintiff in error. H. Z. Wedgwood, of Enid, for defendant in error. Asp, Snyder, Owen & Lybrand, of Oklahoma City, amici curiæ.

GALBRAITH, C. W. L. Green Commission Company, hereinafter designated as plaintiff, commenced this action against C. G. Morrison, hereinafter designated as defendant, for damages for breach of a contract for the sale and delivery of wheat. It is alleged in the petition that the plaintiff agreed to buy and the defendant agreed to sell and deliver 3,000 bushels of No. 2 hard wheat, at 87⅞ cents per bushel, at New Orleans, La., for August, 1914, delivery; that the plaintiff, relying upon the performance of said contract, on behalf of the defendant, resold said quantity of wheat, and that the defendant failed to deliver the same, and on account of such failure the plaintiff was forced to buy the wheat in the open market at $1.13 per bushel, and thereby was compelled to pay the sum of $933.75 in excess of the amount which he had agreed to pay the defendant, and judgment was prayed in this amount, together with 6 per cent. interest thereon from September 1, 1914.

The answer was, first, a general denial. The second ground of defense was that the contract being signed by one of the parties and not being signed by the plaintiff, was for that reason void; and the third ground of defense was that on account of the war in Europe the Rock Island Railroad Company placed an embargo on the shipment of wheat from Medford, Okl., where the defendant was doing business, to New Orleans, in July and August, 1914, and he was therefore not able to procure cars for the shipment of wheat, and further, that the banks in the country, owing to the flurry caused in financial circles by the world war then raging, refused to pay out money, and "it was impossible for the said defendant to receive pay for the purchase price of said wheat." Therefore the contract was impossible of performance. A demurrer was interposed to the second and third grounds of defense and sustained by the court. Afterwards the cause came on for trial on the petition and the general denial in the answer. At the close of the evidence the court instructed the jury to return a verdict for the plaintiff for the amount claimed. The verdict was returned, and judgment entered thereon. To review that judgment this appeal has been prosecuted.

[1] The first assignment of error is to the ruling of the court in sustaining the demurrer to the second and third grounds of defense. The order sustaining the demurrer was made and entered on the 7th day of May, 1915. The petition in error and case-made were filed in this court on March 2, 1916. Objection is made to the consideration of this assignment for the reason that more than six months expired between the day the order complained of was made and filing petition in error and case-made in this court, and it is contended for that reason that the court is without jurisdiction to consider this assignment.

This objection seems to be well taken. Section 5255, Rev. L. 1910, as amended by Sess. Laws 1911, p. 35, reads in part:

"All proceedings for reversing, vacating or modifying judgments, or final orders shall be commenced within six months from the rendition of the judgment or final order complained of. * * *"

Inasmuch as more than eight months intervened between the date of the order sustaining the demurrer and commencing the proceedings in error in this court, and that order being appealable became final at the expiration of six months after it was made.

In Holland v. Beaver, 29 Okl. 115, 116 Pac. 766, Ann. Cas. 1913A, 814, the first paragraph of the syllabus reads:

"This court cannot consider the question of whether a district court erred in sustaining a demurrer to a petition, when the petition in error is filed more than one year after the ruling of the court sustaining such demurrer was made, notwithstanding the fact that proceedings are begun within one year from the date of judgment subsequently entered."

It will be recalled that this cause arose prior to the amendment of section 5255, Rev. L. 1910, by the act of February, 1911, above quoted, and that the section prior to the amendment allowed one year's time instead of six months to commence proceedings in error.

Again in Rhome Milling Co. v. Farmers' & Merchants' Nat. Bank of Hobart, 40 Okl. 131, at 134, 136 Pac. 1095, at 1096, the court, in discussing this question, said:

"The first specification of error set forth in plaintiff's brief and urged for reversal of the cause is that the court erred in sustaining defendant's demurrer to the first count of its amended petition and to the cause of action therein set forth. This action of the trial court, however, cannot be reviewed. At the time the order complained of was rendered, section 6082, Comp. Laws 1909 (Rev. L. 1910, § 5255), was in force, by which it is required that a proceeding to reverse a judgment or a final order of a court in a civil action shall be commenced within one year after the rendition of the judgment or order complained of. More than two years elapsed after the trial court sustained said demurrer before this proceeding was instituted, and, under the previous decisions of this court, the court was without jurisdiction to review the order of the court sustaining said demurrer. Holland v. Beaver, 29 Okl. 115, 116 Pac. 766, Ann. Cas. 1913A, 814: Reynolds v. Phipps et al., 31 Okl. 788, 123 Pac. 1125. See, also, Blackwood v. Shaffer, 44 Kan. 273, 24 Pac. 423, which is also controlling upon this question."

[2] The remaining assignment of error is:

"That the court erred in refusing to hear testimony of the defendant, and in sustaining objection to the offers made on page 60 of the record."

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It appears from the record that the defendant, notwithstanding the demurrer had been sustained to that part of his answer, setting out the reason for his failure to perform the contract, the court was willing to and did allow him to state his reason, as is shown from the following proceeding:

"Q. Now I will ask you what the financial condition was so far as being able to collect any money on drafts or checks during the latter part of August or the first part of September, 1914?

"Mr. Wedgwood: Objected to as incompetent, irrelevant, and immaterial, and too general.

"The Court: I think it is, but overruled. Let him answer.

"A. Well there was quite a good deal of stir in the banking business at that time; some of the grain companies wired us to not make any drafts that they couldn't pay, but the Green Commission Company had never wired us because we never shipped them any. I don't know whether that is the reason or not, because we never shipped them any. Q. What is your experience so far as knowing whether the banks would hand out any money on drafts, if so, how much?

"Mr. Wedgwood: Objected to as incompetent, irrelevant, and immaterial.

"The Court: Yes, sustained. You should have tried these fellows to see whether or not you could get your money.

"Mr. Riding: Exception. The defendant now offers to show by this witness that during the latter part of the month of August and the first part of September, 1914, that the financial condition was such that only a limited amount, $5, $10 or $15, would be paid by any of banks per day, throughout the country on any checks or drafts, and that it was impossible during the last 15 or 20 days of the month of August, 1914, and the first part of September, 1914, to obtain any money from any bank in the country in the sum of $2,000 or more.

"Mr. Wedgwood: To which the plaintiff objects as incompetent, irrelevant, and immaterial.

"The Court: Yes, sustained.

"Mr. Riding: Exception.

"The Court: Wait a minute, I just want to ask a question. Q. Did you tender this wheat to the railroads? A. Well, I didn't tender it because I didn't have the chance; I went to the agent every morning and asked him, and the embargo was still on. Q. You didn't tender this wheat did you to the railroad company to deliver? A. I couldn't very well; they wouldn't set out a car. Q. Well, I mean did you try? A. Yes, sir; I don't know as I tried specially in the Green case, but I tried to get cars and I couldn't get any for New Orleans or Galveston; the embargo went on I think in the latter part of July.

"The Court: What do you call an embrago? A. They refuse to take cars for either of the ports, either Galveston or New Orleans at our station. Of course, I am only doing business at one station. Q. On account of the— A. Of the war I guess. Q. We didn't have any war here did we? A. No, but we had an embargo on the railroads, at least we had at Jefferson.

"The Court: Stand aside."

This testimony of the defendant, it will be seen, did not give a sufficient ground for his rescinding the contract, nor offer any sufficient excuse for his failure to perform. If it did not then clearly the refusal of the offer and excluding this evidence was not error. This division of the commission has recently had occasion to consider the law controlling the rescission of contracts and what constitutes an impossibility of performance, so as to justify a rescission of the contract and a failure to perform. In No. 7998, W. P. Clements and W. E. Green v. Jackson County Oil & Gas Co. et al., 161 Pac. 216, filed, but not officially reported, the second and third paragraph of the syllabus reads as follows:

"To bring a contract within the rule of impossibility of performance it must appear that the thing to be done cannot by any means be accomplished.

"An allegation that a party to a contract 'did not have funds' to make the payments required thereunder is not alone sufficient to support a rescission of such contract by the other party."

The defendant voluntarily entered into this contract by which he agreed to sell and deliver the quantity of wheat at New Orleans during the month of August, 1914. He voluntarily placed this obligation upon himself; he made no provision in his contract to relieve him of this obligation in the event of war, or the placing of an embargo on the shipments of grain from his town to New Orleans by the railroad. He makes no claim that he could not have purchased this wheat at some other market and have delivered it by some other road other than the Rock Island. The contract was not impossible of performance. The wheat could have been delivered as the contract provided. The plaintiff purchased the amount of wheat in open market in order to enable him to perform his contract which he had entered into on the faith of the contract made with the defendant, and owing to the failure of the defendant to perform he was compelled to pay a higher price for the wheat than the defendant had agreed to furnish it for. The difference in the price and the interest thereon is the amount claimed as damages resulting to him on account of the breach of the contract. For this amount the judgment was rendered in the trial court, and should therefore be affirmed.

PER CURIAM. Adopted in whole.

(62 Okl. 21)

CASH v. THOMAS et al. (No. 7957.)

(Supreme Court of Oklahoma. Nov. 14, 1916. Rehearing Denied Dec. 12, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐1175(7)—REVIEW—EQUITY CASES.

In an action of purely equitable cognizance, where it appears that the court failed to consider uncontradicted, competent evidence, or that the finding and decree are clearly against the weight of the evidence, this court will consider the entire record, weigh the evidence, and cause to be rendered such judgment as the trial court should have rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4581; Dec. Dig. ⇐ 1175(7).]

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2. VENDOR AND PURCHASER ⟸43(1)—VALIDITY OF CONTRACT — RIGHT TO SET ASIDE — RATIFICATION.

Where one, who has been induced to enter into a contract by fraud, after discovery of the fraud, with full knowledge of the facts and of his own right to impeach the contract for fraud, or who ought to, or might, with due diligence, have been aware of such right, proceeds to the execution of the contract and receives and retains the consideration therefor, he thereby ratifies the contract and cannot thereafter set up the alleged fraud as ground for cancellation or rescission.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 67; Dec. Dig. ⟸43(1).]

3. DEEDS ⟸211(3)—ACTIONS — EVIDENCE—SUFFICIENCY.

Evidence considered, and the judgment of the trial court *held* to be contrary to the weight of the evidence.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 644, 645; Dec. Dig. ⟸211(3).]

Commissioners' Opinion, Division No. 1. Error from District Court, Okfuskee County; George C. Crump, Judge.

Action by Mollie E. Thomas and others against Allen Cash and others, in which J. J. Klabzuba, Jake Zabloudil, J. O. Myers, and H. I. Grimes intervened. There was a judgment for plaintiffs, and in favor of the interveners, and defendant Cash brings error. Reversed.

John Caruthers, of Okemah, and Burford, Robertson & Hoffman, of Oklahoma City, for plaintiff in error. J. T. Dickerson, of Edmond, and Riddle & Hammerly, of Chickasha, for defendant in error Mollie E. Thomas. C. T. Huddleston, of Okemah, for defendants in error J. J. Klabzuba, Jake Zabloudil, J. O. Myers, and H. I. Grimes.

RUMMONS, C. This action was commenced in the district court of Okfuskee county by the defendant in error Mollie E. Thomas, hereinafter styled the plaintiff, against the plaintiff in error Allen Cash and others, hereinafter styled the defendants, to cancel and set aside a deed of conveyance from plaintiff to defendant Cash for 80 acres of land in Okfuskee county. After the commencement of the action the defendants J. J. Klabzuba and Jake Zadloudil intervened and answered, claiming title to an undivided one-fourth interest in said tract of land, and the defendants J. O. Myers and H. I. Grimes intervened and answered claiming title to an undivided one-eighth interest in said tract of land. The cause was tried to the court resulting in a decree declaring the deed from plaintiff to defendant Cash to be fraudulent and void, and declaring the defendants J. J. Klabzuba, Jake Zabloudil, J. O. Myers, and H. I. Grimes to be innocent purchasers and owners of an undivided three-eighths interest in said tract of land, and canceling and setting aside the conveyance from plaintiff to defendant Cash, and revesting title in the plaintiff as to an undivided five-eighths interest in said tract of land upon the payment to defendant Cash of the proportionate part of the purchase price of said tract of land. Defendant Cash, having unsuccessfully moved for a new trial, prosecutes this proceeding in error to reverse the decree of the court below.

The evidence on behalf of the plaintiff discloses that prior to November 6, 1914, the plaintiff was the owner of the tract of land here in controversy; that the same was incumbered by an oil and gas lease, in full force, to the Prairie Oil & Gas Company; that the Prairie Oil & Gas Company was drilling a well for oil and gas upon a tract of land contiguous to plaintiff's land; that plaintiff had offered and sought to sell this tract of land for the sum of $3,000; that about two weeks before November 6, 1914, plaintiff was in the town of Paden and had a conversation with the defendant Cash in which he inquired as to whether she was willing to sell her tract of land; that plaintiff replied that her price was $3,000 before they struck anything in the well being drilled; that the defendant Cash told plaintiff that if he made a deal, which he expected to make within the next two weeks, that he would take her land at that price, and requested plaintiff to say nothing about it; that on November 5th a showing of gas was struck in the well being drilled by the Prairie Oil & Gas Company, and that the defendant Cash had knowledge of that fact on the morning of November 6th; that on November 6th defendant Cash called plaintiff on the telephone and inquired if she were coming to town, to which she replied that she was not; that the defendant Cash then said that he would come out to see her, and did drive out to her place, where he proposed to buy her tract of land for the sum of $3,000 and gave her a check for $100 to bind the bargain; that shortly after Cash had given her the check and returned to town a son of plaintiff came in and told plaintiff that they had struck gas in the well adjacent to her land; that on the afternoon of the same day she went to Paden and executed a conveyance of the tract of land to the defendant Cash; that she received the purchase money and used it. Plaintiff further testified that she had been seriously sick during that year from January until March and had to go to Claremore for treatment; that the defendant Cash had been her neighbor for some years, and that she had consulted him about her business affairs, and regarded him as her best friend. It further appears from the cross-examination of plaintiff that one Cameron, who, so far as the record discloses, has no interest in this land, had agreed with the plaintiff to pay the costs of the prosecution of this suit and had furnished bond for costs.

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The evidence on behalf of the defendant Cash does not materially conflict with the evidence of plaintiff as to his knowledge of the striking of gas in the well or as to the fact that he made no disclosure of that knowledge to the plaintiff. The defendant Cash, however, testified that when the plaintiff came to town on November 6th to execute the deed after she had learned that gas had been struck in the well, the plaintiff upbraided him for having concealed the fact that gas had been struck, and that he had said to her, "It is like this, Mrs. Thomas, you have not made me any deed; if you are not satisfied;" and that plaintiff replied, "When I make a trade I stay with it, so I am going to let it go;" that thereupon the deed was executed. This conversation was not denied by the plaintiff. The defendants J. J. Klabzuba, Jake Zabloudil, J. O. Myers, and H. I. Grimes offered evidence tending to show that they had purchased their respective interests in this tract of land from the defendant Cash before the commencement of this action and without any knowledge of any right or claim of right of the plaintiff to the said tract of land. The court found the land to be worth $2,000 as agricultural land, and that an oil and gas lease on said land was worth about $125 an acre.

The defendant Cash makes several assignments of error, which, however, all practically present the same question: That the judgment of the court was not sustained by sufficient evidence, and is contrary to law.

[1] This being an equity case, under a long line of decisions of this court, we have the power to consider the whole record, weigh the evidence, and if the judgment of the court is against the weight of the evidence, cause to be rendered such judgment as the trial court should have rendered. Schock v. Fish, 45 Okl. 12, 144 Pac. 584; Success Realty Co. v. Trowbridge, 150 Pac. 898; Tucker v. Thraves, 151 Pac. 598; Britton v. Morris, 158 Pac. 358.

[2, 3] The plaintiff seeks in this action a cancellation of her conveyance upon the ground of fraud, the fraud alleged consisting in the concealment from the plaintiff by the defendant Cash of the fact that gas had been found in the well adjacent to plaintiff's land. It is urged on behalf of plaintiff that the evidence shows such relationship between the plaintiff and defendant Cash as to make it the duty of the defendant Cash to make a full disclosure to the plaintiff of the facts within his knowledge relating to this land before he bought it from her.

On the other hand, it is urged by counsel for defendant Cash that the evidence does not disclose any such relationship between plaintiff and defendant as to impose any duty upon the defendant Cash to disclose his information to the plaintiff, and so long as he said and did nothing to mislead the plaintiff he might maintain silence as to information that he had obtained and be within his rights.

Numerous authorities are cited by counsel for plaintiff and for defendant sustaining their respective positions. The rules laid down in the authorities cited are couched in general language, hedged about with exceptions, so that no case cited may be said to be directly in point, since upon the question of fraud each case must be determined by the peculiar facts involved in it.

We, however, do not think that under the facts shown in this case that it is necessary for us to determine whether or not a duty was imposed upon the defendant Cash to disclose his knowledge as to the finding of gas, to the plaintiff. The learned trial court in determining this cause seems to have entirely overlooked the undisputed testimony of defendant Cash to the effect that, after the plaintiff had discovered that gas had been found and before the execution of the deed, when he was questioned by plaintiff as to his concealment of his knowledge, he stated to her that if she was not satisfied she need not make him a deed, and that she replied that when she made a trade she stuck to it. To be sure, it is stated by plaintiff that she was not aware of her rights in the premises when she executed the deed, but this testimony not being denied by her shows that before she executed the conveyance she was advised that if she was not satisfied that she need not execute a deed, but that disregarding this privilege she proceeded to carry the contract into effect and executed a deed to defendant Cash.

It is well settled that where one who has been induced to enter into a contract by fraud, after a discovery of the fraud with full knowledge of the facts and of his own right to impeach the contract for fraud, or who ought and might with due diligence have been aware of such right, proceeds to the execution of the contract and receives and retains the consideration for such contract, that he thereby ratifies the contract and is estopped to set up thereafter the alleged fraud as ground for a cancellation or rescission of the contract. 2 Pomeroy's Equitable Remedies, § 687; Gidney v. Chappell, 26 Okl. 737, 110 Pac. 1099; Kingman & Co. v. Stoddard, 85 Fed. 740, 29 C. C. A. 413; McLean v. Clapp, 141 U. S. 429, 12 Sup. Ct. 29, 35 L. Ed. 804.

In the instant case the plaintiff at the time she executed the conveyance was fully informed of all the facts. Nevertheless, she proceeded to execute to defendant Cash her deed and to receive from him the purchase money and appropriate the same to her own use. It does not appear from the evidence that in so doing she acted under any influence or suggestion from the defendant Cash. In fact, the evidence shows it was suggested to her that she need not carry out the deal if she was dissatisfied. Under those circumstances, it seems clear that she ratified the contract with full knowledge of all the facts, and she cannot now be heard to complain.

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We are convinced that the judgment of the trial court is contrary to the weight of the evidence, and that on the whole record the judgment of the trial court should have been for the defendant Cash.

The judgment of the court below should therefore be reversed, with directions to enter judgment dismissing the petition of plaintiff.

PER CURIAM. Adopted in whole.

(68 Okl. 760)

CHICKASHA INV. CO. v. PHILLIPS et al.
(No. 7193.)

(Supreme Court of Oklahoma. Oct. 10, 1916. Rehearing Denied Dec. 12, 1916.)

(Syllabus by the Court.)

1. TRIAL ⟸155—MOTION FOR DIRECTED VERDICT—EFFECT.
Where at the close of all the evidence defendant interposes a demurrer to the plaintiffs' evidence, same will be treated as a motion to direct a verdict in favor of defendant.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 346, 352, 353; Dec. Dig. ⟸155.]

2. TRIAL ⟸178—MOTION TO DIRECT VERDICT—EFFECT.
The question presented on a motion to direct a verdict is whether, admitting the truth of all the evidence in favor of the party against whom the action is contemplated, together with such inferences and conclusions as may be reasonably drawn from it, there is enough competent evidence to reasonably sustain a verdict in favor of such party.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401–403; Dec. Dig. ⟸178.]

3. BROKERS ⟸88(3)—COMMISSIONS—ACTIONS—JURY QUESTION.
Where there is a conflict in the evidence as to who was the procuring cause of the sale of real estate, the issue of fact thus made should be submitted to the jury under proper instructions.
[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 128, 129; Dec. Dig. ⟸88(3).]

4. TRIAL ⟸260(1)—INSTRUCTIONS—REQUEST.
Where propositions of law contained in requested instructions are fully and fairly covered in instructions given, it is not error to refuse such requests.
[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. ⟸260(1).]

Error from County Court, Grady County; N. M. Williams, Judge.

Action by W. T. Phillips and O. S. Penny, partners, doing business under the firm name of Phillips & Penny, and others against the Chickasha Investment Company, a corporation. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

Holding & Herr, of Chickasha, for plaintiff in error. Bond, Melton & Melton, of Chickasha, for defendants in error.

HARDY, J. Defendants in error, as plaintiffs, began this action to recover of plaintiff in error a certain sum alleged to be due as commissions for selling certain property belonging to plaintiff in error. The parties will be referred to here as they appeared in the trial court. Trial resulted in verdict and judgment for plaintiffs, and defendant prosecutes error.

[1-4] The first ground urged for reversal is that the court erred in overruling defendant's demurrer to the evidence. An examination of the case-made fails to show that a demurrer was interposed at the close of plaintiffs' evidence, but does show that at the close of all the evidence demurrers were interposed. The action was originally against the Chickasha Investment Company and two individuals. The court sustained demurrers on behalf of the individual defendants and overruled demurrer of the Chickasha Investment Company. The journal entry of judgment recites that demurrer was interposed and taken under advisement by the court until the close of all the evidence. Inasmuch as it does not appear from the case-made that demurrer was interposed to plaintiffs' evidence at the close thereof, we shall treat the demurrer as a motion to direct a verdict or a request for a peremptory instruction in favor of defendant; and this would present the question whether, admitting the truth of all the evidence given in favor of plaintiffs, together with such inferences and conclusions as may be reasonably drawn therefrom, there is enough competent evidence to reasonably support a judgment for plaintiffs. Cooper v. Flesner, 24 Okl. 47, 103 Pac. 1016, 23 L. R. A. (N. S.) 1180, 20 Ann. Cas. 29; Harris v. M., K. & T. Ry. Co., 24 Okl. 341, 103 Pac. 758, 24 L. R. A. (N. S.) 858.

The property in controversy was a certain brick building in the city of Chickasha; and W. T. Phillips, one of the plaintiffs, testified that he figured out a proposition whereby the property in question could be purchased by the county for courthouse purposes upon the installment plan at an annual payment of less than the county was paying as rent, and submitted the proposition to the defendant, with whom he entered into an agreement regarding the sale thereof, and then submitted the matter to the board of county commissioners by taking it up personally with the chairman of the board and by filing a typewritten proposition with the county clerk while the board of county commissioners were in session, with the request that it be presented to the board. He further testified that the board of county commissioners did accept the proposition submitted by him; that Mr. Speake, president of the defendant company, told him after the purchase that the board of county commissioners had accepted the proposition submitted by him and purchased the property, and that plaintiff was entitled to his commission, and that the chairman of the board of county commissioners had told him that the proposition

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which the board accepted and upon which they purchased the property was the proposition submitted by him. The testimony of plaintiff as to the statements by the president of the defendant company and by the chairman of the board of county commissioners was not denied. There was a conflict in the evidence of plaintiffs and some of the evidence of defendant, but that offered by plaintiffs which we have set out was sufficient to raise an issue of fact, and, if true, to support a judgment in their favor. This being true, it was the duty of the court to overrule the demurrer and submit the issues to the jury by proper instructions. Lane v. C., O. & G. Ry. Co., 19 Okl. 324, 91 Pac. 883; Taylor v. Ins. Co. of North America, 25 Okl. 92, 105 Pac. 354, 138 Am. St. Rep. 906; Midland Sav. & L. Co. v. Sutton, 30 Okl. 448, 120 Pac. 1007; Adams v. Coon, 36 Okl. 644, 129 Pac. 851, 44 L. R. A. (N. S.) 624; Gamble v. Riley, 39 Okl. 363, 135 Pac. 390; Mod. Brotherhood of America v. Beshara, 42 Okl. 684, 142 Pac. 1014; Schlegel v. Fuller, 149 Pac. 1118.

In this connection it may be stated that after the proposition of plaintiff was submitted there appeared to be some delay in the negotiations, and the president of the defendant company, being anxious to consummate the deal, sought the assistance of one Lindsay, who had at one time served in the capacity of county clerk, and was then acting as tax ferret, and arranged with him to assist in furthering the proposition submitted. It was admitted by Mr. Speake, president of the defendant company, that he employed Lindsay because of his former experience, which he thought would help get the proposition through, and that the proposition which was gotten through was the one submitted by Phillips. Lindsay received a commission for his services, which was paid after this suit was commenced, one-half of which he paid to Bradley, the county clerk.

Error is predicated upon the refusal of the court to give certain instructions requested by defendant. Request No. 1 was, in substance, to the effect that before plaintiffs could recover the jury must believe that plaintiffs submitted a plan of purchase to the board of county commissioners which was adopted by them through the efforts of plaintiffs. This proposition was covered by instruction No. 6, in which the jury were told that, if they believed from a preponderance of the evidence that plaintiffs, as agents of defendant, brought about the consummation of the agreement and contract of sale, plaintiffs were entitled to recover. This was a correct statement of the law. If plaintiffs submitted the proposition to the board of county commissioners, and same was accepted, and the property purchased in pursuance thereof, it would be immaterial whether plaintiffs put forth any other effort in trying to persuade or influence the acceptance of said proposition. Under these circumstances they would be the procuring cause of the sale, and would be entitled to their commission; and this proposition was fairly presented in instruction No. 6. Roberts v. Markham et al., 26 Okl. 387, 109 Pac. 127; Wheelan et al. v. Hunt, 37 Okl. 523, 133 Pac. 52; Eichoff v. Russell, 149 Pac. 146.

Request No. 2 is, in substance, that if plaintiffs abandoned the employment and the sale was made through the efforts of others, plaintiffs could not recover. This point was fully and fairly covered by instruction No. 7, wherein the jury were told:

> That, if they believed from the evidence that plaintiffs did not bring about the purchase of the property, "or that they had abandoned procuring a purchaser, and the matter was afterwards taken up by some one else, and the contract or agreement finally entered into between the investment company and the commissioners of Grady county was not brought about by the plaintiffs, but was consummated by other agency, your verdict should be a verdict for the defendant."

See Nation v. Harness, 33 Okl. 630, 126 Pac. 799; Wheelan v. Hunt, supra; Menten v. Richards, 153 Pac. 1177.

Request No. 3 was to the effect that plaintiffs would not be entitled to recover their commission unless they submitted their proposition to the board of county commissioners in open session. There was no error in refusing this request. Plaintiff testified that he filed his proposition with the county clerk, while the commissioners were in session, and in the presence of the board, with the request that it be presented. The defendant relies upon the case of Commissioners v. Seawell, 3 Okl. 281, 41 Pac. 592, in support of this request. That case merely declares the rule that the board of county commissioners can only contract to bind the county while they are sitting as a board, and an agreement with one of the members in the absence of the others does not bind the county. The statement there announced is the correct statement of the law, but that case does not hold that a person in order to enter into a valid contract with the county must personally appear before the commissioners while in session. In this case a written proposition was prepared and filed with the clerk, to be considered by the board, and it appears from the evidence and the findings of the jury was accepted by them while in regular session, and a purchase of the property actually consummated.

There are no exceptions to the instructions given.

The judgment of the trial court is therefore affirmed. All the Justices concur.

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(58 Okl. 766)

EGAN v. INGRAM et al. (No. 5989.)

(Supreme Court of Oklahoma. Oct. 10, 1916. Rehearing Denied Dec. 12, 1916.)

(Syllabus by the Court.)

1. INDIANS ⊂⇒15(1) — INDIAN LANDS — DISPOSAL.

Under the act of Congress of May 27, 1908 (chapter 199, 35 Stat. 312), which became effective July 27, 1908, the allotted lands of a Cherokee Indian minor of nine thirty-seconds Indian blood is subject to a federal restriction upon the right of alienation during the minority of such an allottee, unless and until such alienation is duly authorized by the proper county court of the state of Oklahoma, in the exercise of its probate jurisdiction as permitted in this respect by said act.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 39; Dec. Dig. ⊂⇒15(1).]

2. INDIANS ⊂⇒15(1) — INDIAN LANDS — DISPOSAL.

Under the act of Congress of May 27, 1908, which became effective July 27, 1908, a male Cherokee Indian is a minor until he has attained the age of 21 years; and it is not within the power of the state to confer majority rights upon him so as to affect the federal restriction upon the right of alienation of his allotted lands during such minority.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 39; Dec. Dig. ⊂⇒15(1).]

3. INDIANS ⊂⇒15(1) — INDIAN LANDS — DISPOSAL.

Under the act of Congress of May 27, 1908, which became effective July 27, 1908, an attempted alienation of the allotted lands of a Cherokee Indian minor of nine thirty-seconds Indian blood, in violation of the federal restriction thereon, is "absolutely null and void."

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 38, 39; Dec. Dig. ⊂⇒15(1).]

Error from District Court, Tulsa County; L. M. Poe, Judge.

Action by James Egan against John M. Ingram and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Davidson & Williams, and L. M. Lane, all of Tulsa, for plaintiff in error. Biddison & Campbell and O. S. Booth, all of Tulsa, for defendants in error.

THACKER, J. The plaintiff in error will be designated as plaintiff and the defendants in error as defendants, in accord with their respective titles in the trial court.

The plaintiff, alleging possession and title in himself, brought this action on March 22, 1913, to quiet title in himself to lots 1 and 2 of section 1, township 20 north, range 13 east, in Tulsa county, Okl., against defendants, who he alleges assert some adverse right, title, and interest to this land under certain pretended conveyences, the nature of which he asks that they be required to disclose.

The defendant John M. Ingram, answering for himself, and the defendants L. D. Marr, Jr., and Emma C. Marr, joining in another answer for themselves, in the first count of their respective answers, make a general denial of the allegations of plaintiff's petition. The defendant Ingram in the second count of his answer alleges title and possession to a part of this land in himself. The defendants Marr in the second count of their answer allege title and possession in themselves, except that they allege that possession was wrongfully taken by plaintiff a short time prior to the commencement of this action and then wrongfully withheld from them. In the second count of each of these answers it is alleged by the defendants that plaintiff's claim is a cloud upon their respective titles; and they severally pray that these titles be quieted in themselves. In the answer of the defendants Marr there is also a prayer for the restoration of possession.

[1-3] The undisputed evidence shows that Chilli Henson, a citizen of the Cherokee Nation, of only nine thirty-seconds Indian blood, on September 21, 1909, owned all of this land as a part of his homestead and surplus allotments; that on said date he was a minor within about 1 year of his majority; that on said date the district court of Tulsa county made an order purporting to confer majority rights upon him under the Laws of 1895, pp. 180, 181 (sections 4427–4430, Rev. Laws 1910); that thereafter, upon the same day, he executed and delivered a general warranty deed, purporting to convey this land, for a consideration of $1,000 actually paid him, to Ed. T. Egan, who, on September 3, 1910, executed and delivered a like deed, purporting to convey the same to the plaintiff; that on October 4, 1910, the said Chilli Henson, having attained his majority of 21 years in the meantime, upon a recited consideration of $500, of which only a small part was actually paid, executed and delivered to the defendant Ingram a general warranty deed, purporting to convey all of this land to said Ingram, who, thereafter, on the same day, executed and delivered a like deed, purporting to convey a portion of the same to the defendants L. D. Marr, Jr., and Emma C. Marr; that on February 20, 1913, the said Chilli Henson executed and delivered a quitclaim deed of all of this land to the plaintiff.

The evidence adduced in behalf of the plaintiff tends to show that his grantor and himself, in succession, were in continuous actual possession of this land after Chilli Henson executed his deed of September 21, 1909, and that neither Chilli Henson nor any one by whom he could have claimed title, at the time of his deed of October 4, 1910, had been in possession of the same under any claim of title, or of the reversion and remainder thereof, or had taken the rents and profits thereof for the space of 1 year before the execution and delivery of the latter deed.

The evidence adduced in behalf of defendants tends to show that neither the plaintiff nor his immediate grantor had been in possession of any portion of this land when the deeds of October 4, 1910, were executed and

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delivered by Chilli Henson to the defendant Ingram, and by the latter to the defendants Marr, and that Chilli Henson was then, and at all times after receiving his allotment of the same, in the actual possession thereof; that upon the execution and delivery of the deed of October 4, 1910, the defendants took, and have since been in, the actual possession of this land, except for an intrusion by plaintiff upon that portion claimed by the defendants Marr a short time before this action was commenced.

The trial court gave judgment against the plaintiff and for the defendants, quieting the title in the latter and awarding to the defendants Marr the possession of their portion of the same, and the plaintiff brings the case to this court for review.

If, on February 21, 1909, these allotted lands were subject to any federal restriction upon Chilli Henson's right to alienate which was violated by the deed of that date, that deed was "absolutely null and void" under the act of Congress of May 27, 1908, which took effect on July 27, 1908, and, being therefore subject to this attack, the judgment of the trial court should be affirmed. If, on September 21, 1909, these lands were, as expressly declared in the first section of said act of Congress "free from all restrictions," that is, free from all federal restrictions, so that Chilli Henson, being a minor, was merely subject to the incapacity of minors in general in this state, and so that his conveyance was merely voidable upon his disaffirmance of the same during his minority, or within 1 year after attaining his majority "upon restoring the consideration to the party from whom it was received or paying its equivalent with interest," as provided by section 3973, Statutes 1890 (section 885, Rev. L. 1910), the judgment of the trial court is wrong, and should be reversed. In other words, the principal question in this case is as to whether the act of Congress sets these lands absolutely free from all federal restrictions, or only upon condition, during the minority of such allottees, that their alienation or incumbrance is authorized by a county court of this state. In Jefferson v. Winkler, 26 Okl. 653, 110 Pac. 755, decided on July 12, 1910, this act of Congress was, for reasons therein fully set forth, construed as removing the federal restrictions on alienation or incumbrances during the minority of such allottees only upon the condition that such alienation or incumbrance should be authorized by the county courts of this state, to which end the exercise of the essential jurisdiction over the persons and property of such minors is permitted to such courts; and since that time there has been an unbroken line of decisions to the same effect. Kirkpatrick v. Burgess, 29 Okl. 121, 116 Pac. 764; Gill v. Haggerty, 32 Okl. 407, 122 Pac. 641; Campbell v. McSpadden, 34 Okl. 377, 127 Pac. 854; Tirey v. Darneal, 37 Okl. 606, 133 Pac. 614; Tirey v. Darneal, 37 Okl. 611, 132 Pac. 1087; F. B. Collins Inv. Co. v. Board, 148 Pac. 846; Bell v. Fitzpatrick, 157 Pac. 334; McKeever v. Carter, 157 Pac. 56; Truskett v. Closser, 236 U. S. 223, 35 Sup. Ct. 385, 59 L. Ed. 549.

In Jefferson v. Winkler, supra, as already stated in effect, this act of Congress is construed as if it had read:

"All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood, including minors, shall be free from all restrictions; provided, however, the allotted lands of such minors may be alienated or incumbered during the minority of such allottees only upon the authority of the county courts of the state of Oklahoma, which courts shall, except as otherwise specifically provided by law, have jurisdiction of the persons and property of such minor allottees."

In Truskett v. Closser, supra, the Supreme Court of the United States, in commenting upon Jefferson v. Winkler, supra, said:

"In Jefferson v. Winkler an Indian girl married when she was under 18, and while under that age conveyed her allotment. It was held that under the general law of Oklahoma the marriage emancipated her, but that, notwithstanding, her conveyance was void, the act of May 27, 1908, prevailing over the state law. The reasoning of the court is directly antagonistic to that of appellants in the case at bar, the same contentions being urged in that case as in this. In other words, it was contended that section 1 of that act was absolute, and was not modified by section 2, and the court, considering all of the provisions of the act, was of opinion that the legislative intention was to provide that the allotted lands of freedmen and mixed-blood Indians of less than half Indian blood, under the age of 18 if a female, and under the age of 21 if a male, might be sold under the supervision and jurisdiction of the probate courts of the state and not otherwise. The court, therefore, decided, upon a consideration of the act of May 27, 1908, and of the laws of the state, that the latter, removing the disability of minority, do not extend to Indian minors as defined by the act of Congress. The decision has been followed in Tirey v. Darneal, 37 Okl. 606, 133 Pac. 614; also Tirey v. Darneal, 37 Okl. 611, 132 Pac. 1087. The construction has become a rule of property in the state, and we should be disposed to accept it as such, even if we had doubts of the construction of the act of May 27, 1908."

Section 5 of this act of Congress reads:

"That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after approval of this act, which affects the title of the lands allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this act shall be *absolutely null and void.*" (The italicization is ours.)

The foregoing cases also show that no qualification whatever attaches to the declaration in the above-quoted section in the act of May 27, 1908; that any attempted alienation or incumbrance of the allotted lands of Indian minors in violation of the federal restrictions thereon are "absolutely null and void"; and, indeed, the use of the word "absolute" in this section excludes the possibility of allowing any qualification to that declaration (Pearsoll v. Chapin, 44 Pa.

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[8 Wright] 9, 14, and Thompson v. Craft, 238 Pa. 125, 85 Atl. 1107) as effectively as the use of the language that was employed in section 16 of the Supplemental Creek Agreement would do.

The plaintiff not only contends that the aforesaid order of the district court of September 21, 1909, conferred majority rights upon Chilli Henson but he contends that it was necessary for the defendants to have pleaded his minority, etc.; but, of course, this cannot be so if, as we think, this land was, on September 21, 1909, subject to a federal restriction in respect to the minority of this allottee against alienation, and his attempted alienation on that date was "absolutely null and void."

Where such allottee still has the consideration for such attempted alienation or incumbrance, or the proceeds of the same, it may be that a court of equity would refuse him the affirmative relief of adjudging such alienation or incumbrance void except upon condition that he do equity; but no such reason exists for refusing such relief to a third party, holding a valid deed from such Indian minor for which he has paid a valuable consideration, against another party, claiming under an absolutely void deed from the same source.

The foregoing appears to be an obviously sufficient answer to every question presented for our review, and we have not thought it necessary to discuss to any considerable extent some of these questions.

For the reasons stated the judgment is affirmed.

TURNER, SHARP, and HARDY, JJ., concur. KANE, C. J., not participating.

(61 Okl. 280)

FOWLER v. FOWLER. (No. 8041.)

(Supreme Court of Oklahoma. Nov. 21, 1916.)

(Syllabus by the Court.)

1. DIVORCE ⟸280—DECISIONS REVIEWABLE—ORDER FOR ALIMONY.

An order allowing alimony pendente lite is not a final order from which an appeal will lie to this court.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 764; Dec. Dig. ⟸280.]

2. DIVORCE ⟸214(4) — ALIMONY — ORDER — VALIDITY.

An order for alimony pendente lite is not void because no evidence on behalf of the defendant was heard.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 628-631; Dec. Dig. ⟸214(4).]

3. DIVORCE ⟸286—REVIEW—DISCRETION OF TRIAL COURT—ALLOWANCE OF ALIMONY.

An order for alimony pendente lite will not be reversed for abuse of discretion by the trial court in refusing to hear testimony offered by the defendant thereon, where the trial court offers to hear such testimony upon a motion to reduce the amount allowed, and no such motion is filed.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 769, 770; Dec. Dig. ⟸286; Appeal and Error, Cent. Dig. § 598.]

4. CONTEMPT ⟸66(3) — PRESENTING QUESTIONS IN TRIAL COURT—CONDUCT OF JUDGE—OBJECTIONS OR EXCEPTIONS.

The question of whether the trial court during the trial asked questions indicating his opinion of the guilt of a defendant charged with contempt is not before us for review where no objection or exception was taken to such questions.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 229; Dec. Dig. ⟸66(3).]

5. CONTEMPT ⟸66(7)—ARGUMENT OF COUNSEL—PREJUDICE.

Remarks of counsel in argument examined, and *held* not prejudicial.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 232-237; Dec. Dig. ⟸66(7).]

6. DIVORCE ⟸215—ALIMONY PENDENTE LITE—EARNING CAPACITY OF DEFENDANT.

In fixing alimony pendente lite, the husband's ability to earn money is an element to be considered.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 632-634; Dec. Dig. ⟸215.]

7. DIVORCE ⟸269(9) — ALIMONY — DISOBEDIENCE OF ORDER—CONTEMPT.

A man who has no money or tangible property may be punished for contempt of court in failing to pay alimony adjudged to be paid by him, if he makes no honest effort, considering his physical and mental capabilities, to work and earn money to pay the same.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 760; Dec. Dig. ⟸269(9).]

8. TRIAL ⟸252(1)—INSTRUCTIONS—APPLICABILITY TO CASE.

It is not error to refuse offered instructions which, though correct as statements of abstract principles, are not applicable to the facts of the particular case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596, 612; Dec. Dig. ⟸252(1).]

9. TRIAL ⟸260(1)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

It is not error to refuse offered instructions which are fairly covered by the general charge given by the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. ⟸260(1).]

10. APPEAL AND ERROR ⟸1064(1)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

A cause will not be reversed for misdirection of the jury unless it appears that the error complained of has probably resulted in a miscarriage of justice or constitutes a substantial violation of a statutory or constitutional right.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. ⟸1064(1); Trial, Cent. Dig. §§ 525, 553.]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Johnson County; J. H. Linebaugh, Judge.

Action by Roxie Fowler against Guy A. Fowler. From a judgment finding defendant guilty of contempt, he appeals. Affirmed.

Cornelius Hardy, of Tishomingo, for plaintiff in error. Robert M. Rainey, of Atoka, for defendant in error.

BURFORD, C. Roxie Fowler sued Guy A. Fowler, her husband, under the statute for separate maintenance. The district judge

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made an order for the payment of alimony pendente lite, counsel fees, and suit money. Plaintiff in error failed to pay any part of the amount so ordered to be paid, and thereupon Roxie Fowler, in the original divorce action, applied for and obtained an order to show cause why plaintiff in error should not be punished for contempt. Plaintiff in error answered the rule by averring his inability to comply with the court's order. He demanded a jury trial, which was granted, and upon the trial was found by the jury guilty of contempt of court. The trial judge thereupon remanded him to jail until he complied with the order of court. After a motion for new trial was filed and overruled, plaintiff in error superseded the judgment by giving a bond and appealed to this court.

[1] The first assignment of error is that the trial court erred in refusing to hear evidence offered by plaintiff in error at the time the order to pay alimony was made. To this contention answer is made that the order allowing temporary alimony was appealable to this court, and that, no such appeal having been prosecuted, the validity of that order is not before us for review, and McKennon v. McKennon, 10 Okl. 400, 63 Pac. 704, is cited in support. That case, however, was expressly overruled by this court in State ex rel. Blackaby v. Cullison, Judge, 31 Okl. 187, 120 Pac. 660, holding that an order granting alimony pendente lite was not appealable. No question is here raised as to whether the judgment in contempt is an appealable order. See State ex rel. v. Cullison, supra. Such an order was treated as appealable in Wells v. Wells, 148 Pac. 723, and the question not being raised we so treat it here.

[2] Assuming that an appeal lies from the judgment in contempt, a serious question arises as to how far we may inquire into the validity or propriety of the original order allowing alimony. It is a principle of universal acceptance that the violation of a void order is not a contempt, and that upon the contempt proceedings inquiry may be made into the actual validity of the order upon which such proceedings are based. But if the order be one not void, but within the power of the court to make, may this court, upon appeal from the judgment in contempt, inquire into the propriety of the original order or determine whether or not the trial court committed reversible error in granting it? A number of the courts have held to the view that in certain classes of cases such an inquiry is permissible. See Alexander v. United States, 201 U. S. 117, 26 Sup. Ct. 356, 50 L. Ed. 686; Ross v. Ross, 47 Mich. 185, 10 N. W. 193; Lester v. State, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375; Weigley et al. v. People, 51 Ill. App. 51. However, we do not deem it proper to pass directly upon this question, since, under the state of the record, we are proceeding upon an assumption that an appeal lies from the judgment in contempt, and are therefore not inclined to declare a rule as to the scope of that appeal, without definitely passing upon the right of appeal itself. We are not forced to a decision of this point, for the reason that we may assume also the right of review in its broadest comprehension without affecting the ultimate result. The original order was made upon an ex parte hearing at which the trial judge refused to hear the evidence then offered by plaintiff in error. His power to so proceed, it seems, is fixed in principle by the decision in Gundry v. Gundry, 11 Okl. 423, 68 Pac. 509. It was there held that alimony pendente lite might be lawfully granted without notice to the adverse party. If the order may be made without notice to the adverse party, clearly it may be made without hearing evidence in his behalf.

[3] As to an abuse of discretion in refusing to hear the offered evidence, it appears that at the time the trial judge suggested that he would hear testimony upon a motion to reduce the amount allowed, which motion plaintiff in error did not see fit to file. If there was any abuse of discretion in refusing to hear the testimony in the first instance, plaintiff in error had, by offer of the court, an opportunity to have such error corrected, and did not avail himself of it. Under such circumstances we are of opinion that he is not entitled to relief here.

[4] The second assignment of error is upon certain questions propounded by the court which, it is alleged, indicated the court's opinion of guilt of the defendant. This question appears to be not before us, for the reason that no objection or exception thereto appears in the record.

[5] The third assignment relates to certain remarks of counsel in argument to be improper and tending to arouse the passion and prejudice of the jury. A large part of the argument is quoted in the brief, but upon an examination of the record we find that the only remarks to which objection was made are the following:

"Let's go to the defendant and see how he stands in this case. He was a man that came down here and got married and promised before God and man to support her. Gentlemen, he has this little child whose duty it was to support."

This was objected to as prejudicial, counsel stating:

"The only issue in this case is the question of this man's ability to comply with the court's order, and not one of marriage vows."

The court directed the argument to proceed, exception was taken, and the argument resumed as follows:

"We want to talk about the ability of this man with fairly good education, a man in good health, six feet tall, and weighing 220 lbs.," etc.

We see nothing in the language used justifying an assumption that it was improper. There was no dispute that the defendant was married to the plaintiff. It is true the technical offense was a violation of the court's

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order, but the order itself was necessarily founded upon the marriage relation and the obligations growing out of it. As is said by Mr. Bishop, in his work on Marriage and Divorce (volume 2, § 829):

Alimony "is the necessary consequence of what the unwritten law establishes between husband and wife as to property."

And by the Supreme Court of Ohio in Fickel v. Granger, 83 Ohio St. 101, 93 N. E. 527, 32 L. R. A. (N. S.) 270, 21 Ann. Cas. 1347:

"Alimony * * * is an award by the court upon considerations of equity and public policy, and is founded upon the obligation which grows out of the marriage relation that the husband must support his wife. * * *"

We cannot say that to refer to the duty incumbent upon plaintiff in error, of which the court's order was but the written legal expression, constituted such misconduct of counsel as to justify a reversal.

[6] The next assignment is as to the giving of certain instructions by the trial court. These instructions were as follows:

"You are instructed that the burden is upon the defendant to show to your satisfaction by a fair preponderance of all the evidence that he has complied with said order, or that, failing to do so, he has made an honest and faithful effort to comply, and in considering whether or not he has made such effort honestly and faithfully you may consider whether or not the defendant has applied to the court to have said order vacated, or modified and reduced, or whether or not he has paid in to the clerk any amount to be applied on said order, and whether or not he has in good faith done everything that a reasonable man could do to comply with said order."

"The court instructs you that the fact that the defendant has no property or money at the time of the making of said order would not be sufficient to excuse him from a compliance with same, but that it is incumbent upon him to make every reasonable and honest effort that he could to comply with said order, and in determining whether or not he has made such honest and faithful effort you may take into consideration his age, his intelligence, his physical condition, and his general capabilities to secure employment and earn money."

"In this case you are instructed that, if you find, by a fair preponderance of the evidence, after taking into consideration all of the facts and circumstances in the case, that the defendant, Guy A. Fowler, has made every reasonable effort that he could have made to comply with said order, that is to say, that he has applied to the court to have said order vacated, or to have the same modified or reduced, or has put forth every effort that was within his power and ability, for one in his condition and circumstances in life, to comply with said order, then it would be your duty to find the defendant not guilty; but if you do not find that he has made an honest effort to comply with said order as above defined to you, then it would be your duty to return a verdict of guilty against the defendant."

"The court instructs you that it was the duty of this defendant to promptly and faithfully comply with said order, and before he will be excused for not having done so he must show to your satisfaction that he has done everything within his power to comply with said order, and that, having put forth every effort that he reasonably could put forth, he has been unable to comply with the same."

We have carefully examined the various errors alleged to be contained in these instructions, and find but one which we think it necessary to discuss in detail. The exceptions to these instructions, taking into consideration the evidence in the case, fairly raise the question as to whether or not a man, without money or property, may be punished as for a contempt for failure to pay alimony pendente lite because he has made no reasonable or honest effort to work and obtain the necessary funds. The evidence in this case showed that plaintiff in error was a young man, of better than average education, large in stature, and of apparent physical health. There was testimony that he was troubled with an affection of the ear, and that he had a predisposition to Bright's disease, and that he had done but little work during his lifetime, but had lived with his father, who supported and maintained him. His answer to the citation was that he had no property, and had been unable to obtain employment to make money. There was evidence that he had asked several parties for work, but the jury evidently found that he had made no honest or reasonable effort to obtain it. There being evidence from which the jury might reasonably draw this conclusion, we are bound by it. The evidence showed, without contradiction we think, that defendant had no money or property, at least in any amount, either at the time the order was made or prior to or at the hearing on the citation. We have then a man without property, who makes no reasonable effort to work and pay the sums directed in an order for alimony pendente lite. May he be punished for contempt?

[7] Upon this question there appears to be considerable conflict in the American authorities. Thus in Messervy v. Messervy, 85 S. C. 189, 67 S. E. 130, 30 L. R. A. (N. S.) 1001, 137 Am. St. Rep. 873, it was held:

"The court cannot compel a husband who has no trade * * * or employment, to learn a trade, acquire a profession, or find employment, and, by exercise thereof derive an income, to comply with the court's order to pay alimony to his wife, in a suit for separate maintenance."

This decision is based solely upon the proposition that courts do not so attempt to enforce judgments, the court saying:

"If it could do so to enforce payment of a judgment for alimony, why could it not do so to enforce payment of any other judgment? The moral obligation to pay a judgment for alimony may be greater than the obligation to pay any other, but there is no difference in the legal obligation."

If this be true, it seems entirely inconsistent for the court to say in the same opinion that:

"If the husband is able to comply with the order of the court, and willfully refuses to do so" he may be punished for contempt, and to reverse the cause "without prejudice to plaintiff to apply for further orders as may be proper to compel obedience to the orders of the court if and when appellant is able to comply therewith."

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Courts do not enforce judgments by contempt proceedings when the judgment debtor, being able, willfully refuses to pay. If there is no distinction between ordinary judgments and orders to pay alimony, especially orders pendente lite, why does the court reserve the right to punish in contempt for willful refusal? The fallacy of the argument advanced to support the position of the court in the Messervy Case seems to lie in this, that an ordinary judgment at law does not order the defendant to pay anything. It simply adjudicates the amount owing from defendant to plaintiff and remits the plaintiff to his ordinary remedies by execution or otherwise to enforce payment. On the other hand, an order to pay alimony pendente lite, though partaking also of the nature of a judgment (Hartshorn v. Hartshorn, 155 Pac. 508), goes further, and is a direct command of the court to the defendant to pay the sums therein mentioned. This command it has been the practice of courts from time immemorial to enforce by proceedings for contempt; some of the authorities going so far as to say that such remedy is exclusive. Whatever, therefore, may be the wisdom of the rule enunciated in the Messervy Case the reason given therefor is in our judgment not based upon sound principles.

In Ex parte Todd, 119 Cal. 57, 50 Pac. 1071, the court, without the expression of any reason therefor, or the citation of authority, reversed an order of committal in contempt, saying that:

"This order was clearly in excess of the power of the court, which cannot compel a man to seek employment in order to earn money to pay alimony, and punish him for his failure so to do."

In Webb v. Webb, 140 Ala. 262, 37 South. 96, 103 Am. St. Rep. 30, the Supreme Court of Alabama, affirming an order refusing an attachment for contempt seems to find the reason for refusing the order rather in the difficulty of accomplishing the desired result than in the power of the court to inflict punishment. It was there said:

"The only remaining insistence is that he is able to work and will not work to earn money to make the payment, and the court ought to commit him for default in this respect. It is difficult to understand how the desired result was thus to be accomplished, and how the court would go about it. If complainant would not labor, the court was without power to inflict corporeal punishment to compel him. If it imprisoned him till he was willing to work, that would not have produced money meantime, but would have entailed expense for the imprisonment; and if imprisoned, and he should relent and come in and signify his willingness to labor, employment would have to be obtained for him by the court, by himself, or some one else; and how the court would have proceeded legally to hire him out, or supervise him, if he hired himself, and collect the money for application of its decree, has not been made to appear."

The force of this objection is hereafter considered.

Upon the other hand, Mr. Bishop, in his work on Marriage and Divorce and Separation (volume 2, § 888 et seq.), in defining the "faculties" which are to be considered in fixing alimony, says:

"The husband's faculties are his capabilities of maintaining a family ordinarily consisting of his income from whatever source derived. But if he refuses to acquire income, the sum which he might obtain by due exertion is also to be estimated as faculties."

And:

"The husband's duty to maintain his wife does not depend alone on his having visible property. * * * Plainly the husband's ability is the measure of his duty, so that if he exerts himself his actual earnings become faculties for alimony, or if he will not exert himself his capacity for earning must be estimated."

This doctrine is admitted in Messervy v. Messervy, supra, which justifies the rendition of a "judgment for alimony to the wife where the husband has neither property nor income, but is able by the use of his faculties to provide maintenance for her," but classing on order to pay alimony purely as a common judgment, leaves the order enforceable against a working husband, but useless against a lazy and worthless one. We think the law is not so impotent. In Pauly v. Pauly, 69 Wis. 419, 34 N. W. 512, it is said:

"It is proper to say that something more than the present, visible property of the appellant, as a means of such payment, may be considered. 'The husband's ability to maintain his wife does not depend alone upon his having property accumulated in any of its visible forms.' His ability to earn money must be considered."

Again it is tersely said by Justice Ruffin, speaking for the Supreme Court of North Carolina, in Muse v. Muse, 84 N. C. 35:

"A husband is not excused from the maintenance of his wife because he lacks an estate. He must labor if need be for her support; and, if reluctant, it is fortunate that it happens in this instance that he may be compelled to do so."

The Supreme Court of California in an earlier case than Ex parte Todd, supra (Galland v. Galland, 44 Cal. 475, 13 Am. Rep. 167), found the defendant had applied his available earnings to the payment of alimony adjudged, but in considering the power of the court stated what, in our opinion, is the true rule to be observed, as follows:

"It is our opinion, however, where one is called before a court to answer for contempt for not doing an act which he has been adjudged to do, inquiry may properly be had as to whether it is still in his power to do it, and, if it be not, he should not be adjudged guilty, unless he has voluntarily and contumaciously disabled himself from doing it. Ex parte Cohen, 6 Cal. 318."

And in State v. District Court et al., 37 Mont. 485, 488, 97 Pac. 841, 842, 15 Ann. Cas. 941, the court said:

"In our opinion, inability to render obedience to such an order is a good defense to a charge of contempt for its violation, unless it appears that the person charged has voluntarily and contumaciously brought the disability upon himself."

It appears to us, however, that refusing or willfully neglecting to work is "contumaciously disabling" himself from obeying the order of the court, just as much as a fraudulent transfer of property or the like would

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be. As was said in Myers v. Trimble, 3 E. D. Smith (N. Y.) 612:

"Courts will not adjudge a defendant in contempt for not doing an impossibility, nor for not doing what it is not in his power to do, unless he has voluntarily disabled himself to do the act where the creation of the disability was itself a contumacious act."

Upon the particular facts and legal questions involved in the case at bar Lansing v. Lansing, 41 How. Prac. (N. Y.) 248, is closely in point. It there appeared, as here, that the defendant was a young man who had not "apparently made any effort to earn money to make such payment, but had lived with and been supported by his father." Defendant's answer showed that he had since the making of the order no means and no property but wearing apparel. The court, however, refused to discharge him, saying:

"He has lived with his father, and his labor must have been worth something. It is not shown that he is a man of feeble or infirm health, and I do not understand why he has not been able to earn $200 per year, and pay the amount to his wife.

"It may be that he has not real or personal property, except his clothing, but why has he none; has he been idle since the decree? If not, where are his earnings? If he had no property when the decree was granted, then it was his duty to try to earn something, he had no right to lay idle, and, because he could live at his father's house, therefore refuse to work and to support his wife."

In the case at bar the jury found that defendant had made no honest effort to obtain work, and, there being evidence from which they might fairly draw that conclusion, we are bound by it. In this view of the instant case the principles above quoted upon very similar facts are applicable.

In Lester v. Lester, 63 Ga. 357, the court, in considering a question similar to that here involved, said:

"If a man, though having health, will not work for the support of his wife and minor children, a court cannot assume direct control of his will and muscle and compel him to labor. To do this would be to reduce him to a sort of juridical slavery, and would contradict the spirit of our institutions. To be idle (taking the consequences) is one of the privileges of a freeman, unless he is convicted penally of some offense and put to work as a punishment. But, while a civil court cannot order an able-bodied man to go to work, it can, in a proper case for alimony, order him to contribute so much money at such and such times to the maintenance of his dependent family, and leave him to provide the money by the free and voluntary exercise of his faculties, mental and physical, or by any other means at his command. If it is not reasonably and fairly within his power to comply with the order, he may disobey it, and the court must and will excuse him. But it is not a sufficient excuse to say, 'I cannot raise the money unless I work for it,' nor, 'although I can raise money by my labor, I cannot save that much over and above my expenses, unless I practice a more rigid economy than is agreeable to me.'"

The court there refused to discharge the judgment to pay or be imprisoned.

Again, in Staples v. Staples, 87 Wis. 592, 58 N. W. 1036, 24 L. R. A. 433, the Supreme Court of Wisconsin had under consideration a commitment for contempt for failure to pay alimony. The defendant pleaded that he was without funds or property and unable to borrow. The trial court found that he had "in no way controverted the fact of his ability as an able-bodied man to earn and accumulate money," and committed him to jail until the sum adjudged was paid. It also appeared that he had said he would pay nothing. The appellate court said:

"Imprisonment certainly should not be ordered when it appears that the default is the result of honest inability to pay, on account of business misfortunes, or lack of health or earning ability, or other circumstances which are not the fault of the defendant. But where the inability is willfully brought about by defendant himself, with intent to avoid payment, the refusal to pay becomes contumacious, and the inability so resulting will not purge the defendant of contempt. The present case seems clearly one of contumacious refusal to pay."

The judgment of committal was affirmed.

The same view was taken by this court in Wells v. Wells, 148 Pac. 723, where it was said:

"It is shown by the testimony that the defendant not only did not pay the alimony and attorney's fees, as directed by the court to do, but made no effort to pay, and did not even ask the court to reduce the amount in order that he could pay all or a part of it, altogether displayed a willful indifference to the order of the court. He seemed to have been obsessed with the illusion that he did not have to pay if he did not have the money and did not acquire it."

We might well content ourselves with merely following the doctrine there expressed, but, owing to the importance of the question, we have seen fit to enter into a more extended inquiry as to the reasons and grounds therefor.

Referring finally to the difficulty found by the California court in the matter of punishment set out in Ex parte Todd, supra. If the right to punish for contempt in this class of cases exists, and we hold that it does, we are loath to restrict the right upon considerations of the remedy. In this class of cases, civil contempts, the punishment ordinarily is, as in this case, that the defendant be confined until he complies with the order of the court. If, as here, the defendant is without property, naturally he cannot ordinarily labor in jail and require the money to comply with the court's order. Nor can the court let him out to hire in any sort of judicial peonage. But, upon the other hand, the order of confinement is always within the discretion of the trial court. We assume that the power of that court will not be used oppressively. If it should be, clearly relief may be afforded here. It may well be that in such cases as this, even in the jail, the defendant, through his own efforts, or that of his friends, may find hitherto overlooked resources or employment available upon his release. Such employment being found, and the defendant expressing a willingness to accept it, we have no doubt the trial court would release him that he

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might thereby comply with the order. The difficulty of the mode of punishment is not so great that we regard it as insuperable, and therefore a deterrent to the exercise of the right to punish. The result is well illustrated in the present case. The defendant, although asserting he was utterly without means or resources, within a few hours after being confined found two sureties (among whom it is to be noted his father did not appear) willing to trust him to the extent of signing a bond in the sum of $2,000, conditioned to pay the alimony and costs adjudged in the original order, if the present judgment be affirmed. Our views upon this question of punishment are better expressed than is within our power by Mr. Justice Bleckley, speaking for the Supreme Court of Georgia in Lester v. Lester, supra:

"It is the common practice of husbands and fathers wherever civilization prevails, to supplement or supply deficient pecuniary means of support for their families with their personal exertions, and to so curtail their own expenses as to leave something for the wife and minor children. Whatever may be the theoretical difficulties of maintaining a family on the labor of one man, with such casual assistance as his wife and young children can afford, practically all such difficulties are overcome so generally that there is a reasonable presumption of the ability of any able-bodied husband and father to contribute something to the support of his wife and each minor child. Here there was an entire cessation to respond, with anything, to the order for alimony. The suspension was complete; every cent was withheld. And there was some appearance of doubtful faith in the shape of co-operative dealings with relations. We cannot say that the judge, under the circumstances, abused his authority in not accepting the respondent's answer as satisfactory, and in ordering an attachment for contempt. The attachment will bring the actual resources of the respondent to a practical and decisive test. Pressure is a great concentrator and developer of force. Under the stress of an attachment, even the vision of the respondent himself may be cleared and brightened, so that he will discern ways and means which were once hidden from him, or seen obscurely. It is a great help to do a thing to feel that it must be done, and that there is no evading it. Harsh as was the old remedy of imprisonment for debt, it had this wholesome effect in many cases, and was, so far, a beneficent instrumentality. While the imprisonment which impends over the respondent is not for debt ([Strait v. Strait] 9 Reporter, 109; [Thweatt v. Kiddoo] 58 Ga. 300; [Smith v. McLendon] 59 Ga. 523; [Carlton v. Carlton] 44 Ga. 216), it can be prevented by the same means as if it were; that is, by payment. In reducing him to the alternative of prompt payment each month or of being attached, the judge has put the respondent on the vantage side of all his resources, whatever they may be. Another consideration to which we look is that such orders are subject to modification from time to time; and we will not anticipate that, if the respondent really becomes willing to render obedience and proves unable, there will be any further exaction made of him at the expense of his liberty."

Upon the instructions given as a whole, and upon counsel's contention that defendant by working could not have paid the amount required within the time limited, the language of the Supreme Court of Illinois in Deen v. Bloomer, 191 Ill. 416, 422, 61 N. E. 131, 133, is pertinent and is adopted herein. The court there said:

"It may be conceded that he was not at all times able to pay the whole of the monthly allowance, but his affidavit and his letters fail to show that he made an honest effort to pay it, while, on the other hand, they and the other evidence adduced tend to indicate a willful neglect to pay not only the whole, but even a small part of it.

"Counsel attempt to say that the allowance of alimony was too large. It does not appear that this was the reason he failed to comply with the mandate of the court. He did not question the propriety of the allowance, but pursued a course which indicated that he acquiesced in the justice of the order. Furthermore, if he had indicated a desire to pay any part of it, and the amount had appeared to the court to be unjust because beyond his means and ability to pay, the order was subject to be modified at any time, and doubtless would have been. He during the seven years made no complaint as to the amount of the allowance, but only when attached for contempt does he attempt to resort to that excuse for his failure to comply with the order of the court. The burden of proof was upon him to show that, acting in good faith and with an honest purpose to comply with the order of the court, he was unable to do so, and this, we think, the circuit court was justified in finding he failed to do."

Upon the whole we are of opinion that the instructions given were a fair statement of the law, and not prejudicial to the rights of the defendant.

[8] The final assignments are upon instructions offered and refused. The first of these instructions offered was as follows:

"Gentlemen of the jury, you are instructed that under the law the father of the defendant has no legal obligation to loan to the defendant or pay to the clerk of the court for the defendant the alimony, attorney's fees, or suit money ordered by the court to be paid by the defendant in this cause."

Plaintiff in error's father was introduced as a witness in his behalf. Upon direct examination he volunteered statements to the effect that his son had applied to him for loans and he had been unable to accommodate him. On cross-examination the trial court permitted, over objection, certain questions as to the father's wealth. No question as to the admission of this testimony is raised in the brief. The above instruction was offered evidently with this testimony in view. Ordinarily, of course, the question of the parents' wealth was wholly immaterial. The instruction offered was correct, and the trial court could have given it in this particular case without error. It appears, however, from the record that the testimony upon cross-examination was admitted more as affecting the credibility of the witness in giving his testimony in chief than for the purpose of bringing up any question of the father's responsibility for the son's obligations. We think this is fairly inferable from the court's remarks in overruling the objection to the cross-examination. The arguments of counsel are in the record, and from an examination of them it appears that counsel expressly disclaimed any contention that the father was liable for or under any obligation

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to pay the sums set forth in the order for alimony. Under section 6005 of the Code we are precluded from reversing a cause for misdirection of the jury unless "it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." Under the state of the record we are unable to say that the refusal of this instruction probably resulted in a miscarriage of justice.

The defendant also offered the following instruction, which was refused:

"Gentlemen of the jury, the defendant has a right to retain out of his income or earnings a sufficient sum for his own subsistence or maintenance before paying into court the money ordered as alimony, and is not guilty of contempt of court in so doing."

This instruction, though perhaps a correct statement of the law applicable to some cases, is not correct as applied to the facts of the case at bar. The testimony showed that the defendant was living with and being supported by his father. Though there was no legal obligation upon the father to assume this burden, it sufficiently appears that his affection for his son had prompted him to do so. Under such circumstances we think the defendant might well have devoted all of his earnings or the earnings which he could have made to the support of his wife, at least so far as comprehended by the order of the court. His support was apparently secure without applying any of his earnings thereto. We see no legal difference in this regard between support derived from investments or labor and support derived from a parent. Suppose an ancestor had by his will provided that his executors should sufficiently support defendant out of the deceased's estate. Should he not then, being himself provided for, devote his earnings to his family? Is there any difference where the support, though not required by law, is voluntarily furnished by one living? We think not. Had defendant lived to himself and upon his own earnings, the case might be different. Inasmuch as he has the good fortune to be provided for without labor, we see no reason why his wife should not receive the entire benefit of his labor which, from the verdict of the jury, we take it he can perform. Some of the cases heretofore referred to involve similar states of fact, and will, we think, be found to support our conclusions that the refusal of this instruction in this particular case was not error.

[9] Finally the following instructions were offered and refused:

"Gentlemen of the jury, you are instructed that before you can find the defendant guilty of contempt in refusing to obey the order of the court you must find by a preponderance of all the evidence in the case that the defendant's failure to pay the alimony, attorney's fees, and suit money was contumacious, showing a resolve to disobey or defeat the order of the court. If you find that the defendant's failure to comply with the order was due to his inability from business misfortunes, lack of health or employment, or other extenuating circumstances, you will return a verdict in favor of the defendant finding him not guilty."

"Gentlemen, you are instructed that, if you find that the defendant is unable to comply with the order of the court in this cause, you cannot find him guilty unless you further find that he voluntarily and contumaciously disabled himself to comply with the order, and has endeavored to obtain employment or the money to comply with the order, but has been unable to do so; you will return a verdict in favor of the defendant finding him not guilty of contempt."

These instructions were covered, in substance, in the charge of the court. It is true the trial court did not use the word "contumacious," but he did, we think, fairly and clearly define the circumstances applicable to the case, under which the defendant would not be guilty of contumacy and consequently of contempt. Where offered instructions are fairly covered in the general charge, it is not error to refuse them.

[10] We find no reversible error in the record, and conclude that the judgment should be affirmed.

PER CURIAM. Adopted in whole.

(61 Okl. 314)

MIDLAND VALLEY R. CO. v. RIPPE.

(No. 6954.)

(Supreme Court of Oklahoma. Nov. 14, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐1001(1)—REVIEW—JURY QUESTION.

The question of actionable negligence is ordinarily for the jury, and where there is evidence or inferences that may be drawn therefrom, reasonably tending to support the findings of the jury that there was actionable negligence which was the proximate cause of the injury suffered, this court will not disturb such verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928–3933; Dec. Dig. ⇐ 1001(1).]

2. POISONS ⇐6—LIABILITY FOR KEEPING—DUTY.

Where a poisonous compound is kept upon the right of way of a railroad company, it is its duty to keep such poisonous compound in a safe place, and whether or not the place in which such poisonous compound is kept is a safe place is a question of fact for the jury.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. §§ 3, 4; Dec. Dig. ⇐6.]

3. POISONS ⇐6—ON RAILROAD RIGHT OF WAY—DUTY OF CARE.

While a railroad company is not required to fence its right of way at depots and crossings, it is its duty to properly fence or otherwise so guard a poisonous compound kept upon its right of way as not to leave the same accessible to trespassing cattle.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. §§ 3, 4; Dec. Dig. ⇐6.]

4. PLEADING ⇐236(4)—AMENDMENTS—TRIAL AMENDMENTS.

Under the liberal rules of pleadings in this state, it is not an abuse of judicial discretion to permit, after the close of the evidence, an amended petition to be filed which does not state a different matter—another subject of contro-

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versy—than the one stated in the original petition, and does not substantially change the action or its defense.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. ⊂⊃236(4).]

5. PLEADING ⊂⊃245(4)—TRIAL AMENDMENTS —ALLOWANCE.

The amended petition allowed to be filed in this case carefully examined, and *held* that the court did not commit a breach of discretion in permitting the same.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 660, 664–666; Dec. Dig. ⊂⊃ 245(4).]

6. TRIAL ⊂⊃250—INSTRUCTIONS—REFUSAL.

Requested instructions, predicated only upon part of the pleadings and evidence in the instant case, were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584–586; Dec. Dig. ⊂⊃250.].

7. POISONS ⊂⊃6 — ACTIONS—INSTRUCTIONS— SUFFICIENCY.

Instructions, given and assigned as errors in the instant case, carefully examined, and found to correctly state the law.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. §§ 3, 4; Dec. Dig. ⊂⊃6.]

8. TRIAL ⊂⊃139(1) — JURY QUESTION — DIRECTED VERDICT.

The jury are the sole judges of the facts and the inferences to be drawn therefrom, and where there is any evidence or inferences to be drawn therefrom reasonably tending to sustain a petition stating a cause of action, it is prejudicial error to sustain a demurrer to the evidence, or to direct a verdict for the defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341; Dec. Dig. ⊂⊃139(1).]

9. POISONS ⊂⊃6—RIGHT TO—DENIAL.

The record in this case carefully examined, and it found that the court did not err in refusing defendant a new trial.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. §§ 3, 4; Dec. Dig. ⊂⊃6.]

Commissioners' Opinion, Division No. 1. Error from District Court, Osage County; R. H. Hudson, Judge.

Action by John Rippe against the Midland Valley Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

A. R. Museller, of Pawhuska, for plaintiff in error. Farrar L. McCain, of Tulsa, and O. E. Swan, of Muskogee, for defendant in error.

COLLIER, C. This is an action brought by the defendant in error against the Midland Valley Railroad Company and board of county commissioners of Osage county, to recover damages for the loss of 28 head of cattle, alleged to have been caused by said cattle drinking poisonous water, which, by negligence of the plaintiff in error, flowed from a dipping vat on the right of way of said company adjacent to the land of the defendant in error, upon the lands of defendant in error. Hereinafter the parties will be designated as they were in the trial court.

At the conclusion of the plaintiff's evidence, each of the defendants demurred to the evidence of the plaintiff, which demurrer was sustained as to the said board of county commissioners, and the said cause dismissed as to the said board. The demurrer of said company to the evidence was overruled, to which the said company duly excepted. At the conclusion of the evidence the said company moved for an instructed verdict in its favor, which was overruled and excepted to. Thereupon the plaintiff moved to amend his petition so as to conform to the evidence, to which the defendant company objected. The court permitted the petition to be amended as moved, to which the defendant duly excepted. The material allegations of the petition as amended are that the defendant company maintained dipping vats, storage tanks, and cooking pans on its right of way, which contained certain poisonous waters, and that the said defendant failed and refused to protect the same from stock by keeping up its fences around and about the same, and also neglected to protect the same from a rain which fell, and because of such neglect to protect the same as was its duty to do, said dipping vats and cooking pans were filled to overflowing by said rain; that some of said water so poisoned ran into the pasture of plaintiff and around said vats and pans and upon the grounds adjacent to said vats and pans, and same was left standing in the cooking vats on said premises, the same not being properly fenced and protected; that by reason of said neglect of the defendant the cattle of said plaintiff drank of the poisoned water in the said pasture of plaintiff, and also escaped through the defective fence in and around the said vat and cooking pans, and drank out of the pools of poisoned water near said vat and out of said vat, and that by reason of drinking said poisoned water, so negligently made accessible, the said 28 head of cattle died.

The uncontradicted evidence is that the plaintiff owned pasture lands adjacent to the right of way of the defendant company, and that upon said right of way the said company maintained a dipping vat and the other paraphernalia for dipping cattle for the eradication of Texas ticks; that the said "dip" was composed of arsenic and other materials; that a large quantity of said dip was left in said vats and dipping pans; that on the 7th of June, 1913, a heavy rain came, which caused the said vats to overflow, and part of such overflow to flow upon the lands of plaintiff and form a pool; that on the 8th day of June, 1913, and within 2 or 3 days thereafter, 28 head of said cattle suddenly died; that there were tracks of cattle around said dipping vat and pools of water near the same; that in the cooking pan was a solid substance, which was shown by analysis thereof to contain some 14 per cent. of arsenic, and that samples of water from said vat had been analyzed and shown to contain arsenic.

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The evidence was in conflict as to the condition of the fence around the vat, and whether or not the gate which opens to the vat was shut or closed, and whether or not the cattle gained access to said vat and pans through the gate or through a defective fence. It was further shown in evidence that the dipping vat and pans belonged to the said company, and that the dipping vat had been used by Osage county.

There was expert testimony as to the quantity of arsenic that it would take to kill an animal, but the same was in conflict, and there was no direct evidence as to what quantity of water which had been poisoned the cattle drank, or what quantity of arsenic had been licked from the pan, while there was evidence tending to show that the licking by the cattle of the solid substance which was left in the pan would produce death.

Against the objection and exception of defendant, an expert witness was asked:

"What would you say as to the possibility or probability of stock grazing in a pasture within the width of the railroad right of way, plus 95 yards, being poisoned by overflow of seepage from a dipping vat, storage pan, and cooking pan, after a heavy rain, by water flowing into the pasture and into the pools from which they drank?"

To which the witness answered:

"Well, it would be possible there would be enough go through that might kill, but I don't know how much went through, or anything like that."

Also, against the objection and exception of the defendant, a witness was asked the condition of the fence "in the spring," and answered, "It was in bad shape." The smallest valuation of the cattle that died, shown by the evidence, was—together with the expense of burying the same, and the interest thereon—less than the verdict rendered.

Of the instructions given by the court instructions numbered 1, 4, 5, and 6 were duly excepted to, respectively, and are assigned as errors. Said instructions read:

"(1) You are instructed that this is an action by the plaintiff, John Rippe, against the defendant, Midland Valley Railroad Company, to recover damages for the loss of 28 head of cattle, which the plaintiff claims died as the result of the negligent acts of the defendant company. Plaintiff claims in his petition that the defendant, on or about the 8th day of June, 1913, was the owner of and had in his possession and under his control certain dipping vats, storage tanks, cooking pans, paraphernalia, lands, and fences, the same being located on or near the right of way of the defendant near the town of Foraker, Osage county, Okl. That said vats, storage tanks, and cooking pan were, on and before the date mentioned, filled with certain poisonous waters which had theretofore been used in dipping cattle to remove from them what is commonly known as the cattle tick. That the defendant railroad company, being the owner of and in the possession and control of said dipping vat, storage tank, cooking pans, and paraphernalia, neglected and refused to protect the same from stock by keeping up its fences around and about the same, and also neglected to protect the same from a rain which fell on or about the 8th day of June, 1913, and that because of such neglect to protect the same said dipping vats, storage tanks, and cooking pans were filled to overflowing by said rain, and that some of said water, so poisoned, ran away from said vats across the railroad right of way and into the pasture of the plaintiff, and around the vats, and over the ground adjacent to said vats, same being left standing in the cooking vat on said premises, the same not being properly fenced and protected, and that the fences of defendant along its right of way in the immediate vicinity were not properly kept up, and that by reason of this neglect on the part of the defendant, the cattle of plaintiff drank of the poisoned water in the said pasture of plaintiff, and also escaped through the defective fence of defendant in and around the vats, cooking pan, and paraphernalia of defendant, and drank out of the pools of poisoned water near said vat, and out of said vat, and that by reason of said drinking said poisoned water, so negligently made accessible to the cattle of plaintiff, 28 head of said cattle died, to the plaintiff's damage in the sum of $1,234; and plaintiff prays for judgment against the defendant for the said sum of $1,234, with interest thereon from the 8th day of June, 1913. The defendant has filed an answer, in which it denies each and every material allegation contained in the plaintiff's petition, and under the issues thus joined the burden of proof is upon the plaintiff to prove to your satisfaction the material allegations of his petition by a fair preponderance of the evidence before you would be warranted in returning a verdict for the plaintiff and against the defendant."

"(4) You are instructed that the Midland Valley Railroad Company had the right to have upon its right of way vats for the purpose of dipping cattle, in order to remove therefrom and to eradicate from the county the fever tick, and had the right to use said vats for the said purpose, and to permit any other person, or persons, to use the same for such purposes, and had the right to use in said vats, for the purposes of such dipping, an arsenical dip such as has been testified to by the witness in this case. But in this connection you are instructed that it was the duty of the railroad company, and all other persons using the said vat for the purpose of dipping cattle in such arsenical dip, to properly guard the said vats, and to use the same and said dip that injury would not result to other persons or their property. And in this connection you are instructed that if you find from a fair preponderance of the evidence that the officers, agents, and servants of Osage county were permitted, by the defendant Midland Valley Railroad Company, to use the dipping vats, storage tanks, cooking vats, and other paraphernalia used in connection with the dipping of cattle upon the right of way of the Midland Valley Railroad Company, and that the officers, agents, and servants of Osage county did use the said vats and other paraphernalia for the purpose of dipping cattle, and did use in said vats the arsenical dip that has been testified to by the witnesses in the case, and you further find from a fair preponderance of the evidence that said dip was of a poisonous and dangerous character, then it was the duty of the railroad company, and of all persons using the said vats, by or with its permission, to use and exercise ordinary care in handling of said dip and in properly guarding the same to prevent its escaping upon the land of adjacent owners, and in order to prevent cattle from coming upon the right of way, and either drinking the said dip in solution or eating the ingredients thereof, and if you find from a fair preponderance of the evidence that the railroad company, or any person or persons using the said vats with its permission, failed to exercise ordinary care, that is, such care as an ordinarily reasonable prudent person would have exercised under the same or similar circumstances, to prevent the said dip from escaping from the said premises, or in preventing cattle of adjacent landowners from coming upon the premises and

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drinking or eating the said dip or its ingredients, and you further find that as the result of the failure upon the part of the defendant company, or such other person, or persons, acting by or with its consent, dip was left in said vats, and because of rain the same were caused to overflow and to flow upon the land of the plaintiff in this case, and that his cattle drank thereof, and died, or the plaintiff's cattle came upon the premises where the said vats were located and ate or drank of the said dip or its ingredients, and as a result thereof died, then and in that event your verdict in this case should be for the plaintiff, and against the defendant.

"(5) You are instructed that the burden of proof is upon the plaintiff to show, by a fair preponderance of the evidence: First, that on or about the 8th day of June, 1913, there was in the dipping vat on the railroad right of way poisonous matter of sufficient quantity and strength so that, mixed with enough rainwater to cause the vat to overflow, the overflow therefrom would be dangerous to cattle if drank by them; second, that on or about said date there was a rain, and that such rain caused said vat to overflow; third, that the overflow from said vats flowed across and along the right of way of the railroad company into the pasture of the plaintiff; fourth, that when said overflow reached the plaintiff's pasture, it contained sufficient of the poisonous matter alleged to have been contained in said vat to be dangerous to cattle which might drink it; fifth, that plaintiff's cattle did drink such overflow water; sixth, that they drank it while they were in the pasture of the plaintiff; and, seventh, that they died therefrom. Or else the burden is upon the plaintiff to show by a fair preponderance of the evidence, that poisonous matter was left upon the right of way of the defendant company, and that because of failure to exercise ordinary care in safeguarding such poisonous matter, the cattle of plaintiff entered upon the premises of the defendant company and ate or drank of such poisonous matter, and as a result thereof died. If the plaintiff has failed to prove, by a fair preponderance of the evidence one or the other of these propositions, then the plaintiff cannot recover in this case, and your verdict should be for the defendant.

"(6) You are instructed that if you find from the evidence that a rain fell on the 8th day of June, 1913, and caused the vat to overflow, and that said overflow flowed into plaintiff's pasture and caused the damage to the cattle shown by the evidence, if any, the mere failure on the part of the defendant to protect the vat from overflow would not render the defendant liable, but, in addition to the other elements necessary for you to find, as stated in the other instructions given you, before you can return a verdict for the plaintiff, you must find that there was negligence in failing to protect the said vats; and, in order to find such negligence, you must find, from a fair preponderance of the evidence, that the defendant, or some other person acting for it or with its permission, failed to exercise ordinary care in guarding the said vats, and as a result thereof the cattle of the plaintiff came upon the premises and ate or drank of the contents of the said vat; or you must believe from a fair preponderance of the evidence that an ordinarily prudent man would reasonably have anticipated that such a rain would fall as would cause the vat to overflow, and that such overflow would flow thence into plaintiff's pasture, and you must further find that an ordinarily prudent man would reasonably have anticipated that such overflow from the vat, after flowing over the right of way and then into plaintiff's pasture, if it did so overflow, would, after reaching such pasture, contain sufficient poisonous matter to kill cattle if they drank it; and if the plaintiff has failed to show to your satisfaction, by a fair preponderance of the evidence, then the plaintiff cannot recover in this case, and your verdict should be for the defendant."

The defendant requested the court to give the jury instructions respectively numbered 1 and 8, which the court refused to do, to which action of the court the defendant duly separately excepted. Said requested and refused instructions, which are assigned as error, read:

"(1) The burden of proof is upon the plaintiff to show by a fair preponderance of the evidence: First, that on or about the 8th day of June, 1913, there was a dipping vat on the railroad right of way containing poisonous matter of sufficient quantity and strength so that, mixed with enough rainwater to cause the vat to overflow, the overflow therefrom would be dangerous to cattle if drunk by them; second, that on or about said date there was a heavy rain, and that said rain caused said vat to overflow; third, that the overflow from said vat flowed across and along the right of way of the railroad company into the pasture of the plaintiff; fourth, that when said overflow reached the plaintiff's pasture, it contained sufficient of the poisonous matter alleged to have been contained in said vat to have been dangerous to cattle which might drink it; fifth, that plaintiff's cattle did drink such overflow water; sixth, that they drank it while they were in the pasture of the plaintiff; and seventh, they died therefrom. If the plaintiff fails to prove by a preponderance of the evidence any one of the elements, or if the evidence on any one of these elements is, in your judgment, evenly balanced, the plaintiff cannot recover in this case, even if he proves all of the remaining elements by a preponderance of the evidence."

"(8) If you find from the evidence that a rain fell on the 8th day of June, 1913, and caused the vat to overflow, and that said overflow flowed into plaintiff's pasture and caused damage to the cattle shown by the evidence, if any, the mere failure on the part of the defendant to protect the vat from the overflow would not render the defendant liable, but in addition to the other elements necessary for you to find, as stated in the other instructions given you, before you can return a verdict for the plaintiff, you must find that there was negligence in failing to protect the vat from overflow by rain; and, in order to find such negligence, you must believe from the evidence that an ordinarily prudent man would reasonably have anticipated, considering the season and weather usually prevailing at that season in that vicinity, that such a rain would fall as to cause the vat to overflow, and that such overflow would flow thence into plaintiff's pasture, if in fact it did so flow, and you must further find that an ordinarily prudent man would reasonably have anticipated that such overflow from the vat, after flowing over the right of way and then into plaintiff's pasture, if it did so flow, would, after reaching said pasture, contain sufficient poisonous matter to kill cattle if they drank it."

The jury returned a verdict for the plaintiff in the sum of $1,082.73, to which the defendant duly excepted. Within the statutory period, the defendant filed a motion for a new trial, which was overruled, and judgment was entered upon the verdict, to which the defendant duly excepted. To reverse the judgment rendered, this proceeding in error is prosecuted.

The defendant bases a reversal of the case upon the following assignments of error: (1) Overruling demurrer to plaintiff's evidence; (2) overruling motion for an instructed verdict; (2½) permitting plaintiff to amend his petition; (3) overruling objection to question

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to plaintiff as to condition of fence in the spring of 1913; (4) overruling objection to hypothetical question propounded to Mr. Kauffman; (5) giving instructions respectively numbered 1, 4, 5, and 6; (6) refusing requested instructions respectively numbered 1 and 8; (7) overruling motion for a new trial; and (8) rendering judgment for the plaintiff.

In reviewing the several assignments, we will do so as we think the same logically should be considered, and not in the order assigned:

[4-9] If the court erroneously overruled the demurrer to plaintiff's evidence at the close thereof, which we do not hold, the evidence and the inference that can be drawn therefrom, that was introduced by the defendant after the overruling of said demurrer, in our opinion, in connection with plaintiff's evidence, conclusively shows that the court did not err in overruling the demurrer to the evidence.

"A demurrer to evidence admits every fact * * * which the evidence most favorable to the other party tends to prove, but where the court erroneously overrules such a demurrer, and afterward the defect in the evidence is supplied by other evidence, introduced by either party, the error is cured." Henry Stephens v. Isaac Scott et al., 43 Kan. 285, 23 Pac. 555.

The defendant devotes a large part of its brief, and presents many authorities, to support its contention that the court erred in permitting plaintiff, at the conclusion of the evidence, to amend his petition. We are unable to see that by the amendment there was a departure from the original cause of action, or that the amendment "changed substantially the claim or the defense."

It is true that at the time of the interposition of said demurrer to the plaintiff's evidence, the only negligence averred in the petition was permitting the poisoned water to overflow upon the pasture of plaintiff; while, under the amended petition, additional grounds of negligence were alleged in maintaining the vat and paraphernalia connected therewith and failing to properly protect the same. In the original petition and in the amended petition, each was predicated upon the negligence on the part of the defendant in maintaining the dipping vat and its accessories, and the injuries sustained are alleged to be the loss of the cattle due to said negligence. In the amended petition the negligence averred is also based upon the negligence of the defendant in maintaining the same dipping vat as averred in the original complaint, and only adds additional grounds of negligence—the defective fence and failure to properly guard the said vat; and we are unable to see how there is any departure from the original cause of action as alleged in the original complaint.

"The allowance of an amendment not substantially changing the claim of defense rests in the court's sound discretion." Shawnee, Tecumseh Traction Company v. Newcome, 158 Pac. 1193.

"The test is whether the proposed amendment is a different matter, another subject of controversy, or the same matter more fully or differently laid to meet the possible scope and varying phases of the testimony." Fulsom-Morris Coal & Min. Co. v. Mitchell, 37 Okl. 575, 132 Pac. 1103.

Applying the test stated in the above-styled cause, we are clearly of the opinion that the amendment is not a different matter, another subject of controversy, but simply the same matter more fully and definitely laid to meet the additional testimony that was introduced in the cause.

We fully agree with the defendant that a proper opportunity should have been given the defendant to properly try their cause, and that they should not be put at a disadvantage by reason of amendments made after the evidence was closed, which they have not had an opportunity to meet; but, if the defendant was taken by surprise by such amendment, and was not prepared at that time to meet the same, then the proper procedure would have been to ask for additional time in which to prepare the defense, and if this be refused, we think it might show abuse of discretion on the part of the court. In the instant case no request was made for additional time in which to prepare to meet or defend against the allegations of the amended petition. Under the liberal rules of pleading in this state, we are of the opinion that the court did not abuse its discretion in permitting the filing of the petition as amended.

We have carefully considered the objection to the question propounded to the witness as to the condition of the fence in the spring of 1913, and we are unable to agree with the learned counsel of defendant that the court committed error in overruling objection to the same. While probably the evidence would have been more satisfactory had the time been more definitely fixed, we think it was pertinent to prove the condition of the fence prior to and so approximately near the time that it is alleged that the injuries herein complained of were suffered.

The hypothetical question, propounded to the witness, "as to the possibility or probability of stock grazing in a pasture within the width of a railroad right of way, plus 95 yards, being poisoned from an overflow or seepage from dipping vats, storage tank and pan, after a heavy rain by water flowing in the pasture and into the pools from which they drank," we think was properly permitted by the court to be asked, as there was evidence in the case upon which to base such hypothetical question. Of course, the substance of a hypothetical question must have a direct and intimate connection with the testimony in the case; otherwise the attention of the jury would be distracted from the issue, and the very object of hearing the evidence defeated. But it is sufficient if the question fairly states such facts as proof of the examiner fairly tends to establish and fairly presents his claim or theory. Jones. Commentaries on Evidence, vol. 2, § 371.

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[1-3] We have carefully examined the several instructions given by the court and excepted to by the defendant and assigned as errors, and are unable to say that said instructions do not clearly state the law. Instruction No. 1 simply states the issues involved in the trial of the cause, and we think does so without prejudice to the defendant. Instructions Nos. 4, 5, and 6 also, we think, clearly state the law, and certainly does so as fairly to the defendant as could possibly be asked. Many requested instructions were asked which were refused, but only the refusal to give instructions respectively numbered 1 and 8 are assigned as error. Requested and refused instruction No. 1 we think was properly refused upon the ground that the said instruction only takes into consideration that the negligence complained of was the overflow of the vat and the flowing of the poisoned water upon the lands of the plaintiff, while the pleadings in the case as made by the amended petition, and the evidence, includes, not only the negligence of permitting the poisoned water to flow upon the land of plaintiff, but also bases his right of action upon the negligence of the plaintiff in failing to properly safeguard the said dipping vat, failure to properly fence the same, and failure to discharge its duty in permitting the pools of poisoned water to exist near the said vats on the premises of the defendant and accessible to the stock for whose loss this action is instituted.

We are further of the opinion that the refused requested instruction No. 8 is tainted with the same vice as that of requested instruction No. 1.

Unquestionably there was sufficient evidence for the jury to determine that the death of the cattle was due to drinking the poisoned compound which flowed from the dipping vat, and in drinking from the vat and licking the compound contained in the vessels connected with said dipping outfit. It is true that the expert evidence as to the quantity of arsenic necessary to produce death was in conflict, but there was evidence upon which the jury could reasonably conclude that a sufficient quantity of poisoned water, and a sufficient quantity of the poisonous matter contained in the dipping vat and pan and pool near the same, was taken by the cattle to produce death. Of course, though the death of the cattle was due to drinking the poisoned water or licking the poisonous compound, the defendant would not be liable unless the negligence of the defendant was the proximate cause of the death of the cattle, and this question of negligence was a question of fact for the jury. C., R. I. & P. Ry. Co. v. Hill, 36 Okl. 540, 129 Pac. 13, 43 L. R. A. (N. S.) 622.

Many cases are cited by the defendant as to the duty of a railroad company, and its exemption from liability, when its right of way is properly fenced as to killing stock which stray upon its right of way, which we think correctly state the law, but we cannot agree with the learned attorneys of defendant that said cases are in point in the instant case. There is a different rule of law as to the care that must be exercised in safeguarding poisons upon one's premises, to the end that the property of another may not be injured thereby, and we do not think that, because the defendant was not required to fence its right of way at its depots or crossings, said exemption in any way tended to relieve it from properly protecting, even as against trespassing animals, by fencing or otherwise, as might be necessary, said poisonous compound contained in said dipping vat and its paraphernalia. Section 2531, Revised Laws 1910, provides:

"Whoever shall, except in a safe place on his own premises, lay out strychnine or other poison, is guilty of a misdemeanor."

We think that said section indicates clearly that it is the policy of our law to require one having poison upon his premises to exercise more than ordinary care to avoid danger to others or their property; and, when a poisonous compound, as shown by the evidence in this case, was permitted to remain upon the right of way, and not properly safeguarded to prevent the approach of cattle thereto, there was sufficient evidence to authorize the jury to find that the said poisonous compound was not kept in a safe place, and that the defendant was consequently guilty of actionable negligence and liable for the death of the trespassing cattle.

"In order for the violation of a criminal statute to constitute actionable negligence, the injury complained of must be of the sort the legislation was intended to prevent." Denton v. M., K. & T. Ry. Co., 90 Kan. 51, 133 Pac. 558, 48 L. R. A. (N. S.) 820, Ann. Cas. 1915B, 639.

We think that said section 2531 was intended to prevent such negligence as is shown by the evidence in the instant case.

"Persons using dangerous agencies are required to use the utmost care to prevent injuries, and to adopt every known safeguard." 29 Cyc. pp. 460–463.

In M., K. & T. Ry. Co. v. Rose, 160 Pac. 734 (not yet officially reported), Judge Galbraith, speaking for this court says:

"The company is bound to have known the dangerous character of this dip. When, with this knowledge, this poisonous fluid was permitted to escape from the tank and accumulate in a pool accessible to the cow, and no steps were taken to prevent her from drinking it, the company failed to discharge the duty it owed her, even though she was, as contended by the plaintiff in error, a trespasser."

We therefore think that the jury had sufficient evidence upon which to find that the defendant was guilty of actionable negligence.

There being evidence to reasonably sustain the jury in finding that there was actionable negligence on the part of the defendant which was the proximate cause of the death of the cattle, and, it not being contended that the verdict of the jury was excessive, and the verdict of the jury having

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been approved by the trial court, we are powerless to interfere with the verdict rendered.

"A general finding in favor of a party includes a finding of all those facts necessary to constitute the claim of the party in whose favor the finding is made." Oland v. Malson, 39 Okl. 456, 135 Pac. 1055; Davis v. First State Bank of Norman, 152 Pac. 122; Theo. Maxfield Co. v. Andrus, 155 Pac. 1163; Schultz v. Barrows, 8 Okl. 297, 56 Pac. 1053; Brewer & S. v. Black, 5 Okl. 57, 47 Pac. 1089.

"A verdict [reasonably] supported by evidence will not be disturbed on appeal." Crane v. Franklin, 17 Ariz. 476, 154 Pac. 1036; G., C. & S. F. Ry. Co. v. Beasley, 153 Pac. 1155; Apple v. French, 154 Pac. 659; First State Bank of Indiahoma v. Menasco, 155 Pac. 261.

"A verdict upon conflicting evidence will not be disturbed when reasonably supported by evidence." Harrell v. Scott, 151 Pac. 1169.

Having reached the conclusion that there was evidence in the case reasonably supporting the verdict of the jury, it necessarily follows that we find no error in the refusal of the court to direct a verdict for the defendant.

"A motion to direct a verdict leaves for consideration only such evidence as is favorable to the party against whom the motion is directed." Buckeye Engine Co. v. City of Cherokee, 153 Pac. 1166.

"A motion to direct a verdict admits the evidence of the opposite party and all reasonable inferences which can be drawn therefrom." Bowles v. Biffles, 151 Pac. 193; Supreme Tribe of Ben Hur v. Owens, 151 Pac. 198, L. R. A. 1916A, 979; Shields v. Smith, 151 Pac. 207.

"Where there is any evidence reasonably tending to establish plaintiff's claim, it is error to direct a verdict." Scott v. Moore, 152 Pac. 823; Alexander Drug Co. v. O'Dell, 153 Pac. 114; Stewart v. Lafayette, 153 Pac. 847.

"Issues in an action should be submitted to the jury where there is any evidence reasonably tending to support the plaintiff's contentions." Kali Inla Coal Co. v. Ghinelli, 155 Pac. 606.

There being evidence reasonably tending to support the verdict and the issues involved having been submitted to the jury under proper instructions, the court did not err in refusing to grant a new trial and in entering judgment on the verdict.

This cause should be affirmed.

PER CURIAM. Adopted in whole.

(58 Okl. 744)

GROVES v. STOUDER et al. (No. 5977.)

(Supreme Court of Oklahoma. Nov. 21, 1916.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER ⟸341(1½) — REMEDIES OF PURCHASER—ACTION TO RECOVER PAYMENTS—PARTIES.

In an action to rescind a contract for the purchase of land and to recover advanced payment made thereon upon the ground that defendant had failed to convey the character of title which he agreed to convey to a portion of the premises, the only necessary party defendant is the party to the contract against whom the decree of payment will operate.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 1010; Dec. Dig. ⟸341(1½).]

2. VENDOR AND PURCHASER ⟸116 — REMEDIES OF PURCHASER — SUIT TO RESCIND — RESTORATION OF CONSTITUTION.

A person, induced by false and fraudulent representations to purchase real estate, may, upon discovering the fraud, bring an action in equity to rescind the contract, and in such cases should restore, or make an offer in his petition to restore, everything of value which he has received under the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 205–208; Dec. Dig. ⟸116.]

3. VENDOR AND PURCHASER ⟸128 — PERFORMANCE OF CONTRACT — TITLE TO PROPERTY.

One who contracts to convey a certain character of title to real estate should be prepared and able to convey to the grantee an estate or interest therein substantially corresponding with that bargained for and agreed to be sold.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 234–237; Dec. Dig. ⟸128.]

4. VENDOR AND PURCHASER ⟸133—PERFORMANCE OF CONTRACT—PART PERFORMANCE.

G. contracted to convey to S. certain lands in fee simple and to deliver preference leases on certain school lands. He executed warranty deed to the lands to be conveyed in fee simple, but failed to deliver preference leases on a portion of the school lands. *Held*, that S. was not required to take a title different from that agreed to be delivered, and was entitled to rescind the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 234–237; Dec. Dig. ⟸133.]

5. VENDOR AND PURCHASER ⟸337 — REMEDIES OF PURCHASER—RESCISSION—LIEN.

Where a vendor cannot convey the interest which he agreed to convey in all of the property, but only to a part of it, the purchaser, upon rescinding the contract, is entitled to a lien upon the land of the vendor to secure repayment of purchase money advanced by him.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 985–990; Dec. Dig. ⟸337.]

Error from District Court, Beaver County; R. H. Loofbourrow, Judge.

Action by Nellie Stouder and others against Charles C. Groves. Judgment for plaintiffs, and defendant brings error. Affirmed.

Charles Swindall, of Woodward, for plaintiff in error. Dickson & Dickson, of Beaver, and Gray & McVay, of Oklahoma City, for defendants in error.

HARDY, J. Defendants in error brought suit against plaintiff in error to rescind the sale of certain real estate purchased from him, consisting of 160 acres to which he held title in fee simple and also certain school land leases. The parties will be referred to as they appeared in the trial court.

The plaintiff Nellie Stouder and defendant entered into two written contracts for the purchase of said premises, by one of which it was agreed that defendant should deliver to plaintiff clear and absolute title to 160 acres of land, owned by him in fee simple, for the consideration of $2,500 and by the other, agreed to deliver to plaintiff Nellie Stouder

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preference leases on the W. ½ of section 16 and the S. ½ of section 17, township 3 north, range 26 east, C. M., Beaver county, Okl., which leases were to be deposited in escrow in the Speermore State Bank at La Verne, Okl., and to be approved by the state school land commissioners, for which plaintiff was to pay $2,050. In pursuance of this contract defendant executed and delivered warranty deed for the 160 acres of land, and also deposited in the Speermore State Bank two printed forms of leases, containing the names of of the lessees, the description of the land, and the amount of rental to be paid, with the term and date filled in and with the places for signature on behalf of the lessors and the acknowledgment left blank. The blank form, purporting to lease the west half of section 16, is in the form of the ordinary preference lease, while the blank form, purporting to be a lease of the south half of section 17, confers no preference right of purchase, but contains a provision that same is made subject to the right of the state to sell and convey the lands therein leased at any time, and that upon such sale the lease shall thereupon expire. These purported leases were executed by no one, and were nothing more nor less than blank forms, and conveyed no right in the premises to lessees, and wholly failed to comply with the provisions of the written contract entered into between the parties. Judgment was rendered for plaintiff, the decision of the court being placed upon the ground that defendant had failed to deliver to plaintiffs the preference right lease to the south half of section 17.

[1] Defendant insists that the court erred in overruling his motion to require plaintiffs to make as additional parties to the proceeding his sons Carol K. and Fred C. Groves, each of whom had an interest in the leases upon the school lands which by his contract he undertook to relinquish and transfer to plaintiffs. This was an action against defendant to rescind a contract entered into with him to which his sons were not parties, by the terms of which he undertook to convey a certain character of title to certain premises described in the written instruments, and he is the only necesary party to this action, and the only one who would be affected by a judgment decreeing a repayment of the sums received by him. In Harding v. Olson, 177 Ill. 298, 52 N. E. 482, appellant contracted to convey real estate to appellee the title of which at the time was in his son, who conveyed to an insurance company which conveyed to a real estate and loan company. The action was to rescind the contract for failure to convey title and to recover payment thereon. The holding of the court is stated in these words:

"The only necessary party defendant to a bill to set aside a contract for the purchase of land and recover advanced payments, on the ground that defendant had no title, is the party to the contract, against whom the decree of repayment will operate." Warren v. Miller & Sons (Iowa) 99 N. W. 127.

[2] Defendant also insists that before plaintiffs would be entitled to rescind, they would be required to relinquish all of their right, title, and interest in and to the school land which was transferred to them, respectively, by the defendant, which he says could only be done by tendering defendant and his sons leases properly executed by the board of land commissioners for the signature of the defendant and his sons. If leases executed by the board of land commissioners were essential to a transfer of this school land, then no interest was ever transferred therein to plaintiffs. The blank forms of leases which were deposited in the Speermore State Bank were not so executed, and, according to defendant's own contention, plaintiffs never possessed any leases on said lands, or had any interest therein which they could transfer. It is alleged in the petition that as soon as plaintiffs discovered the false and fraudulent representations and concealments of defendant, they forthwith offered to rescind their purchase of said lands and leases, and tendered to defendant a warranty deed in due form to the N. E. ¼ of section 17, and offered to return the school land leases which they had received, and at the time of trial in open court, renewed their tender and offered to execute a release of all their claims under and by virtue of said purported leases, and to bring the same into court for the use and disposition of defendant. This action is of an equitable nature, and the tender was sufficient. In Howe et al. v. Martin et al., 23 Okl. 561, 102 Pac. 128, 138 Am. St. Rep. 840, in the third paragraph of the syllabus it is held:

"A person induced by false and fraudulent representations to purchase or exchange for property has three remedies: * * * Second, he may bring an action in equity to rescind the contract, and in such a case it is sufficient for plaintiff to restore, or make offer in his petition to restore, everything of value which he has received under the contract." Lamb v. Dodson, 41 Okl. 638, 139 Pac. 125.

[3] The tender made in the petition and in open court complied with the rule announced, and in addition thereto the court ordered each of the plaintiffs named in the unexecuted leases which had been placed in escrow to indorse on the blank forms a relinquishment in favor of defendant in conformity with section 7185, Rev. Laws 1910. The fact that the relinquishment was directed to be executed in favor of defendant could not affect plaintiff's right to recover, for it does not appear that his sons had any leases executed by the school land department which were relinquished in favor of plaintiffs; and, so far as the record before us is concerned, if they had such, they are still the holders thereof. In addition to this, at the time judgment was rendered, it was stated by the court that if any matter had been overlooked

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upon his attention being called thereto, he would modify the decree, and the objection now made was not then called to his attention, nor any request made that the decree be modified in this respect.

[4] It is claimed that plaintiffs are not entitled to rescind on the ground of false and fraudulent representations, because plaintiffs had the same opportunity of inspection that defendant had, and by her agent had inspected said lands prior to the contract of purchase. This contention is immaterial, in view of the fact that the court placed its judgment upon the ground that defendant had failed to convey the title which he agreed to convey. The plaintiff Nellie Stouder testified that her object in making the purchase was to get a sufficient quantity of land lying together so that she and her children, who had become scattered, could live together, she having one place and they occupying adjoining places, and that she wanted the school land, with preference right leases thereon, so that her children could later buy the lands themselves, and this desire upon her part was communicated to defendant at the time of the trade, and she testified that, had she known defendant had no preference right leases to that portion of section 17 which he agreed to convey, she would not have entered into the contract. It being her desire to acquire a quantity of contiguous land for the purpose of obtaining homes for herself and children, her intention thus becomes a material element in the transaction, and affecting the subject-matter of the contract, that it might be reasonably supposed that, but for the representation of defendant that he could convey preference right leases upon the school lands, she would never have entered into the contract. Keating v. Price, 58 Md. 532; Owens v. Rector, 44 Mo. 389. Having contracted to deliver preference right leases upon all of said school lands, the defendant must be prepared and able to convey to the plaintiffs an estate or interest therein substantially corresponding with that bargained for and agreed to be sold. Keating v. Price, supra.

The land to which defendant did not convey a preference right lease constitutes a material portion of the whole tract, and is a substantial failure upon his part to comply with his contract according to its terms. In Schechinger v. Gault, 35 Okl. 416, 130 Pac. 305, Ann. Cas. 1914D, 468, the petition alleged that Gault, as agent of Miller, entered into a contract with Schechinger that he, as the agent of Miller, had full and complete authority to execute a contract for the sale of certain lands of which Miller was the absolute owner in fee, and that Schechinger, relying upon these representations, entered into a written contract for the purchase thereof, and delivered to Gault a draft for $1,000, which was paid. Afterwards learning Miller was not the owner of said lands, but that title thereto was vested in Miller and his wife, and Gault was not the agent of Miller and had no authority to execute the contract on behalf of Miller's wife, Schechinger brought suit to rescind the contract, and the petition was held to be good against demurrer.

In Yeates v. Pryor, 11 Ark. 58, the defendant Yeates was unable to make title to one-third of the land which he had agreed to convey, and this was held to be grounds for rescission of the whole contract, the court saying:

"It is evident that Yeates is unable to make title to two of the tracts sold exceeding in quantity one-third of the whole connected tract, and that the tracts, to which no title can be made, are so situated and connected with the residue of the tract as not only to defeat his purchase to that extent, but impair the value of the whole purchase in view of the object and design of the purchase itself. We think, therefore, that Pryor should not be compelled to accept any part of the land, but may well ask to have the whole contract rescinded."

In the case of Chastain v. Staley, 22 Ga. 26, the vendee was allowed to rescind the contract of purchase because the vendor was unable to convey the interest in two-fifths of the land that he had agreed to convey.

It is generally held that a purchaser of real estate cannot be compelled to take only a part of the land for which he has contracted. If he cannot get the whole, he has a right to rescind the contract. The reason for this is that, the vendor not being able to convey the interest in a part of the land agreed to be conveyed, he cannot perform the original contract, and equity will not make a new contract for the parties different from that actually entered into, but will allow the vendee to rescind and compel a repayment to him of the purchase price paid to the vendor, thus placing the parties in the position they occupied before the vendor entered into the contract, which he could not perform according to its terms. Owens v. Rector, 44 Mo. 389; Wells v. Porter, 5 B. Mon. (44 Ky.) 416; Farber v. Blubaker Coal Co., 216 Pa. 209, 65 Atl. 551; Porterfield v. Payne, 11 N. Y. Supp. 31;[1] Wood v. Mason, 42 Tenn. (2 Cold.) 251; Yeates v. Pryor, 11 Ark., supra; Hayes v. Skidmore, 27 Ohio St. 331; Weiss v. Schweitzer et al., 47 Misc. Rep. 297, 95 N. Y. Supp. 923; Bailey v. James, 11 Grat. (Va.) 468, 62 Am. Dec. 659; Adams v. Kibler, 7 S. C. 47; Bank v. Kellogg, 4 S. D. 312, 56 N. W. 1071.

[5] And where vendor cannot convey the interest which he agreed to convey in all of the property, but only to a part of it, the purchaser is entitled to a lien on the land of the vendor to secure repayment of the purchase money advanced by him. Coleman v. Floyd, 131 Ind. 330, 31 N. E. 75; Wood v. Mason, supra; Caldwell v. Rainey, 6 Ky. Law Rep. 601 (memo); Swetitsch v. Waskow,

[1] Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 57 Hun, 591.

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87 Ky. 155; Weiss v. Schweitzer, supra; Craft v. Latourette, 62 N. J. Eq. 206, 49 Atl. 711.

Plaintiffs were entitled to rescind for the reasons given, and the tender made in their pleadings and in open court and the requirement in the decree that they relinquish all their rights under the property leased in favor of the defendant are sufficient, and the judgment of the trial court is affirmed. All the Justices concur.

(29 Idaho, 587)

VALLEY STATE BANK, Limited, v. POST FALLS LAND & WATER CO., Limited, et al.

(Supreme Court of Idaho. Nov. 17, 1916.)

1. JUDGMENT ⟸143(12) — DEFAULT — VACATION—GROUNDS.

The showing made in this case to set aside the default reviewed, and *held* insufficient to support or justify the order of the trial court in setting aside the default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 284; Dec. Dig. ⟸143(12).]

2. JUDGMENT ⟸143(10) — DEFAULT — VACATION—GROUNDS.

The failure of the attorney to familiarize himself with the law covering the practice of the forum wherein his case is pending will not be held to be excusable neglect, since it is incumbent upon the lawyer from another state, practicing law in this state, to familiarize himself with the rules of practice of the courts in this state.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 281; Dec. Dig. ⟸143(10).]

3. APPEAL AND ERROR ⟸957(1) — REVIEW — DISCRETION OF TRIAL COURT—VACATION OF DEFAULT JUDGMENT.

The action of the trial court to set aside a default is governed by sound, legal discretion, and where it appears that such discretion has been abused, the order setting aside a default will be reversed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. ⟸957(1).]

Budge, J., dissenting.

Appeal from District Court, Kootenai County; Robt. N. Dunn, Judge.

Action by the Valley State Bank, Limited, against the Post Falls Land & Water Company, Limited, and another. From an order setting aside a judgment for plaintiff, it appeals. Reversed and remanded, with directions.

C. L. Heitman, of Rathdrum, and W. F. Morrison, Jr., of Palouse, Wash., for appellant. Elder & Elder and Ralph S. Nelson, all of Cœur d'Alene, and Cullen, Lee & Matthews, of Spokane, Wash., for respondents.

SULLIVAN, C. J. This action was brought to recover against the defendants on a promissory note executed by the corporation to the defendant Coffman, for the sum of $500 and interest, and indorsed by him. The defendant corporation failed to appear and answer. Coffman appeared and filed a demurrer. Thereafter the attorney for the plaintiff notified the attorney for defendant Coffman that the demurrer would be called for hearing on November 20, 1915. On that date, by agreement of counsel, the demurrer was submitted to the court without argument, and was overruled by the court, and defendant Coffman was given 10 days in which to answer. On November 20th plaintiff's attorney mailed to Cullen, Lee & Matthews of Spokane, Wash., attorneys for defendant Coffman, a copy of said order overruling the demurrer. On December 3, 1915, Coffman having failed to answer within the time allowed by the court, or at all, his default was entered, and judgment entered against him. Thereafter, on December 7, 1915, the attorneys for Coffman served upon plaintiff's attorney a notice that said defendant would, on December 18, 1915, move to vacate and set aside said judgment against the defendant and ask permission to file an answer. The ground on which said motion was based was—

"that said judgment was taken against the said defendant through mistake, inadvertence, and excusable neglect of his attorneys."

The motion was based upon the pleadings and files, the affidavit of W. F. Matthews, one of the attorneys for the defendant, the affidavit of Robert H. Elder, and the answer of defendant Coffman. The affidavit of Matthews is, in substance, that he, as one of the attorneys for defendant Coffman, had charge of all the pleadings and files in said case; that the order overruling said defendant's demurrer dated November 20, 1915, stated that said defendant had 10 days in which to answer plaintiff's complaint; that upon the receipt of said order, affiant noted in his daily docket that the answer would be due in said case on December 7, 1915, whereas the entry should have been made that said answer was due on November 30, 1915; that during the week ending December 4, 1915, affiant was engaged in court in Spokane, and did not notice until December 6th that the time for filing said answer, according to the court's order overruling the demurrer, was on November 30, 1915. The affiant immediately telephoned plaintiff's attorney, and advised him that the answer was being forwarded. Affiant then learned for the first time that judgment by default had been entered. Affiant further states that said Coffman has a good and valid defense to plaintiff's complaint, and that the promissory note sued on was indorsed without recourse by said Coffman to the plaintiff, and that after said indorsement and delivery said bank wrongfully and without authority from said Coffman canceled the words "without recourse," which defense is set up in defendant's answer; that unless said judgment is vacated, defendant Coffman will suffer great injustice, and that affiant believes that on a trial no judgment will be recovered from

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said Coffman. Affiant further states that said judgment was entered through his mistake, inadvertence, and excusable neglect.

It appears that Elder & Elder, lawyers located at Cœur d'Alene, Kootenai county, were employed as local attorneys, and it is nowhere stated in Matthews' affidavit that said local attorneys had anything whatever to do with said case. Matthews swears that he, as one of the attorneys of defendant Coffman, had charge of all the pleadings and files, and that the notice, overruling the demurrer, was served on him. He nowhere states that local counsel had anything to do with the matter at all.

In the affidavit of Robert H. Elder, he states that on or about the 12th of November, 1915, the said firm of attorneys and defendant Coffman arranged with his firm to represent said defendant as local attorneys in said action, and that no notice of the hearing of the demurrer was ever served on him or his firm.

It appears from the showing that Matthews had charge of this case, and that Elder & Elder had nothing to do with it, that Matthews had notice of the overruling of Coffman's demurrer and of the order giving him 10 days in which to answer, but, on account of being very busy in the courts of the state of Washington, and apparently relying upon the practice in the state of Washington of notifying opposing counsel before taking default, he failed to answer for Coffman within the time given by the court. He also relies upon having made a wrong entry in his docket of the date on which Coffman had to answer. He fails to show that Elder & Elder did, or was expected to do, anything in the case.

[1] The showing made was clearly insufficient to warrant the trial court in setting aside the default, and this case comes clearly within the rule laid down by this court in Domer v. Stone, 27 Idaho, 284, 149 Pac. 505, Kynaston v. Thorpe, 29 Idaho, 302, 158 Pac. 790, and Hall v. Whittier, 20 Idaho, 120, 116 Pac. 1031.

[2] In the Domer v. Stone Case it is held that the neglect of a lawyer to familiarize himself with the laws governing the practice of the forum where his case is pending cannot be held to be excusable, when a defendant, having received the warning given him by the plain terms of a summons, chooses to disregard it and to neglect the laws of the state governing the court from which it was issued, and when he elects to rely upon the purely imaginary security of the rules of practice or customs prevailing in another state, and that:

"If a default judgment is taken against him the courts are not invested with discretionary power to grant him relief from it."

If an attorney is careless and makes a wrong entry in his docket as to the time his client has to answer, that of itself is not sufficient to show a mistake, inadvertence, or excusable neglect. If default judgments could thus easily be set aside, the delays of the law would be greatly enhanced.

It clearly appears from the showing made to open the default that the local attorneys had nothing whatever to do with this case, and that Attorney Matthews had full control, and had full knowledge of the overruling of the demurrer and of the time that the defendant was given to answer.

[3] There was not a sufficient showing of mistake, inadvertence, or excusable neglect on the part of defendant's attorneys in this case, and the trial court clearly abused its discretion in setting aside said judgment, since such discretion is confined to a sound legal discretion.

The order setting aside said judgment is reversed, and the cause remanded to the trial court, with directions to overrule said motion. Costs are awarded to the appellant.

MORGAN, J. I fully concur in the conclusion reached in the foregoing opinion, but believe the reason for the decision of this court will be better understood if the affidavits of W. J. Matthews and Rob't H. Elder, upon which the action of the trial court vacating the judgment and setting aside the default was based, are set out in full and briefly discussed. The affidavit of Mr. Matthews is as follows:

"State of Washington, County of Spokane—ss.:

"W. J. Matthews, being first duly sworn, upon his oath states: That he is one of the attorneys for the defendant Thomas J. Coffman, and makes this affidavit for and on his behalf; that he has had charge of all of the pleadings and files herein; that the order overruling said defendant's demurrer, dated the 20th day of November, 1915, stated that said Thomas J. Coffman may have 10 days in which to answer plaintiff's complaint; that upon receipt of said order overruling said demurrer, affiant noted in his daily docket that an answer would be due on Tuesday, the 7th day of December, whereas an entry should have been made in affiant's daily docket that said answer was due on Tuesday, the 30th day of November, 1915; that during the week ending December 4, 1915, affiant was engaged in the trial of cases in the superior court of Spokane county, and did not notice until Monday morning, the 6th day of December, that the time for filing said answer, pursuant to said order overruling said demurrer, was due on the 30th day of November; that affiant immediately called W. F. Morrison, Jr., attorney for plaintiff, on the long-distance phone, and told him that the answer was being forwarded. Affiant learned then, for the first time, that said W. F. Morrison, Jr., had caused default judgment to be entered.

"Affiant also states that said Thomas J. Coffman has a good and valid defense to plaintiff's complaint, in that the promissory note in question was indorsed by said Thomas J. Coffman to plaintiff bank, without recourse; that after such indorsement and delivery to said bank of this promissory note the representative of the bank, wrongfully and without authority from said Thomas J. Coffman, canceled the words 'without recourse' on the back of said note, which defense more fully appears in said defendant's answer, which is hereby tendered for the purpose of filing, and which has heretofore been prepared and

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served upon W. F. Morrison, attorney for the plaintiff.

"Said W. J. Matthews further states that unless the said judgment is vacated and set aside and the said defendant Coffman permitted to file his answer and have a trial in said case, great injustice will be done the said defendant Coffman; and your affiant further believes that when the trial of said case comes on to be heard, no judgment will be recovered against the said Coffman, and that in right and justice the said Coffman will be discharged and will recover judgment for his costs expended.

"Affiant further states that said judgment was rendered through his mistake, inadvertence, and excusable neglect, and that no delay or injury will be done the plaintiff by permitting the said judgment to be set aside and the said answer to be filed. W. J. Matthews."

(Duly verified.)

In view of the provisions of section 4229, Rev. Codes, that the court may "relieve a party, or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect," it is quite manifest that in order to procure a judgment to be vacated and a default to be set aside it must affirmatively appear that they were permitted to be made and entered by reason of mistake, inadvertence, surprise, or excusable neglect.

Measured by this rule, the affidavit of Mr. Matthews is insufficient. He states that after receiving the order overruling the demurrer and notifying him that he would have 10 days within which to answer, he noted in his daily docket that an answer would be due on Tuesday, the 7th day of December, whereas an entry should have been made that the answer was due on Tuesday, the 30th day of November, 1915. He does not state that this entry was so made through mistake, inadvertence, surprise, or excusable neglect, nor does he say he thereafter, and prior to the time the answer was due according to the terms of the order served upon him, examined the entry in his docket, or that he was misled by it. For aught that appears in his affidavit he may have made the entry purposely, carelessly, or through culpable neglect, and, so far as is disclosed by this record, it never misled him, nor caused him to fail to file the answer in time. It is true he further states that said judgment was rendered through his mistake, inadvertence, and excusable neglect. This is a conclusion, and no fact is alleged from which it may properly be inferred.

If any reason existed, which would constitute an excuse, why the attorney in question put down in his docket the wrong date instead of the right one, or if he ever thereafter examined the entry and was misled thereby, his affidavit does not disclose it, nor are we aware of any rule which should prompt a court to infer these necessary facts in his favor.

Mr. Elder's affidavit is as follows:

"State of Idaho, county of Kootenai—ss.:

"Robert H. Elder, being first duly sworn, deposes and says: That he is a member of the firm of attorneys known as Elder & Elder with offices at Coeur d'Alene, Idaho, and admitted to practice in the courts of the state of Idaho. That on or about the 12th day of November, 1915, the above-named defendant, Thomas J. Coffman, and Cullen, Lee and Matthews arranged with affiant's firm to represent the above-named defendant Thomas J. Coffman, as local attorney in the above-entitled cause. That no notice of the calling up for hearing of the demurrer in the above-entitled cause was ever served upon the affiant, or upon any member of affiant's firm, and was not served upon any local attorney resident in Idaho, and that no notice was given affiant, or any member of affiant's firm, that said demurrer had been overruled. Rob't H. Elder."

(Duly verified.)

The material portion of the foregoing affidavit is that the firm of Elder & Elder was local counsel for Coffman in the case; that no notice of the hearing upon the demurrer was served upon that firm, nor was notice given to it that the demurrer had been overruled. This affidavit is insufficient, in that it fails to state that affiant's firm would have taken any action in the premises had these notices been served upon it. If we are asked to infer from the affidavit of Mr. Elder that had his firm, instead of associate counsel, been served with notice it would have appeared and answered, we may say we are unable to do so. First, because he does not say so; second, because Mr. Matthews, in his affidavit, says that he had charge of all the pleadings and files in the action. The natural presumption (if courts are permitted to indulge in presumptions in cases of this kind) is that had notice been served upon Elder & Elder, that firm would have mailed it to Matthews, and Matthews already had notice. In any event, the affidavit of Mr. Elder falls far short of being a showing that the default and judgment would not have been permitted to be taken and entered had he, or his firm, instead of his associate counsel, been served with notice.

For these reasons I find, as is found in the foregoing opinion, that the showing made was insufficient to justify the order vacating the judgment and setting aside the default.

BUDGE, J. (dissenting). I am unable to concur in the conclusions reached by the majority of the court, and dissent therefrom. As I gather the facts in this case from the record, the Post Falls Land & Water Company, Limited, on June 22, 1914, made, executed, and delivered its promissory note to respondent Thomas J. Coffman for $500, payable on or before October 1, 1915, with interest. Thereafter, and before maturity, Coffman indorsed said note to the Valley State Bank, Limited, without recourse. On October 1, 1915, the note was presented to the Post Falls Land & Water Company, Limited, and payment refused. Thereafter due notice of said presentment and nonpayment was given to respondent Coffman, who also refused to pay said note. Suit was thereupon commenced by the Valley State Bank, Limited, against

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the Post Falls Land & Water Company, Limited, and Thomas J. Coffman. The corporation defaulted, and judgment was thereupon entered against it. Coffman filed a demurrer to the complaint, which was both general and special. The demurrer was signed by his attorneys, Cullen, Lee & Matthews of Spokane, Wash., and Elder & Elder, of Coeur d'Alene City, Idaho. On November 15, 1915, W. F. Morrison, Jr., attorney for the Valley State Bank, Limited, notified in writing the attorneys for the defendant residing at Spokane, but he did not notify Elder & Elder, that the demurrer filed by them on behalf of Coffman would be called for hearing on November 20, 1915. On that date, by agreement of the Spokane lawyers and Morrison, the demurrer was submitted without argument and overruled, and Coffman was given, by order of the court, 10 days in which to answer the complaint of the Valley State Bank, Limited.

On December 3, 1915, Coffman having failed to file and serve his answer within the 10 days allowed by the trial court, his default, upon application of the plaintiff, was entered by the clerk, and on the same day judgment by default was entered against him, as prayed for in plaintiff's complaint. On December 7, 1915, the attorneys for Coffman filed with the clerk of the district court their motion and notice of motion that they would, on December 18, 1915, move the trial court to vacate said default judgment and permit them to file an answer; the ground of the motion being that said judgment was taken against said defendant through the mistake, inadvertence, and excusable neglect of his attorneys; the motion being based upon the pleadings and files in the case, the affidavits of W. F. Matthews and Robert H. Elder, and upon the answer of Coffman to the complaint, tendered for filing by the defendant.

In his affidavit, Matthews, in explanation, states that he was exceptionally busy during the week ending December 4, 1915, engaged in the trial of causes in the courts at Spokane, Wash., and that he did not notice until December 6, 1915, that the time for filing the answer according to the court's order was on November 30, 1915; that he thereupon immediately telephoned plaintiff's attorney, and advised him that the answer was being forwarded, and then learned for the first time that judgment by default had been entered against his client. In his affidavit he further states that Coffman has a good and valid defense to the action brought against him by the Valley State Bank, Limited, in this, that the promissory note sued upon was by him indorsed to and accepted by the Valley State Bank, Limited, without recourse, and that after such indorsement, delivery, and acceptance, the bank wrongfully and without authority, canceled the words "without recourse," etc.

Robert H. Elder of the law firm of Elder & Elder, of Coeur d'Alene, Idaho, and one of the attorneys for Coffman, in support of the motion to set aside the default judgment, filed his affidavit, in which he set out, in substance:

"That on or about November 12, 1915, his firm was employed as local attorneys to represent the defendant Coffman, but that no notice of the hearing of said demurrer was served upon him, or any member of his firm, and that he had no notice of the overruling of the demurrer."

An examination of the allegations of the answer discloses that the answer would, if proven, constitute a meritorious defense.

In opposition to the motion to set aside the default judgment, W. F. Morrison, Jr., one of the attorneys for the Valley State Bank, Limited, filed his affidavit in which, in substance, he stated: That service of the complaint was made on Coffman on November 2, 1915. On November 13, 1915, Coffman by his attorneys, Cullen, Lee & Matthews, of Spokane, Wash., and Elder & Elder, of Coeur d'Alene City, Idaho, filed and served a demurrer to the complaint on behalf of the defendant Coffman; that thereafter on November 15, 1915, affiant noted said demurrer for hearing on November 20, 1915, and served notice of the hearing of said demurrer upon Cullen, Lee & Matthews at their office in Spokane, Wash.; that thereafter Cullen, Lee & Matthews wrote to affiant, asking that said demurrer be submitted without argument, which was done. On November 20, 1915, the demurrer was overruled, and the defendant given 10 days in which to answer. No communications were received by affiant from Elder & Elder, nor did said attorneys, or either of them, appear at the time of the submission of said demurrer. Immediately upon filing the order overruling defendant's demurrer, affiant served a copy of such order on Cullen, Lee & Matthews at their office in Spokane. No further appearance was made by Coffman, and the time for filing the answer having expired, on December 4, 1915, after clerk's entry of default had been duly and regularly entered against Coffman for his failure to answer, judgment by default was taken against him. On December 6, 1915, Matthews, of the firm of Cullen, Lee & Matthews, telephoned affiant about filing the answer, and thereupon affiant informed Matthews that judgment had been taken against Coffman by default.

The motion to vacate the default judgment was argued to the court on December 29, 1915, and the court made its order, vacating and setting aside the default judgment entered against Coffman, on the ground of mistake, inadvertence, and excusable neglect of his attorneys, and held that the allegations in the defendant's answer, if proved, stated a good and meritorious defense.

The court's order setting aside the default judgment states as a fact that at the time the default judgment was rendered and entered the defendant Coffman was represent-

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ed by Elder & Elder, local counsel, residing at Coeur d'Alene, Idaho, and that they or either of them had no notice of the hearing or of the overruling of the demurrer.

In substance the foregoing statement of facts appears in appellant's brief. I have set them out in full for the reason that in my opinion they are in no essential respects similar to the facts stated in the cases cited in the majority opinion as authority for reversing the action of the trial court in setting aside the default judgment entered in this case.

In the case of Domer v. Stone, 27 Idaho, 279, 149 Pac. 505, this court held that:

"The rule is well settled in Idaho that where a trial court, in the exercise of its sound judicial discretion, upon a proper showing that a defendant, who has a meritorious defense, has failed to appear and answer by reason of his mistake, inadvertence, surprise, or excusable neglect, sets aside the default which has been entered against him, its action in so doing will not be reversed upon appeal"

—and further added another well-known rule that the defendant, "in order to bring himself" within the rule announced above, "must show that his mistake was one of fact and not of law." The mistake in that case, being one of law and not of fact, was not excusable neglect. In the case at bar there was a mistake of fact, and not of law, in this, that Matthews, when the notice of the overruling of the demurrer was served upon him, made a calculation as to when his time for filing the answer would expire, and made a mistake in this calculation, figuring the time to expire December 7, 1915, when in truth and in fact it expired on November 30, 1915. This was clearly a mistake of fact, without intention on his part, as clearly appears from his affidavit. It is quite evident from his affidavit that the entry upon his office docket was inadvertently made. There is no counter showing, and we must therefore assume that his statement in his affidavit is correct. It is such a mistake as the most painstaking lawyer might make. Being a mistake of fact, a litigant should not, by the application of technical rules of law, be made to suffer for it, particularly in view of the fact that no serious injury could possibly result to the plaintiff below by reason thereof, for which he could not be compensated by the imposition of terms.

In the case of Hall v. Whittier, 20 Idaho, 120, 116 Pac. 1031, the affidavit in support of the motion to set aside the default judgment failed to set forth the facts which it was claimed constituted the mistake or inadvertence. The only showing made in that case was contained in an affidavit of the attorney to the following effect:

"That the time for answering said complaint thereupon expired on or about the 18th of February, 1911, but that because of inadvertence and mistake the time for answering said complaint as fixed by this court was overlooked and permitted to pass without an answer having been filed."

This court, in passing upon the sufficiency of the foregoing affidavit, said:

"It has been repeatedly held by this court in all matters of this kind that the facts must be presented to the court upon which the party relies to bring himself within the purview of the statute. In other words, the litigant cannot be allowed to pass judgment on the question as to whether or not his facts entitle him to the relief he claims, or bring him within the purview of the statute, but he must set up those facts and submit them to the judgment and discretion of the court, who must be the final judge as to their sufficiency."

This case has no application to the case at bar, for the reason that the facts in the case at bar are fully set out in the affidavits in support of the motion to set aside the default judgment.

The case of Kynaston v. Thorpe, 29 Idaho, 302, 158 Pac. 790, was an action brought to quiet title to the waters of a certain stream in Bannock county. It appears that the complaint was filed July 21, 1913. On August 19, 1913, the defendants appeared and demurred to the complaint. On December 12, 1913, the demurrers were withdrawn, and 25 days given within which to answer. On January 27, 1914, no answer having been filed, default was entered, and thereafter default judgment was entered. On July 20, 1914, nine months after the judgment was entered, a motion was made to vacate the judgment and set aside the default, upon the grounds: First, that the default and judgment were taken and entered through mistake, inadvertence, and excusable neglect on the part of the defendant; and, second, that the judgment did not conform to the allegations in or the prayer of the complaint. On May 15, 1915, an order was entered granting the motion, and the judgment and default were set aside and vacated upon the ground of inadvertence, mistake, and excusable neglect. Briefly stated the facts appear as follows: Thorpe, who was the defendant below, employed an attorney, paid him a small retainer, and made arrangements with one Douglas to pay the balance of the attorney fee, which Douglas never did. The fee not being paid, the attorney did not appear in the case after the demurrer was withdrawn. The client simply failed to pay his attorney, and this court held, in effect, that the attorney was within his rights in not appearing in the case further, and that it was the duty of the client to see that his attorney was paid, and in failing to do so he did not conduct himself as a reasonable and prudent man would, or should do under like circumstances; that more than nine months intervened, during which time Thorpe made no inquiry about his case, or whether his attorney had been paid or not. This, the court held, did not constitute mistake, inadvertence, surprise, or excusable neglect. I am unable to see where the facts in this case have any similarity to the facts in the case at bar.

At this point it may be well to call atten-

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tion to a few cases that I think are in point, and which, in my opinion, support the judgment of the trial court in setting aside the default judgment in this case and permitting the defendant below to file his answer.

In the case of Howe et al. v. Independence Consolidated Gold & Silver Mining Co., 29 Cal. 72, which was an action for the recovery of money, the defendant demurred; the demurrer was overruled and 10 days were given to answer. The 10 days having expired and no answer having been filed, on application of the plaintiff the clerk entered judgment by default against the defendant. The defendant moved the court to vacate the judgment and to be allowed to answer, and upon the hearing of the motion, in addition to the affidavit of the secretary of the company, an affidavit was filed by counsel, setting forth the following facts:

"Affiant states that during the present term he has been very much pressed for time, having to discharge his duties as district attorney, besides attending to all his civil business, without any one to aid him; * * * that * * * he has had many things on his mind, demanding his attention; * * * that, this case being set for trial, affiant had adopted the erroneous idea that an answer had been filed. * * *"

The court vacated the judgment and gave defendant leave to answer, and plaintiff appealed from the order. The judgment of the trial court was affirmed. The appellate court in the course of its opinion made the following observation:

"Orders of the court below upon applications made under the sixty-eighth section of the Practice Act will not be disturbed by this court, except in cases of gross abuse, where the power of the court has been exercised in a manner which is calculated to defeat, rather than advance, the ends of justice, which, in our judgment has not been done in the present case."

The case of Watson v. San Francisco & Humboldt Bay Railroad Co., 41 Cal. 17, was also an action brought for a balance due for work and labor, where a default was taken for want of an answer, and an application was made by the defendant to open the default, which was allowed by the trial court, and from which an appeal was taken. The court in that case, inter alia, held:

"Applications of this character are addressed to the discretion—the legal discretion—of the court in which the default has occurred, and should be disposed of by it as substantial justice may seem to require. Each case must be determined upon its own peculiar facts, for perhaps no two cases will be found to present the same circumstances for consideration. As a general rule, * * * where * * * application is made so immediately after default entered as that no considerable delay to the plaintiff is to be occasioned by permitting a defense on the merits, the court ought to incline to relieve. The exercise of the mere discretion of the court ought to tend, in a reasonable degree, at least, to bring about a judgment on the very merits of the case; and when the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a general rule, that the doubt should be resolved in favor of the application."

In the case of Reidy v. Scott, 53 Cal. 69, the case of People v. Rains, 23 Cal. 129, upon which counsel for appellant chiefly relies, is distinguished and modified so as not to be subject to the construction contended for. In the latter case the affidavit of the defendant's attorney was to the effect that he had mistaken the day of service, and that he appeared and demurred to the complaint. The court held that when the affidavit shows that the defendant rests on matters appearing on the face of the complaint (by which, of course, is meant matters of defense which, except for the interposition of a demurrer, would be deemed to be waived), the defense is merely of a technical character, and the affidavit is insufficient. In the former case the court held that a showing that the defendant made a mistake as to the day he was served with a copy of the complaint and summons, that he was ready with his answer containing allegations of meritorious defense on the day the default was entered, and that upon a full and fair statement of all the facts of the case he is advised by his counsel that he has a good and sufficient defense entitles the defendant to have the default set aside.

In the case of Francis v. Cox et al., 33 Cal. 323, it appeared that when the summons was served, the attorney for the defendant directed his clerk to make a memorandum of when the time for answering would expire. The attorney's clerk failed to make this entry, and owing to this failure, the filing of the answer was overlooked. Afterwards the attorney set up these facts by affidavit, and the lower court opened the default judgment, which ruling was sustained.

The above case is similar to the case now under consideration. Matthews, however, made the memorandum himself, instead of requesting his clerk to do so. However, he inadvertently calculated the time to be December 7, 1915, when it should have been November 30, 1915, and he sets up these facts in his affidavit, and they are uncontradicted. The lower court found these facts to be true, and set aside the default judgment. To the same effect, see the case of Lathrop v. O'Brien, 47 Minn. 428, 50 N. W. 530.

In the case of Scott v. Smith, 133 Mo. 618, 34 S. W. 864, in discussing the discretion of trial courts in the exercise of their power to set aside a default judgment, among other things the court said:

"These motions are addressed to the sound discretion of those courts, to be liberally exercised in furtherance of justice. A wise judge has said that it is not alone sufficient that justice be administered, but it must be administered in a manner satisfactory to suitors. An indiscriminate interference by this court with matters of pure discretion in the courts below would, in the end, be productive of more injustice than a refusal to interfere in any case. In the review justice might sometimes be done, but in the most of them it would be little more than groping in the dark, in which the court could not satisfy itself whether it was doing right or wrong." Stout v. Lewis, 11 Mo. 439.

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In the case of Collier v. Fitzpatrick, 22 Mont. 553, 57 Pac. 181, the Supreme Court of Montana, in discussing the Code of Civil Procedure, § 774, which is the same as section 4229, Rev. Codes, which provides that the court may, in its discretion, in furtherance of justice and upon terms, relieve a party from a judgment taken against him through his excusable neglect, states:

"The design and purpose of the statute is to further the administration of justice so that the very right upon the merits may be determined, and to that end to grant relief from excusable neglect in cases where diligence is shown in applying promptly for the relief sought, provided the opposite party be not deprived of any advantage to which he may properly be entitled. The defendant should have been afforded, upon terms, the right of trial."

While it is true that there are certain cases which lay down the rule that the mistake or ignorance of a party's counsel will not relieve him from a judgment rendered against him, a majority of the decisions do not favor this rule, provided it was a mistake of fact and not of law, and provided it was such as might reasonably and genuinely have occurred, and this court has followed the general rule.

In the case of Pittock v. Buck, 15 Idaho, 47, 96 Pac. 212, it appeared that counsel for Stella Pittock had appeared in the district court and asked orally for permission to intervene. Her counsel was asked how much time he wanted in which to intervene, and, as stated by her counsel, he understood to the best of his recollection the court gave him until December 5, 1907. Under these facts the court held that counsel had a right to rely upon his understanding that no further proceedings would be taken in the action until the time fixed for the application to intervene had expired. Judgment had been taken in that case before the time so fixed had expired, as he understood it. This court held that the lower court should have set aside the default judgment, and permitted her to answer, and in its decision among other things said:

"An application to open a default is addressed to the sound legal discretion of the trial court, and the order of the court will not be reversed on appeal, unless it clearly appears that the court abused its discretion; and in determining the question of discretion, the power of the court should be freely and liberally exercised, under the statute, to mold and direct its proceedings, so as to dispose of cases upon their substantial merits." Holzeman v. Henneberry, 11 Idaho, 428, 83 Pac. 497; Buell v. Emerich, 85 Cal. 116, 24 Pac. 644; Miller v. Carr, 116 Cal. 378, 48 Pac. 324, 58 Am. St. Rep. 180.

In the case of Pease v. County of Kootenai, 7 Idaho, 737, 65 Pac. 432, which was an appeal from an order of the district court, vacating and setting aside a judgment rendered by default, from which an appeal was taken, this court in its opinion, among other things, held:

"That the trial court is clothed with large discretionary powers in cases of the character before us for review is not controverted by counsel for appellants, and it is only where it is plainly apparent from the record that the court has abused this discretion that the appellate court will disturb the action of the lower court. * * * If there are any class of cases in which the trial court should not be hampered in the exercise of its discretion, it is the kind under consideration."

There is another and an additional reason that strongly appeals to me as a reason for sustaining the judgment of the trial court, and that is contained in the affidavit of Robert H. Elder, of the law firm of Elder & Elder, of Coeur d'Alene City, Idaho, which is uncontradicted and is to the effect that he is one of the resident attorneys employed by respondent Coffman; that he was employed immediately subsequent to the service of summons in the action, but that neither he nor any other member of his firm was served with notice that the demurrer would be called up for hearing, or that the demurrer had been overruled, and time given within which to answer. Under rule 6 of the Rules of Practice of the District Court of the Eighth Judicial District, the law firm of Elder & Elder should have been notified, instead of the law firm of Cullen, Lee & Matthews, of Spokane. Rule 6 provides that:

"Where a demurrer * * * is overruled and no answer is on file, the answer shall be filed within five days after the service of notice * * * of the overruling order. * * *"

Section 4892, Rev. Codes, provides, inter alia, that after appearance a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. Rule 6 required notice to be given of the overruling of demurrers. Elder & Elder had appeared for the defendant, and their names were signed to the demurrer filed to the complaint within the time allowed by law. They were his attorneys, and represented him by reason of their employment and were entitled to notice of all subsequent proceedings of which notice is required to be given, either under the statutes or under the rules of court.

Section 4893, Idaho Revised Codes, provides that:

"* * * In all cases where a party has such resident attorney in the action * * * the service of papers, when required, must be upon the attorney instead of the party."

We think these two statutory provisions heretofore cited and the rule of the court fully support that portion of the order of the court, setting aside the default judgment, where the court says:

"And the court further finds that at the time such judgment was had and obtained, the record in said case disclosed that the defendant Coffman was represented by local counsel, the firm of Elder & Elder, and that no notice of the calling up of said demurrer in the case or of the overruling of the same was ever served upon said local counsel, and that they had no knowledge of the hearing or overruling of said demurrer."

"The courts [of this state] will look to resident counsel in the first instance, and require at their hands the same careful consideration and attention to the business that is intrusted to their care, when associated with counsel of sis-

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ter states or territories, as if they were conducting such cases alone. Their liability will, in every respect, be the same when associated with counsel who are not residents of the state as it would under any other circumstances." Anderson v. Coolin, 27 Idaho, 334, 149 Pac. 286.

This being true, it was clearly the duty of counsel for appellant to have served the firm of Elder & Elder with the notice served upon the Spokane lawyers. Local counsel being primarily responsible, being answerable to the courts of this state for all proceedings had in connection with litigation before the court, they are certainly entitled to notice of all proceedings had or taken in any case in which they are interested, where the statutes or rules of the court provide for the giving of such notice.

A motion to vacate and set aside a default judgment is addressed to the sound legal discretion of the trial court on the particular facts of the case, and its action in the matter, unless there has been a manifest abuse of such discretion, should not be disturbed. The nature of this discretion has been described in a well-considered opinion of the Supreme Court of California in Bailey v. Taaffe et al., 29 Cal. 424, as follows:

"The discretion intended," says the court, "is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles, * * * to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or to defeat the ends of substantial justice. * * * If it be doubted whether the excuse offered is sufficient or not, or whether the defense set up is with or without merit in foro legis, when examined under those rules of law by which judges are guided to a conclusion, the judgment of the court below will not be disturbed. * * *"

As a general rule in a doubtful case, the court should incline to relieve. The exercise of the court's discretion ought to tend, in a reasonable degree, to bring about a judgment on the merits of the case.

This is an action upon a promissory note. No immediate injury could result to the appellant here (the plaintiff below) by setting aside the default judgment. In my opinion the showing made by the affidavits was sufficient to justify the trial court in granting the motion and in setting aside the default judgment. The judgment of the court should be sustained.

(29 Idaho, 490)

SANTTI v. HARTMAN.

(Supreme Court of Idaho. Oct. 12, 1916. Rehearing Denied Dec. 11, 1916.)

1. APPEAL AND ERROR ⟸337(2)—DECISIONS APPEALABLE—DISMISSAL.

Where upon examination of the transcript it appears that an appeal is sought to be taken from a final judgment which has not been entered, this court has no jurisdiction, and the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1877; Dec. Dig. ⟸337(2).]

2. APPEAL AND ERROR ⟸133—DECISIONS APPEALABLE—ORDERS.

An appeal will not lie from an order for a judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 897; Dec. Dig. ⟸133.]

Appeal from District Court, Shoshone County; William W. Woods, Judge.

Action by Antti Santti against John Hartman, in justice court. Judgment for plaintiff, and defendant appealed to district court. In that court respondent's motion to dismiss appeal was granted, and appellant's motion to require justice to file transcript on appeal was denied. Appeal by defendant from order for judgment. Dismissed.

Charles E. Miller, of Wallace, for appellant. Walter H. Hanson, of Wallace, for respondent.

BUDGE, J. A judgment by default was obtained by respondent against appellant in the justice's court of Wallace precinct, Shoshone county, Idaho, on October 8, 1915. On November 8, 1915, appellant perfected his appeal from the judgment entered in the justice's court, and paid to the justice the sum of $2 for his costs for making the transcript on appeal. The justice of the peace at the time of the payment of the above sum informed counsel for appellant that he would not make his transcript and certify the same to the district court until all fees that had theretofore been incurred in his court were paid by appellant.

On December 13, 1915, the fees of the justice of the peace not having been paid, the respondent here (the plaintiff below) filed a motion in the district court to dismiss the appeal of the appellant here (the defendant below) from the judgment of the justice's court for the reason that the appellant failed to comply with rule No. 22 of the district court of the First judicial district, which is to the effect that in all appeals taken to the district court the appellant must, within 20 days after the appeal is perfected in the lower court, procure the papers of such appeal to be filed and docketed in the district court, paying the clerk of said court the necessary fees for that purpose, and upon failure of appellant to comply with these provisions, the rule provides that the respondent may procure a certificate from the lower court, stating the fact that the appeal has been perfected, and the date thereof, and, upon the filing of such certificate in the district court, and paying the necessary fees for that purpose, may have the cause docketed, and can then move to dismiss the appeal for want of prosecution, and the rule provides that such appeal is subject to dismissal. On December 17, 1915, appellant herein filed a motion in the district court for an order of said court, requiring the justice to make and file in the district court a transcript on appeal, as pro-

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vided by section 4841, Rev. Codes. The two motions, viz., one to dismiss the appeal for want of prosecution made by the respondent, and the other to require the justice of the peace to make and file his transcript on appeal in the district court, came on for hearing on the 20th day of December, 1915, and on February 2, 1916, the court made the following order:

"It is therefore ordered that the motion of the plaintiff and respondent for a dismissal of the appeal of the defendant and appellant be, and the same hereby is granted, and that said appeal be, and hereby is, dismissed at the defendant's and appellant's costs, and that the plaintiff and respondent have judgment against the defendant and appellant for his costs and disbursements herein expended, taxed at $———."

"It is further ordered that the motion of the defendant and appellant to require Joseph Hermann, justice of the peace, to file herein a transcript on appeal in said cause be, and the same hereby is, denied."

This is an appeal from the foregoing order of the district court, as appears by notice of appeal, served and filed by the appellant, which, after omitting the caption, is as follows:

"You, and each of you, will please take notice that the defendant and appellant in the above-entitled action hereby appeals to the Supreme Court of the state of Idaho from the order made in this case on the 3d day of February, A. D. 1916, and filed herein on the same date, dismissing defendant and appellant's appeal from the certain judgment rendered by Joseph Hermann, justice of the peace, herein, and refusing and denying defendant and appellant's motion to require the said Joseph Hermann, justice of the peace, to make and file return and transcript on appeal herein, and from the whole of said order and every part thereof."

Counsel for respondent has filed a motion in this court to dismiss appellant's appeal upon several different grounds, the majority of which are well taken. It appears from the transcript that the justice's fees, as provided for in section 4841, supra, were not paid by appellant, nor were the clerk's fees paid or tendered until after the motion to dismiss appellant's appeal was filed in the district court.

[1] An examination of the record discloses the fact that no final judgment was ever signed by the trial court or entered by the clerk, but it affirmatively appears that the court merely made an order for a judgment.

Section 4807, Rev. Codes, as amended by chapter 111 of the Idaho Session Laws of 1911, p. 367, as amended by chapter 80 of the Idaho Session Laws of 1915, p. 193, provides that an appeal may be taken to the Supreme Court from a district court:

"1. From a final judgment in an action * * * from a judgment rendered on an appeal from an inferior court: * * *

"2. * * * From any special order made after final judgment."

Where there is no final judgment entered in an action, no appeal can be taken, and where it appears that no judgment in the court below has been signed, filed, and entered, this court has no jurisdiction. Durant v. Comegys et al., 3 Idaho, 67, 26 Pac. 755, 35 Am. St. Rep. 267.

[2] An appeal will not lie from an order for a judgment. Ah Kle et al. v. McLean et al., 3 Idaho, 70, 26 Pac. 937; Grey, Sheriff, v. Cederholm, 2 Idaho, 34, 3 Pac. 12; Hodgins, Administrator, v. Harris, 4 Idaho, 517, 43 Pac. 72; Bissing v. Bissing, 19 Idaho, 777, 115 Pac. 827.

In Havens v. Stewart, 7 Idaho, 298, 62 Pac. 682, the court held that after an order for the judgment has been made by the court, it is the duty of the clerk to enter the judgment, and under the provisions of section 4807, supra, as amended, an appeal from a judgment cannot be taken until the judgment has been entered, and if the clerk neglects to enter the judgment as the law requires, either party who desires to have it entered can compel him to do so by writ of mandate. Oliver v. Kootenai County et al., 13 Idaho, 281, 90 Pac. 107; Thiessen v. Riggs, 5 Idaho, 21, 46 Pac. 829; Potter v. Talkington, 5 Idaho, 317, 49 Pac. 14; Boyd v. Steele, 6 Idaho, 625, 59 Pac. 21; Meysan v. Chabrie (Cal.) 7 Pac. 634;[1] Thomas v. Anderson et al., 55 Cal. 43; Schroder v. Schmidt, 71 Cal. 399, 12 Pac. 302.

The appeal in this case must be dismissed; and it is so ordered. Costs awarded to respondent.

SULLIVAN, C. J., and MORGAN, J., concur.

(82 Or. 85)

HANCOCK LAND CO. v. CITY OF PORTLAND.

(Supreme Court of Oregon. Dec. 5, 1916.)

Department 1. Appeal from Circuit Court, Multnomah County; L. T. Harris, Judge.

On petition for rehearing. Opinion corrected, and petition denied.

For former opinion, see 159 P. 969.

W. P. La Roche and Henry A. Davie, both of Portland, for appellant. J. F. Boothe, of Portland, for respondent.

MOORE, C. J. In the former opinion, in referring to evidence received at the trial, it is said:

"Neither the original affidavit of the posting of the notices nor a copy thereof has been brought to this court."

The transcript relating to this matter reads:

"The plaintiff offers the original proof of posting, and we ask to have it marked 'Plaintiff's Exhibit C,' with the privilege of withdrawing the same and substituting a copy."

Attached to the transcript is a paper having in typewriting at the top thereof the words: "Plaintiff's Exhibit 'C.'" There is no certificate appended to indicate that it is a copy of the evidence so received. In the ex-

[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 67 Cal. xx.

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cerpt quoted from the opinion, the word "certified" should have been employed to limit the word "copy" as there used. No doubt is entertained in this instance that what purports to be a copy of the affidavit referred to is an exact exemplification of the original. By the language first hereinbefore quoted it was designed to show that, if such practice was approved, it might be possible in some other case for designing parties to substitute spurious exhibits which might escape the attention of adverse parties, thereby imposing upon this court.

With the insertion of the qualifying word mentioned, and correcting the former opinion in this particular, the petition for a rehearing is denied.

(82 Or. 345)

SORSBY v. BENNINGHOVEN.

(Supreme Court of Oregon. Dec. 5, 1916.)

1. MUNICIPAL CORPORATIONS ⇐705(5) — STREETS — INJURIES TO PERSONS UPON — SPEED OF MOTOR VEHICLES.

Under Motor Vehicle Law (Laws 1911, pp. 266, 267) § 2, subds. 11 and 17, declaring that in passing railroad or street cars motor vehicles shall be operated upon that side of the street or railroad car with due care and caution for the safety of passengers alighting or descending, but should there be on the left side of the street or railroad car a clear space, motor vehicles shall be permitted to so increase their speed for the necessary distance to negotiate a safe clearance between the street or railroad car and the vehicle desiring to pass, which such speed shall not be deemed excessive, having due regard to the speed of the railroad or street car, and that the speed on all streets and highways shall be a reasonable speed up to and not exceeding 25 miles an hour, but any speed beyond that shall be unreasonable, it is not negligent for a motorist in passing a street car where there is a clearance to drive his car at any necessary speed up to 25 miles an hour.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515; Dec. Dig. ⇐705(5).]

2. MUNICIPAL CORPORATIONS ⇐705(3)—INJURIES TO PERSONS ON STREETS — NEGLIGENCE.

A motorist for the purpose of passing a street car increased the speed of his vehicle so that he was proceeding at a speed estimated as high as 18 miles an hour. The street was clear, and he could not see a young child standing behind a telegraph pole. Just as he was abreast the child it ran out and was struck by the rear fender, the motorist turning his vehicle into the car to escape an accident. *Held*, that the motorist was not liable for the resultant death of the child; for he was not driving at an excessive speed, but was lawfully proceeding in accordance with the express permission given by statute.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515; Dec. Dig. ⇐705(3).]

Bean, J., dissenting.

In Banc. Appeal from Circuit Court, Multnomah County; D. R. Parker, Judge.

Action by W. C. Sorsby against Paul Benninghoven. From a judgment for plaintiff, defendant appeals. Reversed, with directions to enter nonsuit.

The plaintiff sues to recover damages for the death of his four year old son, alleged to have been caused by the defendant running his automobile upon the child. The allegations of the complaint charging negligence upon the defendant are these:

"That at all times mentioned herein the defendant was the owner of a certain automobile, and on the 20th day of November, 1912, at about the hour of 5 o'clock p. m., was carelessly and negligently operating and driving said automobile while in an intoxicated condition, and while running south on East Fiftieth street, between Hawthorne avenue and East Harrison street, in the city of Portland, Or., carelessly and negligently ran said automobile into the said Sherman Stanley Sorsby, thereby causing the death of the said Sherman Stanley Sorsby.

"That at the time said accident occurred the defendant was carelessly and negligently driving said automobile at a high rate of speed and operating said automobile in a careless and negligent manner, and carelessly and negligently failed to sound any signal when approaching the said Sherman Stanley Sorsby."

"That Ordinance No. 14030, entitled 'An ordinance regulating the operation of and limiting the speed of automobiles' of the city of Portland, Or., provides that at the place said accident occurred automobiles shall not be driven at a rate of speed to exceed —— miles per hour, and the plaintiff believes, and therefore alleges, that the defendant at the time said accident occurred was driving said automobile at a rate of speed in excess of 25 miles per hour."

We note in passing that the blank left in this averment for the rate of speed was never filled, and the ordinance referred to was not put in evidence, although the allegation was denied. The plaintiff claims general damages for loss of the services, society, and comfort of the child in the sum of $25,000, and special damage for burial expenses in the sum of $180.50. The ownership of the automobile is admitted, but all other allegations of the complaint are denied. An affirmative defense was to the effect that the death counted upon by the plaintiff was an unavoidable accident so far as the defendant is concerned; for, as he was driving along East Fiftieth street in the city of Portland, the boy suddenly ran out in an attempt to cross the street, and struck the rear fender of the automobile, whereby he was killed. The reply traverses the new matter of the answer. From a judgment upon a verdict in favor of the plaintiff, the defendant appeals.

Gus C. Moser, of Portland (Moser & McCue, William A. Williams, and Roy K. Terry, all of Portland, on the brief), for appellant. C. M. Idleman, of Portland (V. A. Crum, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). At the close of the plaintiff's case the defendant moved for a judgment of nonsuit on the ground that the plaintiff had failed to prove a case sufficient to be submitted to the jury. The overruling of this motion is assigned as one of the errors committed by the trial court. A review of the testi-

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mony on behalf of the plaintiff therefore becomes necessary.

Without dispute it appears that the defendant with two friends was riding in this automobile on Hawthorne avenue following a "no-stop" train of two street cars running east on Hawthorne avenue and thence south on Fiftieth street. The accident occurred on the latter street in the outskirts of Portland where some of the cross streets had not been improved. As the train came to a switch it slackened its speed, and the defendant turned out to the left as though to pass it. After passing the switch the trainman increased the speed. The witnesses say that the automobile gained upon the train, and that this continued for about a block and a half when the accident occurred. All the witnesses testifying upon the question of speed gauged that of the automobile by reference to that of the train. H. B. Spaulding, a witness for the plaintiff, answering the question, "What rate of speed was the automobile making at that time?" said:

"The cars traveled from 15 to 20 miles an hour at that hour of the evening, and the automobile was going fast enough to pass the car. It was gaining on the car passing it on the left side."

S. E. True, a passenger on the train and a witness for the plaintiff, told about the automobile coming up behind and alongside the train, and said, speaking of the defendant:

"Well, to my best judgment he had followed us several blocks before we got to Fiftieth street, where we turned. There he was half a car behind us, to my best memory; he was straddling the rail with his car. I think we slowed down at Fiftieth street to open the switch, make the turn, and he also slowed down. After we turned on Fiftieth street, he came right alongside of this back vestibule. I was chewing, and I came near spitting in his car a couple of times. He ran along a few feet, I didn't pay much attention to it. Presently, he got out of sight alongside the car, and the next I knew the car got a bump, and I looked out to see what it was. I didn't know what the accident was then."

He said further:

"I should judge the car was— The rate of speed is kind of a hard thing to solve out; somewhere in the neighborhood of 14 or 16 miles; might have been 18 miles; might have been less; might have been more or less; might not have been over 12 miles."

This witness was accustomed to riding on the car about 300 days in the year, and was familiar with the rate of speed. The motorman in charge of the train testified on behalf of the plaintiff that until he came to the frog at the crossing track he was traveling at the rate of probably 12 or 14 miles an hour, and when he came to cross over to the other track he slowed up to 7 or 8 miles. He says that he then speeded up to between 12 and 15 miles an hour, "maybe a little more, maybe a little less." It is also without contradiction in the testimony on behalf of the plaintiff that the child stood on the sidewalk behind a telephone pole, where he was entirely out of sight of the defendant. The evidence shows that the automobile was being driven along about 3 feet from the curb on one side and 3 or 4 feet from the train on the other. The witness Spaulding says:

"The little Sorsby boy was standing beside the post on the sidewalk at the time the car was opposite. He had been on the bank a moment before and stepped down on the sidewalk."

He declared that the rear fender of the automobile struck the child. The witness Doan was walking along the east side of the street going south at the time, and says:

"I noticed a couple of poles, saw some children playing around the poles, and I saw a little girl up a couple of feet on a telegraph pole; that is, before I got within 15 feet of the child. As I came up the walk I noticed this little girl climb up and down the pole, or on it. I also noticed some one run across the street from the opposite side, just ahead of the street car and step up onto the curb, and as the street car went by, the tail end passed, I saw this child start out in the street, that is, just stepped out (witness claps his hands together), the automobile struck him."

He testified:

"I didn't see the automobile, only just as it struck the child and was gone. It was done as quick as that."

He said the child just jumped off the sidewalk to go across. He stated he thought he saw the child cross the street from the west side, and then continued:

"I saw him step up behind the post. Whether he came clear across the street or not, I don't know, but my supposition was he ran across ahead of the street car, and stepped up behind the post, and when the car went by he started to go back."

This question was propounded to him:

"And it is still your judgment that from where the boy was standing that Mr. Benninghoven, driving the automobile, could not see him until he ran out into the street?"

He answered:

"It is. He couldn't see him until the boy stepped out from the pole. I couldn't see him from where I was."

The testimony also shows that at the very moment of the accident the defendant turned his car to the right, away from the child, so that he collided with the train, and that it was the rear fender of the automobile that struck the little fellow.

[1, 2] On the question of intoxication but one witness states anything connected therewith, and he avers that immediately after the accident in talking with the defendant he smelled liquor on his breath, but no one says that the defendant was intoxicated.

Recurring to the allegation of negligence, we find it couched in these terms:

"The defendant was carelessly and negligently driving said automobile at a high rate of speed, and operating said automobile in a careless and negligent manner, and carelessly and negligently failed to sound any signal when approaching the said Sherman Stanley Sorsby."

Under section 2 of chapter 174 of the Laws of 1911, known as the Motor Vehicle Law, certain specifications are laid down regarding

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the speed of vehicles. Subdivision 11 reads thus:

"In passing railroad or street cars operated in any city, town or village in this state, vehicles shall be so operated upon that side of said street or railroad car with due care and caution that the safety of passengers boarding or alighting from such street or railroad car shall be fully protected, and for that purpose said vehicle shall be brought to a stop, if necessary, but upon the other or left side of said street or railroad car, should there be a clear passage, said vehicle shall be permitted to so increase its speed for the necessary distance to negotiate a safe clearance between said street or railroad car and said vehicle so desiring to pass, and the rate of speed requisite and necessary so to do shall not be deemed to be an excessive rate of speed, having due regard to the speed of said railroad or street car."

Subdivision 17 is as follows:

"The rate of speed on all streets, roads and highways of this state shall be a reasonable speed, up to and not exceeding twenty-five miles an hour, but any speed in excess of twenty-five miles an hour upon any road or highway of this state shall be an unreasonable speed and is prohibited by this act."

If the plaintiff had alleged the rate of speed allowed by the city law, and had met the general issue on that point by introducing the ordinance with proof that the defendant was going faster than the permissible maximum, the result would have been a situation to which could have been applied the doctrine of the majority opinion in Kalich v. Knapp, 73 Or. 558, 142 Pac. 594, 145 Pac. 22, to the effect that violation of a city ordinance, although it conflicts with an act of the Legislative Assembly is evidence of negligence. In default of these conditions, however, that case does not apply, and the present controversy is judicable by the state statute mentioned.

The highest rate of speed attributed to the street car by any witness is found in the testimony of Mr. Spaulding that the car traveled 15 to 20 miles an hour, and that the automobile was gaining on it. The enactment referred to says that the speed requisite and necessary to pass the car shall not be deemed to be an excessive rate. This, of course, must be taken in connection with the other provision prescribing a maximum of 25 miles an hour. Nothing further is shown on the question of the rate at which the automobile was traveling than that it was gaining on the car. This would be true if it was going only 21 miles an hour. Admittedly there may and often will be cases when it would be gross negligence to move an automobile at all; but in a situation defined by the statute, nothing else being shown, the motorist is entitled to travel as the law permits. All the testimony for the plaintiff, however, shows that the street was clear when Benninghoven turned out to pass the train. The child was not in sight, but, on the contrary, was concealed behind the telegraph pole. There was nothing whatever to intimate his presence to the defendant, and, even if the latter had known that the little one was standing on the curb by the telegraph pole, still the fact would have remained that he was in a place of safety.

The way was clear to the driver of the automobile. He was doing what the statute expressly permits him to do, and he was doing it in a lawful manner without any suggestion of the presence of the boy. The little fellow stepped out into the street, and had but 3 or 4 feet to traverse before he collided with the defendant's vehicle. Considering the matter most favorably for the plaintiff, it is plain that, in order to avoid the collision, the defendant would have had to travel at least the length of his machine before the child covered the 3 or 4 feet. Under such circumstances with the appliances at hand no human agency could have stopped the automobile in time to prevent the accident. The defendant did everything within his power to avoid the child, turning his car so far to the right that he collided with the train. The misfortune would have happened if the automobile had been going only 5 miles an hour. To hold the defendant liable in those conditions would be tantamount to making him an absolute insurer against all manner of casualties happening to any one on the street while he was passing.

The case presented is like the hypothesis suggested by Mr. Chief Justice Bean in Wallace v. Suburban Railway Co., 26 Or. 174, 177, 37 Pac. 477, 478 (25 L. R. A. 663):

"If we assume, as does the argument for the defendant, that the child, without the fault or negligence of the defendant, suddenly and unexpectedly appeared on the track immediately in front of the car, we might conclude that her death was an unavoidable accident, and that the rate of speed would be immaterial, for upon such an appearance upon the track no precaution could have prevented the accident."

In that case the court refused to apply the principle thus announced by the learned judge because the facts were in controversy. Here there is no dispute on that score. It is unquestioned that the child hitherto concealed by the pole suddenly and unexpectedly stepped out into the street evidently alongside of, and not in front of, the automobile and collided with the back fender. So far as the speed is concerned the pity is that the defendant was not driving at a much greater rate; for then he might have escaped the baby's impact.

On the subject of failure to give an alarm Mr. Chief Justice Magie, writing in Graham v. Consol. Traction Co., 64 N. J. Law, 10, 13, 44 Atl. 964, 965, says:

"The clear evidence is that the boys, in their play on the sidewalk, gave no indication that they intended to cross the track. No signal nor warning as to them would have been appropriate or required. When they rushed from the sidewalk and ran directly in front of the car, the motorman made every effort to arrest the motion of the car. The car was visible and visibly moving; the signal by the gong would have been of no avail. From the evidence an inference of failure of duty in this respect could not reasonably be drawn."

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In that instance the decedent was a boy of four years and four months of age whom the motorman saw playing on the sidewalk adjacent to the street on which the car was passing. The present case is much stronger because the little fellow was concealed from the view of the defendant and gave no intimation that he was moving, or likely to move. In Stahl v. Sollenberger, 246 Pa. 525, 92 Atl. 920, a little boy suddenly ran from the footway on a bridge into the driveway provided for vehicles and was killed. The court said:

"The defendant cannot fairly or reasonably be charged with negligence in failing to stop his automobile and avoid the accident, unless it appeared that the boy entered the roadway at a sufficient distance from the automobile to permit of its being stopped before the collision occurred. If the boy suddenly left the footway, at a place where the driver had no reason to expect him to do so, and ran directly in front of the automobile, the result could hardly have been other than disastrous, even though the machine had been moving at a very reasonable rate. * * * But in the present case, with no evidence that the child appeared upon the roadway in front of the car at any appreciable distance ahead of it, and with no circumstance shown that would tend to suggest to the driver, prior to the happening of the accident, the probability of the boy leaving the footway, or getting into danger upon the driveway, we think the trial court was right in holding that there was not sufficient proof of any negligence causing the accident, on the part of the defendant, to justify the submission of the question to the jury."

Other instructive precedents are Curley v. Baldwin (R. I.) 90 Atl. 1; Hyde v. Hubinger, 87 Conn. 704, 87 Atl. 790; Paul v. Clark, 161 App. Div. 456, 145 N. Y. Supp. 985; Perry v. Macon Consolidated St. Ry. Co., 101 Ga. 400, 29 S. E. 304, 3 Am. Neg. Rep. 755; Winter v. Van Blarcom, 258 Mo. 418, 167 S. W. 498.

In brief, the allegation of excessive speed is not proven when measured by the motor vehicle law, which is the legislative standard. Owing to the admitted suddenness with which the child appeared from his concealment behind the pole, the accident was unavoidable, and the rate of speed therefore became immaterial, because, no matter how fast or slow the defendant was traveling, there was no time after he discovered the child that he could have stopped the car soon enough to avoid hurting him. On the contrary, the evidence for the plaintiff affirmatively shows that by swerving to the right all was done that was humanly possible under the circumstances to prevent injury to the boy. Considering the statute and giving to the plaintiff every inference that can be drawn from his own testimony, he has not proven any legal blame against the defendant. The loss of his sprightly little son is no doubt a sever affliction to the parent, but it does not justify the visitation of a money judgment upon the defendant. It is unnecessary to consider the other questions raised by the appeal.

The judgment of the circuit court is reversed, with directions to enter a judgment of nonsuit in favor of the defendant.

EAKIN, J., absent. BEAN, J., dissents. HARRIS, J., concurs in the result.

(82 Or. 166)

OLIVER v. CRANE et al.

(Supreme Court of Oregon. Dec. 12, 1916.)

1. ATTORNEY AND CLIENT ⇐165—ACTION FOR FEES — ANSWER — CONTINGENT FEE CONTRACT.

In an action for attorney's fees, where the complaint alleged that the fees were in part agreed upon and asked for a reasonable value of the balance, an answer generally denying allegations of the complaint "except as hereinafter alleged," and then alleging that the services were rendered on a contingent fee and no damages were recovered, was sufficient to raise the issue that plaintiff was employed on a contingent fee contract.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 365–367; Dec. Dig. ⇐ 165.]

2. APPEAL AND ERROR ⇐1151(3)—DISPOSITION OF THE CASE—INCREASING JUDGMENT —UNDISPUTED EVIDENCE.

In an action for attorney's fees, where the evidence as to part of the employment and the reasonable value of the services rendered thereunder was undisputed, but the jury returned a verdict only for the amount actually expended by the attorney, the Supreme Court will add to the judgment the uncontroverted value of the services not contested.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4499, 4503–4506; Dec. Dig. ⇐1151(3).]

In Banc. Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Action by Turner Oliver against Susan Crane and others. Judgment for the plaintiff for a part only of the amount claimed, and he appeals. Judgment modified.

Testimony on behalf of the defendants in relation to the contract involved in the first cause of action was given as follows:

"He was employed to fight the company. I asked him how much percentage he wanted, and he said $10 on the $100 for the first $500, and after that $25—what he got. It was to come out of what he got out of it, if we sold it to the company."

This was an action to recover the value of legal services rendered by plaintiff to defendants. The first cause of action alleged that in November, 1908, defendants became jointly indebted to Ramsey & Oliver in the sum of $316.67 for services rendered as attorneys in defending an action brought against defendants by the Oregon Railroad & Navigation Company; that thereafter defendants employed said firm to try said action in the Supreme Court of the state of Oregon on appeal, agreeing to pay a reasonable compensation therefor and to repay any moneys they should advance on said appeal; that said firm did try the action in the Supreme Court; that their services were reasonably worth $250, and that they advanced a filing

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fee of $10 and $32 for printing briefs, no part of which has been repaid, except the sum of $40; that the case was sent back to the circuit court for retrial, and was afterward dismissed by the plaintiff, Oregon Railroad & Navigation Company, and that there is now due and owing from said defendants for said services the sum of $568.67; that Ramsey has assigned his interest to plaintiff. For a second cause of action it was alleged that in October, 1909, the defendants employed plaintiff to bring any necessary action or actions to enforce their rights against the Oregon Railroad & Navigation Company in certain real estate owned by defendants in La Grande, Or., which the said company had seized and appropriated to their own use, and to defend any action that might be brought against defendants concerning said lands by said company, and agreed to pay him a reasonable compensation for his services; that pursuant to this agreement plaintiff commenced an action in ejectment against said company, which was tried out in the circuit court, and that the reasonable value of plaintiff's services in said court was $500, and that plaintiff advanced costs for trial and reporter's fees amounting to $16.50; that said action was appealed to the Supreme Court by both parties, and that plaintiff's services in trying the case in the Supreme Court were worth $154.80, which defendants undertook and promised to pay; that there is due in said behalf $1,171.30. For a third cause of action plaintiff alleges that in December, 1910, the defendants employed him to commence an action of ejectment in the circuit court against the city of La Grande in respect to lands owned by them, and agreed to pay him what his services should be reasonably worth; that said action is still pending, and that $100 is a reasonable compensation for said services. Defendants answered the first cause by a general denial "except as hereinafter alleged," and by what is termed a further and separate answer they allege:

"That they are not indebted in any sum of money whatever to Ramsey & Oliver, or to the plaintiff, for that the litigation mentioned in the first cause of action was to be conducted by said Ramsey & Oliver on a contingent fee, whereby they were to have one-third of the damage recovered, and were to pay the costs of said litigation themselves, and hold the defendants harmless therefrom; that no damages were recovered, and defendants allege that they do not owe Ramsey & Oliver or the plaintiff anything for said or any services."

There was a like general denial of the second cause of action, and an affirmative allegation in respect thereto as follows:

"That with respect to the litigation referred to in defendant's second, further, and separate answer and defense the defendants entered into an agreement with the plaintiff whereby he was to furnish the legal services in connection with said litigation on a contingent fee of one-third of the damages recovered; that the defendants recovered in said action the sum of $1 damages, whereby they owe the plaintiff one-third of said amount, and no more."

As to the third cause of action there was a general denial coupled with the words "except as hereinafter alleged," but nothing is affirmatively pleaded in the answer. Motions to strike out each separate answer were interposed and overruled, as were demurrers to each of the defenses; and, a reply having been filed, the case went to trial, and the plaintiff had a verdict and judgment for $223.63, from which he appeals.

Turner Oliver, of La Grande (Joel H. Richardson, of La Grande, on the brief), for appellant. O. H. Finn and Crawford & Eakin, all of La Grande, on the brief, for respondents.

PER CURIAM. [1] Taken as a whole, the denials to the first two causes of action are sufficient to raise the issues to which the defendants' testimony was directed. Objection was made to the admission of certain letters of plaintiff to the defendants, but we are of the opinion that they had at least a remote bearing upon the issues tried and were admissible.

[2] As to the third cause of action the testimony of plaintiff indicated that plaintiff was employed as alleged, and that the services were worth the sum of $100, and this testimony was uncontroverted. The court should have directed the jury to include this amount in any verdict which they might render. It is apparent that the jury returned a verdict for plaintiff only for the amounts of money actually expended by him on behalf of the defendants, and we will add thereto the sum of $100 for services in the case against the city of La Grande and affirm the judgment as so amended. The plaintiff will have judgment here for the sum of $323.63, and his costs and disbursements in this court and in the circuit court.

(82 Or. 171)

BEST v. PARKES, Justice of Peace.

(Supreme Court of Oregon. Dec. 12, 1916.)

MANDAMUS ⊂⊃44 — SUBJECTS OF RELIEF — CHANGE OF VENUE.

L. O. L. § 2432, providing that the justice of the peace may change the place of trial when it appears from the affidavit of a party that the justice is so prejudiced against the party making the motion that he cannot expect an impartial trial before such justice, does not require a justice of the peace to grant a change of venue upon the mere assertion of the party that the justice is prejudiced, and therefore an alternative writ of mandamus to compel a justice of the peace to grant a change of venue, which contains no showing as to prejudice, except the conclusion of the party applying for the change, must be quashed under L. O. L. § 613, authorizing mandamus to require action by an inferior court in the discharge of its functions, but not to control judicial discretion.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 90, 91; Dec. Dig. ⊂⊃44.]

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In Banc. Appeal from Circuit Court, Umatilla County; Gilbert W. Phelps, Judge.

Mandamus by J. A. Best against Joe H. Parkes, Justice of the Peace for Pendleton District, Umatilla County. Alternative writ quashed, and plaintiff appeals. Affirmed.

The plaintiff sought by mandamus to compel the defendant, a justice of the peace, to change the place of trial of a criminal action, wherein the plaintiff here was the defendant. In the alternative writ issued by the circuit court there appeared a history of the criminal action against the plaintiff, showing that it was brought to issue, and, after stating the filing of a motion and affidavit for change of venue, the writ contains this averment:

"That the said J. A. Best duly and regularly swore to the said affidavit, and stated therein, under oath, that the said J. A. Best knew the said Joe H. Parkes, justice of the peace for Pendleton district; that the said Joe H. Parkes, justice of the peace for said district, is so prejudiced against the defendant that the defendant could not expect a fair and impartial trial before the said justice."

Other recitals are to the effect that the justice refused to grant a change of the place of trial, and he was required to show cause why he did not transfer the hearing to some other justice. Upon the return and the reply thereto the writ was quashed, and the plaintiff appealed.

Alger Fee, of Pendleton (Fee & Fee, of Pendleton, on the brief), for appellant. Geo. M. Brown, Atty. Gen., of Salem (Frederick Steiwer, Dist. Atty., of Pendleton, on the brief), for respondent.

PER CURIAM. It is provided, in substance, in section 2432, L. O. L., that the justice may change the place of trial when it appears from the affidavit of a party either that the justice is a party to or directly interested in the event of the action or connected by consanguinity or affinity within the third degree with the adverse party or those whom he represents; (2) "that the justice is so prejudiced against the party making the motion that he cannot expect an impartial trial before such justice;" and (3) that the convenience of parties and witnesses will be promoted. Section 613, L. O. L., relating to mandamus, authorizes it to require action by an inferior court in the discharge of its functions, but says it shall not control judicial discretion.

It may be admitted that where the showing made before the inferior court conclusively establishes a situation requiring a change of venue under the statute, the writ will issue, compelling the action desired. A case of this kind is Krumdick v. Crump, 98 Cal. 117, 32 Pac. 800, where it was admitted on the record that the judge was disqualified because he had been of counsel in the very case. The statute in that case used the mandatory language that the venue "must" be changed under such conditions. The other cases cited by the plaintiff are largely upon the same lines. The question here is whether such a showing is made in the writ. The allegation quoted is all that appears in the record about what was charged before the justice to induce a change in the place of trial. There are no facts stated from which an impartial judge could draw the same conclusion reached by the pleader or the affiant that the justice was prejudiced. The excerpt from the writ is not aided by the case of Rugenstein v. Ottenheimer, 78 Or. 371, 152 Pac. 215. There the affidavit set out the very language used by the judge whose fairness was impugned. The words he used were not disputed. They clearly indicated a decided hostility on his part towards the defendant. The situation there portrayed is quite different from the one in question, where merely the conclusion of the affiant is embodied in the statement.

In the very nature of things the judge himself is called upon to determine his own bias on the one hand or freedom from partiality on the other. Before his decision can be disturbed by mandamus, sufficient must appear in the showing made before him and reproduced before the court issuing the writ whereby the latter tribunal can determine, as a matter of law, that the justice is indeed prejudiced within the meaning and extent of the statute. To hold otherwise would be to substitute the interested judgment of a litigant for the judicial function of the officer. The law does not vest in the accused the discretion of selecting the court in which he will be tried, yet he could enforce that as a principle if it were sufficient for him barely to say that the judicial officer is prejudiced against him.

The decision of the circuit court is affirmed.

BEAN, J., took no part in the consideration of this case.

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(173 Cal. 721)

In re KRIEG'S ESTATE.

KRIEG et al. v. COOLEY et al.

(S. F. 7747.)

(Supreme Court of California. Nov. 27, 1916. Rehearing Denied Dec. 21, 1916.)

WILLS ⟸597(1)—NATURE OF ESTATE CREATED—HOMESTEAD—DEVISE IN FEE.

In view of Code Civ. Proc. §§ 1465–1468, as to setting aside property for the widow, etc., a will reading, "to my * * * wife * * * I bequeath and devise" a certain sum, and continuing, in another sentence, "This in addition to" the homestead, describing it, "to which she shall be entitled and which I hereby request the court to set apart to her," did not devise to the wife the fee of the homestead, which was deceased's separate property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1319, 1322, 1326; Dec. Dig. ⟸ 597(1).]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Anton Krieg. Margaret Krieg and another filed a petition, which was opposed by Louisa Street Cooley and others and from an order and decree, petitioners appeal. Affirmed.

tum Suden & tum Suden, of San Francisco, for appellants. Corbet & Selby and Edgar D. Peixotto, all of San Francisco, for respondents.

MELVIN, J. Anton Krieg died testate, leaving a widow, adult children by his first wife and a minor child by his second wife. The children, including the minor, were to take the residuum of the estate by definite fractional parts. The will provided for the widow as follows:

"To my beloved wife Margaret Krieg, I bequeath and devise the sum of thirty thousand dollars ($30,000). This in addition to the real property now occupied by us as our home on San Bruno avenue, having a frontage of seventy-five feet by a depth of one hundred feet, together with all the furniture and household utensils therein contained to which she shall be entitled and which I hereby request the court to set apart to her and our minor child Lawrence as a homestead:

"In view of the fact that all my property was acquired by me before my marriage to my wife and is separate property, I ask my wife to accept the foregoing provision made for her in lieu of all right of community and in full of her distributive share, either as heir at law or otherwise, subject however to a further reasonable family allowance to be fixed by the court:

"In case my wife Margaret Krieg, contrary to my wishes and expectations insists on receiving her share of the community property, if any there is, then it is my will that she shall receive her said share of the community property but shall take nothing else under this will except the homestead and a reasonable family allowance."

Administration of the estate proceeded as usual until Margaret Krieg and her son Lawrence Krieg filed a petition asking that the real property described in the above quotation be set apart to them as a homestead, but that the fee be found to be in Margaret Krieg. The elder children of the testator opposed such disposition of the property, and after a full hearing the court held with them that the widow was not entitled under the terms of the will to a distribution of the land in fee. An order was made setting apart the property in question to Margaret Krieg, the widow, as a homestead for her life, and to Lawrence Krieg, the minor, during the term of his minority. From this order and the decree this appeal is taken.

The sole question is whether or not the will justified the ruling of the probate court upon the meaning of the language relating to the property occupied by the widow. That it was separate property is necessarily conceded. Such property may ordinarily be set apart to the survivor or the children for a limited time only, to be determined by the court. Code Civ. Proc. §§ 1465–1468, inclusive. When so set apart the property remains subject to administration. Unless the language of the will compels a different interpretation the court has done with this separate property of the testator all that under the law it may do.

Turning to that instrument, we see that the bequest of $30,000 to Mrs. Krieg is contained in a distinct and wholly unambiguous sentence. To be sure, that sentence does contain the word "devise," but that verb is so commonly misapplied to bequests of personal property that its use here is of no great significance. Ogle v. Tayloe, 49 Md. 158–177; Logan v. Logan, 11 Col. 44, 17 Pac. 99; Barry v. Barry, 15 Kan. 587; Leighton v. Sheldon, 16 Minn. 243. The punctuation forbids us from transferring that word into the next sentence, as appellant suggests that we should do, and making it apply to the realty therein described. Examining the next sentence, we find that it contains no words of devise applying to the home on San Bruno avenue. It is suggested that, as the court had the right, independently of the will, to set aside the home and the personal property exempt from execution to the use of the widow and the minor son of decedent, the language is futile and unnecessary, unless we give to it some dispository force. If we grant this to be true, still do we look in vain for the words of devise. "This in addition to," etc., are not such words, nor are the words "to which she shall be entitled." This last expression clearly refers to her right and that of her son to a limited homestead on the separate real property and to the use of the exempt personalty. There is no ambiguity in the language. The paragraph containing the bequest of money to Mrs. Krieg and the request to the court neither by direction nor implication disposes of the fee to the property on San Bruno avenue; but we do not agree with appellant in the belief that, interpreted as a request or direction to the court to do something which might have been

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done without any suggestion on the part of the testator, the language becomes futile or redundant. Read as a whole, the will exhibits, not only a desire on the part of Mr. Krieg to dispose of his property to the natural objects of his bounty, but also a wish to justify the division as a fair and proper one. For example, he asks his wife to accept the provision made for her because he considers it "fair and just." Similarly defending the division of the residue among his children, the testator uses this language:

"I desire to say that the unequal divisions of the residue of my estate made among my children is for the reason that I have during my life time made various and sundry payments and advancements to them. I have deducted these advances in apportioning these bequests, and hereby provide that no further deductions be made on account thereof for past advances."

The estate was of a value of about $165,000. It was the evident intention of the testator to call attention to the fact that the money left his widow would not be the sole means of her support after his death, and he therefore pointed out to her and the other heirs the power of the court in the premises. It makes no difference whether his request to the court was merely precatory, or amounted to a direction which the judge sitting in probate was bound to follow. The fact remains that the property was set aside just as the will indicated the testator's desire to have it assigned, and his purpose was therefore consummated.

The order and decree from which the appeal is taken are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(173 Cal. 675)

In re STONE'S ESTATE. (L. A. 4955.)

(Supreme Court of California. Nov. 18, 1916.)

1. APPEAL AND ERROR ⟸628(1)—LATE FILING OF TRANSCRIPT—MISTAKE.

Where there is sufficient showing to warrant the conclusion that appellant understood she had paid all charges required, including the filing in the Supreme Court of the transcript on appeal, and that her mistake in such regard was not inexcusable, the Supreme Court will not dismiss the appeal because the transcript was not filed within the time prescribed by the rules.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2750, 2757–2764; Dec. Dig. ⟸628(1).]

2. APPEAL AND ERROR ⟸419(2)—NOTICE OF APPEAL—CONSTRUCTION.

In proceedings to contest a will, contestant's notice of appeal, filed June 24, 1916, stating that contestant appealed "from the judgment on the verdict of the jury made and entered in the superior court on the 27th day of April, 1916, in favor of said proponent and defendants," should be construed as showing an appeal from the formal judgment of the superior court, admitting the will to probate, filed June 10, 1916, though not entered until June 28, 1916, rather than as one from the verdict of the jury, received and filed April 27, 1916, on the single issue of undue influence, or from an attempted clerk's judgment for costs filed April 27, 1916, which had not been entered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2146; Dec. Dig. ⟸419(2).]

3. APPEAL AND ERROR ⟸337(2)—PREMATURE TAKING OF APPEAL—STATUTE.

Under Code Civ. Proc. § 1715, amended in 1911 (St. 1911, p. 400) to provide that the appeal may be taken at any time after the order, decree, or judgment is made or rendered, but not later than 60 days after the same is entered in the minute book of the court, in proceedings to contest a will, where contestant's appeal was taken after the rendition or making of the judgment of the superior court, it was not prematurely taken because taken four days before entry of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1877; Dec. Dig. ⟸337(2).]

In Bank. Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

In the matter of the estate of John Newton Stone, deceased. From a judgment admitting decedent's will to probate, Leo Stone Green, the contestant, appeals, and the proponent and defendants move to dismiss. Motion to dismiss the appeal denied.

Bernard Potter and Ingall W. Bull, both of Los Angeles, for appellant. Hartley Shaw and Kemp, Mitchell & Silberberg, all of Los Angeles, for respondents.

PER CURIAM. [1] This is a motion to dismiss an appeal taken by Leo Stone Green. The first ground of the motion was that the transcript on appeal, which has now been filed was not filed within the time prescribed by our rules. As to this ground, at the oral argument we announced that a sufficient showing had been made to warrant us in holding that the appellant's failure in this regard should be excused. Consideration of the affidavits allowed to be filed by the respective parties since the argument has not changed our views in this regard. As to certain matters referred to in these affidavits there is an irreconcilable conflict in the statements made, a conflict that we do not deem it necessary to attempt to determine. We think that there is a sufficient showing to warrant a conclusion that appellant herself understood that she had paid all charges required to and including the filing in this court of the transcript on appeal, and that her mistake in this regard was not inexcusable. We do not feel warranted in dismissing the appeal on this ground.

The notice of appeal was filed June 24, 1916. It stated that the contestant in a proceeding to contest the will of deceased "hereby appeals * * * from the judgment on the verdict of the jury made and entered in the Superior Court * * * on the 27th day of April, 1916, in favor of said proponent and defendants." The record shows that the jury's verdict in the matter, being on the single issue of undue influence, was received and filed April 27, 1916. On this verdict a purported clerk's judgment in favor of de-

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fendants for costs, ineffectual under the law for any purpose, was filed April 27, 1916, and this was not entered until June 28, 1916. On June 10, 1916, there was filed a formal judgment signed by the judge, setting forth the verdict and the conclusions of the court as to the other matters essential to the admission of the will to probate, admitting the will to probate, appointing an executrix, and awarding costs. This judgment was entered June 28, 1916. As we have said, the appeal was taken June 24, 1916.

[2] We are satisfied that the notice of appeal should be construed as showing an appeal from the judgment of the superior court admitting the will to probate, rather than as one from "the verdict," or from the attempted clerk's judgment which even then had not been entered. If this be so, there is no force in the claim that the order from which the appeal is taken is not an appealable order.

[3] There is no force in the suggestion that the appeal was prematurely taken because taken 4 days before the *entry* of the judgment. Section 1715, Code of Civil Procedure, was amended in 1911 (St. 1911, p. 400) so as to provide that "the appeal may be taken at any time after the order, decree, or judgment is *made or rendered*, but not later than sixty days after the same is entered in the minute book of the court." The appeal here was taken *after* the rendition or making of the judgment. The authorities relied on by learned counsel for the respondents are inapplicable in view of the amendment.

The motion to dismiss the appeal is denied.

(173 Cal. 685)

BULSON v. MOFFATT et al. (Sac. 2358.)

(Supreme Court of California. Nov. 23, 1916.)

CONTRACTS ⇐138(3) — EQUITY ⇐66 — ILLEGAL CONTRACT—RELIEF TO PARTIES—DOING EQUITY.

Though actions under Code Civ. Proc. §§ 749a–751, authorizing an action to determine adverse claims to realty, are quasi, if not strictly, in rem proceedings, such a proceeding may become in effect a simple action to quiet title, where a mortgage lien, held by defendant on plaintiff's property, was barred by limitations, and the consideration of the secured note had been adjudged illegal in a former suit to foreclose the mortgage, both parties to the foreclosure suit having violated a statute, and having been equally at fault, plaintiff could not quiet title against the defendant mortgagee without first paying the debt, since the parties must be left where, on account of their mutual violation of the statute, they were placed by the decree in the former suit.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 688, 689; Dec. Dig. ⇐138(3); Equity, Cent. Dig. §§ 180–190; Dec. Dig. ⇐66.]

Department 2. Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Suit to quiet title by A. E. Bulson against James Moffatt (also sometimes known as James Moffat), and also all other persons unknown claiming any right, etc. From a judgment that plaintiff was not entitled to have his title quieted, he appeals. Affirmed.

L. N. Peter, of Quincy, for appellant. A. F. St. Sure, of Alameda, for respondent.

MELVIN, J. Appeal by plaintiff on the judgment roll alone from a judgment by which the superior court refused to quiet plaintiff's title to certain property in Plumas county.

The action was brought under authority of sections 749a, 750, and 751 of the Code of Civil Procedure. After trial the court found that plaintiff was the owner in fee of all of the property involved; that by himself and his predecessors he had exclusively possessed it continuously for more than 20 years preceding the date of this action, and had paid all taxes assessed against it; that Moffatt's only claim of interest was based upon a note and mortgage dated March 5, 1887, upon which no payment had been made since August, 1888; that said mortgage had never been paid, satisfied, nor released, and that it was still of record in Plumas county; that Moffatt was still the lawful owner of the note and mortgage; that in 1890 Moffatt commenced an action upon the note and mortgage; that the court, after trial of the cause, adjudged the consideration for said note and mortgage to have been illegal, both parties to the action having been equally in the wrong; that the said judgment was affirmed by the Supreme Court of California September 1, 1892; and that aside from the mortgage Moffatt had no title whatever in the property specified in the complaint herein. Upon these findings the superior court concluded and adjudged that plaintiff was not entitled to have his title quieted. The appeal to which the court referred in its findings was Moffatt v. Bulson, 96 Cal. 106, 30 Pac. 1022, 31 Am. St. Rep. 192.

Appellant contends that this is a proceeding purely in rem, and that the doctrines of equity are not applicable to its facts. Actions under the McEnerney Act are quasi, if not strictly, in rem (Title, etc., Co. v. Kerrigan, 150 Cal. 289–308, 88 Pac. 356, 8 L. R. A. [N. S.] 844), yet this court has held that such a proceeding may become in effect, a simple action to quiet title between the parties. Faxon v. All Persons, 166 Cal. 707, 137 Pac. 919, L. R. A. 1916B, 1209. This is a case coming properly under the same rule, and on the authority of that and many other cases the court was justified in finding that, although the lien of the mortgage had become extinguished, the debtor could not quiet title against the mortgagee without first paying his debt. See Faxon Case, supra, particularly at 166 Cal. 720, 137 Pac. 924 (L. R. A. 1916B, 1209).

The fact that the consideration for the note was illegal does not take this case from

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under the operation of the rule. The parties to the foreclosure suit were both violators of a statute, and each was equally at fault. This action should leave them, as did the foreclosure suit, exactly where their mutual violation of the statute placed them.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(173 Cal. 697)

BUTTE CREEK CONSOL. DREDGING CO. v. OLNEY et al. (Sac. 2283.)

(Supreme Court of California. Nov. 23, 1916.)

1. APPEAL AND ERROR ⇐1041(5)—HARMLESS ERROR—SUPPLEMENTAL PLEADING.

The objection that a supplemental complaint set up no matter not known to plaintiff when the original complaint was filed will not be considered on appeal, where the trial court awarded no damages or relief on account of additional facts stated in the supplemental complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4106; Dec. Dig. ⇐ 1041(5).]

2. PLEADING ⇐248(16) — AMENDMENT—NEW CAUSE OF ACTION.

Where, after commencing suit for specific performance and damages for breach, plaintiff discovered defendant's lack of title to a portion of the property, an amended complaint alleging that fact and demanding damages therefor did not alter the cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 708½; Dec. Dig. ⇐248(16).]

3. VENDOR AND PURCHASER ⇐351(6)—REMEDY OF PURCHASER—RECOVERY OF PAYMENT—SHORTAGE IN LAND CONVEYED.

It was not error to fix the damages for partial failure of vendor's title at a price per acre based on the sum actually paid the vendor for all the land, although such sum included, in addition to the sum described as the "purchase price," another sum claimed by the vendor to have been intended merely as a "bonus" for the right to make the purchase, since calling this money a "bonus" did not mitigate the vendee's loss.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 1054; Dec. Dig. ⇐ 351(6).]

4. VENDOR AND PURCHASER ⇐65(2)—CONTRACT—CONSTRUCTION—SALE BY ACRE OR IN GROSS.

A contract was not for sale of land in gross, although after specifying the sections and quarter sections to be sold it recited the description was intended to apply to all the vendor's lands "lying west of the east bank" of a creek "as described above, except" a certain quarter "where the middle" of the creek "shall be the dividing line"; the recital being merely to prevent the vendees from asserting title to any of the land covered by the description according to subdivisions yet lying east of the line fixed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 95, 96; Dec. Dig. ⇐ 65(2).]

5. VENDOR AND PURCHASER ⇐351(6)—REMEDY OF PURCHASER—RECOVERY OF PAYMENT—SHORTAGE IN LAND CONVEYED.

The compensation allowed for deficiency in quantity of acreage conveyed should be at the rate of the average price per acre paid by the purchaser for the whole tract, where no difference is shown between the value of the land to which title fails and the remainder of the tract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 1054; Dec. Dig. ⇐ 351(6).]

6. LANDLORD AND TENANT ⇐34(2)—RESCISSION—MISTAKE OF LAW.

Where vendors had by their conduct waived those provisions of a land sale contract making time of the essence, and the vendee, tendering the full purchase price, was entitled to full performance, but, under mistake of law that his rights had been lost by delay, consented to take a seven-year lease instead of conveyance of the premises, for the original consideration named in the contract, the vendee was entitled to rescind the contract of lease, as to which consent was given by mistake, under Civ. Code, § 1689, as to rescission for mistake of law.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 97; Dec. Dig. ⇐34(2).]

Department 2. Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by the Butte Creek Consolidated Dredging Company against Laura F. Olney and another. From judgment for plaintiff and from an order denying new trial, defendants appeal. Judgment modified, and it and order denying new trial affirmed.

Tucker, Kenyon & MacFarland, of Washington, D. C., J. Z. Tucker, of San Diego, and White, Miller, Needham & Harber, of Sacramento, for appellants. Kemp, Mitchell & Silberberg, of Los Angeles, for respondent.

MELVIN, J. Defendants appeal from an adverse judgment and from an order denying their motion for a new trial.

The litigation concerns certain contracts for the sale and purchase of real property. On April 8, 1907, an agreement in writing was made by defendants and plaintiff's predecessors in interest by the terms of which the Olneys, parties of the first part, in consideration of the sum of $5,000, receipt of which was thereby acknowledged, and in further consideration of the covenants and promised future payments provided by the contract, gave and granted to the "parties of the second part" the option and right to purchase the property therein described. The description was of certain land situated in section 19, township 22 north, range 3 east, Mt. Diablo base and meridian in Butte county. The part of the description to be particularly considered in this opinion related to "all of the southwest quarter of the northeast quarter lying west of the east bank of Butte creek." It was further provided that the purchase price of said property should be the sum of $28,000 to be paid as follows: $5,000 on or before October 8, 1907; $10,000 on or before April 8, 1908; and $13,000 on or before October 8, 1908. Deferred payments were to bear interest at the rate of 6 per cent. per annum commencing six months from the date of the instrument. The first parties agreed that upon the demand of the second parties or assigns they would place in escrow a good and sufficient deed to

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be delivered upon deposit of the final payment. The contract also contained the following language:

"That in the event of a failure on the part of the second parties, or their assigns, to make any payment at the times herein provided, or to otherwise fail to comply with any and all the terms and conditions herein stated, all rights hereunder shall thereupon cease and this option become null and void, it being especially understood and agreed that upon any such failure all and any moneys paid and all improvements made upon said property hereunder by the second parties shall be forfeited to and become and remain the property of the first parties, as their compensation and in full satisfaction to them for having granted this option."

It was further provided that the Olneys might occupy the premises for farming, but that after the first payment the second parties might enter upon the land, construct mining machinery, and mine for gold. The sum of $5,000 due under the contract on October 8, 1907, was paid two days before that date. The sum of $10,000 was due on or before April 8, 1908, and before that day the sums of $10,000 principal and $690 interest were paid and a supplemental agreement was signed by all the parties, including the plaintiff. In this instrument the former writing is referred to and designated as "a certain contract for the purchase of lands in Butte county," thus showing, as respondent insists, that the parties treated the original and the supplemental agreements as contracts for the purchase and sale of real property, and not as mere options. By the later instrument the time of payment of the $10,000 due on or before April 8, 1908, was extended to August 8, 1908, and the time of payment of the sum of $13,000 due by the terms of the original contract October 8, 1908, was extended to February 8, 1909, credit being given on this part of the indebtedness, however, for the $1,000 paid on the date of the execution of the supplemental contract—another evidence that the vendors and vendee were regarding the transaction as one of purchase and sale. The installment of $10,000 supposedly with interest then due was paid prior to the date set by the second contract, and on October 20th an additional payment of $27.32 was made to cover an error in the computation of interest. The sum of $12,000 was not paid when due, but on August 3, 1909, payment was made of $5,000 of the principal and $360 interest. Mrs. Olney by letter acknowledged receipt of the check covering these amounts, and while protesting that it was inconvenient for her to grant further extension, she consented to a payment of $3,000 October 8, 1909, with interest to that date on $7,000 and of the remaining $4,000, with interest on or before February 8, 1910. In this letter, however, Mrs. Olney wrote:

"I have no desire to distress you in your efforts, and I imagine it is difficult to start so big a thing as you have undertaken there, so once more I consent to the extension of time you have asked for."

A few days before October 8, 1909, the sums of $3,000 and $70 interest were paid. The final payment was not made on time, but on or about February 8, 1910, the date on which it became due, the secretary of the Butte Creek Consolidated Dredging Company wrote to Mrs. Olney, at Washington, D. C., informing her that an assessment had been levied upon the stock of the corporation to meet the indebtedness, and asking her to send to the Bank of Chico a deed to the property executed by her and her husband to the dredging company as grantee, together with an abstract of title. After receiving this letter Mrs. Olney wrote to the secretary of the corporation under date of February 14, 1910, declaring that by its failure to make the final payment on or before February 8th the plaintiff had forfeited all right to the property.

Mr. March, secretary of the plaintiff, was sent immediately to Washington with a draft for $4,095 principal and interest due as the final payment for the property. He made tender of the money to the Olneys and demanded a deed, but they refused to admit that the corporation had any rights in the property. After negotiations covering several days, Mr. March, the secretary of the Butte County Dredging Company, believing that the vendors might lawfully declare a forfeiture of the contract, agreed to accept a lease of the land for the term of seven years giving the corporation the right, during that period, to dredge the land. He delivered to Mrs. Olney the draft for $4,095 and promised to have his company send to her $500 and 5,000 shares of its capital stock. The board of directors of the dredging company complied with the promise thus made in their behalf and the lease was executed. It was dated March 5, 1910, and it contained as part of the description a specification of the land, approximately 20 acres to which, as the parties to the lease subsequently learned, neither of the Olneys had any title. About July 27, 1910, after the payment of the $500, the transfer of the stock and the execution of the lease, the corporation served notice of rescission of the lease upon Mr. and Mrs. Olney. In this notice the corporation recited that in accepting the lease in lieu of a deed the action of the board of directors of the plaintiff was taken through a misapprehension of the facts and of the legal rights of the corporation. Rescission is sought also on the ground (to quote from the notice):

"That the said Laura F. Olney has received and accepted of this corporation the full purchase price therefor, together with interest on all deferred payments, and that this corporation is entitled to a deed to said property, and on the further ground that at the time the said payment was tendered to you and you refused to accept the same that such refusal was unauthorized, and you had no legal right to refuse to convey the said property to this corporation, and on the further ground that at the time the last payment was due from this corporation to

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you on account of the said lands you concealed the fact from this corporation, and from its agents, that your title to a portion of the said land was not perfected, and you could not at the said time deliver a deed conveying the title to the said lands free of incumbrance."

The writing contained a demand for a deed, for a return of the stock and money paid on account of the lease; and for $5,000 damages sustained by reason of refusal to convey title and on account of fraudulent acts and concealments. These demands were not complied with and this litigation was the result.

[1] The original complaint is not set forth in its entirety in the transcript, although two quotations from it were read into the record by appellants. The amended complaint which does appear in full in the transcript pleads the execution of the two contracts and the various payments thereunder; alleges that the agreements were just and fair; sets up full compliance with their terms; avers that defendants never insisted upon strict performance in the matter of dates of payment; and prays specific performance as well as damages for the refusal on the part of defendants to convey the described property. In the second amended complaint plaintiff alleges that defendants represented themselves as owners of the land described in the two contracts, but that as matter of fact they did not own a certain tract of 20 acres contained in that area, namely, the south one-half of the northwest quarter of the northeast quarter of section 19. There are also averments of the various payments made to defendants of the ownership by Mrs. Olney on behalf of the marriage community of all the land except the 20 acres; of the justness of the agreements; and of the refusal of defendants to give a deed. The pleading further sets forth plaintiff's belief until shortly before the filing of the second amended complaint that the Olneys owned the 20 acres in question and recites that, when its dredging operations had reached the south line of this tract, the work was halted by one Martin, the real owner, greatly to the loss of plaintiff. Damages in the sum of $5,000 are demanded for the loss thus occasioned, and the prayer is for conveyance of the property less the 20 acres belonging to Martin, and for $5,000 damages sustained because of the refusal to convey and because of the failure of title in defendants to the 20-acre parcel. There was a supplemental complaint containing allegations to the effect that after the commencement of the action Martin had halted plaintiff's dredging operations, thus preventing access to other lands of plaintiff to its damage in the sum of $5,000. This pleading also contains the statement that immediately prior to the commencement of the action plaintiff discovered Mrs. Olney's lack of record title to the 20-acre tract, but was assured by her and believed that nevertheless she could deliver title thereto. Appellants earnestly contend that the court erred in permitting the filing of the second amended complaint and the supplemental complaint, because each, they insist, changed the original cause of action from one for specific performance to a suit for damages. Of the supplemental complaint it is said that it set up no matter which was not known to the pleader when the original complaint was filed, and Young v. Turner, 168 Cal. 671–675, 143 Pac. 1029, is cited to the effect that the function of a supplemental complaint is to set up facts material to the case occurring after the filing of the former complaint. We may at once dismiss the consideration of the point of appellants with reference to the supplemental complaint because, conceding the correctness of their claim that the facts therein alleged were known when the original complaint was filed, the court awarded no damages on account of the failure of plaintiff to reach with its dredger other lands owned by the corporation because of the adverse ownership by Martin of the tract of 20 acres.

[2] Appellants are mistaken in their belief that the original cause of action was abandoned and another pleaded in the second amended complaint. Plaintiff in all of its pleadings declared upon the two contracts praying both specific performance and damages for breach. In her original answer Mrs. Olney averred title in her to all the property as alleged in the amended complaint. When subsequently failure of her title to the smaller portion was discovered, a pleading of that fact and the consequent demand for damages did not alter the cause of action. In essence it was still a suit founded upon the written contracts of sale and the failure on the part of the Olneys to perform their part of said agreements.

The court found that strict performance of the original and supplemental contracts had been waived; that plaintiff had performed its part of the agreements; that the title of defendants failed as to 20 acres of the land involved; that by reason of such failure plaintiff had been damaged to the amount of $3,420; that plaintiff was entitled to judgment for $500 paid on account of the lease made after the refusal of defendants to convey any of the land to plaintiff in fee; that the lease was made under misapprehension of law and facts; and that defendants were not damaged by plaintiff's action in canceling and refusing to deliver the 5,000 shares of stock issued to Laura F. Olney in compliance with the terms of the lease. The judgment followed the findings, except, as we have stated above, there were no damages awarded for the exclusion of plaintiff from certain of its properties by reason of Martin's refusal to permit passage across his 20 acres.

Appellants call attention to a mistake of the court in determining the acreage. The parcel of 20 acres, title to which failed, lies

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partly east of the east bank of Butte creek, and therefore is not all within the description contained in the contracts. The evidence shows that the portion east of the creek is of an extent between 1 and 2 acres. On motion for new trial counsel for plaintiff offered to refund $855 as a credit on the judgment in case the motion should be denied. This was the price of 5 acres according to the finding of the court that the amount paid by plaintiff was $171 per acre. The motion for a new trial was denied, but the order failed to notice the remission. Respondent stipulates that the sum of $1,078.45 be remitted from the judgment, being $855 on account of principal together with interest thereon up to the date of judgment. We will permit and direct a modification of the judgment in accordance with this stipulation.

[3] Appellants insist that the court erred in fixing the price of the land at $171 per acre on the basis of the $33,000 actually paid instead of $28,000 described in the contracts as the "purchase price." The argument is that the sum of $5,000 was intended merely as a bonus for the right to make the purchase. Conceding this, it does not follow that in estimating the damage due to the partial failure of the title of defendants the initial payment should be disregarded. Calling this money a "bonus" does not mitigate plaintiff's loss.

[4] Appellants further contend that the contracts were merely for the sale of their land in gross. It is true that after specifying the section and quarter sections to be sold the contract recites that the description is intended to apply to all of the lands owned by the Olneys lying west of the east bank of Butte creek, "as described above, except the northwest quarter of the southwest quarter where the middle of Butte creek shall be the dividing line." There is no force in the contention that by this language the Olneys merely promised to convey title to whatever land they might own in that vicinity. The purpose of the limitation was evident. It was to prevent the vendees or their assigns after payment of the purchase price from asserting title to any of the land covered by the description according to subdivisions, yet lying east of the line fixed. In other words, it was a limitation of a general description by specific boundary lines. In Lawson v. Floyd, 124 U. S. 108, 8 Sup. Ct. 409, 31 L. Ed. 347, cited by appellants in support of this point, the land was described in the contract as "about 1,000 acres of land lying on the east side of Guyandotte and north of Aracoma," and again as a tract "estimated to contain one thousand acres." That case does not support the contention of appellants when applied to the description which we are here considering. In this connection it is argued that there is no evidence of mistake on Mrs. Olney's part with reference to her title to the land described; but the record shows that in the lease the particular tract of 20 acres to which she had no title was specifically described as her land and that of her husband just as it had been in the other contracts previously made; and in her deposition taken after the commencement of this action Mrs. Olney set forth her belief that at the time the contract of sale was made she owned this very land.

[5] It is argued that the court erred in fixing damages for the failure of title in and to the 20-acre tract on the basis of the proportion which it bore to the whole area described in the contract. Appellants say that the recovery should have been limited to the value of the land and call attention to testimony that the property never was worth more than $10 an acre and that a subsequent purchaser of the land once owned by Martin estimated its value as being $100 an acre; while it is true that, where a buyer has proven his right to specific performance and title fails as to a part of the land on which are situated improvements, he will be entitled to compensation for the actual value of the improved property. But we are not confronted with any such state of facts. There was no testimony tending to show a difference in value in Martin's land and that owned by defendants. There was some evidence that plaintiff had paid too much for the entire tract to which defendants claimed title, but the fact remained that the corporation had paid for it at the very price per acre fixed by the court. In Quarg v. Scher, 136 Cal. 406–411, 69 Pac. 96, it was laid down as a rule of decision that, where a court of equity finds itself unable to enforce conveyance of all of the land described in a contract of sale, it will compel compliance with the agreement as far as possible at the rate agreed upon between the contracting parties. A necessary corollary to this rule is that the same measure must be applied in estimating the proportion of the purchase price recoverable by one who has mistakenly paid for more land than the vendor is able to convey. In other words, the compensation allowed for the deficiency in quantity should be at the rate of the average price paid for the entire tract. Kelly v. Riley, 22 W. Va. 247–251. The court applied the correct measure of damages. The case of Tyson v. Eyrick, 141 Pa. 296–313, 21 Atl. 635, 23 Am. St. Rep. 287, cited by appellants, does not support their contention. In that case the vendor had in good faith assumed to convey title to land having a frontage of 50 feet. As matter of fact, the title failed as to one foot of frontage, the land extending the entire depth of the lot. After learning of this defect the vendee continued to make payments according to the terms of his agreement, and did not seek to rescind. The court held that under the circumstances he was entitled merely to an allowance for the proportionate value of one foot of ground

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to be computed upon the basis of the consideration provided by his contract. That case is authority for the rule followed by the trial court in this case. In Wheeler v. Boyd, 69 Tex. 293–297, 6 S. W. 614, the court condemned an instruction which permitted two deductions on account of the shortage of land—one on the basis of the proportion arising from the relation of the amount not conveyed to the whole tract and another based upon the value of the acreage cleared in case the court should find that the property was less open than the vendor represented it to be. The case is not in point.

[6] Appellants assert that the court had no power to set aside the compromise agreement based upon the mutual belief that the vendors had the absolute right to declare a forfeiture because the final payment of the purchase money was not timely made. Even conceding (say appellants), under Boone v. Templeman, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126, Boyd v. Warden, 163 Cal. 155, 124 Pac. 841, Stevinson v. Joy, 164 Cal. 279, 128 Pac. 751, and other cases of similar import, that a waiver of the right to forfeiture of the contract without notice had resulted from their conduct as vendors, nevertheless (as they contend), the vendee's right was merely one which the court might have sustained if appealed to, and was therefore one which might be the subject of compromise. In this behalf they cite such cases as Bank of Commerce v. Scofield, 126 Cal. 156–159, 58 Pac. 451; Spielberger v. Thompson, 131 Cal. 55–58, 63 Pac. 132, 678; and Rohrbacher v. Aitken, 145 Cal. 485, 78 Pac. 1054. The principle of the cited cases is that the courts favor findings declaring compromise agreements which have been made in good faith supported by considerations, even if the litigation compromised or the claims surrendered might not have been susceptible of full enforcement. But in the case at bar the vendee was entitled to full performance on tender of the final portion of the purchase price, because the Olneys had by their conduct waived those parts of the agreements of sale making time of the essence of the transaction. The course of business between the plaintiff and the defendants brought this sale under the rule declared in Boone v. Templeman, supra, and removed it from the category of contracts considered in such cases as Glock v. Howard, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Oursler v. Thacher, 152 Cal. 739, 93 Pac. 1007; Skookum Oil Co. v. Thomas, 162 Cal. 539, 123 Pac. 363; and Myers v. Williams, 159 Pac. 982. Both parties acted under a mistake of law, and there was therefore no consideration for the lease. Respondent was entitled to rescind the contract of lease made by reason of mistake of law or of fact. Civ. Code, § 1689, subd. 1. If plaintiff would not have consented to the lease except for the mistake of law which led to the belief that an arbitrary forfeiture of all the money paid and all the rights of the purchaser could be declared, then the corporation was entitled, upon discovery of the mistake to rescind the lease. That there was such mistake of law there can be no doubt, and we do not doubt the power of a court of equity to uphold the rescission. Hannah v. Steinman, 159 Cal. 142–146, 112 Pac. 1094.

Let the judgment be modified as indicated herein by striking from it the sum of $1,078.45 and as so modified it is affirmed. The order denying the motion of appellants for a new trial is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(173 Cal. 691)

ABSTRACT & TITLE GUARANTY CO. v. STATE. (Sac. 2265.)

(Supreme Court of California. Nov. 23, 1916.)

1. TAXATION ⟸879(1) — TRANSFER TAXES — "CONTEMPLATION OF DEATH."

Under Inheritance Tax Law of 1905 (St. 1905, p. 341), imposing taxes on transfers made in contemplation of death, the term "contemplation of death" cannot be interpreted in that limited sense of expectancy which actuates a person in making a gift causa mortis, but includes transfers made in expectation of death in the future at some more or less distant time.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1702; Dec. Dig. ⟸879(1).

For other definitions, see Words and Phrases, First and Second Series, Contemplation of Death.]

2. TAXATION ⟸879(1) — TRANSFER TAXES — GIFTS.

Under Inheritance Tax Law of 1905, imposing taxes on transfers made in contemplation of death, the adequacy of the consideration may be inquired into for the purpose of determining whether the transfer was in contemplation of death, though the law made no express provision to that effect.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1702; Dec. Dig. ⟸879(1).]

3. TAXATION ⟸893—TRANSFER TAXES—CONSIDERATION.

Where taxes were claimed under Inheritance Tax Law of 1905 on the theory that a conveyance was in contemplation of death, evidence as to the value of the land conveyed, the monetary consideration named being nominal, is admissible.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. ⟸893.]

4. TAXATION ⟸893—TRANSFER TAXES—EVIDENCE—SUFFICIENCY.

Evidence *held* sufficient to warrant a finding that land, claimed to be subject to transfer taxes under Inheritance Tax Law of 1905, because conveyed in contemplation of death, was worth more than $500.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. ⟸893.]

5. TAXATION ⟸880—TRANSFER TAXES—CONSIDERATION.

Where transfer taxes were claimed under Inheritance Tax Law of 1905 on land conveyed for an expressedly nominal monetary consideration, the state may treat the expressed consideration

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as the true one, notwithstanding defendant's payment of debts due from the grantor; there being no evidence that such debts were assumed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1703, 1704; Dec. Dig. ⊂⊃880.]

6. TAXATION ⊂⊃893 — INHERITANCE TAXES — EVIDENCE—SUFFICIENCY.

Evidence *held* to show that a conveyance of land claimed to be subject to transfer taxes under Inheritance Tax Law of 1905 was one of gift made in contemplation of death, without adequate consideration.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. ⊂⊃893.]

Department 2. Appeal from Superior Court, Madera County; Geo. E. Church, Judge.

Suit by the Abstract & Title Guaranty Company against the State of California. From a judgment for defendant and an order denying new trial, plaintiff appeals. Affirmed.

Robert L. Hargrove, of Madera, G. J. Hely, John N. Anderson, of Santa Ana, and Frank Kauke, of Fresno, for appellant. W. H. Larew, of Madera, and Robert A. Waring, of Sacramento, for the State.

MELVIN, J. Plaintiff sued under the provisions of subdivision A et seq. of section 29 of the Inheritance Tax Law of 1905 (Stats. 1905, pp. 341, 351) to quiet its title to the real property described in the complaint, against the state's claim of lien of an inheritance tax. Defendant by its answer averred that the deed upon which plaintiff's claim of title was founded had been made by the grantor in contemplation of death, and to take the place of a testamentary disposition of the realty. After trial upon the issues joined judgment was given in favor of the state. Plaintiff appeals from the judgment and from an order denying its motion for a new trial.

Plaintiff's asserted title is derived through mesne conveyances from the Hely Estate Company, a corporation of which Gorges Hely's three sons and only heirs are the sole stockholders each holding an equal proportion of the stock. The important document upon which plaintiff's alleged title depends is a deed from Gorges Hely to the Hely Estate Company, dated July 10, 1908, and recorded soon thereafter. Plaintiff offered this deed in evidence. In it the grantor Gorges Hely was described as "the party of the first part," and the corporation as "the party of the second part." It provided that:

"For and in consideration of the sum of $10 gold coin, to him in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, as a further and additional consideration the agreement on the part of the party of the second part to and with the first party that the second party will care for, maintain, and support in a proper and suitable manner during the balance of his life the first party, said first party does by these presents grant, bargain, sell, convey, and confirm unto said party of the second part."

After introducing at the trial the other record evidence of its title, plaintiff placed J. H. Hely on the witness stand, and he testified that following the 10th of June, 1908, the Hely Estate Company commenced to pay off the indebtedness on the land described in the deed. He enumerated payments amounting to more than $17,000, some of them made before, but more of them after the grant to the corporation by Gorges Hely. He testified:

"The amount of the indebtedness of my father, Gorges Hely, at the time this deed was made to the Hely Estate Company was, I think, about $23,000."

He did not state, however, that the assumption of the debts of Gorges Hely was a part of the consideration for the conveyance of the land to his corporation. Plaintiff then rested.

Thereafter the defendant introduced its evidence and the court gave judgment in its favor based upon findings that at the time of the conveyance to the family corporation Gorges Hely was 80 years old; that his physical condition was such that, if a reasonable man, he must have apprehended that death was likely to occur at any time; that without any material change or improvement in his physical condition death did occur a little more than 6 months after the execution of the deed; that the deed operated as a transfer of all property owned by Gorges Hely at the time; that the transaction was not a sale; that the transfer was not made for a valuable consideration; that the agreement made by the corporation to care for the old man for the remainder of his life was ultra vires and void; that the conveyance was made in contemplation of death; and that it was made in lieu of a testamentary disposition of the property. As a conclusion of law the court determined that the state of California had a lien on the land for an inheritance tax, and it was so adjudged.

[1, 2] Appellant calls attention to the difference between the phraseology of the Inheritance Tax Law of 1905 and that of 1911 (St. 1911, p. 713), and insists that since the former act is applicable to this case, we may interpret the words "contemplation of death" in the limited sense of that expectancy which actuates a person in making a gift causa mortis. We are also reminded that the words "made without valuable and adequate consideration," which are applied to gifts specified in the later act, do not occur in the earlier statute, and appellant suggests that adequacy of consideration is not an essential element to be dealt with in this action under the law of 1905. Both of these contentions have been considered by this department in Estate of Reynolds, 169 Cal. 600, 147 Pac. 268, and there rejected. In the opinion in that case Mr. Justice Henshaw said of the amendment of 1911 regarding want of valuable and adequate consideration:

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"The amendment served but to clarify and not to change the pre-existing law."

Of the amendment adding to the law an express definition of the words "contemplation of death" he said:

"This amendment also served the purpose of elucidating without changing the law, by giving fuller expression to the legislative intent and meaning."

[3, 4] Another and more serious attack upon the court's findings made by appellant is that the value of the property was not shown, and that therefore the finding of inadequacy of consideration is not supported. The record reveals the fact that the defendant sought to prove the value of the land involved in this controversy by Mr. Bordon, county treasurer of Madera county and a person familiar with land values in that county. The court sustained an objection to the question upon the ground that no definite and specific sum had been proven as a consideration for the transfer of the property, but only the nominal monetary payment of $10 and the agreement on the part of the grantee to care for the octogenarian invalid, and that therefore the value of the land in money was not involved. This was error. The evidence was material. It is true, as the court ruled, that if an inheritance tax was due, an appraisement would be necessary; but it was proper for the defendant to show, in a case of this sort, the amount and value of property deeded by the old man to his sons in return for their promise to support him. But the error did not injure the appellant because it had shown by its own witnesses that the land was of a greater value than $500, and therefore not exempt, under proper conditions, from an inheritance tax. In the first place the situation was such and the acreage was so great as to amount to some proof of substantial value. It would be very difficult, if not impossible, to find 2,000 acres of ranch land in Madera county which was of a value less than $500 at the time when this tract of that extent was transferred. Plaintiff's own witness, J. H. Hely, testified that the grantee paid a mortgage indebtedness the principal amount of which was $3,160. That mortgage was upon a portion only of the land described in the complaint, that is, "on the west half of section 16 in township 12 south of range 18 east," as Mr. Hely said while a witness for the Abstract & Title Guaranty Company. If 320 acres of the land would support such a mortgage, surely there was some evidence that the tract was of much greater value.

[5, 6] But it is contended that the state should prove a value of more than $500 beyond the $23,000 which the grantor owed when he made the transfer of the land. Plaintiff neither alleged nor proved that the assumption of the debts of Gorges Hely was a part of the consideration for the conveyance of the land to the Hely Estate Company. It proved by J. H. Hely the amount of those debts, and that some of them had been paid by the corporation; but the only proof of consideration was that involved in the introduction of the deed itself. Upon this prima facie showing the defendant was entitled to attack the expressed consideration as the true one. The attack was successful, and the court's finding in this regard was supported by abundant testimony. It was shown by the statements of the physicians who attended him at about the time when the deed was executed that Gorges Hely, who was 80 years of age, was very feeble. He was a sufferer from Bright's disease, and his circulatory organs were in a state of arterial sclerosis, resulting in a functional derangement of all the organs. He was unable to care for himself. A nurse, who attended him during the last 6½ months of his life, said that he only uttered the words "Yes" and "No" during that period, and was not able to hold an intelligent conversation. There was some evidence of his ability to read books at about this time, but there was abundant testimony of his great physical feebleness. Upon the evidence and under the principles declared in Estate of Reynolds, supra, we must hold that the essential findings are supported. These were in substance that the deed was one of gift; that it was made without adequate consideration; and that it was executed in contemplation of death.

The appellant objects to the finding that the agreement of the Hely Estate Company to care for Gorges Hely was void as being ultra vires, and calls our attention to that part of the articles of incorporation of the said company declaring one of its purposes to be as follows:

"To execute, accept, or complete contracts, documents, or instruments of all kinds."

It is not necessary for this court to decide whether or not this finding is supported, because the judgment does not invalidate the deed from Gorges Hely to the corporation composed of his sons who were also his sole heirs. The other findings amply support the judgment fixing the state's lien and, therefore, conceding the correctness of appellant's position relative to the finding of ultra vires, we cannot see how it has harmed the Abstract & Title Guaranty Company.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(173 Cal. 679)

BROOKINGS LUMBER & BOX CO. v. MANUFACTURERS' AUTOMATIC SPRINKLER CO. et al. (L. A. 3793.)

(Supreme Court of California. Nov. 23, 1916.)

1. CONTRACTS ⟸212(2)—CONSTRUCTION—REASONABLE TIME FOR PERFORMANCE.

In the absence of provision in a contract for installation of fire prevention machinery as to the time within which the contract shall be com-

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pleted, the installer of such machinery is entitled to a reasonable time.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 947–951; Dec. Dig. ⟸212(2).]

2. PRINCIPAL AND AGENT ⟸103(12)—POWERS OF AGENT—CONTRACTS—CONSTRUCTION.

Where a contract for the installation of fire prevention machinery provided that no alterations should be binding unless indorsed thereon by the president of the company and stated no time within which the contract was to be completed, the agent taking the contract had no authority to guarantee completion within three weeks instead of within a reasonable time.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 290; Dec. Dig. ⟸103(12).]

3. CONTRACTS ⟸305(1)—PERFORMANCE—TIME OF PERFORMANCE—WAIVER.

Under a contract for installation of fire prevention machinery containing no provision as to time of completion, the purchaser waived the oral promise of the installer's agent to complete within three weeks where he permitted the work to be commenced six weeks after signing the contract and made a payment on the price nearly three months thereafter.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1398–1400, 1467–1475; Dec. Dig. ⟸305(1).]

4. APPEAL AND ERROR ⟸1011(1) — REVIEW — DECISION OF TRIAL COURT.

Where the evidence makes it a question for the trial court as to what constituted a reasonable time for performance of a contract to install fire prevention machinery, its determination on conflicting evidence will not be disturbed by the court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⟸1011(1).]

5. DAMAGES ⟸19 — BREACH OF CONTRACT — PROXIMATE CAUSE.

Under a contract for installation of fire prevention machinery containing no provision as to time when the contract should be completed, where the premises were destroyed, during the installation, by fire, three months after the contract was signed, and the owner had not completed his part of the contract by installing connections underground, the proximate cause of damages was the fire, and not the alleged breach of the contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 38–53; Dec. Dig. ⟸19.]

6. PAYMENT ⟸85(7) — RECOVERY — MISTAKE —RATIFICATION.

Where the purchaser of fire prevention machinery mailed a check which was credited on account, but claimed that it was sent through error, and later, by a statement of account, itemized such check as a payment on account, it ratified the payment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 280; Dec. Dig. ⟸85(7).]

Department 2. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by the Brookings Lumber & Box Company against the Manufacturers' Automatic Sprinkler Company and another. Judgment for defendants and order denying new trial, and plaintiff appeals. Affirmed.

Eugene C. Campbell, of Long Beach, for appellant. H. H. Chase, of San Bernardino, for respondents.

MELVIN, J. We will treat this as an appeal from the judgment and from an order denying plaintiff's motion for a new trial, although respondents contend that no efficient appeal was made from the order, owing to the failure of plaintiff to serve them with proper notice.

Plaintiff entered into a written contract on July 7, 1910, with the Manufacturers' Automatic Sprinkler Company, whereby the latter agreed for a certain consideration to install in the former's box factory an improved "wet pipe" system of automatic sprinklers and fire extinguishing apparatus. On September 22, 1910, and while the sprinkler company was putting in the pipes for the installation of said system a fire broke out in the box factory and destroyed it. The plaintiff corporation sued for $15,000 damages, alleging that when the fire occurred the work was being done in a dilatory manner; that the Manufacturers' Company had agreed to install the system within three weeks following July 10, 1910; and that if this promise had been kept or if within a reasonable time the work had been completed the fire would have been extinguished and plaintiff's loss prevented. The Automatic Sprinkler Company of America is sued as the successor to the obligations of the other corporation defendant. By a second count the latter company is sued for $500 money had and received from plaintiff on the 29th day of September, 1910.

After trial the court made findings substantially supporting defendant's contentions, namely, that the contract had been made as alleged; that the Manufacturers' Automatic Sprinkler Company had not agreed that the apparatus should be installed within three weeks from July 7, 1910; that the said corporation had not represented or warranted that its system when installed would extinguish all the fires which might originate in plaintiff's premises; that the Manufacturers' Automatic Sprinkler Company had performed its contract until prevented by the fire from doing further work; that on September 22, 1910, when the fire occurred plaintiff had not performed its part of the work, namely, the putting in of the underground supply pipes; and that had the apparatus been installed the fire could not have been extinguished. It was further found that plaintiff had a verbal agreement with an agent of the Manufacturers' Automatic Sprinkler Company that the apparatus would be installed within three weeks following July 17, 1910, but said agreement was not binding because the agent was not authorized to make it. A waiver of the alleged oral agreement was found and likewise a waiver of any breach of the contract by reason of delay in the performance thereof. The court also found that by its implied terms the written agreement was to be performed within a reason-

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able time, and that at the time of the discontinuance of the work a reasonable time for completing the installation had not elapsed. There were additional findings that any delay in the execution of the work was not a proximate cause of the loss by fire of plaintiff's buildings. Regarding the payment of $500 it was found that this sum was a first installment on the contract being money due under the terms thereof, and that plaintiff had waived any claim to said sum.

All of these findings are substantially supported by the testimony, and we discover no material error in the record to plaintiff's prejudice.

[1, 2] Plaintiff's counsel lay great stress upon the verbal promise made by Barney, the agent for the other contracting corporation that the installation of the sprinkler should be within three weeks, but it is evident that no dependence was placed on this promise by plaintiff's officer, Mr. Brookings, who conducted the negotiations. It is true that he testified that this agreement as to the time of installation was the controlling feature of the contract, yet he did not cause it to be put into that writing. The contract itself did not specify any particular time within which the work was to be done, and the court correctly found that therefore a reasonable time was implied. 17 Cyc. 716; Peterson v. Chaix, 5 Cal. App. 525–527, 90 Pac. 948; Standard Box Co. v. Mutual Biscuit Co., 10 Cal. App. 746–750, 103 Pac. 938. By its distinct and unequivocal language any change or modification of the terms of the contract was prohibited unless indorsed in writing upon it by the president of the Manufacturers' Automatic Sprinkler Company. This was ample notice that the agent was not empowered to vary the writing verbally. Belden v. Union Central Life Insurance Co., 167 Cal. 740, 141 Pac. 370.

[3] Moreover the plaintiff unqualifiedly waived the oral agreement by permitting the work to be started five or six weeks after the written contract was signed, and two or three weeks after it should have been completed if the oral promise had been kept. On September 15, 1910, a check for $500, the first installment on the written agreement, was sent by plaintiff to the Automatic Sprinkler Company of America. In the face of these facts it is clear that the proximate cause of the loss to plaintiff was not the failure to install the fire extinguishing apparatus within three weeks from the date of the verbal contract, and it is equally clear that the plaintiff waived any rights it may have acquired under the oral agreement.

[4] It is not necessary to analyze in detail the testimony upon the subject of the reasonable amount of time necessary to complete the work. There was testimony to the effect that the contract, under the rules of the manufacturing corporation, had to be sent to New York state for approval before the representatives of the contractor in this state could act upon it. So, also, there was testimony that the materials were only obtainable in Syracuse, N. Y., and that their shipment to Highland in this state, where the work of installation was to be done, consumed thirty-five days or more. The peculiar appliances necessary to complete the work were received by that defendant then busy installing the apparatus only on September 22d. Whether these delays were reasonable or not was a matter peculiarly for the superior court to determine, and we will not disturb the findings of that tribunal based, as they were, upon conflicting testimony.

[5] There was a sharp conflict of testimony with reference to the proportion of the work completed at the time of the fire. One of the witnesses, Mr. Goodrich, testified that he had worked in the placing of the fire extinguishing apparatus in the box factory. By the terms of the writing appellant was to put in the pipes for the underground supply, and Mr. Goodrich said that if no fire had occurred and the "underground" had been put in it would have taken him and the helper two days to complete the contract. It would have taken two days according to testimony on behalf of appellant to conduct the water into the building and to connect it with the fire-extinguishing system; therefore if the court accepted Mr. Goodrich's statement as true appellant was quite as much in default as was the contractor, and as the court justly found, if the apparatus had been installed on September 22, 1910, the fire could not have been extinguished because there would have been no water supply for the operation of the sprinklers.

Appellant's contention that the failure to complete the construction of the fire extinguishing machinery was the proximate cause of the destruction of the building by fire has no force. In this state the law is definitely settled adversely to the views expressed in the briefs filed by appellant's counsel. In Hunt Brothers Co. v. San Lorenzo Water Co., 150 Cal. 51, 87 Pac. 1093, 7 L. R. A. (N. S.) 913, the suit was for damages because of loss by fire against a corporation that had promised to furnish certain appliances for protection against fire, but had failed to keep its agreement. It was held in that case that where the contract had been executed to the extent of installing and commencing the contemplated service, and where both parties were acting thereunder, the one being bound for a consideration to furnish water and the other depending upon such service for the extinguishment of fires, only then could the breach of the agreement to supply water be the basis for damages because of loss by fire. The proximate cause of the loss to plaintiff was the fire, not the incomplete condition of the fire extinguishing plant. In Schaeffer Piano Manufacturing Co. v. National Fire Extinguisher Co., 148 Fed. 159, 78 C. C. A.

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293, the fire extinguisher company had entered into an agreement very similar to the one here under review. In that contract as in this was a stipulation that in case of destruction of the building by fire before completion of the equipment, the piano company would be liable for the value of the materials destroyed and labor furnished up to the time of the fire. There was a conflagration which destroyed the partially completed fire extinguishing apparatus, and the court held not only that the National Company could recover for such loss, but that the piano company might not set off as against its contractor's claim damages on account of the latter's failure to complete the contract within a reasonable time. The court declared in that case the familiar rule that damages under any contract are limited to those which may be fairly considered as arising from the breach of the agreement itself or which both parties must have contemplated, when making the contract, as likely to flow from a breach.

[6] At the trial plaintiff endeavored to prove that the check for $500 was sent by mistake, and there was some showing of an attempt to stop payment on it after the fire. But by its own statement of account the plaintiff had later fixed this item as a payment on the contract. This was a ratification of the payment on account in any view of the case, and the court's finding that the money was not sent by mistake therefore finds ample support. It was alleged in the answer that this sum was applied as a credit against plaintiff's obligation to pay for materials destroyed by the fire and for work performed up to that time. While there was no definite proof that the materials and labor furnished by the sprinkler companies amounted to more than $500, there was testimony that they amounted to approximately that sum. We think the court was justified in holding that plaintiff by not demanding an accounting had waived any recovery of the $500 paid under the contract.

There are several alleged errors in admitting and excluding testimony which appellant specifies. We have examined them and find no substantial merit in any of the contentions regarding them.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(173 Cal. 709)

BERGEN v. TULARE COUNTY POWER CO. (Sac. 2294.)

(Supreme Court of California. Nov. 23, 1916.)

1. PLEADING ⟸18—CERTAINTY—NEGLIGENCE.
A pleading, stating several distinct acts of negligence, proof of any one of which would warrant recovery, is not subject to demurrer for uncertainty or ambiguity because plaintiff may recover upon proof of enough to make a cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 39, 64; Dec. Dig. ⟸18.]

2. NEGLIGENCE ⟸111(1)—PLEADING.
If it appear from the allegations of the complaint that defendant's negligence caused or contributed to the injury, it is sufficient if what was done is pleaded and alleged to have been done negligently, without stating the particular omission which made the act negligent.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 182, 184; Dec. Dig. ⟸111(1).]

3. APPEAL AND ERROR ⟸1040(10)—HARMLESS ERROR—OVERRULING DEMURRER—DEFECT IN PLEADING.
Though there was error in overruling a demurrer to the complaint for ambiguity, defendant was not misled, where the case was tried on a well-defined theory, and the controversy fairly determined upon its merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4098, 4105; Dec. Dig. ⟸1040(10); Pleading, Cent. Dig. § 567.]

4. ELECTRICITY ⟸19(4)—ACTION—EVIDENCE.
In an action against an electric company for death of a person electrocuted by a high-voltage wire, the defense being that death was caused by a fall, or by the long-continued passage of 110 volts of electricity through decedent's body, testimony of a witness as to the effect on him of a shock of 110 volts was not objectionable because there was no similarity between the physical condition of the two men, because it appeared that prior to his death deceased had been struck on the head and thereafter was subject to headaches, where there was also testimony that just prior to his death he had been in good physical condition, and that his heart had been strong and normal.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. ⟸19(4).]

5. ELECTRICITY ⟸19(5)—ACTION—EVIDENCE.
In an action for death by electrocution, evidence *held* to show that no material change had been made in the ground wire and the ground pipe or rod, when examined by witnesses 10 and 13 days after the accident.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. ⟸19(5).]

6. EVIDENCE ⟸571(1)—EXPERT TESTIMONY—WEIGHT—ELECTRICITY.
In such action, testimony of experts as to insufficient grounding, where primary and secondary wires were in direct metallic contact with each other, and grounded through the same wire, *held* to support plaintiff's theory that the death occurred from faulty and negligent installation and operation by defendant of the system in use at decedent's pumping station.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2395; Dec. Dig. ⟸571(1).]

7. ELECTRICITY ⟸19(4)—ACTION—EVIDENCE.
In such action, where defendant's liability was based upon its negligence in putting in the pumping plant originally, it was proper to exclude defendant's by-laws offered in evidence by it as showing decedent's duty to care for his electric plant after its installation.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. ⟸19(4).]

8. DEATH ⟸99(4) — ELECTROCUTION—EXCESSIVE DAMAGES.
Where deceased was 50 years old, and evidence showed that he earned $50 a month about half his working time, and the other half being spent in conducting his ranch, and he left a widow and minor children, a verdict of $12,500 was not excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125, 126, 129; Dec. Dig. ⟸99(4).]

9. TRIAL ⟸252(20) — INSTRUCTION — DAMAGES.
In an action against an electric company for electrocution of plaintiff's decedent, where

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there was evidence that he had suffered some injury in a runaway two months before his death, but the physician who treated him at the time described him as a "strong, hearty man" when the accident occurred, an instruction, relating to the use of expectancy tables, was not objectionable as being inapplicable because assuming decedent was in good physical condition.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 610; Dec. Dig. ⟸252(20).]

10. ELECTRICITY ⟸14(1)—CARE REQUIRED.
A company furnishing electricity, although not an insurer, is required to use very great care, where it affords the means for the service.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 7; Dec. Dig. ⟸14(1).]

11. ELECTRICITY ⟸19(13)—INSTRUCTION.
In an action for death by electricity escaping from a defective plant installed by an electric company, an instruction as to the care required of the company, where it affords "the means for the service," was not objectionable; the accident having occurred because of defendant's installation.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. ⟸19(13).]

12. ELECTRICITY ⟸19(3)—INJURIES—BURDEN OF PROOF—RES IPSA LOQUITUR.
In such action, where plaintiff had established the death, while deceased was exercising ordinary care, by an excessive current furnished by defendant through the electric light wire, it then devolved upon defendant to show that the excessive voltage was not due to its negligence.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. ⟸19(3).]

13. ELECTRICITY ⟸19(3) — INJURIES — RES IPSA LOQUITUR.
Where electricity is furnished to a system installed and operated exclusively by the owner of the premises, the doctrine of res ipsa loquitur has no application.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. ⟸19(3).]

14. TRIAL ⟸244(6)—INSTRUCTIONS—EMPHASIZING DAMAGES.
In an action for death, instructions did not unduly emphasize the matter of damages because seven of them made mention of that subject.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 581; Dec. Dig. ⟸244(6).]

Department 2. Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Actions by Sarah E. Bergen, administratrix, against the Tulare County Power Company. From judgment for plaintiff and an order denying new trial, defendant appeals. Affirmed.

E. I. Feemster, of Visalia, Chas. E. Bush, of Tulsa, Okl., and A. E. Cooley, of San Francisco, for appellant. Murry & Knupp, of Porterville, for respondent.

MELVIN, J. Defendant appeals from an adverse judgment and from an order denying its motion for a new trial. The action was one for damages sought by Sarah E. Bergen as administratrix of the estate of L. C. Bergen, deceased, on account of his death. The verdict in favor of plaintiff was for $12,500. Bergen was a rancher living near Strathmore in Tulare county. He had a wife and two minor children, the latter being at the time of his death respectively, 17 and 10 years of age. Water for irrigating the orchard on Mr. Bergen's ranch was raised from a well by means of a pumping plant operated by electricity. This plant had been installed about a year previous to Mr. Bergen's death by the defendant corporation, which is a power company engaged in furnishing electricity to its patrons by means of wires carrying heavy currents. During a few days before that upon which the accident occurred, Mr. Bergen had been having trouble with the pumping plant, and on that evening when he arrived at his home his wife told him that something was wrong with the pump. He replied that the pump was all right, but that there was not enough power coming over the wires to move both the motor and the pump. About 9 o'clock Mr. Bergen went to the pumping plant for the purpose of discovering, if possible, the cause of the trouble with the supply of power. After vainly awaiting his return for about an hour, his wife and daughter caused search to be made for him. His dead body was found in the well pit behind the pump. Deceased was in a kneeling posture, his head resting against the discharge pipe leading from the pump. In his hand was held the lamp socket on the drop cord suspended in the pit. His hands were severely burned, and the physician who examined the body declared that death resulted from electric shock. There was evidence to the effect that glass from broken lamp globes was found scattered about the place; that the motor was burned out; that the insulation on the lamp cord was badly punctured; and that the coating of the jacket which is set over the lamp socket to prevent contact between the interior electrical connection and the brass case was completely burned away over one of the terminals. Appellant delivered its current to Mr. Bergen by means of its primary power wires, which terminated at a pole a few feet from the pumping plant. The primary wires carried 6,600 volts. By means of "transformers" a current of 220 volts was taken off of these wires for the engine, and one of 110 volts for the electric lighting. Respondent's theory developed at the trial by the evidence in her behalf was that appellant in the installing of the plant had employed dangerous and unsafe connections and a deficient ground wire, with the result that a high, dangerous, and excessive current was permitted to pass from the primary side of the transformers into the secondary side, and so through the drop cord into Mr. Bergen's body.

[1] Appellant's first attack is directed against the order of the court overruling the demurrer to the complaint. That pleading set forth with some elaboration the statements that defendant improperly and carelessly constructed and installed transformers and ground wires; negligently and carelessly failed to use due care in selecting proper

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materials, safety devices and appliances, for reducing the current carried by the primary wires; and that by reason of the fact that defendant had permitted the transformers, ground wires, and appliances to remain in a defective condition, a high and dangerous current of electricity was permitted to pass from the primary wires into the secondary wires and into the drop cord and electric light which hung in the pit. Appellant complains of ambiguity because the words "appliances" and "appurtenances" are used in the attempted descriptions of both the primary and the secondary systems. There is no merit in this contention. The complaint clearly sets forth the theory of the accident upon which respondent relies. Appellant also complains of ambiguity in the pleading resulting in its inability to determine therefrom whether its alleged negligence consisted in improperly installing transformers, ground wires, and appliances; in lack of care in selecting proper materials and safety devices; in improper construction and maintenance of transformers, etc.; or in failing properly to operate, inspect, keep, and use the transformers, etc. The statement in a pleading of several distinct acts of negligence, proof of any one of which would entitle the pleader to a recovery, is not properly subject to demurrer for uncertainty or ambiguity because the plaintiff may recover "upon proof of enough to make a cause of action." 6 Thompson on Negligence (2d Ed.) § 7474.

[2, 3] Nor was the complaint vulnerable to the objection that the particular acts constituting the negligence of defendant were not specified. It is well settled in California that negligence may be charged in general terms. It is only necessary to plead what was done, and allege that it was negligently done, without stating the particular omission which made the act negligent. But it must appear from the allegations that the negligence caused or contributed to the injury. Smith v. Buttner, 90 Cal. 95, 27 Pac. 29; Stein v. United Railroads, 159 Cal. 368, 113 Pac. 663; Champagne v. Hamburger, 169 Cal. 683, 147 Pac. 954. Measured by this rule, the complaint was sufficient. The order overruling the demurrer to the complaint was a proper one. The case was tried upon a well-defined theory, and even if the complaint had contained the defects of which the demurring party complained, that litigant was not misled because the controversy was fairly determined upon its merits. Bank of Lemoore v. Fulgham, 151 Cal. 234–237, 90 Pac. 936; Stein v. United Railroads, supra; Irrgang v. Ott, 9 Cal. App. 440–442, 99 Pac. 528.

[4] It was defendant's theory that Mr. Bergen fell from the ladder while he was going down into the pit where the pump was located, and that he was either killed by the fall or by the long-continued passage of 110 volts of electricity from the drop wire through his body. While Mr. Gardiner, an electrician, was under examination as a witness, he was asked if he had ever received a shock of 110 volts of electricity. He answered in the affirmative, over the objection of defendant's counsel. The basis of the objection was that there was no similarity between the physical conditions of the two men, because the evidence showed that a few months before his death Mr. Bergen had been struck on the head, and thereafter had been subject to headaches. The testimony was properly admitted. While it was true that there had been evidence tending to prove an injury to Mr. Bergen which had left some painful results, there had been medical testimony also to the effect that just prior to his death Mr. Bergen had been in good physical condition, and that his heart had been strong and normal at that time. It was therefore competent for plaintiff to offer evidence regarding the result of suffering a shock of 110 volts of electricity by a man of everage physique and resistant powers. If the witness had been unusually powerful and capable of withstanding a heavier shock than the ordinary man, even that fact would have related more to the weight than to the admissibility of the testimony. But it does not appear that he was at all abnormal.

[5, 6] Mr. Gardiner also testified regarding the condition of the ground wire when he examined it about 10 days after the accident. Objection was made upon the ground that the time was too remote, but we cannot say that the court erred in exercising discretion in favor of the admission of this testimony. That 10 days had elapsed between the accident and the electrician's inspection of the ground wire was a fact going more to the weight than to the relevancy of this testimony. It is the contention of appellant's counsel that upon plaintiff devolved the duty of proving that no change had taken place in the condition of the ground wire and the buried pipe between the time of the accident and Mr. Gardiner's inspection of it. It is quite true that, as appellant contends, the presumption of unchanged condition is not retroactive, and that the mere production of the pipe and wire would not prove that they were in the same state 10 days after the accident as they were on that day. Windhaus v. Bootz, 92 Cal. 617–621, 28 Pac. 557; Cerruti Mercantile Co. v. Simi Land Co., 171 Cal. 254–256, 152 Pac. 727. But there was evidence tending to show that no change had been made during that interval. Miss Hazel Bergen testified that, so far as she knew, nothing was done between the date of the accident and the coming of Gardiner to connect the plant with the system of the Mt. Whitney Power Company, except that the defendant caused its power to be disconnected. She said:

"I was not around the plant myself and I did not see anybody else around there."

Mr. Gardiner testified that he did not touch the wire prior to the time it was exam-

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ined by witness Davis, who went to the scene of the accident 13 days after Mr. Bergen's death. Davis said he was accompanied by Mr. Knupp, plaintiff's attorney. They found a ground wire and rod or pipe, and pulled the rod up. It gave no indication of having been lately tampered with, and it looked as if it had been imbedded in the earth at that place for a long time. This rod was in the same place indicated in the testimony of witness Kratzer, who had installed the wiring, and at the time of its removal it was still connected with the ground wire, running the full length of the pole. Mr. Knupp corroborated the statements of Mr. Davis. We think this testimony fairly established the fact that no material change had been made in the rod and the wire during the 13 days following the accident. Kratzer had sworn that the ground wire was attached to the pipe or rod with solder, and that the latter had been driven into the ground about five feet or nearly its entire length. The testimony of Davis, Knupp, and Gardiner was in contradiction to this statement. Gardiner said that the wire was loosely attached to the pipe, but was not soldered; and Davis testified that there never had been any good connection with solder between the wire and the ground pipe or rod, and that the latter was corroded. The rod, together with about two feet of the attached wire, was introduced in evidence. Mr. Gardiner said that if the primary and secondary wires were grounded together and the primary ground wire and rod were not sufficient, the primary voltage would go into the secondary. "In such a case," he said, "if a man attempted to turn on his light in the well pit, if he would come in contact with a bare place or some current would jump through on the socket, the primary would go on through the secondary to the ground and whatever was connected with it. If he made a better ground than the company made in this case, he would be in direct contact with the primary voltage." This testimony entirely sustained plaintiff's theory of the manner in which Mr. Bergen met his death. Mr. Davis, another electrician, gave it as his opinion that the grounding of the system at the Bergen pumping plant was unsafe, for the reason—

"that the primary or high-tension wire and the secondary or low-tension wire are in direct metallic contact with each other, and also grounded through this same wire; one wire runs down the pipe. In other words, the primary ground is not grounded separate from the secondary; they are both tied together with a common ground."

Continuing he said:

"The effect is this: If you remove that ground wholly, your primaries and secondaries are in direct metallic connection with each other. The only difference in the potential you would have would be due to the subtraction of the windings of the transformer, which would be a small amount."

The witness was asked the further question:

"If this ground was insufficient and the primary and the secondary sides of the transformer were connected as Mr. Kratzer has described them here, what would be the effect upon a person who attempted to turn on a light in the pit?"

Over objection he answered:

"I should say that he would be very apt to replace that defective ground with his body."

Mr. Noble, a graduate of and a former assistant professor of electrical engineering in the University of California testified that 110 volts, the normal current in the lighting circuit at the Bergen plant, would not, in his opinion, injure a man in good health having a normal heart. He also gave it as his opinion that in the wiring of the Bergen place the method which had been followed was very unusual and dangerous. He said:

"The danger lies in the fact that the primary or high-voltage side and the secondary or low-voltage side of the transformer are connected together, and then are connected to a ground wire. The loosening of that ground wire, or severing of that ground wire, from its ground connections would immediately cause a considerable rise in the voltage between the secondary, low-tension wires and the ground."

Prof. Noble also testified as follows:

"If the ground were totally deficient in this case and a person came in contact with the lamp cord in the pit under the circumstances testified to in this case, he would get, in my opinion, in the neighborhood of 2,800 volts between the wires on the low-tension side and the ground, assuming that the ground connections became totally loose."

He also inspected the ground wire and pipe or rod which were brought into court, and gave it as his opinion that they would not make a good ground. This witness also examined the lamp cord and socket which had been found in the hand of the dead man, and gave it as his opinion that their conditions indicated the passage of a current of high potentiality greatly in excess of 110 volts.

This evidence fully supported plaintiff's theory that decedent met his death by reason of the faulty and negligent installation and operation of the system in use at the pumping station on the Bergen ranch.

[7] There was no error committed by the court in refusing to admit defendant's by-laws in evidence. We can see no possible connection between said by-laws and the defendant's obligations to plaintiff's decedent. It is argued that they might have shown Mr. Bergen's duty to care for his own electric plant after its installation, but defendant's liability was based upon its negligence in putting in the pumping plant originally.

[8] The amount of damages was not excessive. Appellant attacks the verdict upon the ground that Mr. Bergen's earning capacity was but $50 a month, and, counting his life expectancy as 16 years, the greatest possible pecuniary loss would be about $9,600 assuming that his earning capacity would have remained the same if he had lived. The

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evidence showed, however, that he earned $50 a month during about half of his working time, and that the other half of his time was spent in conducting his ranch. The jury was justified also in considering the loss to the widow and the minors due to the deprivation of the comfort, society, protection, and support of the husband and father.

[9] We find no error in the instructions. Appellant attacks instructions numbered 8, 9, 10, 11, and 12. The first of these related to the use of mortality or expectancy tables, and was based upon an instruction approved in Harrison v. Sutter St. Ry. Co., 116 Cal. 156–168, 47 Pac. 1019. The objection made to the giving of such an instruction is that it is applicable to the case of a man in good physical condition, while Mr. Bergen was the victim of a recent injury which had impaired his health. It is true that there was some evidence that he had suffered injuries in a runaway which occurred about two months before his death, but the physician who had treated him at that time described him as a "strong hearty man" when the accident occurred.

[10, 11] Instruction No. 9 related to the great care exacted of companies like defendant engaged in furnishing that dangerous commodity, electricity. The jurors were told that such a company is not an insurer, but where it affords "the means for the service," it is required to use "very great care." Appellant's counsel say that the instruction is erroneous because of the use of the expression "very great care." There is no force in this objection. Giraudi v. Electric Imp. Co., 107 Cal. 120–124, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114; Tackett v. Henderson Bros. Co., 12 Cal. App. 658, 108 Pac. 151; Fairbairn v. American River Electric Co., 170 Cal. 115–118, 148 Pac. 788. The instruction is not open to the criticism that it would lead the jury to believe that defendant owned and controlled all of the instrumentalities for the application of electric power, including the machinery and wires of the pumping station itself. There was no question but that defendant had installed all of the instrumentalities owned and used by Mr. Bergen, and in that sense it had afforded means for the service. The instruction was approved by the Supreme Court of Alabama in Alabama City, etc., R. R. Co. v. Appleton, 171 Ala. 324–331, 54 South. 638, Ann. Cas. 1913A, 1181.

Defendant criticizes the tenth instruction upon the ground that it failed to apprise the jury of Mr. Bergen's duty to exercise ordinary care, but the instruction in terms does state his duty in that regard. In brief, it informed the jury that if by reason of defendant's installation of dangerous connections and defective ground wires an excessive voltage of electricity was permitted to enter the drop cord in the pit, and if plaintiff's intestate "while using ordinary care" came into contact with the cord and was killed, plaintiff was entitled to recover.

[12, 13] The eleventh instruction stated the rule that if plaintiff had established by a preponderance of evidence the death of her decedent while he was exercising ordinary care, by an excessive and dangerous current furnished by defendant through the electric light wire, it then devolved upon defendant to show that the excessive voltage was not due to its negligence. This did not unduly extend the doctrine res ipsa loquitur as appellant complains that it did. Such control as Mr. Bergen exercised over the equipment of his pumping station could not have resulted in an increase of the voltage; therefore the presence of a death-dealing current in the wire through which defendant had contracted to furnish a current of 110 volts was sufficient to afford reasonable evidence of negligence on its part. It is the rule in this state that where electricity is furnished to a system installed and operated exclusively by the owner of the premises the doctrine res ipsa loquitur has no application. Hill v. Pacific Gas & Electric Co., 22 Cal. App. 788, 136 Pac. 492. But where the defendant in such a case had some control of the situation, either by reason of its construction or its operation of plaintiff's plant, a showing of accident without plaintiff's fault shifts the burden of proof. The jury was carefully instructed that the mere happening of the accident raised no presumption of defendant's negligence.

The twelfth instruction was in its material part a quotation of section 3281 of the Civil Code, defining damages. It had no tendency to impress the jury, as appellant fears, with the idea that the corporation was a lawbreaker.

[14] The final criticism of the instructions is that they unduly emphasized the matter of damages because seven of them made mention of that subject. No objection is urged to the substance of these instructions, but we are told that devoting so much attention to the matter of damages might well have led the jurors to believe plaintiff entitled to compensation. With equal force it might be said that the court's elaboration upon that subject might have caused jurors to devote great care to the consideration of the evidence before they could feel justified in awarding a verdict requiring defendant to pay damages. Defendant's point has the charm of novelty, but possesses no substantial merit.

Other questions discussed in the briefs do not require consideration here, as they are substantially covered by that which is written above.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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(31 Cal. App. 668)

KIRKPATRICK et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 2044.)

(District Court of Appeal, Second District, California. Oct. 12, 1916.)

1. MASTER AND SERVANT ⟸417(7)—INJURY TO SERVANT — WORKMEN'S COMPENSATION ACT—CONCLUSIVENESS OF FINDINGS.

Where the evidence tends to support the Industrial Accident Commission's finding of fact that the employé, when fatally injured, was in the employ of his employer, though furnished to another, such finding is final, and will not be reviewed on certiorari.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⟸417(7).]

2. MASTER AND SERVANT ⟸361—WORKMEN'S COMPENSATION ACT — "EMPLOYER" — "EMPLOYÉ"—STATUTE.

Under Workmen's Compensation Insurance and Safety Act (St. 1913, p. 284) §§ 13, 14, defining "employer" to include every person who has any person in service under a contract of hire, express or implied, and "employé" to include every person in the service of an employer, one regularly employed as a driver and teamster for one engaged in contract teaming, who was directed to take a team and haul lumber for another party, and who used his employer's horse and the other party's wagon when the fatal accident occurred, was then in the employ of his regular employer.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⟸361.

For other definitions, see Words and Phrases, First and Second Series, Employé; Employer.]

3. MASTER AND SERVANT ⟸361—WORKMEN'S COMPENSATION ACT—"IMMEDIATE EMPLOYER"—STATUTE.

In such case, the regular employer of the decedent did not stand in any different relation than that of an "immediate employer," as those words are used in Workmen's Compensation Insurance and Safety Act (St. 1913, p. 294), § 30, subd. d(1), providing that the liability imposed by the section upon a principal and general contractor, when other than the immediate employer, shall exist only where the injury occurred on or in or about the premises on which the principal general contractor or intermediate contractor has undertaken to do any work, or where such premises or work are otherwise under his control.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⟸361.]

Writ of Review to Industrial Accident Commission.

Proceeding under Workmen's Compensation Act by James McLeod to obtain compensation for the death of his son, Jay McLeod, opposed by Roy Kirkpatrick, employer, and the Southwestern Surety Insurance Company, insurer. Compensation was awarded by the Industrial Accident Commission, and the employer and the insurer petition for writ of review as to such order. Award affirmed.

Hickcox & Crenshaw, of Los Angeles, for petitioners. Christopher M. Bradley, of San Francisco, for respondents.

CONREY, P. J. A writ was issued in this proceeding to review an order of the Industrial Accident Commission whereby it awarded to the dependent parents of one Jay McLeod compensation for his accidental death while in the employ of Roy Kirkpatrick, defendant in that case and one of the petitioners herein. Jay McLeod was regularly employed by Kirkpatrick as a driver and teamster in connection with Kirkpatrick's business, which was that of contract teaming and hauling. On that day the Blinn Lumber Company requested the Pasadena Transfer Company to furnish a team and driver for the delivery of some lumber. The Pasadena Transfer Company called upon Kirkpatrick to furnish a team and driver to fill this order. Thereupon Kirkpatrick directed McLeod to take his team and do the hauling required. As Kirkpatrick did not have a wagon suitable for hauling lumber, a wagon of the Pasadena Transfer Company was used. While using said wagon and the horses of Kirkpatrick in hauling lumber for the Blinn Lumber Company, the accident occurred which resulted in the death of McLeod. The Southwestern Surety Insurance Company is the insurance carrier for Kirkpatrick and had insured him against liability for compensation for injuries sustained by his employés in connection with his business.

Petitioners' first contention is that at the time of the accident McLeod was not the employé of Kirkpatrick, but was the employé of the Blinn Lumber Company, and that therefore Kirpatrick was not liable for compensation to McLeod or to his dependents. The argument is based upon rules which often have been enforced in cases arising out of injuries to third persons through negligence of employés, and cases arising out of negligence resulting in injuries to employés, wherein it became necessary to determine who was the employer or master responsible for the acts of the servant or liable for injuries to the servant. It has sometimes been held that, where the direct or immediate employer furnishes his servant to a third person to do work of the latter and places the employé under the exclusive control of such third person in the performance of the work, the employé becomes for that particular purpose the servant of him to whom the employé is furnished, with resultant responsibility on the part of the employer whose work is being done. An instance of this kind is shown in Cotter v. Lindgren, 106 Cal. 602, 39 Pac. 950, 46 Am. St. Rep. 255. It was there held that the defendant, who was the first or general employer of the servants whose negligence caused plaintiff's injuries, was not responsible for their negligence, because the work in which the servants were employed was not work of the defendant, and the defendant had not at that time the control or right to control or supervise the conduct of the servants in doing that work.

[1] But even in negligence cases it does not always follow that the general employer is

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freed from responsibility by the mere act of hiring out his employés to third persons to be used by them in the performance of their work. Thus in Stewart v. California Improvement Co., 131 Cal. 125, 63 Pac. 177, 724, 52 L. R. A. 205, the defendant company had employed one Conger as engineer to manage a steam roller owned by it. The steam roller, with the engineer in charge, was hired out by the company to the city of Oakland for use in rolling and leveling a street, such use being under the direction of the superintendent of streets. The plaintiff suffered injuries caused by negligence of the engineer, who carelessly let off steam from the engine without giving warning thereof, thereby frightening the plaintiff's horse. It was held that under the given circumstances the relation of master and servant existed between the defendant company and its engineer, and not between the city of Oakland and said engineer. "Here the city simply hired the use of the street roller outfit from the defendant company—to wit, the roller, engine, and the engineer to manage the same—for so much a day. The city's agent—foreman of the street superintendent—only directed or supervised how and where the street should be rolled; he did not have the control or management of the engine; this was subject entirely to the judgment of the engineer, the servant of the owner, the defendant company, who had selected and employed him for that special purpose, paid him his wages, and had the sole right to discharge him." So here, the Industrial Accident Commission may well have concluded from the evidence that the Blinn Lumber Company simply hired the use of the team and driver to deliver its lumber, without in any way interfering with the control or management of the team by McLeod as servant of Kirkpatrick, who had selected and employed him for that special purpose, who paid him his wages and had the sole right to discharge him. The evidence thus tending to support the Commission's finding of fact to the effect that McLeod at the time of receiving his injuries was in the employ of Kirkpatrick, such findings are final and will not be reviewed in this proceeding, since they present only questions of fact and not of law.

[2] The Workmen's Compensation, Insurance and Safety Act, in sections 13 and 14 thereof, furnishes its own definition of the terms "employer" and "employé." The term "employer" includes every person who has any person in service under any contract of hire, express or implied. The term "employé" includes every person thus in the service of such employer. The decisions in negligence cases such as those above mentioned are not necessarily controlling in cases like the present; for the liability of the employer in this case arises, not from any wrong done by him, but from the statute, which imposes such liability upon persons bearing toward each other the relation of employer and employé as defined in the statute. While this appears to be the first case in this state in which the courts have been called upon to review an award of the Commission for injuries received by an employé hired out by one employer to another, the same questions have been presented under the Workmen's Compensation Acts in other states.

In Dale v. Saunders Bros. (N. Y.) 112 N. E. 571, the award was made to a widow and children for the death of one Frank Dale. The general employer in that case, like Kirkpatrick in this case, was engaged in the teaming business and in hiring out teams with drivers for trucking purposes. Dale was sent with a team to work for one Walsh, by taking sand from Walsh's sand pit and delivering it to his customers. The Court of Appeals, after referring to the rules which we also have mentioned as applied in negligence cases, declared that the question in this case was not one of responsibility for negligent injuries inflicted upon strangers, nor upon an employé; that the doctrine of respondeat superior had no application there, nor were the rules of employers' liability for negligence controlling—and it was held that Dale was working for Saunders Bros. as a teamster; that he was engaged in teaming, not in the operation of a sand pit. In like manner it might be said in the present case that McLeod was engaged in teaming, which was the business of Kirkpatrick, and not in the lumber business, which was the business of the Blinn Lumber Company.

In Rongo v. Waddington & Sons, 87 N. J. Law, 395, 94 Atl. 408, a similar case arose. There the Supreme Court of New Jersey determined that the petitioner, who had been injured in the course of his employment, was the employé of Waddington & Sons, the contracting teamsters, who employed him by the day, and who had let him out for the day to haul sand and other building materials for a third person. In this, as in the New York case, the terms of the statute were not identical with those of the California statute. They are sufficiently alike, however, to indicate the trend of opinion. In the New Jersey case it was determined that the person to whom the team and driver had been furnished by Waddington & Sons could not be held liable as the employer. He "had no direct dealings with the petitioner; he had nothing to say on the question how much wages petitioner should be paid; the only contract that he made was a contract with Waddington for the supply of a team, consisting of a wagon, horses, and driver, for which he paid as a team. There was, of course, ample evidence to justify an award as against Waddington, and this is what we think the court ought to have done."

[3] Petitioners further contend that "Kirkpatrick, not being the immediate employer, would be considered as a principal and in-

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termediate contractor, and would be excluded from liability under subdivision 1 of subdivision 'd,' section 30 of the Workmen's Compensation, Insurance and Safety Act." Even without taking into consideration the effect of section 30 under the construction given to it in Carstens v. Pillsbury, 158 Pac. 218, and Sturdivant v. Pillsbury, 158 Pac. 222, we are of opinion that Kirkpatrick does not occupy any different relation than that of an "immediate employer," as those words are used in said section 30.

Finally, petitioners contend that the act under consideration, so far as it provides or attempts to provide for compensation to others than employés, is unconstitutional. This question has been determined adversely to petitioners' contention, by a recent decision of the Supreme Court. Western Metal Supply Co. v. Pillsbury, 156 Pac. 491.

The award is affirmed.

We concur: JAMES, J.; SHAW, J.

(31 Cal. App. 667)

DELLARINGA v. HOOKER et al. (Civ. 1389.)

(District Court of Appeal, Second District, California. Oct. 12, 1916.)

APPEAL AND ERROR ⊂⊃1133—FAILURE TO OFFER ARGUMENT TO SUSTAIN APPEAL.

In an action to quiet title, where, prior to plaintiff's request for dismissal, a defendant had answered, setting up ownership and asking for an adjudication in his favor, and plaintiff, on appeal from an order made on defendant's motion directing that the order of dismissal entered on plaintiff's request be set aside, being advised of the suggestion of defendant's counsel at the time for oral argument that the controversy had been settled, and that only moot questions were now involved, fails to furnish any stipulation on which to authorize the court to enter order of dismissal, the court will affirm, the record showing no reason why the order should be disturbed, being left without argument offered by plaintiff to sustain his appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4450–4453; Dec. Dig. ⊂⊃1133.]

Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by Luvisa Dellaringa against E. T. Hooker and others. From an order, made on motion of defendant Hooker, directing that an order of dismissal of the action theretofore entered upon the written request of plaintiff's attorneys be set aside, plaintiff appeals. Order affirmed.

W. W. Kaye, Rowen Irwin, and Emmons & Hudson, all of Bakersfield, for appellant. John F. Poole, of Los Angeles, for respondents.

JAMES, J. This appeal was taken from an order of the superior court made on the motion of defendant E. T. Hooker. This order directed that an order of dismissal of the action theretofore entered upon the written request of the attorneys for the plaintiff be set aside. The action was to quiet title, and defendant Hooker had answered prior to the request made for the dismissal of the action, in which answer he set up ownership in the property in controversy and asked for an adjudication to be made in his favor. A clerk's transcript was prepared under the alternative method of appeal, and that is the only document which has been filed in this court. At the time set for oral argument, no counsel for appellant appeared, and counsel for respondent being present stated that the controversy had been settled, and that only moot questions were therefore now involved. However, the appellant, upon being advised of the suggestion made, has failed to furnish any stipulation upon which to authorize the court to enter an order of dismissal. We are left without any argument offered by the appellant to sustain the appeal taken. An examination of the record discloses to our minds no reason why the order of the court should be disturbed.

The order is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(31 Cal. App. 698)

Ex parte DUPES. (Cr. 513.)

(District Court of Appeal, Second District, California. Oct. 17, 1916.)

1. DIVORCE ⊂⊃312 — ACTION — CUSTODY OF CHILDREN—APPEAL—STATUTE.

Code Civ. Proc. §§ 946, 949, provide that the perfection of an appeal stays all further proceedings upon the judgment or order appealed from. Petitioner's husband brought an action for divorce and for the custody of the minor children, and petitioner asked a divorce and custody, and, pending the trial, the court awarded their custody to her, and on findings that the husband was entitled to a divorce, and that petitioner was unfit to have their custody, awarded their custody to him, and, after petitioner's appeal had been perfected, vacated the temporary order and gave their custody to the husband. *Held*, that the appeal stayed all proceedings and deprived the trial court of jurisdiction to make any order pending the appeal, so that its findings, its decree, and its order, awarding custody to the husband, constituted no ground for his asserted right to their custody.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 806; Dec. Dig. ⊂⊃312.]

2. DIVORCE ⊂⊃312—CUSTODY OF CHILDREN—FITNESS—APPEAL.

Pending such appeal a new proceeding involving the same question as determined therein respecting petitioner's fitness to have the custody of minor children could not be based thereon.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 806; Dec. Dig. ⊂⊃312.]

Petition for writ of habeas corpus by Eugenia N. Dupes against T. W. Dupes to secure the custody of petitioner's two minor children. Ordered that the custody of the minors be surrendered and restored to petitioner.

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MacKnight & Fitzgerrell and P. N. Myers, of Los Angeles, for petitioner. Chas. N. Sears and E. J. Emmons, both of Bakersfield, for respondent.

SHAW, J. The facts are as follows: On February 25, 1916, T. W. Dupes filed a complaint in the superior court of Kern county, wherein he prayed for a decree of divorce from Eugenia N. Dupes and the award to him of the care, custody, and control of Janice and Bernard Dupes, minor children of the parties, who, it appears, were at the time living with their mother. By answer and cross-complaint Eugenia N. Dupes asked that she be awarded the decree of divorce and likewise awarded the care and custody of the children; each of said parents alleging the other's unfitness to have control of them. Pending the trial an order was issued to Eugenia N. Dupes requiring her to show cause why an order should not be made awarding the custody of the children to their father, and this matter coming on for hearing, the court, pursuant to stipulation of the parties, on March 6, 1916, made an order, subject to such further order as might be made, awarding the custody of the children to the mother. The case was tried, and on July 22, 1916, the court made findings in said action upon which, as a conclusion of law, it found that T. W. Dupes was entitled to a decree of divorce and that Eugenia N. Dupes was unfit to have the custody and care of the minor children, and awarding their custody to the father. Three days thereafter, to wit, on July 25, 1916, the defendant in said action, Eugenia N. Dupes, perfected an appeal from said interlocutory judgment. After the appeal had been perfected, and on July 26, 1916, the court made an order reciting that whereas, before the hearing of said action upon its merits, to wit, on March 6, 1916, an order had been made awarding the care, custody, and control of said minor children to the defendant Eugenia N. Dupes, and the court, having at the conclusion of the trial of the action found that defendant was not a fit and proper person to have the care of said children, and it having appeared by the evidence introduced that T. W. Dupes was a proper person to whom their care and custody should be awarded, ordered that said temporary order made on the 6th day of March, 1916, be vacated, and the care, custody, and control of said children awarded to their father, T. W. Dupes. Thereafter, on July 31, 1916, the court by an order directed the sheriff of Kern county to take into his custody and deliver to the court said Janice and Bernard Dupes, to be disposed of according to the order of court, and further ordered that a copy of the order so made be delivered to the mother then having possession of the children. The sheriff complied with this order and took from the mother the possession of the children and produced them in court; whereupon, on the same day, to wit, July 31, 1916, the court ordered the sheriff to immediately deliver the children to their father.

By the return made in response to the writ T. W. Dupes bases his right to the custody, care, and control of the minors upon the findings of fact showing petitioner's unfitness to have charge of the children, and upon the interlocutory decree made July 22, 1916, awarding the custody of the children to the plaintiff in said action, and also upon the order of the superior court made after the perfecting of the appeal from said interlocutory decree (and which said order purported to vacate and set aside the order awarding the custody of the children to Eugenia N. Dupes on March 6, 1916), pursuant to which the sheriff was on July 31, 1916, directed to take possession of the children and deliver them to the father.

[1] The effect of the perfecting of an appeal is to stay all further proceedings upon the judgment or order appealed from or matters embraced therein in the court below. Sections 946, 949, Code Civ. Proc. It operates to remove the subject-matter of the adjudication from the jurisdiction of the court below pending the appeal, and suspends the power of that court to enforce its order until the appeal is determined. Ex parte Queirolo, 119 Cal. 635, 51 Pac. 956.

"The effect of the appeal is to remove the subject-matter of the order from the jurisdiction of the lower court, and that court is without power to proceed further as to any matter embraced therein until the appeal is determined." Vosburg v. Vosburg, 137 Cal. 493, 70 Pac. 473.

The fitness of the respective parties as custodians of the children was one of the issues involved in the action and tried by the court, and as to which it found the mother, Eugenia N. Dupes, was not a proper person to have control of the children, that the father was a fit person to whom the control should be awarded, and so ordered.

The mother, however, under and by virtue of the order of March 6th awarding her the custody of the children, had possession of them, and, since the stay of proceedings pending appeal has the legitimate effect of keeping the subject thereof in the condition in which it was when the stay of proceedings was granted (Schwarz v. Superior Court, 111 Cal. 113, 43 Pac. 580), it would seem clear that the decree from which the appeal was perfected should constitute no ground upon which respondent could found his right to the custody of the children. This being true, the order awarding their custody to T. W. Dupes, as embodied in the decree from which the appeal was perfected, left in full force and effect the order of March 6th, under which petitioner was awarded control of the children. Since by perfecting the appeal the subject of the litigation was removed from the lower court, it would seem equally clear that the court was without jurisdiction to make the order of July 31st purporting to vacate and annul the order of March 6th,

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and directing the sheriff to take the children from the mother and deliver them to the father. Our conclusion is that the appeal stayed all proceedings upon the decree and order embraced therein and removed the case from the trial court, thus depriving it of jurisdiction to make any order as to the subject-matter thereof pending the appeal. Hence neither the findings, decree based thereon, nor the order made after the appeal was taken purporting to vacate the order of March 6th constitute any ground for respondent's asserted right to the control and custody of said minors. See Vosburg v. Vosburg, and Ex parte Queirolo, supra.

[2] It is also claimed that petitioner is not a fit and proper person to have the care and control of said minors. Specific acts of neglect of the children occurring prior to the trial and a course of misconduct pursued by petitioner prior thereto are set forth in the return, to prove which numerous affidavits are presented. These affidavits, however, relate to acts of omission and commission on the part of petitioner, as stated, occurring before the trial of the issues involved in the litigation and therein relied upon to show her unfitness. Pending the appeal a new proceeding involving the same question cannot be based thereon.

It is ordered that the custody of said Bernard Dupes and Janice Dupes be by T. W. Dupes, the respondent herein, surrendered and restored to petitioner, Eugenia N. Dupes.

We concur: CONREY, P. J.; JAMES, J.

(31 Cal. App. 673)

KRAMER v. INDUSTRIAL ACC. COMMISSION OF STATE OF CALIFORNIA et al. (Civ. 2088.)

(District Court of Appeal, Second District, California. Oct. 12, 1916.)

MASTER AND SERVANT ⊜361—WORKMEN'S COMPENSATION ACT—INJURY TO "JANITOR"—"HORTICULTURAL LABOR."

Under the Workmen's Compensation Act (St. 1913, p. 284) § 14, excluding from its operation employés engaged in horticultural labor, where a janitor of a dancing hall and dwelling house was injured by stepping on a palm thorn while pruning a fig tree on a lot adjacent to his employer's, used in part for a garage, the servant was not entitled to compensation, as, when injured, he was engaged in "horticultural labor," the labor of caring for grass lawns, trees, shrubbery, and flowers, and not engaged as a "janitor," a person employed to take charge of a building and rooms therein.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⊜361.

For other definitions, see Words and Phrases, First and Second Series, Janitor.]

Proceedings under the Workmen's Compensation Act by Oscar Ohlsson for compensation for personal injuries, opposed by Henry J. Kramer, the employer. There was an award by the Industrial Accident Commission, and to review its action the employer petitions for certiorari. Award set aside and annulled.

Jones & Evans and Gibson, Dunn & Crutcher, all of Los Angeles (Norman S. Sterry, of Los Angeles, of counsel), for petitioner. F. M. Shepard, of Los Angeles, and Christopher M. Bradley, of San Francisco, for respondents.

SHAW, J. Certiorari to review the action of the industrial accident commission in awarding benefits to Oscar Ohlsson, an employé of petitioner Henry J. Kramer.

[1] The findings are, unfortunately, meager in detailing the facts upon which the commission based its conclusion. Such being the case, we may refer to the evidence, not to vary or contradict the findings of fact, but for the purpose of explaining or supplementing the same. Matter of Rheinwald, 168 App. Div. 425, 153 N. Y. Supp. 598. It appears that Ohlsson was an employé of Kramer, who conducted a dancing academy in a building which was also used by him for the purpose of a residence. Adjoining the lot upon which this building stood was a lot, upon the rear of which there was a garage, reached by a driveway from the street, along which there grew some peach and palm trees, the branches of which overhung the driveway, thus interfering with the free use thereof, and some 25 feet from which was a growing fig tree. Kramer did not own this adjoining lot, but was permitted by the owner thereof to use the garage, and Ohlsson had been directed by Kramer to trim the branches of the palm and peach trees which overhung the driveway. On both lots were plots of grass, flowers, trees, and shrubbery. The evidence, without conflict, shows that Ohlsson was employed by Kramer in the capacity of a janitor, the duties of which position were to take charge of the rooms, sweep and dust the same, and in general keep them in order, and also employed as a gardener to look after and care for the grass, flowers, shrubbery, and trees growing upon both lots, and that he performed services in both capacities.

The commission found:

That Ohlsson was injured by accident "while in the employment of * * * Henry J. Kramer as a janitor of a dancing hall and house and garden laborer." (2) "That said accident and injury arose out of and happened in the course of said employment, and occurred while the said employé was performing service growing out of, incidental to, and in the course of his employment, and was as follows: While pruning a fig tree upon a lot adjacent to that occupied by his employer, and in part used by such employer, a garage used by such employer being located thereon, and the driveway thereto on such property having along its border palm and peach trees which applicant had been instructed to trim, applicant stepped upon and was pierced in the ankle by a palm thorn, which occasioned serious disability. That the pruning of such fig tree without specific instructions so to do did not constitute misconduct on the part of the applicant or take him outside the

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scope of his employment, but was such an act as any employé might reasonably perform incidental to the course of his employment."

[2] It thus appears that Ohlsson was employed in a dual capacity; that is, in the capacity of a janitor for a dancing hall and a house and garden laborer. A janitor is defined to be "one who is employed to take care of a public building." As generally understood, the term refers to a person employed to take charge of a building and rooms therein and keep the same clean and in order. Fagan v. Mayor, 84 N. Y. 348. For the purpose of this case we may assume that the employment of a person in such capacity brings him within the operation of the statute. Section 14 of the act excludes from its operation employés engaged in farm, agricultural, or horticultural labor, or in household domestic service. In the light of the evidence we construed the finding that Ohlsson was employed as a house and garden laborer, as referring to household domestic service mentioned in section 14, and the caring for the flowers, grass, trees, and shrubbery growing upon the two lots. In other words, the service performed by Ohlsson as a house laborer consisted of household domestic service, while that performed by him in the capacity of a garden laborer consisted in horticultural labor. Clearly the labor of caring for grass lawns, trees, shrubbery, and flowers is horticultural in character. See definitions of "horticulture" in Standard Dictionary and American Encyclopedia. Ohlsson was thus employed for the performance of services in two capacities: One that of janitor, falling within the terms of the act; the other as a house and garden laborer; employés engaged therein being excluded from its operation. Hence, if the injury sustained by Ohlsson was due to an accident while he was engaged in labor as and under his employment as a gardener, he would not be entitled to the benefits of the act, unless the service was incidental to the work of janitor. The pruning of this fig tree without specific instructions so to do might well be regarded as within the scope of his employment as gardener, since the proper care thereof required such work to be done. It did not, however, interfere with the use of the driveway, and the pruning thereof had no connection with the work of janitor which by any stretch of the imagination could render it incidental thereto. Therefore the conclusion of law as found by the commission that at the time of the injury "the applicant employé was not engaged in any of the occupations or employments excepted by section 14 of the Workmen's Compensation, Insurance, and Safety Act from the provisions of said act" is without support in the facts found. Southern Pacific Co. v. Pillsbury et al., 170 Cal. 782, 151 Pac. 277. The New York Compensation Act does not apply to all employés, but to those only engaged in certain occupations there designated as extrahazardous, while the California act applies to all except those designated as being excluded when engaged in certain work. This being true, the decisions of the New York courts in like cases furnish a rule which we think should be followed in the case at bar. In the case of Gleisner v. Gross, 170 App. Div. 37, 155 N. Y. Supp. 946, a part of the duties of an employé was to operate boilers and elevators, designated as extrahazardous. He had other duties to perform, however, which were not within those so classed by the Legislature, and was injured while performing some of the latter duties. In holding that he was not entitled to recover, the court said:

"Regardless of the contractual or colloquial designation of the duties or position of an injured employé, the question remains in every instance as to the work which he was in fact doing and the extent to which his work came within the category of the enumerated employments. The actuality, rather than the appellation, is the sound basis for the commission's action in determining whether an employé met with mishap in the course of an enumerated employment."

In the case of In re Sickles, 171 App. Div. 108, 156 N. Y. Supp. 864, the defendant was engaged as warehouseman in storing fruit, and also engaged in buying and selling fruits. An employé of the defendant was engaged part of the time in connection with defendant's business as a warehouseman, designated as extrahazardous, and part of the time as a salesman in buying and selling fruit, which latter calling was not within the operation of the statute. He was injured while engaged in the latter business, and it was held that he was not entitled to recover compensation therefor. The court there said:

"The difficulty is that the employer was engaged in two entirely distinct kinds of business, one of which was not within the protection of the statute, and that the claimant was injured in performance of his duties, which at the time of the injury, solely had reference to that kind of business not thus protected."

So, too, where an employé of a common carrier engaged in both intra and inter state transportation is injured, his right to recover under the federal statute will depend upon the character of his service at the time of his injury; that is, if at the time of the injury he was engaged in interstate work, he may recover under federal statute; otherwise his rights are measured by the state law. Illinois C. R. Co. v. Behrens, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163; Colasurdo v. Central R. R. Co. of N. J. (C. C.) 180 Fed. 832; Erie R. Co. v. Jacobus, 221 Fed. 335, 137 C. C. A. 151. Our conclusion is that the injury sustained by Ohlsson arose out of and was in the course of his employment, not as a janitor, but while engaged in garden labor, which is in the nature of and included within the term horticultural labor, for which he is not entitled to the benefit of the act.

The award is therefore set aside and annulled.

We concur: CONREY, P. J.; JAMES, J.

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(31 Cal. App. 664)

DAHNE v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY.

(Civ. 2180.)

(District Court of Appeal, Second District, California. Oct. 12, 1916. Rehearing Denied by Supreme Court Dec. 11, 1916.)

DIVORCE ⊂⊃201—PROCEEDINGS—APPLICATION FOR ALLOWANCE—RIGHT TO PRIOR HEARING.

Where plaintiff in a divorce action alleges that she has been a resident of the state for 1 year and of the county for the 90 days next preceding her action as required by Civ. Code, § 128, and makes the verified assertion that she is without means to prosecute the action, she is entitled to have her application for allowances heard in advance of a motion to dismiss the suit, on the ground that the court has not jurisdiction of either party, as said section does not impose any limitation on jurisdiction.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 591, 592; Dec. Dig. ⊂⊃201.]

Petition for writ of mandate by Louise B. Dahne against the Superior Court of the State of California, in and for the County of San Diego. Peremptory writ of mandate ordered issued.

C. C. Kempley and Holcomb & Kempley, all of San Diego, for petitioner. W. Jefferson Davis, of San Diego, for respondent.

JAMES, J. Petition for mandate to compel the superior court of the county of San Diego to hear and determine the application of Louise B. Dahne made for the purpose of securing to her in a divorce action against Eugenio Dahne an allowance to cover attorney's fees, court costs, and alimony pendente lite. This petitioner filed her complaint in due form in the superior court, alleging, among other things, that she had resided in the state for 1 year and in the county of San Diego for 90 days next preceding the commencement of her action, and further set forth that she was without means or money with which to prosecute the action. The complaint was duly verified. The matter of her application for the allowance referred to first coming on to be heard, the defendant filed a demurrer, alleging among other grounds that the court had no jurisdiction over his person. He also made a motion to quash the service of summons and dismiss the action on the ground that he was not a resident of the state of California, but was a resident of Brazil, and that he was in the state of California for a temporary purpose as representative of the department of agriculture, industry, and commerce of the government of Brazil. The argument is made that the domicile of the husband is in law the domicile of the wife, and that as the defendant was a Brazilian subject and had no intention of remaining permanently in the state, the wife could claim no residence here sufficient to entitle her to bring an action for divorce. We do not understand the law to be that a citizen of a foreign country may not, even under the alleged facts asserted by petitioner's husband, be deemed in a divorce action to have acquired such residence as the Code (Civ. Code, § 128) requires. But that is a matter which need not here be considered. Counsel for the defendant insisted upon the right to have the question of the plaintiff's residence determined in advance of the hearing on the application for an allowance of attorney's fees and costs, and in this contention he was sustained by the trial judge who, as appears from the petition and return herein, has refused to consider the motion for such allowances. On the other hand, the court proposes to proceed in advance of the trial of the case to a hearing of the motion to dismiss the suit and to determine the truth of the allegation of plaintiff's complaint that she has been a resident of the state of California for a period of 1 year and of the county of San Diego for a period of 90 days next preceding the commencement of her action. The question presented is as to whether the plaintiff, this petitioner, in view of her verified assertion that she is without means to live or prosecute the action, is entitled to have her application heard in advance of the trial of the main issues. As appears from the petition, the trial judge is of the opinion that the question of the plaintiff's residence, where challenged, must be first established before any jurisdiction rests in the court to make to her any allowance provided to be made under the provisions of the Civil Code. We cannot agree with the view taken by the learned trial judge on that proposition. In the case of Estate of McNeil, 155 Cal. 333, 100 Pac. 1086, it is said:

"Section 128 of the Civil Code, relative to residence of the plaintiff, does not impose any limitation on the jurisdiction of the superior court in the matter of divorces, but simply prescribes certain facts essential to the making out of a case warranting a divorce, and allegations in regard to residence stand upon the same footing as any other allegation of facts showing the right to a divorce."

Admitting, as we must for the purpose of this motion, that the petitioner is without means to prosecute her divorce action, is to admit that she is without means of meeting the objection raised by the defendant as to one of the material issues in the case. That issue is to be treated as any other issue of fact, and the wife should in a proper case be furnished with funds by her husband in order that she may employ counsel and produce such evidence as may be available to her. To say that she is entitled to have her motion for a preliminary allowance heard by the court before being required to meet the defendant on issues regularly proposed by the complaint is not to say that the court must make such allowance, for that is a matter which the discretion of the trial judge will regulate altogether upon the hearing of

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the motion. But it appears clear to us that the petitioner is entitled to have her application considered in advance of the determination of any question of residence which the defendant has sought to interpose in advance of the trial.

Peremptory writ of mandate is ordered to be issued, requiring respondent superior court to proceed in accordance with the conclusions expressed in this opinion; petitioner to have her costs.

We concur: CONREY, P. J.; SHAW, J.

(31 Cal. App. 678)

HARTNETT v. WILSON et al. (Civ. 2005.)

(District Court of Appeal, Second District, California. Oct. 12, 1916.)

1. GAMING ⊂⊃37 — MARGIN TRANSACTIONS — RECOVERY OF COLLATERAL—CONSTITUTIONAL PROVISIONS.

Under Const. art. 4, § 26, as amended November 3, 1908, whereby contracts for the purchase or sale of corporate stock on margin or for future delivery are unlawful only when made without intention to make actual delivery and when contemplating merely the payment of the difference between the contract prices and the market prices, plaintiff might maintain replevin to recover stock, etc., deposited with a broker as collateral security for any indebtedness accruing from such unlawful transactions.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 74; Dec. Dig. ⊂⊃37.]

2. APPEAL AND ERROR ⊂⊃1050(1)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In such action, where the gaming character of defendant brokers' business was fully brought out, the facts being almost wholly within their knowledge and unknown to the plaintiff, and where a course of transactions had been shown to be the same, and where, if any transaction was of a different character, defendant could have shown it, the admission of plaintiff's statement that after he put up the collateral no stock owned by him had ever been sold by defendants was not prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157; Dec. Dig. ⊂⊃1050(1).]

3. GAMING ⊂⊃49(2)—MARGIN TRANSACTIONS —RECOVERY OF COLLATERAL—EVIDENCE.

Where it did not appear that defendants were members of the New York Stock Exchange or transacted any of the plaintiff's business through that Exchange, and there was no evidence of genuine purchases or sales on plaintiff's account, or any deliveries, objection to a question to defendant's manager as to whether he knew the laws of the New York Stock Exchange in regard to buying and selling stock was properly sustained, since such rules were in no way material to the defense.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 101; Dec. Dig. ⊂⊃49(2).]

4. REPLEVIN ⊂⊃106—DAMAGES—TIME.

In replevin for certificates of stock, etc., deposited by plaintiff as security on his margin transactions with defendant brokerage firm, on the ground that no deliveries were intended by the parties, plaintiff was entitled to the value of the collateral when demand for its delivery was made, and not to its value at the time of its deposit.

[Ed Note.—For other cases, see Replevin, Cent. Dig. §§ 416–423; Dec. Dig. ⊂⊃106.]

5. CONTINUANCE ⊂⊃14(2)—GROUNDS—AMENDMENT OF PLEADING.

Where plaintiff was permitted to amend, without objection, and as to evidentiary matter provable without allegation, the refusal of a continuance on the ground of further time needed to put in the defense and to prove actual purchases was not an abuse of the trial court's discretion.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 100; Dec. Dig. ⊂⊃14(2).]

6. BANKRUPTCY ⊂⊃418(3)—STAY—DISCHARGE IN BANKRUPTCY.

It was no ground for an order staying all proceedings that since the rendition of the judgment appealed from and the time of the appeal defendant had obtained a discharge in bankruptcy, where the defendant about 16 months before the bankruptcy proceeding had given a stay bond with undertaking under Code Civ. Proc. § 943, conditioned to obey the orders of the appellate court upon the appeal, since, while the court might order a stay of execution, plaintiff was entitled to an affirmance, in order that he might recover the property if adjudged to him and prosecute his rights under the bond, since nothing in the bankruptcy proceeding would prevent a return of the property in discharge of any money judgment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 767; Dec. Dig. ⊂⊃418(3).]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Replevin by Patrick J. Hartnett against John C. Wilson and B. A. Wilbrand, copartners doing business under the firm name of J. C. Wilson & Co., and John C. Wilson and B. A. Wilbrand. Judgment for plaintiff, new trial denied, and defendants appeal. Modified and affirmed.

Hartley Shaw, of Los Angeles, for appellants. Arthur Wright, of Los Angeles, for respondent.

CONREY, P. J. This is an action of replevin brought by the plaintiff to recover certain certificates of stock and a certain bond, alleged to be his property, in possession of the defendants and unlawfully detained by them. The defendants were partners doing business under a firm name as stock brokers engaged in the business of buying and selling stocks and bonds on margin and otherwise. The complaint shows that on July 30, 1912, a series of transactions began between the plaintiff and the defendants wherein, as it is alleged, contracts were made between the parties, whereby the plaintiff employed the defendants to purchase for him shares of the capital stock of corporations on margin, without any intention on the part of either of the parties for delivery of the shares sold or bought and without any actual delivery of such shares or any agreement for such delivery. It is alleged that each of said contracts provided that only the difference between the contract price and the market price of said shares on divers days should be paid, and only such difference was ever paid. On the day of trial of this action the complaint was amended so as to show that the transactions included purchases and

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sales by the defendants as principals and included bales of cotton as well as corporation stock.

On several dates, beginning on August 8th, the plaintiff deposited with defendants the certificates and the bond, one at a time until all of them had passed to the possession of defendants. It was alleged that the property was deposited as collateral security for any debt that might accrue from the plaintiff to defendants on account of any loss caused by reason of any contract that plaintiff might make with defendants whereby defendants might purchase of or for or sell to or for plaintiff, on margin without intention to deliver, shares of the capital stock of divers corporations, or bales of cotton; that since said delivery of the certificates and bond plaintiff has entered into divers verbal contracts with defendants whereby the plaintiff sold to or for defendants, and divers other verbal contracts whereby the plaintiff purchased of defendants shares of the capital stock of corporations or bales of cotton on margin; that in each instance and in every case, and as agreed to in each of said contracts, there was no intention either on the part of the plaintiff or on the part of the defendants to deliver by the party selling or to receive by the party purchasing any of said shares or bales of cotton, and no shares of capital stock or bales of cotton were ever delivered by plaintiff to defendants or by defendants to plaintiff, as the case might be, and no agreement was ever made for such delivery or receipt; that each of said contracts provided that only the difference between the contract price and the market price of said shares or bales of cotton on divers days should be paid, and only such difference was ever paid; that said certificates and bond were deposited with the defendants for no other purpose than as so stated. By their answer the defendants raised issues upon the material allegations of the complaint, both as to the ultimate facts and the evidentiary facts thus pleaded, other than as to plaintiff's ownership and deposit of the certificates and bond. The case was tried upon those issues with resulting findings and judgment in favor of plaintiff, awarding to plaintiff possession of each of said certificates and said bond; it being further provided in each instance that, if delivery or return of the property cannot be had, plaintiff should recover the value thereof as stated in the judgment. These values were severally stated, and in the aggregate amounted to $5,017.50. The defendants appealed from the judgment and from an order denying their motion for a new trial.

[1] It is not disputed that the complaint states facts sufficient to entitle the plaintiff to recover. Willcox v. Edwards, 162 Cal. 455, 123 Pac. 276, Ann. Cas. 1913C, 1392; Const. Cal. art. 4, § 26. Appellants also admit that the evidence is sufficient to justify the court in finding that all of the transactions involved were of the character alleged, except those involved in the account of one M. T. Zorn. We are satisfied, however, that the Zorn transaction was like the others. The defendants maintained an office in the city of Los Angeles in which they kept a blackboard for market quotations and maintained a telegraph operator, a manager, a bookkeeper, and agents for soliciting business. One of these agents, Mr. C. H. Marshall, introduced the plaintiff to that place of business and suggested that there was a chance for plaintiff to make some easy money there by buying stock on margin. Upon being informed that plaintiff had never done business of that kind, Marshall compared it to horse racing. He said:

"It is just about the same as making a book. You bet that the stock will either go up or down. If you bet it goes up and it goes up, you win the equivalent of what you bet or what you buy."

The transactions which followed and which are set forth at great length in the record as occurring between the plaintiff and the defendant, were of the nature thus described and nothing else. After the plaintiff had invested few hundred dollars there came a time when he was called upon for more cash to protect his margins, but did not have the money. In lieu of cash the defendants accepted from plaintiff the certificate for ten shares of Northern Pacific Railroad stock as collateral for plaintiff's account. The other deposits were made from time to time under like circumstances.

At the office of defendants the plaintiff was made acquainted with Mr. Zorn. Plaintiff's testimony concerning Zorn is not disputed, and in substance is as follows:

"He had some deals on there in corn, and they were calling him for $200. He asked me if I would give him a loan, or he would lose a whole lot of money, he claimed. I brought this certificate up the next morning, and I told Mr. Marshall to protect this corn."

It is unnecessary to follow this matter through its devious course wherein the Zorn account was manipulated and shifted into plaintiff's name and the deposited shares of stock used for purposes not intended or authorized by the plaintiff. In further discussion of the case we will make no further separate mention of the Zorn transaction.

[2] Appellants next contend that, since the burden was on plaintiff to show the unlawful character of the transactions, and since there were many of those transactions, the court erred in allowing the plaintiff to make this proof in a wholesale manner and by general questions; for, if any of these were lawful transactions and indebtedness arose out of them, defendants were entitled to hold plaintiff's collateral therefor. A great deal of evidence was received covering particular details of the several transactions, including numerous statements in writing made by the defendants. The character of the business

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of the defendants was thus thoroughly exposed to view. The facts as to the manner in which the business was done were almost wholly within the knowledge of the defendants, and were not known to the plaintiff. This is peculiarly true of that portion of these transactions well along toward the end of them, when (the plaintiff then being "ahead of the house") the defendants got the plaintiff drunk for three days, during which time numerous transactions occurred, and then or soon thereafter nearly all of the "losses" occurred whereby they claimed that his collateral had been absorbed. The principal objection made by appellants under this head is to the following question put to the plaintiff by the court:

"Subsequent to the time that you put up these collaterals was there ever any stock you owned sold by them for you in Los Angeles or anywhere else, after you put up these collaterals?"

To which the plaintiff answered, "No, sir." Objection was made that the question was too general and called for the conclusion of the witness. This matter must be considered in the light of occurrences immediately preceding the asking of this question, as shown in several pages of the transcript. Plaintiff's showing of facts had progressed to a point where it was appropriate for the court to intervene for the purpose of shortening the record and saving a large waste of time which would be consumed in proving the details of many transactions of apparently the same character. If any of those transactions were of different character and involved actual and legitimate sales, it would have been an easy matter for the defendants to point out the transactions upon which they relied to protect their claim to these collaterals. But this they did not do, and we are unable to see that the defendants were prejudiced by the ruling of the court.

[3] The defendants called as their witness at the trial one Ellis M. Harris, who on and after November 1, 1912, was the manager of their Los Angeles office, and propounded to him the following question:

"Do you know what the rules of the New York Stock Exchange are in regard to buying and selling stock?"

Objection to this question was sustained, and was properly sustained, unless the rules of that Exchange were in some way material and of benefit to the defendants. Some of the statements of account furnished by the defendants to the plaintiff contained a statement in the following form:

"It is agreed between broker and customer: (1) That all transactions are subject to the rules and customs of the New York Stock Exchange and its clearing house.

There is no evidence that the defendants were members of the New York Stock Exchange, or transacted any of the plaintiff's business through that exchange, and if we may suppose that the rules of the New York Stock Exchange prohibit mere gambling and fictitious transactions that fact would be of no value to the defendants if in truth the transactions between them and the plaintiff were not conducted in accordance with those rules. Neither at the time when the foregoing question was asked of the witness Harris, nor at any other time, was evidence offered tending to show that in any instance there was a genuine purchase by the plaintiff or a genuine sale by him. It is true that, referring to two or three orders received from the plaintiff, Mr. Harris testified that the orders were transmitted to New York, that the orders were executed, and that the cotton mentioned was bought; but there is nothing to show that the word "bought" was used in any other sense than in the multitude of other transactions in which that word was current in the business of defendants. Harris admitted that never in his experience as an employé of the defendants did he know of cotton being actually delivered. As a specific instance: In referring to the last 500 bales of cotton "bought" for the plaintiff (and which previously had been "sold" for him), the amount involved would be about $60,000 and he said:

"We did not get $60,000 from anybody, nor deliver any cotton at all." "Q. Isn't it true that those losses were merely differences between different days of the price of cotton? A. Different prices at which he bought and sold cotton."

He said that the contracts were held by their correspondent in New York, and that he did not know whether plaintiff knew or not that there was any such transaction. Under the circumstances shown by this and by all of the evidence in the case, it is manifest that any rules of the New York Stock Exchange, whatever they might be, could not affect the plaintiff's rights in this case.

[4] Appellants contend that the court erred in its findings as to the value of the property involved. At the trial an attempt was made by the attorneys for the respective parties to agree upon these values. Plaintiff's attorney claimed that he was entitled to the value of the property as of the dates when the certificates and bond were deposited. Defendants' attorney claimed that the value should be taken as of December 17, 1912, the day when plaintiff made his demand for their return to him. As to the latter date, defendants' answer admitted values amounting to only $4,848.75. The answer of defendants had admitted values at the date when the properties were deposited by the plaintiff with the defendants, which admitted values in the aggregate amounted to $5,017.50, or $168.75 more than the values at the time of the demand. The court in its decision adopted the larger figures, proceeding evidently upon the theory that the value should be fixed as of the earlier dates. Appellants now contend that the court's findings as to values are wholly without support in the evidence, because there is no evidence of the value of

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the property at the time of the trial, which they now for the first time contend is the time for which the values should have been fixed. It is provided by Code of Civil Procedure, § 667, that:

"In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention."

As no damages for the detention of the property were allowed, that element need not be considered. It is said that there is only one decision upon this precise point. In Phillips v. Sutherland, 2 Cal. Unreported Cases, 241, 2 Pac. 32, it was held that in an action of this kind, where the judgment is in the alternative, the value of the property should be fixed as of the day of the trial as being nearest to the time when the property would be delivered. Under the stipulations made as above stated, we do not think that the losing party should be allowed on appeal to object for the first time that the findings are wholly unsupported by the evidence. In substance, he conceded that on any theory of the case the values to be found by the court would amount to at least $4,848.75. So far as this matter is concerned, the only relief to which he should be entitled would consist in reducing the amount of the judgment by deducting therefrom the sum of $168.75. This may the more readily be done because, unless controlled by the decision above cited, it is our opinion that the value of the property at the time when demand for its delivery was made is the value which should prevail.

[5] It is contended by appellants that the court erred in refusing to allow a continuance at the close of the evidence presented on behalf of the plaintiff. When the plaintiff presented his amendment to the complaint at the beginning of the trial, the defendants made no objection thereto, but stated that they would desire to have a continuance. The court responded that the plaintiff might introduce his evidence, and that, whenever it became necessary in the interest of fair play to get the defendants' evidence on the transactions in cotton, the court would adjourn the trial of the case for such time as was necessary. After the plaintiff had rested his case, the attorney for appellants stated that, on account of the cotton transaction having been received as part of the evidence, he would want further time before he could finish putting in his defense; that it would be necessary for the defendants to show that the deals in cotton were actually made, and he was not prepared to produce such evidence at that time. He said that the man Marshall was not then in the employment of the defendants, and they had no means of communicating with him, and did not know whether they could find him or not. He said he wanted to prove that the cotton deals were actually carried out on the New York Exchange; that there was a telegraph line from their office to New York, and messages were received in New York about this cotton, and the cotton was bought and sold according to the order and report got back to Los Angeles and given to the plaintiff. Upon suggestion of defendants' attorney that he could put the evidence in the form of an affidavit, the court stated:

"It is not necessary. I am assuming every word you say to be true, and no affidavit is necessary; but I say, assuming all that you have said to be correct, I do not see any reason for a continuance."

The following also occurred:

"The Court: But you don't claim that this man ever owned any cotton in his life, or put up one cent of money as the purchase price of the cotton?

"Defendants' Attorney: It does not make any difference whether he ever owned any cotton in his life or not. The court has stated that it is perfectly legal to make a contract to sell something he hasn't got."

Thereupon, the continuance having been denied, the defendants introduced the testimony of several witnesses. One of them, the witness Harris, manager of the office of defendants, referred to the cotton deals as follows:

"Two or three days after I came to Los Angeles [which would be two or three days after November 1, 1912] I asked Mr. Hartnett for some more money to protect us on some cotton that we were carrying for him. He told me he wouldn't be able to take care of it at that time, and we bought in 500 bales, I think, November 6th, and I told him we would put a stop loss order on the remaining 500 bales at $1,215. I told him it would be bought in when it reached $1,215. He said if it would go up there, it would have to be closed out, if it reached that point before he heard from the east. He made no objections to my closing it out. That is one of the two cotton transactions I spoke of before. The other one is the one we bought in the day I first spoke to him about margin, because he said he didn't have any money, and he would lighten up his load by buying in half his commitments, which was 500 bales. These two days were about five days apart, I think. The day he told me we had better lighten up his load by buying 500 I entered an order to buy 500 bales January cotton at the market. It was bought. The other time there was an order entered with our New York correspondent to buy if it reached a certain point. That was bought too at 1215."

Defendants made no further attempt than as above shown to prove the good faith and reality of their transactions with plaintiff.

Let the statements made by defendants' attorney be treated as a substitute for an affidavit; they nevertheless were not sufficient to require that the court grant a continuance. It was not stated that Mr. Marshall could or would testify to the facts referred to by the attorney, nor that other witnesses upon whom the defendants must rely were not within call on the day of the trial. For aught that appears, the defendants themselves were then in court or at their office in Los Angeles. It may be that books, contracts and other documents were in the hands of the defendants which, together with testimony of defendants or of their bookkeepers and other agents in the city where the case was on trial, would have proved all of the facts covered by the statement made in connection

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with the application for a continuance. Moreover, the allegations of fact introduced into the case by the amendment of the complaint at the day of the trial were all of evidentiary matter which would have been provable in the case without such allegations. This was an action for the recovery of personal property wherein the plaintiff had alleged all the facts necessary to a complaint in that kind of an action, including the facts of ownership by the plaintiff and his right to immediate possession and the wrongful possession by the defendants, the demand for a return of the property, and refusal thereof. The defendants were fully acquainted with the facts upon which the determination of the case must depend and adequately warned of the nature of the plaintiff's claims. Our conclusion is that the refusal of a continuance under the circumstances shown did not constitute an abuse of the discretion vested in the court as to that matter.

[6] In addition to the foregoing matters directly involved in the appeals herein, we are required to consider a motion presented by counsel for appellants whereby they ask for an order staying all proceedings in the action on the ground that since the rendition of the judgment appealed from and since the time of the appeal the defendants have been duly discharged in bankruptcy. The motion is accompanied by a certified copy of an order duly made in the District Court of the United States for the Northern District of California discharging the defendants from all debts and claims provable under the acts of Congress relating to bankruptcy and which existed on the 7th day of November, 1914, when the petition for adjudication of bankruptcy against them was filed, with the usual exceptions, none of which require attention at this time. Respondent in reply to the motion shows that the appeal from the judgment herein was taken and a stay bond filed by appellants on the 16th day of July, 1913, which was about 16 months prior to the commencement of the bankruptcy proceedings; that an undertaking was given as required for a stay of proceedings under section 943, Code of Civil Procedure, and was conditioned that the defendants will obey the orders of the appellate court upon the said appeal. Respondent concedes that this court may appropriately make an order perpetually staying execution as against the appellants themselves, but insists that he is entitled to an affirmance of the judgment in order that he may prosecute his rights under the bond. That he is so entitled, and that an action may be maintained upon such bond, we do not doubt.

Regardless of the suggestion thus made with respect to the existence of a stay bond, we also think that appellants are not on this motion entitled to anything more than is thus conceded to them by counsel for respondent. The principal object of the judgment was to enforce the plaintiff's right to have certain personal property restored to his possession. If that property remains in the possession or under the control of the defendants, it may be redelivered to the plaintiff, in which event the alternative money judgment would be of no consequence. We are not aware of anything in the bankruptcy proceedings which would prevent such return of his property by the defendants to the plaintiff. The respondent is entitled to a determination of this appeal, so that, if the judgment be affirmed, he may recover that property; and since the condition of the bond was that the defendants would obey the order of this court upon the appeal (which upon an affirmance of the judgment would in substance be an order for the return of the property), we see no reason why the respondent is not equally entitled to a determination of the appeal so that if the judgment be affirmed he may assert his rights with respect to that bond. All the protection to which the appellants are entitled by reason of a discharge in bankruptcy will be obtained by them under an order perpetually staying proceedings by execution or otherwise, against them, to realize upon the alternative money judgment which was rendered against them.

The order denying defendants' motion for a new trial is affirmed. The judgment is modified in that portion thereof providing for the amount to be recovered in case a delivery or return of the property cannot be had by substituting for the sum of $1,287.50 the sum of $1,200, and for the sum of $1,270 the sum of $1,250, and for the sum of $1,460 the sum of $1,398.75, and for the aggregate sum of $5,017.50 the sum of $4,848.75. As thus amended, the judgment is affirmed, without prejudice to the right of appellants to apply to the superior court for an order perpetually staying execution as against them, upon those parts of the judgment which provide for recovery by the plaintiff against the defendants of any sum or sums of money in case a delivery or return of the described personal property or any thereof cannot be had.

We concur: JAMES, J.; SHAW, J.

(31 Cal. App. 695)

REHKOPF v. WIRZ et al. (Civ. 1806.)

(District Court of Appeal, Second District, California. Oct. 17, 1916. Rehearing Denied by Supreme Court Dec. 14, 1916.)

1. LANDLORD AND TENANT ⇐195(2)—ABANDONMENT BY TENANT—RELETTING.
Where a tenant abandons the leased property and repudiates the lease, the landlord may accept possession of the property for the benefit of the tenant and relet it.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 792, 793; Dec. Dig. ⇐195(2).]

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2. LANDLORD AND TENANT ⟸195(2)—ABANDONMENT BY TENANT—RELETTING—ACTION FOR DAMAGES.

In such case the landlord may maintain an action for damages for the difference between what he was able in good faith to let the property for, and the amount payable under the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 792, 793; Dec. Dig. ⟸ 195(2).]

3. LANDLORD AND TENANT ⟸110(2)—ABANDONMENT OF PREMISES—ACTION FOR DAMAGES—NOTICE.

A lessor, who on the lessee's abandonment of the leased premises chooses to bring an action for damages, must in some manner inform the lessee that he is accepting possession for his benefit, and not for his own benefit, and, if he takes unqualified possession of the property, he thereby releases the lessee from liability.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 367–369; Dec. Dig. ⟸ 110(2).]

4. LANDLORD AND TENANT ⟸172(1)—SURRENDER—LIABILITY FOR RENT—RELEASE.

A lessor's unqualified taking of possession and his reletting of the premises as owner to new tenants is inconsistent with the continuation of the original lease, and, if done without the lessee's consent, is an eviction which will release the lessee from liability for rent, and, if done pursuant to the lessee's attempted abandonment, it is an acceptance of the surrender releasing the lessee.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 695, 697, 700, 702; Dec. Dig. ⟸ 172(1).]

5. LANDLORD AND TENANT ⟸110(2)—ABANDONMENT BY TENANT—ACTION FOR DAMAGES—RELEASE.

Where the lessee of a ranch informed the lessor that he was going to leave it and left and failed to pay an installment of rent, and the lessor, without any further demand or any information as to his course, took possession and relet the ranch, he had no right of action for damages.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 367–369; Dec. Dig. ⟸ 110(2).]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by A. H. Rehkopf against Joe Wirz and others. Judgment for defendants upon a motion to nonsuit, and plaintiff appeals. Affirmed.

Dan V. Noland and Walter B. Kibbey, both of El Centro, for appellant. McPherrin & Nichols, of Imperial, for respondents.

CONREY, P. J. This is an action whereby the plaintiff seeks to recover damages for breach of the covenants of a written lease of real property. The court having granted defendants' motion for a nonsuit, judgment was entered, from which plaintiff appeals.

The lease was for three years, beginning April 1, 1913. Defendants paid the rent monthly in advance for the period of one year and vacated the premises a few days prior to April 1, 1914. Thereupon the lessor took possession of the premises and advertised for another tenant. During the month of April, 1914, he obtained another tenant to whom he leased the premises for a term of three years, beginning May 1, 1914, and at a rate of rental less than that provided for in the lease which had been made to defendants. Plaintiff claims damages in a sum equal to the difference between the rent which would have been paid under the lease of the defendants and the amount for which he was able to rent the property for the period of the unexpired term of the defendants.

[1, 2] Where a tenant abandons the leased property and repudiates the lease, the landlord may accept possession of the property for the benefit of the tenant and relet the same, and thereupon may maintain an action for damages for the difference between what he was able in good faith to let the property for and the amount provided to be paid under the lease agreement. Bradbury v. Higginson, 162 Cal. 602, 123 Pac. 797.

[3] But a lessor who chooses to follow that course must in some manner give the lessee information that he is accepting such possession for the benefit of the tenant and not in his own right and for his own benefit. If the lessor takes possession of property delivered to him by his tenant and does so unqualifiedly, he thereby releases the tenant. Baker v. Eilers Music Co., 26 Cal. App. 371, 146 Pac. 1056; Welcome v. Hess, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145.

[4] An unqualified taking of possession by the lessor and reletting of the premises by him as owner to new tenants is inconsistent with the continuing force of the original lease. If done without the consent of the tenant to such interference, it is an eviction, and the tenant will be released. If done pursuant to the tenant's attempted abandonment, it is an acceptance of the surrender and likewise releases the tenant.

[5] In this case the plaintiff's testimony presents the facts clearly and without conflict. The defendants informed the plaintiff that they were going to leave the ranch. They did leave, and omitted payment of the installment of rent which, according to the terms of the lease, fell due April 1, 1914. Without making any further demand upon the defendants or in any manner informing them as to the course which he would pursue, the plaintiff took possession and made a new lease of the land as above stated. Upon these facts the plaintiff failed to establish any right of action for the damages claimed by him. In Auer v. Penn, 99 Pa. 370, 44 Am. Rep. 114, it was stated that if the tenant gives up the demised premises, the landlord may re-enter and relet, and that such action on his part raises no presumption of acceptance of a surrender, since it is for the advantage of the tenant that he should do so. Referring to that case and that proposition, the Supreme Court of California in Welcome v. Hess, supra, declared

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that while there are many cases which hold to this view, "the weight of authority and the better reason is the other way." It follows that the evidence in this case, although construed as favorably as possible to the plaintiff, was insufficient to establish his case, and the court was right in granting the nonsuit.

In examining the evidence we have not overlooked the proposed alteration of the lease, which alteration was signed by the lessor and delivered by the lessor to the defendants for their approval, nor the evidence of the circumstances connected with that proposed change in the terms of the lease. The defendants did not sign the proposed supplemental agreement, and it does not appear that any of the things which they did after it was delivered to them amounted to an acceptance or part performance. Throughout the transaction they appear to have acted consistently with the terms of the original lease until the time when they abandoned the premises and thereby offered to surrender the same, which surrender must be deemed to have been accepted by reason of the acts of the plaintiff as above stated.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

(31 Cal. App. 626)

CORSON v. CROCKER et al. (Civ. 1571.)

(District Court of Appeal, Third District, California. Oct. 6, 1916.)

1. WATERS AND WATER COURSES ⟸231—IRRIGATION DISTRICTS — TAX SALES — PRIMA FACIE CASE—STATUTE.

Under St. 1897, p. 271, § 48, providing that the matter recited in the certificate of sale of land for delinquency in paying an assessment of an irrigation district must be recited in the deed, and that the deed, duly acknowledged or proved, is prima facie evidence of certain matters, where plaintiff sued to quiet title, claiming under a sale of land to satisfy a delinquent irrigation assessment, and supported his claim of ownership by proof of a tax deed to the property which contained all the matters recited in the certificate of sale, as required by the statute, being duly acknowledged, plaintiff made a prima facie case, and the burden devolved on defendant to establish her title to the property by a preponderance of the evidence.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. ⟸231.]

2. WATERS AND WATER COURSES ⟸231—TAX SALES—DEFENDANT'S BURDEN OF PROOF.

In suit to quiet title by one claiming under a tax sale of the property by an irrigation district, to satisfy her burden of proof and to establish her title to the property it was requisite that defendant should show some defect in the assessment or other proceedings leading up to the sale, and, finally, to the execution of the tax deed to the purchaser at the sale, fatal to the legality of the sale or deed.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. ⟸231.]

3. WATERS AND WATER COURSES ⟸231—IRRIGATION—ASSESSMENT BY DISTRICT—RESOLUTION OF BOARD—STATUTE.

Under St. 1897, p. 254, authorizing the organization and government of irrigation districts, whether the act of the board of directors of a district in levying an assessment be done by a mere motion or in the form of a resolution is immaterial, so long as it constitutes the action of the board and the proceeding is otherwise properly carried out and duly preserved in the board's records or the books required to be kept for that purpose by sections 34, 39.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. ⟸231.]

4. WATERS AND WATER COURSES ⟸231—IRRIGATION—ASSESSMENT BY DISTRICT—CERTIFICATION OF ASSESSMENT ROLL AND DELINQUENCY LIST—STATUTE.

Under the statute, it was no objection to the validity of a sale of property for unpaid taxes levied by an irrigation district that the assessment roll and delinquent list were not certified, since the statute makes no such requirement, and the governing body of the district was required to take no step not expressly or by necessary implication required.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. ⟸231.]

5. WATERS AND WATER COURSES ⟸231—IRRIGATION—ASSESSMENT—LISTING PROPERTY—STATUTE.

Under St. 1897, p. 254, authorizing organization of irrigation districts, section 35, providing that the assessor must prepare an assessment book with appropriate headings in which must be listed all real property within the district, and in which must be specified in separate columns under the appropriate heading the name of the person to whom the property is assessed, etc., where property sold for nonpayment of taxes by an irrigation district was listed and described in the assessment book of the district, as well as in the delinquent assessment book, under the heading "Description of Property," "Modesto, Bl'k 123, lots 1 to 5, inclusive," the property, situated in the city of Modesto, was properly listed.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. ⟸231.]

6. TAXATION ⟸421(1)—ASSESSMENT—DESIGNATION OF LAND.

If the designation of land in the assessment book is such as to afford the owner the means whereby the land may readily be identified, or does not mislead, or is not calculated to mislead him, it is sufficient.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 720, 733, 735; Dec. Dig. ⟸421(1).]

7. WATERS AND WATER COURSES ⟸231—IRRIGATION — ASSESSMENT — PUBLICATION OF NOTICE OF DELINQUENCY.

In suit to quiet title by plaintiff claiming under tax deed from irrigation district, evidence *held* to support the court's finding that the delinquency notice was published as required by St. 1897, p. 268, § 41.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. ⟸231.]

8. WATERS AND WATER COURSES ⟸231—IRRIGATION—ASSESSMENT—SALE FOR DELINQUENCY—CERTIFICATE—DEED—STATUTE.

Under St. 1897, p. 254, authorizing organization of irrigation districts, section 45, providing that, after receiving the amount of as-

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sessments and costs, the collector must make out in duplicate a certificate, dated on the day of the sale for taxation, etc., where a sale of property in an irrigation district for nonpayment of an assessment was made February 20th and the certificate of sale was dated March 3d, such certificate was not void, as the mere dating of the certificate subsequent to the date of sale is not of material importance.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. ⟸231.]

9. WATERS AND WATER COURSES ⟸231—IRRIGATION — ASSESSMENT — SALE FOR LESS THAN DUE.

Where land in an irrigation district was sold, for nonpayment of an assessment, for $21.92, the actual amount due on the assessment, including its amount and penalties, the property was not sold for less than the total amount actually due because, in computing the amount in the assessment book, the assessor penciled 50 cents in the column entitled, "Amount of tax for semi-annual interest bonds," $1.02 in the column entitled "Amount of tax for redemption of bonds," and $21.92, in the column entitled "Amount of tax for general purposes," amounts which totaled $23.44.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. ⟸231.]

10. APPEAL AND ERROR ⟸843(2)—IMMATERIAL QUESTION.

Where the trial court's judgment could stand on the one finding, with another finding eliminated, it is immaterial whether the latter finding is without support in evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3331; Dec. Dig. ⟸843(2).]

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by R. A. Corson against Charles Crocker and others. From a judgment for plaintiff, defendant Josephine Arata appeals. Affirmed.

F. W. Reeder, of Oakdale, and Charles S. Conner, of Los Angeles, for appellant. E. H. Zion, of Modesto, for respondent.

HART, J. This is an action to quiet title to certain real estate. The plaintiff had judgment, from which this appeal is prosecuted by the defendant Josephine Arata, upon a transcript of the record prepared in pursuance of the provisions of section 953a of the Code of Civil Procedure. The plaintiff claims title under a deed executed by the Modesto irrigation district, a corporation, the property in dispute lying within the boundaries of said district and having been sold on default of the owner in the payment of an assessment levied thereon by the district in the year 1905. The appealing defendant challenges the validity of the sale and deed, and the objection so made presents the only questions involved in the controversy.

The lands in question consist of lots 1, 2, 3, 4, and 5, in block 123, of the city of Modesto, and, as stated, are embraced within the limits of the said irrigation district, and were assessed to the appealing defendant.

The appellant was the daughter of one Giovanni Arata, who died testate on the 22d day of March, 1897. With the mother, and other surviving children of the deceased, she was made a devisee in trust of a certain designated portion of the residue of his estate, of which the lots in dispute constituted a part. The record discloses that the lots in question were, together with lots 6, 7, 8, 9, and 10, in the same block, by the trustee conveyed by deed to one Susan Springsteen, on the 2d day of February, 1903, and that said deed was duly recorded in the office of the county recorder of Stanislaus county on the 15th day of December, 1903. This conveyance appears to have been executed prior to the partition of the residue of the said estate and the assignment to the devisees in trust of their respective interests therein in severalty. But it is further made to appear that a partition suit was subsequently filed in the superior court of Stanislaus county, wherein and whereby the several interests of the parties in the residue of the estate were set off to them in severalty, and that by the decree in said action the appellant was awarded title in fee to the particular lots involved in this controversy.

The above recital is important only because thus it is made to appear that the record shows that legal title to the lots in dispute was, notwithstanding the conveyance to Springsteen, still in the appellant, and that the assessment involved herein was properly made against the lots in the latter's name.

By finding No. 4 the court in effect found that the plaintiff's title was deraigned from the sale of the property for the satisfaction of the assessment above referred to, and further found that for more than five years prior to the commencement of this action he and his predecessors in interest have been in actual, exclusive and continuous possession of said lots, which possession was founded on the "certificate of sale and deed for delinquent irrigation assessment, issued by the Modesto irrigation district, * * * and has himself and his said predecessors in interest paid all taxes and assessments of any kind and description and character levied on or against said property for the said period of five years preceding and immediately prior to the date of the filing of the complaint herein."

By finding No. 5, the court further found:

"Fifth. That the said assessment of the Modesto irrigation district, for the nonpayment of which said premises were sold, was duly and regularly levied according to law, and that the said irrigation district and its officers complied with all the provisions of law prior to and leading up to the sale and the issuance of the certificate hereinbefore referred to, and that thereafter a deed was duly and regularly issued by the Modesto irrigation district conveying to the predecessors in interest of the said plaintiff the said premises, and that all proceedings leading up to said deed were duly and regularly taken, and that the said deed conveyed to and vested in the grantee therein named a good and perfect title to the said premises, free from all claims

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and demands of every character of the defendants, Josephine Arata, Assunta Arata, as trustee, and all persons holding by, through or under them."

The appellant claims that said findings are not supported by the evidence, and thus the objections urged against the legality of the assessment and sale of the property in question are raised. These objections, specifically stated, are: (1) That it does not appear that the board of directors of the said irrigation district had, in proper form, and previously to the levying of the assessment, passed a resolution authorizing the assessment; (2) that the assessment roll and the delinquent list "are not certified"; (3) that "the assessment book and delinquent roll show that this property was not properly listed, being under the head of 'fractional or metes and bounds' rather than under 'city' or 'town' or 'city' or 'town lots'"; (4) that notice of delinquency is shown to have been published for one week only, whereas the statute requires that publication of such notice shall be for two weeks; (5) that the certificate of sale is void because it was dated on a date subsequent to the day upon which the sale was made.

The Modesto irrigation district was organized under the provisions of an act of the Legislature of 1897, entitled:

"An act to provide for the organization and government of irrigation districts, and to provide for the acquisition or construction thereby of works for the irrigation of the lands embraced within such districts, and, also, to provide for the distribution of water for irrigation purposes." Stats. 1897, p. 254 et seq.

Section 43 provides for the sale by the tax collector of the district of all lands within the district upon which assessments duly levied under the act have not been paid. Section 45 provides that:

Upon a sale of real property for delinquent assessments being made the collector, after receiving the amount of the assessments and costs, "must make out in duplicate a certificate, dated on the day of sale, stating (when known) the name of the person assessed, a description of the land sold, the amount paid therefor, that it was sold for assessments, giving the amount and year of the assessment, and specifying the time when the purchaser will be entitled to a deed. The certificate must be signed by the collector, and one copy delivered to the purchaser, and the other filed in the office of the county recorder of the county in which the land is situated."

Section 48 of said act provides:

"The matter recited in the certificate of sale must be recited in the deed, and such deed duly acknowledged or proved is prima facie evidence that: (a) The property was assessed as required by law. (b) The property was equalized as required by law. (c) That the assessments were levied in accordance with law. (d) The assessments were not paid. (e) At a proper time and place the property was sold as prescribed by law and by the proper officer. (f) The property was not redeemed. (g) The person who executed the deed was the proper officer."

[1, 2] The action is, as seen, one to quiet title, in which the plaintiff alleges that he is the owner in fee of the property in dispute. The plaintiff having supported his claim of ownership by proof of a tax deed to the property, said deed containing all the matters recited in the certificate of sale, as required by the statute, and having been duly acknowledged, a prima facie case was thus made by the plaintiff, and the burden was thereupon devolved upon the appellant to establish her title to the property by a preponderance of the evidence. To do this it was requisite that she should show some defect or defects in the assessment or other proceedings leading to the sale and, finally, to the execution of the tax deed to the purchaser at the tax sale, fatal to the legality of the sale or said deed. As before stated, she made an attempt at such showing, but we think without success. The points made against the validity of the assessment we shall consider in the order in which they are above stated.

[3] 1. The act of 1897 authorizing the organization and government of irrigation districts nowhere expressly requires that the levying of an assessment by the board of directors for the purposes of the district shall be by or in the form of a resolution. The law, of course, requires the board of directors to levy an assessment, when necessary; but whether this act be done by a mere motion or in the form of a resolution is immaterial so long as it constitutes the action of the board and the proceeding is otherwise properly carried out and duly preserved in the records of the board or the books required to be kept for that purpose. Sections 34 and 39, Act of 1897, pp. 265, 267.

[4] 2. The reply to the proposition that the the "assessment roll and delinquent list are not certified" is the same as the answer given above to the proposition that the board did not proceed to levy the assessment in the form of a resolution. Counsel have not pointed to any provision of the act in question requiring the assessment roll and delinquent list to be certified by any person or officer of the district, and, after a careful examination of the statute, we have found no such requirement. It ought not to be necessary to suggest that the governing body of the district was required to take no step in the tax proceedings not expressly or by necessary implication required by the statute.

[5, 6] 3. The next objection is that the assessment book and delinquent list disclose that the property was not properly listed. The specific objection is as above stated.

Section 35 of the irrigation act provides, inter alia: That the assessor must prepare an assessment book, with appropriate headings, in which must be listed all real property within the district, in which must be specified, in separate columns, under the appropriate head: (a) The name of the person to whom the property is assessed; * * * (b) land by township, range, section, or fractional section, and when such land is not a congressional division or subdivision, by metes and bounds, or other description

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sufficient to identify it, giving an estimate of the number of acres, locality, and the improvements thereon; (c) city and town lots, naming the city or town, and the number and block, according to the system of numbering in such city or town, and the improvements thereon.

By stipulation of counsel on both sides, the memoranda of the map of the city of Modesto were received in evidence and considered in lieu of the map itself, and from the memoranda so received it appears that the lots in question were delineated on said map and described as lots 1, 2, 3, 4, and 5, in block 123, in said city. It is admitted that that portion of the city of Modesto embracing said lots is included within the boundaries of the Modesto irrigation district. In the assessment book of said district for the year 1905, as well as in the delinquent assessment book of said district for said year, the property in dispute is listed and described as follows, under the heading: "Description of property": "Modesto, Bl'k 123, lots 1 to 5, inclusive." In the assessment book, the assessed value of the property is stated and in the delinquent assessment book the value of said property is given under substantially the same heading.

The description of the property as above shown was in substantial compliance with the requirements of the statute, and it was sufficiently clear and definite to facilitate the ready identification and location of the land by means of the deed itself, and therefore sufficient to apprise the owner that an assessment lien subsisted upon the lots and so enable her to discharge such lien.

If the designation of the land in the assessment book is such as to afford the owner the means whereby the land may readily be identified, or does not mislead or is not calculated to mislead him, it is sufficient. Cooley on Taxation, p. 745; San Gabriel Co. v. Witmer Co., 96 Cal. 635, 29 Pac. 500, 31 Pac. 588, 18 L. R. A. 465, 470; Best v. Wohlford, 144 Cal. 733, 736, 78 Pac. 293; Baird v. Monroe, 150 Cal. 560, 569, 89 Pac. 352. As before suggested in another form of expression, the description of the lots here fully measured up to the test thus stated.

[7] 4. We cannot say that the trial court was not justified in finding, as impliedly it did so find, that the statutory requirement as to the publication of notice of delinquency was complied with. Section 41 of the statute provides that such notice must be published by the collector of the district in a newspaper published in each county in which any portion of the district may lie for the period of two weeks. The record here does not show in what particular newspaper said notice was ordered to be published. One of the attorneys for the appellant, however, was sworn as a witness and testified that he had examined several numbers of the "Weekly News" (presumably a newspaper) and that he had found the notice referred to published in one issue only of said newspaper. This constituted all the showing that was made which tended in any degree to disclose that the notice had not been published as prescribed by the statute; and it was wholly with the trial court to decide whether the showing so made was sufficient to overcome the prima facie showing through proof of the deed that the notice referred to was published as required. If the appellant had shown by clear and direct proof that the "Weekly News" was a newspaper published in Stanislaus county, in which the district is situated, that the notice had been by the collector, within 20 days after the delivery of the assessment book to him by the secretary of the board, given to said newspaper and no other published in said county for publication therein, and that said notice had not been published in said paper for and during the full time prescribed by the statute, there would then have been a sufficient showing of noncompliance with the requirement of the statute in that regard to have overcome the effect of the deed as prima facie proof of the due regularity of all the proceedings leading to the sale and the execution of the deed. It is very clear that no such showing was made by the appellant. Indeed, so far as we are given direct information to the contrary upon the subject by the record the collector might have ordered the publication of the notice in some newspaper published in Stanislaus county other than the "Weekly News," and that the notice was published in accordance with the mandate of the statute upon that subject.

[8] 5. The point that the certificate of sale is void because it was not dated on the day of the sale is without substantial merit. The point has its inspiration in the language of section 45 of the act. It will be recalled that that section reads, in part:

"After receiving the amount of assessments and costs, the collector must make out in duplicate a certificate, dated on the day of the sale, stating," etc.

The sale in this case was made on the 20th day of February, 1906, and the certificate of sale dated the 3d day of March, 1906.

The certificate, it is to be observed, recites that the property may be redeemed from said sale "within twelve months from the date of said purchase, viz. this 20th day of February, 1906, by the person and in the manner as provided by law," etc. Thus (the certificate being in duplicate, one of which to be recorded in the office of the county recorder) the most important object thereof was fully effectuated, viz. the giving of notice to the owner of the date of the sale and of the time when the purchaser will be entitled to a deed upon his (the owner's) default in redeeming the property within the time prescribed by the law and stated in the certificate. It thus must become clearly manifest that the mere dating of the certificate on some day subse-

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quent to the day of the sale is not of material importance. It has so been held. The state of Idaho has a statute which contains a provision as to the dating of the certificate of a tax sale in the precise language of section 45 of the statute here in question. In McGowan v. Elder, 19 Idaho, 153, 113 Pac. 103, the tax sale was had on the 8th of July, 1904, and the certificate of sale was dated July 9, 1904. The Supreme Court of Idaho, replying to an objection to the certificate similar to that urged here, held that the language of its statute regarding the dating of the certificate was merely directory, and held the certificate in that case to be good. And in the recent case of Bruschi v. Cooper, 159 Pac. 728, this court, having a similar proposition before it, cited and approved McGowan v. Elder, supra, in so far as it held the language of the statute as to the dating of the certificate to be directory.

[9] Besides the objections to the assessment proceedings above considered, the point is made that the property was sold for less than the total amount actually due on the assessment. There is no real ground for the support of the point, it being made to appear that certain items which counsel for the appellant have added to the assessment and penalties as computed by the assessor were figured in lead pencil on the face of the assessment book and constituted no part of said book. The explanation, as shown by the record, is as follows: That the delinquent assessment involved herein showed the amount of the assessment to be $20.40, to which were to be added 5 per cent., amounting to $1.02, and costs amounting to 50 cents, making the assessment and penalties total the sum of $21.92; that the assessment book for the year 1905 contained three columns, entitled as follows: the first, "Amount of tax for semiannual interest bonds," second, "Amount of tax for redemption of bonds," and, third, "Amount of tax for general purposes"; that none of said three columns was used in the assessment of the property in question, and the same were blank and vacant; and that, in compiling and preparing said delinquent assessment, the assessor used the assessment book of the irrigation district and, for convenience, "used the said three blank columns for the purpose of computing and determining the amount of costs and five per cent. additional and the total assessment and the penalties," the same as stated, being figured in lead pencil on the face of the assessment book in said three columns. The figures so made appeared as follows: "$.50 in the column entitled, 'Amount of tax for semiannual interest on bonds'; $1.02 in column entitled, 'Amount of tax for redemption of bonds,' and $21.92 in column entitled, 'Amount of tax for general purposes.'" Quite clearly, the addition of the three amounts would make the total assessment $23.44, whereas, as the record unquestionably shows, the actual amount due on the assessment, including the amount of the assessment and the sums of fifty cents and one dollar and two cents, penalties, etc., was $21.92, for which sum the property was sold.

[10] It is further pointed out that the court found (finding 4) that the plaintiff had acquired title to the lots in controversy by adverse possession and that there is no evidence to support said finding. Assuming this to be true, it is also true that the court by its fifth finding found that the plaintiff obtained title to the property by the tax sale and deed, and this finding is sufficient to support the decree quieting plaintiff's title to said property. Finding 4 is further and otherwise criticized, but the judgment could stand secure on the fifth finding with finding 4 entirely eliminated, and it is therefore immaterial whether the last-mentioned finding is or is not justly amenable to the criticism referred to.

We have found nothing in the record which would warrant us in holding that the decree assailed by the appellant is not justified by the facts and the law.

The judgment is, accordingly, affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(31 Cal. App. 689)

RICH et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR MENDOCINO COUNTY et al. (Civ. 1595.)

(District Court of Appeal, Third District, California. Oct. 14, 1916.)

1. JUSTICES OF THE PEACE ⟸159(9) — APPEAL—UNDERTAKING FOR COSTS—STATUTE.

An undertaking with sureties in the sum of $248.70, securing costs on appeal to the superior court from a justice's judgment for $115.35, taxing costs at $8.75, which purported to be given to stay execution, was sufficient as a bond for the payment of costs on appeal under Code Civ. Proc. § 978, providing that an appeal from a justice or police court is not effectual unless an undertaking with sureties be filed in the sum of $100 for the payment of costs on the appeal, and the superior court could not be divested of its jurisdiction, acquired by the filing of the bond, by appellants' failure to file stay bond.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 565; Dec. Dig. ⟸ 159(9).]

2. JUSTICES OF THE PEACE ⟸159(1)—SUPERIOR COURT — DISMISSAL OF APPEAL FOR FAILURE TO FILE UNDERTAKING FOR COSTS —STATUTE.

The superior court has the right and power to pass upon and decide a motion to dismiss an appeal taken from a justice's judgment thereto, and where the motion is based on the ground that the undertaking for costs on appeal required by Code Civ. Proc. § 978, has not been filed, it is the duty of the superior court to dismiss the attempted appeal if such is the fact, since the section makes the filing of the undertaking an essential and indispensable requisite for conferring upon the superior court jurisdic-

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tion to hear and determine an appeal from a justice or police court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 573; Dec. Dig. ⊂⊃ 159(1).]

3. CERTIORARI ⊂⊃28(1) — JURISDICTION — WHERE QUESTION FOR DETERMINATION IS OF JURISDICTION.

The rule that, where a court once obtains jurisdiction of the subject-matter of an action, it then has jurisdiction to decide a question arising therein erroneously as well as correctly, and a jurisdictional writ, as writ of review, does not lie, has no application to a case where the question to be determined is whether the court has legal authority to hear and determine the matter before it, since the rule simply means that when a court has jurisdiction of the subject-matter of the action, and commits error during the course of the trial, or in its final decision, the error is correctible, not through a jurisdictional writ, but solely by appeal.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 41; Dec. Dig. ⊂⊃28(1).]

Petition for writ of review by E. F. Rich and Gertrude Rich against the Superior Court of the State of California in and for the County of Mendocino and the Honorable J. Q. White, Judge thereof, to annul an order dismissing an appeal. Order annulled, set aside, and vacated.

Charles Kasch, of Ukiah, for petitioners.
Frank W. Taft, of Willits, for respondents.

HART, J. One Harvey Carlton, on the 21st day of June, 1916, recovered judgment against the petitioners in the justice's court of Little Lake township, in the county of Mendocino, for the sum of $115.35, together with costs of suit, taxed at $8.75. Thereafter, and within the time allowed by law, the petitioners appealed from said judgment to the superior court in and for the county of Mendocino; said appeal being upon questions of both law and fact. The petitioners in due time filed the following undertaking:

"Whereas, on the 21st day of June, A. D. 1916, a judgment was entered in said justice's court against defendant in favor of plaintiff for $115.35, and costs. Defendant has appealed from said judgment to the superior court of the county of Mendocino; and he wants proceedings stayed pending appeal. Now the undersigned jointly and severally undertake in the sum of $248.70, that, if proceedings be stayed, appellant will pay the amount of the judgment appealed from, and will pay all costs if the appeal be withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in action in the superior court, and will obey any order made by the court therein.

"Dated this 26th day of June, A. D. 1916.

"E. F. Rich.
"Gertrude Rich.
"J. D. Barnwell.
"Louis Bilodeau."

Thereafter the respondent noticed a motion to dismiss the said appeal on the ground that no appeal bond, or deposit in lieu thereof, had been filed for the purposes of the appeal, and that the superior court therefore had failed to acquire jurisdiction of said appeal. Said motion came on for hearing and was heard on the 21st day of August, 1916, and on the 28th day of August, 1916, the respondents herein made and entered an order dismissing said appeal on the ground set forth in the notice of motion and above stated.

The petitioners claim that the undertaking filed by them and above quoted herein was and is legally sufficient to support the appeal, and that therefore the respondents, in ordering the appeal dismissed, exceeded their jurisdiction. The proceeding here is for a writ of review to secure an annulment of the order dismissing said appeal.

Section 978 of the Code of Civil Procedure provides that "an appeal from a justice's or police court is not effectual for any purpose, unless an undertaking be filed with two or more sureties in the sum of one hundred dollars for the payment of the costs on the appeal." The same section provides that, if a stay of proceedings be claimed, there shall be filed a like undertaking, "in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money," etc.

The undertaking in the case involved herein, it will be observed, is for a sum equal to twice the amount of the judgment and the costs, and while it is possible that its sole purpose might have been to effect a stay of proceedings, it obligates the sureties to pay all costs which may accrue by reason of the appeal, if the same be withdrawn or dismissed, or to pay "the amount of any judgment and all costs that may be recovered against him in the action in the superior court," and to "obey any order made by the court therein."

[1] It is clear that the sureties, by their undertaking, bound themselves to pay the costs on appeal, and the bond, being in an amount in excess of $100, is in all respects sufficient for that purpose. Whether it was also sufficient to stay proceedings is wholly immaterial, so far as the appeal is concerned. To perfect his appeal, the statute makes it indispensably necessary for the appealing party to file an undertaking in the sum of $100 for the payment of the costs on appeal, and when this is done, the court to which the appeal is taken acquires jurisdiction thereof, and obviously cannot be divested of such jurisdiction by the mere failure of the appellant to file a stay bond. Nor is its validity as an appeal bond destroyed by the fact that it also purports to be given to stay execution. Edwards v. Superior Court, 159 Cal. 710, 714, 115 Pac. 649; Ward v. Superior Court, 58 Cal. 519; Jones v. Superior Court, 151 Cal. 589, 91 Pac. 505.

The undertaking in the case of Edwards v. Superior Court, supra, contained the following condition, between which and the condition of the undertaking herein involved it

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will readily be perceived no substantial difference exists:

"The condition of the above undertaking is such that * * * the said Edwards and others obtained a judgment * * * before James G. Quinn, justice of the peace of Oakland township, in and for the county of Alameda, state of California, on the 25th day of October, 1909, for $73.20, principal sum, and for $9.50 costs; and whereas the above-bounden F. E. Miller (defendant and appellant) is desirous of appealing from the decision of said justice to the superior court in and for the county of Alameda, and a stay of proceedings is claimed: Now, if the above-bounden shall well and truly pay or cause to be paid, the amount of the said judgment and all costs, and obey any order the said superior court may make therein, if the said appeal be withdrawn or dismissed, or pay the amount of any judgment and all the costs that may be recovered against the said appellant in the said superior court, and obey any order the said court may make therein, then this obligation to be null and void; otherwise to remain in full force and virtue."

Chief Justice Beatty, who prepared the main opinion in that case, among other things, said:

"The latest decision of this court upon that point (Jones v. Superior Court, 151 Cal. 589, 91 Pac. 505) is a conclusive affirmance of the sufficiency of the undertaking under section 978 of the Code of Civil Procedure. It may be doubted whether the decision in that case successfully distinguishes the case of McConky v. Superior Court, 56 Cal. 83, in which section 978 appears to have been differently construed, but if that case was not distinguishable it was certainly overruled, and, I have no doubt, properly overruled, for the construction there given to section 978 was only reached by disregarding the express terms of the statute; i. e., by the substitution of the word 'or' for 'and' with the effect of requiring two undertakings each containing the same condition, where one was amply sufficient for every conceivable purpose, and that in a class of actions where simplicity of procedure and economy are a most important desideratum."

In a concurring opinion the other members of the court said:

"We concur in the order denying a writ, on the ground that the bond is sufficient to confer jurisdiction on the superior court. The undertaking is in more than the sum of $100, and is conditioned for the payment of the costs on the appeal. It thus contains all that is required by section 978 of the Code of Civil Procedure to make the appeal effectual. * * * Whether or not it is effectual to operate as a stay bond is not here involved. We express no opinion on this point, nor do we think it necessary for the decision of this case to question the correctness of McConky v. Superior Court, 56 Cal. 83."

The Edwards Case "is a conclusive affirmance of the sufficiency of the undertaking" in "the present case," under section 978 of the Code of Civil Procedure, as a bond for the payment of costs on appeal. The learned counsel for the respondents argue, however:

"It is elementary that, if a court has jurisdiction to decide a question correctly, it also has jurisdiction to decide it incorrectly, and to hold that a court exceeds its jurisdiction in granting a motion to dismiss would compel us to hold that it exceeds its jurisdiction in denying such motion. Therefore a rule which holds that the superior court exceeds its jurisdiction in either granting or denying a motion must, perforce, hold that the superior court cannot pass upon a motion at all. A litigant could, under such a rule, appeal to the superior court without filing any bond whatever and the superior court would be without jurisdiction to dismiss it."

[2, 3] The reasoning is clearly and wholly fallacious. The superior court has the right and the power to pass upon and decide a motion to dismiss an appeal taken thereto, and where the motion is based upon the ground that the undertaking required by section 978 of the Code of Civil Procedure for the indemnification of the costs accruing by reason of the appeal has not been filed, it is not only within the power, but it is the duty, of the court to dismiss the appeal, or, speaking more accurately, the attempted appeal, since, as stated, the section named makes the filing of such an undertaking one of the essential and, indeed, indispensable requisites for conferring upon such court jurisdiction to hear and determine an appeal thereto from a justice's or police court. The rule that, when a court once obtains jurisdiction of the subject-matter of an action, it then has jurisdiction to decide a question arising therein erroneously as well as correctly, has no application to a case where the very question to be determined is whether the court has the legal authority to hear and determine the matter before it. The rule simply means that when the court has jurisdiction of the subject-matter of the action and makes error during the course of the trial or in its final decision, such error is correctible, not through a jurisdictional writ, but solely by appeal. Obviously, if the trial court is called upon to decide whether it has jurisdicton of the subject-matter of the action and determines the question erroneously, or, having no jurisdiction, nevertheless claims it, it can be prevented from proceeding to exercise the usurped authority or, having exercised it, its action may be annulled and vacated by means of the remedy appropriate thereto.

For the reasons herein given, the order made by the respondents in this proceeding dismissing the appeal by the petitioners herein from the judgment of the justice's court of Little Lake township, Mendocino county, in the action wherein said Harvey Carlton was plaintiff and the said petitioners were defendants, is hereby annulled, set aside and vacated.

We concur: CHIPMAN, P. J.; BURNETT, J.

(62 Colo. 211)

EL PASO COUNTY LAND & FUEL CO. v. HOWELL. (No. 8772.)

(Supreme Court of Colorado. Dec. 4, 1916.)

1. TRIAL ⊂⊃178—MOTION FOR DIRECTED VERDICT.

A motion for a directed verdict, being in effect a demurrer to the evidence, admits the truth of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401–403; Dec. Dig. ⊂⊃178.]

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2. MASTER AND SERVANT ⇐217(1)—MASTER'S LIABILITY—ASSUMPTION OF RISK.

A servant assumes not only such risks as from the nature of the employment as ordinarily conducted he must have known, but also those which the exercise of his opportunities for inspection would have disclosed to him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 574; Dec. Dig. ⇐217 (1).]

3. MASTER AND SERVANT ⇐217(1)—MASTER'S LIABILITY—ASSUMPTION OF RISK—KNOWLEDGE.

A servant to be held to have assumed a risk need not have knowledge of the risk, if it is such that an ordinarily prudent man under the circumstances could by reasonable diligence have discovered it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 574; Dec. Dig. ⇐217 (1).]

4. MASTER AND SERVANT ⇐288(5)—ACTION FOR INJURIES—QUESTION FOR JURY—ASSUMPTION OF RISK.

In a miner's action for injury from tripping on a part of a curtain which lapped and folded on the floor of a mine entry, *held* that, whether plaintiff as an ordinarily prudent man should have noticed that the curtain was too long was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1077; Dec. Dig. ⇐288(5).]

5. MASTER AND SERVANT ⇐288(5)—ACTION FOR INJURY—ASSUMPTION OF RISK—KNOWLEDGE.

Whether plaintiff was bound to recognize that there was danger to him in the length of the curtain, *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1077; Dec. Dig. ⇐288(5).]

6. MASTER AND SERVANT ⇐285(10)—ACTION FOR INJURY—QUESTION FOR JURY—MANNER OF INJURY.

The manner in which he was injured *held* a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1016; Dec. Dig. ⇐285 (10).]

Error to District Court, El Paso County; W. S. Morris, Judge.

Action by Daniel Howell, a minor, by John Howell, next friend, against the El Paso County Land & Fuel Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. L. Holland, of Colorado Springs, for plaintiff in error. Orr, Robinett & Mason, of Colorado Springs, for defendant in error.

TELLER, J. The defendant in error, a minor 20 years of age, brought suit, by his father, against the plaintiff in error to recover damages from an injury which he suffered while in the employ of the latter. Referring to the parties as they were related in the trial court, the plaintiff was employed by the defendant as a driver in a coal mine, and while so employed stepped upon a curtain suspended at the entrance to one of the rooms, was tripped and thrown down, and one knee dislocated. He alleged negligence on the part of the employer in using a curtain which was so long that several inches of it lay upon the floor of the mine, and upon the track over which plaintiff hauled out coal. It was alleged that the entry was on a slight down grade, that it was dark and unlighted; that plaintiff's duties, on this trip, required him to stop his car at the entry and pass through the curtain in order to stop his train and attach another car; and that in alighting from his car for that purpose he was tripped by stepping on that part of the curtain which lapped and folded on the floor of the entry.

The answer denied that defendant was negligent, and alleged contributory negligence on the part of the plaintiff. The jury found for the plaintiff, fixing his damages at $1,000, and judgment was entered on the verdict.

Plaintiff in error contends that its motion for a directed verdict should have been sustained; the ground thereof being that the evidence sustained the defense of assumed risk or contributory negligence, treating both of these defenses as included in the answer.

The argument in favor of this contention is that from the evidence it appears that the plaintiff had been working there for five months with full opportunity to observe the curtain and know of its length. Witnesses who had worked in the mine testified that they had noticed that the curtain lapped on the floor, though the plaintiff asserted that going through on his car he had never observed the length of the curtain. He also testified that usually in getting another car at that entry he stopped and connected the car inside of the curtain, and that he had gone through the curtain on foot, as in this case, but once or twice before.

[1] The motion for a directed verdict, being in effect a demurrer to the evidence, admits the truth of the evidence. The question, then, is this: Does the evidence show, as a matter of law, that plaintiff assumed the risk of injury from the condition of the curtain?

[2] Plaintiff in error, to support its contention, invokes the rule that:

"A servant assumes not only such risks as from the nature of the business, as ordinarily conducted, he must have known, but also those which the exercise of his opportunities for inspection would have disclosed to him."

There is no dispute that such is the law.

[3] It is true, also, that a servant, to be held to have assumed a risk, need not have knowledge of the risk, if it is such that an ordinarily prudent man, under the circumstances, could by reasonable diligence have discovered it.

[4] In this case the plaintiff denies that he knew that the curtain was too long; hence, to affect him with knowledge of the curtain's excessive length, it must be found that an ordinarily prudent man would, under the circumstances of this case, have noticed that the curtain was too long. This is a question

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on which from the evidence fair-minded men might reasonably differ. It was therefore for the jury to determine.

[5] Again, if it were found that knowledge of the curtain's length should be imputed to the plaintiff, there still remains the question whether or not he recognized, or should, under these circumstances, have recognized that there was danger to him in the length of the curtain. The danger was not obvious, and it cannot be said that reasonable men might not draw different conclusions as to plaintiff's duty to recognize that injury to him might result from the length of the curtain. There were, therefore, two questions to be left to the jury, according to the rule as laid down by this court. Rice v. Van Why, 49 Colo. 36, 111 Pac. 599; Williams v. Sleepy Hollow M. Co., 37 Colo. 62, 86 Pac. 337, 7 L. R. A. (N. S.) 1170, 11 Ann. Cas. 111.

[6] There was no error in overruling the motion for a directed verdict. The only other point argued is that there was evidence which contradicted plaintiff's testimony as to the precise manner in which he was injured. If that be true, it was the province of the jury to determine which testimony to accept, and find accordingly.

Finding no error in the record, the judgment is affirmed.

Judgment affirmed.

GABBERT, C. J., and SCOTT, J., concur.

(62 Colo. 206)

BENSON v. GILLESPIE et al., Election Commission of City and County of Denver.

(No. 9087.)

(Supreme Court of Colorado. Dec. 4, 1916.)

ELECTIONS ⇐143—PRIMARY ELECTIONS—NOMINATION—"LEGAL VOTER."

Under Primary Election Law (Laws 1910, p. 24) § 11, giving the right to vote at a primary election to every legal voter, specifying the statutory requirements as to residence, etc., and providing that every such voter shall be properly registered if such registration shall be required for primary elections, and section 26, providing for nomination by certificate and declaring that the section shall be construed so as to give independent candidates for public office opportunity to make their candidacies effective, the right of making nominations is not limited to those only who are registered, and a voter signing a certificate of nomination, adding his place of residence, and making oath that he is a voter within the political division where such nomination is made and has truly stated his residence, is prima facie a "legal voter" entitled to sign such certificate; the provision as to registered voters merely relating to a procedure by which frauds may be prevented and mistake avoided on the day of election.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 121; Dec. Dig. ⇐143.

For other definitions, see Words and Phrases, First and Second Series, Legal Voter.]

Gabbert, C. J., and Garrigues, J., dissenting.

En Banc. Error to District Court, City and County of Denver; John W. Sheafor, Judge.

Petition by John W. Gillespie against Bert Martin and others, constituting the Election Commission of the City and County of Denver, and Horace G. Benson. Certificate of Benson's nomination declared insufficient, and he brings error to review the cause under section 44 of an act concerning elections, approved October 17, 1910. Reversed, and cause remanded, with direction to dismiss.

Charles A. Irwin, Philip Hornbein, and O. N. Hilton, all of Denver, for plaintiff in error. Henry E. May and Samuel D. Crump, both of Denver, for defendants in error.

TELLER, J. This cause is before us for review under the provisions of section 44 of an act concerning elections, approved October 17, 1910 (Laws 1910, p. 42).

The petition filed in the district court represented that the petitioner was the candidate of the Republican party, duly nominated at a primary election, for the office of district attorney for the Second judicial district; that a pretended certificate of nomination of respondent Horace G. Benson for said office of district attorney had been filed with the respondents, the election commission of the city and county of Denver; that said certificate of nomination is signed by only 58 persons who were at the time of such signing registered voters in said district; and that said Benson had filed with said commission his acceptance of said nomination. There were numerous other allegations which we need not now consider.

The prayer of the petition was that said certificate of nomination be ordered stricken from the files of said commission, and that the commission be restrained from placing the name of said Benson on the official ballot as a candidate for said office.

Upon the coming in of the answers, which put in issue the sufficiency of the certificate of nomination, the case was set for trial, and tried to the court.

It appears from the record that the trial court declined to pass upon several of the questions raised, and held the certificate of nomination insufficient on the ground that it was signed by less than 100 registered voters. In other words, the court construed the term "legal voters," as used in the statute under consideration, as meaning registered voters. It was conceded that the certificate was signed by more than 100 legal voters, if that term was not restricted in its meaning to registered voters. Judgment was entered according to the prayer of the petition.

In support of the court's construction of the law it is urged that the right to participate in the nomination of candidates for office, when such nomination is made at a primary election, is, by section 11 of the law in question, confined to registered voters. This it is argued, indicates a purpose on the

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part of the makers of the law to give the right of making nominations to those only who are registered voters.

We do not think such conclusion is justified. The section gives the right to vote at a primary election to "every person possessing the constitutional qualifications of a voter," which qualifications are then named, together with the statutory requirements as to residence in county, city, ward, and precinct, and adds the proviso:

"That every such voter shall also be properly registered, if such registration shall be required by law for primary elections."

When it is remembered that this language is used concerning elections, for the orderly and proper conduct of which registration laws have been passed, it is clear that it does no more than to make the registration laws applicable to primary elections, which this act inaugurated. Such laws do not limit the right of suffrage, or add to the constitutional qualifications of voters, nor could they do so. They merely prescribe a procedure by which frauds may be prevented and mistakes avoided on the day of election. When this purpose is recognized, the requirement that voters at the primary election be registered appears natural and proper.

No such reason exists for making the same requirement of voters who sign a certificate of nomination. The law requires each voter signing such certificate to add to his signature his place of residence, and make oath, by affidavit attached to such certificate, that he is a voter within the political division for which such nomination is made; that he has truly stated his residence, and has not voted at any primary election to nominate a candidate for such office.

This makes a prima facie showing that the signer is a legal voter, and is all that the occasion requires. Such an affidavit establishes a voter's qualifications in all essential particulars as well as does registration. If the theory of the petitioner is correct, valid signatures, under the last-quoted provision of the law, are those only of persons who, though registered, have not voted at the primary. This would greatly limit the number who might aid in the promotion of independent candidacies, which, as we shall see, the law favors.

Under the title In re Herman, 96 N. Y. Supp. 144 (108 App. Div. 335), the Supreme Court of New York, Appellate Division, passed upon this question. In the opinion it is said:

"Objection is also made that the signers upon some of the petitions are not registered voters. I do not think it was the intention of the statute to require that an elector or voter should be registered in order to join in a certificate of independent nomination. And while the words 'voter' and 'legally qualified voter or elector' are used in different places, it may be fairly said to embrace a legally qualified voter. Without necessarily including his registry at the particular election, he must be legally qualified as an elector or voter at general and special elections within his district. But if he should neglect to register, and does not think that that is a qualification of an elector as used in the Constitution and fundamental statute of the state, and unless it would clearly appear that a statute regulating the conduct of elections intended to go to the disqualification of any particular elector or class of electors, such regulation ought not to limit the constitutional right of a voter. The statute was intended for the orderly conduct of elections, and not for the purpose of preventing citizens discharging their ordinary duties. It should be so construed as to permit such voters and electors as are recognized by the Constitution to take part in all the preliminaries of an election, and it is not necessary that he should declare his intention to vote at the election, or that he should actually intend to vote. It follows, therefore, that the objection to those signers that were not registered is not well taken."

The Oregon Constitution provides that a named percentage of "legal voters" may propose an initiative measure. An ordinance of the city of Portland provided that the signatures on a petition to initiate a local measure should be verified by reference to the registration books. This requirement was held to be "an unwarranted restriction of the right to exercise the initiative power, guaranteed by the Constitution to legal voters." Woodward v. Barbur, 59 Or. 70, 116 Pac. 101.

It is said, however, that a later Oregon case, State v. Billups, 63 Or. 277, 127 Pac. 686, 48 L. R. A. (N. S.) 308, holds to the contrary. Such is not the fact. In that case there was involved the sufficiency of a petition for an election on the question of making the local option law apply to a specified district. It was contended that the order was insufficient because the county court found that the petition was signed by a stated number of "legal voters," and not by registered voters as by law provided. The court held merely that the term "legal voters" did not indicate that the signers were not registered voters.

The closing paragraph of section 26 of this act, the section which provides for nomination by a certificate, is as follows:

"This section shall be liberally construed, so as to give independent candidates for public office every reasonable opportunity to make their candidacy effective."

To give to the term "legal voters" a restricted meaning, unless clearly required by the terms of the statute, would be to ignore this mandate of the law, and make it unnecessarily difficult for candidates "to make their candidacy effective."

The judgment is without support either in principle or precedent. It is therefore reversed, and the cause remanded, with directions to dismiss.

Judgment reversed.

GABBERT, C. J., and GARRIGUES, J., dissent.

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(62 Colo. 214)

CREDIT MEN'S ADJUSTMENT CO. v. VICKERY et al. (No. 8672.)

(Supreme Court of Colorado. Dec. 4, 1916.)

1. LIMITATION OF ACTIONS ⟸35(3) — LIABILITY OF DIRECTORS—REMEDIAL OR PENAL STATUTE.

Laws 1911, p. 259, requiring corporations to file annual reports as to specified matters, and providing that the directors of any corporation failing to file such report shall be jointly and severally and individually liable for all debts of the corporation contracted during the year next preceding the time when such report should have been filed, and shall also be subject to a fine recoverable before any court of competent jurisdiction, is, broadly speaking, penal in character within the statute of limitations, and for the purpose of determining the director's liability is, as to them, in the nature of a penalty; but, when the facts bring the case against the directors directly within the statute, it affords relief to creditors, and as to them is remedial in character, affording relief by way of compensation, which may be summed up in a judgment against them.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 162; Dec. Dig. ⟸35(3).]

2. CONSTITUTIONAL LAW ⟸165—OBLIGATION OF CONTRACT — CORPORATION — PENALTY AGAINST DIRECTORS.

Such law is so far penal in its nature that it may be repealed without impairing the obligation of contracts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 460; Dec. Dig. ⟸165.]

3. STATUTES ⟸241(2) — PENAL STATUTE — STRICT CONSTRUCTION.

Such statute in so far as it is penal in its nature is to be strictly construed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 323; Dec. Dig. ⟸241(2).]

4. STATUTES ⟸236 — REMEDIAL STATUTE — LIBERAL CONSTRUCTION.

Such statute in so far as it is remedial is to be liberally construed in its enforcement.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 317, 324, 325; Dec. Dig. ⟸236.]

5. CORPORATIONS ⟸341 — FAILURE TO FILE REPORT—LIABILITY OF DIRECTORS—RIGHT OF ASSIGNEE.

Such statute being remedial in character and compensatory as to creditors, the liability of the directors to them can be enforced by their assignee as a creditor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1479–1484; Dec. Dig. ⟸341.]

Error to District Court, City and County of Denver; William D. Wright, Judge.

Action by the Credit Men's Adjustment Company against Albion K. Vickery and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

The Colorado Chalmers Motor Company, a Colorado corporation, of which defendants in error are the directors, failed to file its annual report as provided by law. Eight of its creditors assigned their claims to the adjustment company, plaintiff in error, which brought this action to enforce payment of the debts under the statute making the directors liable personally for all the debts of the corporation for their failure to file the report. There are no disputed facts. The correctness of all the claims is admitted, and it is conceded the directors would have been liable had actions been brought by the original creditors. The only question is whether an assignee of creditors of a corporation is entitled to pursue the remedial right to enforce the personal liability of the directors under the statute relating to the filing of annual reports. The court below held plaintiff could not maintain the action for the reason that the right, being one to enforce a penalty, was not assignable. We are asked to review this ruling.

Everett Owens and George B. Struby, both of Denver, for plaintiff in error. Bardwell, Hecox, McComb & Means and Horace C. Skillman, all of Denver, for defendants in error.

GARRIGUES, J. (after stating the facts as above). Chapter 102, Laws of 1911, after stating that corporations shall file annual reports and specifying what they shall contain, at page 259, provides:

"And if any such corporation, joint-stock company, or association shall fail, refuse or omit to file the annual report aforesaid, and to pay the fee prescribed therefor, within the time above prescribed, all the officers and directors of said corporation shall be jointly and severally and individually liable for all debts of such corporation, joint-stock company or association that shall be contracted during the year next preceding the time when such report should by this section have been made and filed, and until such report shall be made and filed. And as a further penalty for such failure, refusal or omission of the president and secretary of such corporation, joint-stock company or association to comply with the conditions of this law, they shall be subject to a fine of not less than one thousand dollars to be recovered before any court of competent jurisdiction."

It is the contention of defendants in error that the action is to collect a penalty given by statute to original creditors and that the right to recover a penalty cannot be assigned; that the assignment to plaintiff of the claims did not carry with it the right to enforce the statute against the directors making them personally liable for all the debts of the corporation; that though the original creditors could enforce the collection of their claims against the directors, as a penalty, for their failure to file the annual report, the assignee of the claims secured no such right because the right to collect a penalty cannot be assigned.

[1, 2] 1. This kind of a statute, imposing a liability on directors for the debts of a corporation for failure to file a report, is, broadly speaking, penal in character, although not such in the strict sense of that term. It may be repealed without impairing the obligation of contracts. Within the statute of limitations, and for the purpose of determining the liability of directors, it is as to them in the nature of a penalty; but, when the facts bring the case against the directors

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clearly within the statute, it affords relief to creditors and, as to them, is remedial in character. The courts of this state have often considered the statute from the side affecting directors and as to them uniformly held it to be penal in its nature. Here the directors' liability is admitted, and we are now confronted with the question which requires a consideration of the statute from the viewpoint of creditors in enforcing the liability. The dominant idea of the statute no doubt is to secure an enforcement of the law by making directors personally liable for the debts of the corporation if they neglect to file the report. But at the same time it affords creditors relief by way of compensation, which may be summed up in a judgment against the directors. In Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, it is said:

"Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American Constitutions, the executive of the state has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.

"As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the private suit of the creditor only, measured by the amount of his debt, it is as to him clearly remedial."

[3, 4] In some respects the statute is penal, while in others it is remedial in character; penal in its nature as to the directors for the purpose of determining their liability, and to be strictly construed. When the liability is clearly shown, it is remedial in character as to creditors and to be liberally construed in its enforcement. Nickerson v. Wheeler, 118 Mass. 295; Marathon Bank v. Jones, 30 Neb. 798, 47 N. W. 208, 10 L. R. A. 658; Cady v. Sanford, 53 Vt. 632; Nebraska Bank v. Walsh, 68 Ark. 433, 59 S. W. 952, 82 Am. St. Rep. 301; Machinery Co. v. Smith, 87 Kan. 331, 124 Pac. 414, 41 L. R. A. (N. S.) 379, Ann. Cas. 1913E, 243; Kilton v. Prov. Tool Co., 22 R. I. 605, 48 Atl. 1039.

[5] 2. Having determined that the statute is remedial in character and compensatory as to creditors, the next question is: Can plaintiff, as assignee of creditors, enforce the liability against directors? There are no conditions, restrictions, or exemptions in the statute making directors liable who fail to file annual reports. It says they shall be liable for all debts. When these claims were assigned to plaintiff, it became a creditor by virtue of its ownership of debts against the corporation. The debts and the remedial right to collect them from the directors go together. Plaintiff had its own right of action under the statute for the recovery of these debts from the directors, not an assigned right of action to collect a penalty. This right it possessed, not by reason of the assignment of a penalty—except in the sense that the remedial right to sue for the penalty passed to plaintiff as an incident to the assignment of the debts—but because the statute which makes the directors liable for all the debts gives it that right.

We are of the opinion that plaintiff as assignee is entitled to maintain this action as a creditor, against the directors, for the recovery of the corporate debts held by it, under the statute imposing liability upon directors. Boynton v. Sprague, 100 App. Div. 443, 91 N. Y. Supp. 839; Pier v. George, 86 N. Y. 613; Cornell v. Roach, 101 N. Y. 373, 5 N. E. 52; Davis v. Mills (C. C.) 99 Fed. 39. The following cases are also cited with reference to statutes making individuals liable for corporate debts in certain contingencies: Winchester v. Howard, 136 Cal. 432, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153; Came v. Brigham, 39 Me. 35.

The judgment is reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

GABBERT, C. J., and SCOTT, J., concur.

(62 Colo. 219)

SOMMER v. UNKNOWN HEIRS OF HAHN.

(No. 79481.)

(Supreme Court of Colorado. Dec. 4, 1916.)

1. APPEARANCE ⇐9(7) — GENERAL APPEARANCE—MOTION TO DISMISS.

In an action in attachment a motion by one defendant to dissolve the attachment and dismiss the action constituted a general appearance of that defendant.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 51; Dec. Dig. ⇐9(7).]

2. DISMISSAL AND NONSUIT ⇐73—MOTION—DETERMINATION.

In an action of attachment to recover an agent's commission on the sale of lands in which one defendant filed a motion, containing a formal entry of appearance, to dissolve the attachment and dismiss the action as to himself, on the ground that he was not indebted to plaintiff, a judgment dismissing the action as to both defendants was error, as the other defendant had filed no motion or appearance.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 167, 168; Dec. Dig. ⇐73.]

Error to District Court, Lincoln County; W. S. Morris, Judge.

Action in attachment by Herman Sommer against the unknown heirs of A. G. Hahn, deceased, substituted for A. G. Hahn and another. From a judgment dissolving the attachment and dismissing the action, plaintiff brings error. Reversed.

Frank McDonough, Sr., and Frank McDonough, Jr., both of Denver, for plaintiff in error.

TELLER, J. Plaintiff in error began an action in attachment against the defendants,

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the writ issued and levy was made on lands in Lincoln county, on July 12, 1911. The action was to recover an agent's commission on the sale of lands. On September 7, 1912, defendant Brown filed a motion to dissolve the attachment on the ground that he was not indebted to the plaintiff. The motion was supported by an affidavit of Brown that he was not indebted to the plaintiff, and by an affidavit of defendant Hahn in which he stated that he was one of the defendants in the action, that there was nothing more due plaintiff till a further payment was made on the purchase price, and that defendant Brown was not a party to the contract for a commission to plaintiff, and owed him nothing. Notice of this motion was served upon plaintiff's attorneys, which notice contained a formal entry of appearance by Brown.

October 12, 1912, the motion to dissolve the attachment was sustained, and the action dismissed. A motion to reinstate was overruled. This action of the court in dismissing the case is assigned as error.

Plaintiff in error contends: (1) That the motion to dismiss was in effect an answer, the only ground thereof being that defendant did not owe plaintiff, and that the filing of the motion constituted a general appearance; and (2) that, the motion being only to dismiss as to Brown, the court had no right to dismiss as to Hahn, who had filed no motion.

It should be observed that the order of dismissal recites the appearance of Brown, by his attorney, and that the motion was filed by Brown, no mention being made of Hahn.

[1] In Everett v. Wilson, 34 Colo. 476, 83 Pac. 211, it is held that a motion to dissolve an attachment and dismiss the action constitutes a general appearance. This is decisive of the case as to Brown.

[2] The court then appears to have dismissed the cause because he found that defendant Brown was not indebted to the plaintiff; in other words, the cause was tried on an issue made by the motion. This was error. A cause cannot be so tried.

The judgment is therefore reversed.

Judgment reversed.

WHITE and HILL, JJ., concur.

(62 Colo. 220)

DUNCAN et al. v. GUILLET et al.

(No. 8664.)

(Supreme Court of Colorado. Nov. 6, 1916.)

1. ASSIGNMENT ⇐41—DIRECTION FOR DELIVERY OF CHECKS—"ASSIGNMENT."

A letter from the contractor for the construction of a road in a national park to the Secretary of the Interior, directing the latter to send checks to the contractor in care of one who had furnished supplies to the contractor, does not, as against the sureties on the contractor's bond, amount to an assignment even if accompanied by an oral agreement to indorse the checks to the materialmen when received, since an assignment requires that there should be a complete and present right to the fund conferred on the assignee, not depending on any future acts of the assignor to make it effective.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 76, 77; Dec. Dig. ⇐41.

For other definitions, see Words and Phrases, First and Second Series, Assignment.]

2. SUBROGATION ⇐7(2)—RIGHTS OF SURETY—PRIORITY.

The sureties on the bond of a government contractor, who complete the work after the default of their principal, are entitled to be subrogated to the right of the government to apply the entire contract price to the completion of the work if necessary, which right relates back to the date of the bond and is superior to an assignment by the contractor to one who furnished him supplies.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 18; Dec. Dig. ⇐7(2).]

Error to District Court, Montezuma County; W. N. Searcy, Judge.

Action by P. T. Guillet and another, copartners doing business under the firm name of Guillet Bros., against John T. Duncan and others. Judgment for the plaintiffs, and defendant Duncan and another bring error. Reversed and remanded, with directions.

W. F. Mowry, of Cortez, for plaintiffs in error. H. M. Hogg, of Cortez, for defendants in error.

TELLER, J. The defendants in error were plaintiffs below in an action against plaintiffs in error, with one Lewis E. Perkins, and several other parties who are not concerned in this review. Said Perkins and his brother, now deceased, entered into a contract with the United States for the construction of a road across a national park. The plaintiffs in error became sureties on the bond of Perkins Bros. for the fulfillment of their contract with the government. In February, 1913, Perkins Bros. arranged with the Guillet Bros. for a credit on the purchase of supplies, while carrying out their contract. As a part of that agreement, they addressed the following letter to the Secretary of the Interior, under date of February 20, 1913:

"You are hereby requested to send all checks due the undersigned, or issued to them in payment of monies due them for work and material done and furnished by them in the construction and repair of that certain road to and across the Mesa Verde National Park in Montezuma county, Colorado, under that certain contract therefor with Louis C. Laylin, Assistant Secretary of Interior, in care of Guillet Brothers, at Cortez, Colorado, and this shall be your authority therefor. Elmer W. Perkins, Lewis E. Perkins doing business under the firm name and style of Perkins Brothers."

This letter is the basis of the action, the plaintiffs regarding it as an assignment of the fund. They allege that the sureties had knowledge of the assignment. This the sureties deny. They plead as a defense a contract, under date of June 21st, whereby the plaintiffs were required to pay all labor bills before they could apply any of the funds, to be paid them, to their own account. The

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replication alleges fraud in the making of that agreement, and that it was canceled by consent of the parties to it. A day or two after the making of the contract above mentioned, the plaintiffs refused to give Perkins Bros. further credit, and the latter quit work on the road. Plaintiffs in error, on the abandonment of the work by Perkins Bros., took charge of it, and Lewis Perkins thereupon countermanded the order of February 20th. When the sureties had completed the work, the government paid them the balance, less 20 per cent., and less, also, a deduction of $105 for a defect in the work. The action is for the purpose of recovering from Perkins Bros. and the sureties all indebtedness arising from the furnishing of supplies; the plaintiffs claiming to have a lien upon the fund, due to the contractors from the government, by virtue of the order of February 20, 1913. Judgment was rendered in favor of the plaintiffs against Perkins Bros. in the sum of $1,508.40, and against the plaintiffs in error in the sum of $1,255.56, any collection on it to be applied upon the judgment against Perkins Bros.

It appears in evidence that the sureties received a payment from the government of $1,280, upon the estimate furnished for the work done by Perkins Bros., and a payment of $2,560 for the work done by themselves.

The abstract is unsatisfactory, in that it does not contain the evidence on some points discussed in the briefs. If either counsel desired this court to consider matters which are in the record and not in the abstract, he should have seen to it that they were before us in printed form.

[1] The letter of February 20th to the Secretary of the Interior does not, as against the sureties, constitute an assignment. It will be observed that it provides merely for the sending of the checks to Perkins Bros., in care of the Guillet Bros. If, as it is contended, there was an oral agreement by Perkins Bros. to indorse the checks to Guillet Bros., it still falls short of being an assignment. In Silent Friend Mining Co. v. Abbot, 7 Colo. App. 76, 42 Pac. 318, eminent authorities are cited for the holding that:

"In order to constitute an assignment, either in law or equity, there should be such an actual or constructive appropriation of the subject-matter assigned, as to confer a complete and present right on the assignee, even where the circumstances do not admit of its immediate exercise. A covenant on the part of the debtor, to apply a particular fund in payment of the debt as soon as he receives it, will not operate as an assignment, for it does not give the covenantee a right to the funds, save through the covenantor, and looks to a future act on his part as the means of rendering it effectual. * * * The phraseology employed is not material provided the intention to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund—any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee."

The oral agreement, as stated in the record, is simply to indorse over to Guillet Bros. checks payable to the order of Perkins Bros. The latter could repudiate that agreement, leaving the other parties to their action for damages. Guillet Bros. had a right to the fund only through a future act on the part of Perkins Bros., and that is the fact which, under the authorities cited, prevents the order and the oral agreement from being an assignment. If it is not an assignment, the fund was not affected, and there was no right to pursue it into the hands of the sureties. The complaint, by alleging that the sureties had notice of the assignment, seems to recognize that such notice was necessary to the right of recovery from them. The denial of notice made it necessary for plaintiffs to prove it, if they depended on it as a part of their case. This they did not do. There is no evidence that either of the sureties had any knowledge of the credit given to Perkins Bros., or of the order of February 20th.

[2] Were that order an equitable assignment, the sureties' right to the fund, under the authorities, would still be superior to that of Guillet Bros. Their right relates back to the date of the bond, which was prior to the giving of the order.

In the case of Prairie State Bank v. United States, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412, a somewhat similar case was presented. Sundberg & Co., under contract with the government to build a custom house, borrowed money of the bank in question, giving it authority to receive from the United States the final payment under the contract. The Acting Secretary of the Treasury declined to recognize such authority, but expressed a willingness to forward a check for such payment to the address of the bank's representative. Some time later, Sundberg & Co., defaulted, and the surety, without any knowledge of the alleged rights of the bank, assumed the completion of the contract. The action concerned the percentage retained by the government under the contract. The bank asserted an equitable lien as of the date when the agreement for sending the funds to the bank's representative was made. The surety claimed that his right related back to the date of the bond. The court said that "Hitchcock, as surety under the original contract, was entitled to assert the equitable doctrine of subrogation is elementary," and held that the surety's right of subrogation related back to the date of the original contract, and that he was subrogated to the rights which the United States might have asserted against the fund. The court further pointed out that any agreement, such as was made with the bank, if it gave a lien on the fund, would necessarily operate to impair rights acquired by the sureties under the original contract. The court therefore held that the rights of the contractors in the fund were subordinate to those of the United States and the sureties.

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"The rule is that, as soon as the surety pays the debt of his principal, there arises in his favor an equity to be subrogated to all the rights, remedies, and securities of the creditor, and has the right to enforce them against the principal for the purpose of his indemnification." Hill v. King, 48 Ohio St. 75, 26 N. E. 988.

Here the government could have appropriated to the completion of the work the entire fund, if necessary to pay therefor, and the sureties were subrogated to that right. Unless, then, it be made to appear that they have collected on said contract more than enough to pay all the liabilities under it, there is no right of recovery against them. Such does not appear to be the case.

The judgment is, accordingly, reversed and remanded, with directions for such further proceedings as are in harmony herewith.

Judgment reversed.

WHITE and HILL, JJ., concur.

(62 Colo. 167)

MULFORD v. FARMERS' RESERVOIR & IRRIGATION CO. (No. 8468.)

(Supreme Court of Colorado. June 5, 1916. Rehearing Denied Dec. 4, 1916.)

1. EMINENT DOMAIN ⟸262(1)—APPEAL—SCOPE OF REVIEW—CONSTITUTIONAL QUESTION.

Whether order for immediate possession in favor of the company bringing eminent domain proceedings in accordance with Rev. St. 1908, § 2456, was unconstitutional as depriving the respondent of his property without due process of law is not a question for review on writ of error to the final judgment of condemnation, since, even if such interlocutory order was erroneous, it would not justify a reversal of final judgment, unless it prejudicially affected substantial rights on the merits of the case.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 681, 684; Dec. Dig. ⟸262(1).]

2. EMINENT DOMAIN ⟸191(7)—PETITION—SUFFICIENCY.

In a proceeding to condemn right of way for irrigation ditches under Rev. St. 1908, § 3171, providing that, if necessary to convey water for irrigation across another's land, the shortest and most direct route practicable shall be selected, and section 2416, stating the requisites of a petition in eminent domain, the petition need not contain the averment that the route sought to be established was the shortest and most direct practicable; such allegation going to the necessity, and not to the jurisdiction.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 516; Dec. Dig. ⟸191(7).]

3. EMINENT DOMAIN ⟸171—TRIAL—EXCEPTIONS.

In such case, if in fact the proposed line was not the shortest and most direct route practicable, defendant should have had such question disposed of in limine, but by submitting the case to the jury on the issue of damages he waived further consideration of such question.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 468, 469; Dec. Dig. ⟸171.]

4. EMINENT DOMAIN ⟸136—DAMAGES—HOW ASCERTAINED.

Under Rev. St. 1908, § 2431, as to measure of damages in eminent domain proceedings, the respondent whose land is condemned for right of way of an irrigation ditch is entitled to damages based on the market value of the land taken at the time of trial.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 363–366; Dec. Dig. ⟸136.]

5. EMINENT DOMAIN ⟸112, 136—DAMAGES—HOW ASCERTAINED.

All damages present or prospective which are the natural, necessary, or reasonable results of the taking should be assessed, except such as may arise from negligent or unskilful construction.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 299, 300, 363–366; Dec. Dig. ⟸112, 136.]

6. EMINENT DOMAIN ⟸200—DAMAGES—EVIDENCE—RENTAL VALUE.

Even if the respondent whose land is condemned is entitled as part of his damages to the rental value of land from the time possession was surrendered until final judgment, he should have offered testimony to show the rental value, but, having failed to do so, has no ground of complaint that such damages were not allowed.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 540; Dec. Dig. ⟸200.]

En Banc. Error to District Court, Weld County; Harry P. Gamble, Judge.

Condemnation proceedings by the Farmers' Reservoir & Irrigation Company against L. K. Mulford. Judgment of condemnation and order overruling motion for new trial, and respondent brings error. Affirmed.

Carle Whitehead and Albert L. Vogl, both of Denver, for plaintiff in error. Smith, Brock & Ferguson and John P. Akolt, all of Denver, for defendant in error.

BAILEY, J. On October 1st, 1909, defendant in error presented to the Judge of the District Court of Weld County its petition in a proceeding under the eminent domain statutes, to condemn rights of way for two irrigating ditches upon and across a section of land owned by plaintiff in error, respondent below, to-wit: Section 33, Township 2 North, Range 67 West. The same day an order was entered, upon an ex parte hearing, granting petitioner immediate possession of the land described in the petition and sought to be acquired, upon a deposit of the sum of $335.25 with the clerk of the court for the protection of the respondent.

On February 15th, 1910, respondent filed two motions, one to vacate and annul the order granting immediate possession of the land on the grounds that the law, Section 2456, Revised Statutes 1908, under which it is claimed to have been made, is unconstitutional, in that it permitted the taking of property without due process of law, contrary to Section 25 of Article 2 of the state Constitution, and abridged his privileges and immunities, as a citizen of the United States; and another to dismiss the petition on the grounds of insufficiency, in that it failed to allege that the rights of way were the "shortest and most direct routes practicable upon

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which the canals could be constructed through respondent's land with uniform or nearly uniform grade," which it is claimed was essential by virtue of the provisions of Section 3171, R. S. 1908. Both motions were denied.

May 9th, 1911, respondent filed an answer alleging that the market value of the land sought to be condemned was $600, and that the damage to the remainder of the land was $1,150. Upon trial the jury found the value of the lands described in the petition was $376; that the damage to the remainder of the land was $142.92; and that there was no resulting benefit to the residue. A motion for a new trial was overruled, and judgment entered for petitioner, decreeing to it the rights of way in fee upon payment into court, for the use of respondent, of the sum of $500.92, the amount found by the jury. The respondent prosecutes this writ of error.

The jury were instructed that in determining the value of the land taken they were to be "governed by its market value at the present time," i. e., the time of trial, and that all damages "present and prospective" should be assessed "that are the natural, necessary or reasonable result of the taking." The respondent requested an instruction, which was refused, to the effect that he be compensated for all damages "which have resulted or will result to him in the future" as a consequence of the condemnation of the land.

[1] The propositions urged for a reversal consist of the rulings upon the two motions and the giving and refusing of instructions. Whether it was error to overrule the motion to annul and vacate the order for immediate possession on the grounds that the statute, Section 2456, supra, under which plaintiff in error claims it was issued, is unconstitutional, is a question which may not properly be urged on this review. The order for immediate possession was interlocutory, and even if erroneous would not justify a reversal of the final judgment unless it prejudicially affected substantial rights on the merits of the case. Lavelle v. Julesburg, 49 Colo. 290, 294, 112 Pac. 774; Colo. F. & I. Co. v. Four Mile Ry. Co., 29 Colo. 90, 66 Pac. 902. It is clear that the order had no such effect, and under such circumstances the question of the constitutionality of the statute is moot.

[2] It is contended that error was committed in overruling the motion to dismiss the petition on the ground that it failed to allege that the right of way sought to be condemned was the "shortest and most direct route practicable," etc., on the ground that this averment was jurisdictional. Section 3171, supra, provides:

"Whenever any person or persons find it necessary to convey water for the purpose of irrigation through the improved or occupied lands of another, he or they shall select for the line of such ditch through such property the shortest and most direct route practicable, upon which said ditch can be constructed with uniform or nearly uniform grade, and discharge the water at a point where it can be conveyed to and used upon land or lands of the person or persons constructing such ditch."

Section 2416, R. S. 1908, states what the petition in a case of this sort shall contain, and provides, in substance, that it set forth, by reference, the authority of the petitioner in the premises, the purpose for which the property is sought to be taken or damaged, a description of the property, and the names of the owners or persons interested.

Kaschke v. Camfield, 46 Colo. 60, 102 Pac. 1061, is cited and relied upon in support of the contention that the averment in question was jurisdictional, where it was said:

"It may be, and doubtless is, true that an averment in the petition to condemn land, that the compensation to be paid therefor cannot be agreed upon by the parties interested, is jurisdictional, and therefore a necessary one."

This holding is based upon that part of Section 2416, supra, of the eminent domain statute, which provides:

"That in all cases where the right to take private property for public or private use without the owner's consent * * * has been heretofore or shall hereafter be conferred by general laws or special charter * * * and the compensation to be paid for in respect of the property sought to be appropriated or damaged for the purposes above mentioned, cannot be agreed upon by the parties interested, * * * it shall be lawful for the party authorized to take or damage the property so required. * * *"

[3] It is apparent from these express provisions of the statute that failure to agree upon compensation to be paid for land sought to be taken or damaged is made a condition precedent to the right to institute and maintain proceedings thereunder at all, and is clearly jurisdictional, while the requirement of Section 3171, supra, to the effect that the line sought to be taken must be the shortest and most practicable one, is a matter which plainly goes to the necessity for the taking, and is not in any sense jurisdictional. Section 3171, supra, is no part of the eminent domain statute, but is found in an act relating to rights of way in the appropriation and use of water for irrigation purposes, another section of which, Section 3169, R. S. 1908, expressly provides that a proceeding to condemn and take such a right of way shall be pursued under the statute of eminent domain. If as matter of fact the line proposed was not the "shortest and most direct route practicable," the defendant should have had the question disposed of in limine. Sand Creek L. & I. Co. v. Davis, 17 Colo. 326, 29 Pac. 742; U. P. R. R. Co. v. Colo. Postal Tel. Co., 30 Colo. 133, 69 Pac. 564, 97 Am. St. Rep. 106; Colo. F. & I. Co. v. Four Mile Ry. Co., supra; Kaschke v. Camfield, supra. As this allegation was not jurisdictional, the defendant, by submitting the cause to the jury on the question of damages, waived further consideration of it. It was said in Kaschke v. Camfield, supra:

"The property owner has the privilege of controverting the petitioner's right to condemn,

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and when he does so, the burden is upon the latter to maintain his right by proper proofs; but where the owner fails to make such contest, in the proper manner and at the proper time, the right in the petitioner to condemn will be deemed admitted, leaving the amount of damages to be awarded as the sole matter in dispute."

The motion to dismiss the petition was properly overruled, because a dismissal was competent only if the averment were essential to jurisdiction. Proofs could have been demanded on the question of whether the proposed line was the "shortest and most direct route practicable." This should have been done, in order to save the point, before submitting the question of damages. Where, as in this case, the petition is in full compliance with the requirements of the eminent domain statute, it must be held good against a motion to dismiss, although every evidentiary fact, which under the statute is required to be shown in order that the relief prayed be granted, may not be specifically set out.

[4] The jury was instructed that in determining the value of the land taken they were to be governed by its market value at the time of trial. This is in harmony with Section 2431, R. S. 1908, and the decisions of this court. Lavelle v. Julesburg, supra, and cases cited. It follows therefore that the offer of proof of the value of the land taken at the time actual possession was given was properly rejected.

[5, 6] It was further correctly instructed that in this proceeding all damages present and prospective that were the natural, necessary or reasonable result of the taking should be assessed, except such as may arise from negligent or unskilful construction. Denver City I. & W. Co. v. Middaugh, 12 Colo. 434, 439, 21 Pac. 565, 13 Am. St. Rep. 234; Loloff v. Sterling, 31 Colo. 102, 107, 71 Pac. 1113; Farmers' Co. v. Cooper, 54 Colo. 402, 407, 130 Pac. 1004; Moffat v. Denver, 57 Colo. 473, 482, 143 Pac. 577. The instruction which respondent asked to have given permitted recovery of all damages "which have resulted or will result," which is simply another way of saying all damages present and prospective, since present damages that are the "natural, necessary or reasonable result of the taking" are necessarily damages "which have resulted," damages being the loss suffered by the taking. If, as contended, plaintiff in error should have been allowed the rental value of the condemned property for the period from the date possession was given to the time of trial, as part of his damages, a matter which we do not decide, testimony showing such rental value should have been offered, but as this was not done he has and can have no legitimate ground of complaint in that behalf, since if that proof was competent at all it was available under the rule for the measure of damages given.

The judgment is in all respects right, and it is accordingly affirmed.

Judgment affirmed.

TELLER, J. (concurring specially). I concur in the judgment of affirmance, but cannot agree with that part of the opinion which holds that the petitioner was not required to allege a fact necessary to be proved as a condition to his right to take the tract of land described in his petition, viz., that it formed "the shortest and most direct route practicable," etc.

The duty of the jury, as prescribed by the statute, being only to fix the amount of compensation or damages to be paid the respondent, it follows, as this court has held, that all matters preliminary to the jury trial must be settled prior to such trial; but that fact does not, as the majority opinion seems to hold, affect the question of what is necessary to be stated in the petition. The majority opinion holds that the question of the shortness and directness of the route is included in the question of the necessity for the taking. Clearly such is not the fact. The language of the statute is:

"Whenever any person or persons find it necessary to convey water for the purpose of irrigation through the improved or occupied lands of another," etc. Rev. St. 1908, § 3171.

The necessity here intended is to convey water through the lands of another, not the necessity for taking a particular route. This is recognized in Sand Creek L. I. Co. v. Davis, 17 Colo. at page 331, 29 Pac. at page 743, where the court said:

"Strictly speaking, there was no issue as to the necessity of the taking. There was no controversy as to the necessity petitioner was under to convey water through improved or occupied lands for the purpose of irrigating his own lands lying beyond."

Under Kaschke v. Camfield, 46 Colo. 60, 102 Pac. 1061, the petition makes a prima facie case of right to condemn, and, that being so, it ought to allege every fact necessary to the right to take the land described in it. To hold the contrary is to say that a prima facie case of a right may be made without regarding one of the express conditions upon which the right is based; for an uncontested petition can be treated as establishing prima facie only the facts therein alleged.

I cannot regard section 2416, R. S. 1908, as determining this question of pleading. That section forms a part of a statute enacted long prior to section 3171, R. S. 1908, and should be construed in connection with the latter. Thus considered, it cannot be regarded as prescribing what should be alleged in an application for a right to which new conditions have been attached by the later enactment.

In this case the respondent by going to trial on the issue of damages is rightly held to have waived this question, and for that reason I concur in the judgment of affirmance.

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(40 Nev. 121)

ROBINSON MINING CO. v. RIEPE et al.

(No. 1966.)

(Supreme Court of Nevada. Nov. 29, 1916.)

TROVER AND CONVERSION ⟸4—TRANSFERRING STOCK—REFUSAL—LIABILITY.

Where a corporation's refusal to issue new stock certificates in smaller denominations for old certificates presented by a shareholder for that purpose is based upon its wrongful assertion of ownership of the stock, the corporation is liable to the shareholder for conversion of the stock.

[For other cases, see Trover and Conversion, Cent. Dig. §§ 25–37; Dec. Dig. ⟸4.]

Appeal from District Court, White Pine County; George S. Brown, Judge.

Action by the Robinson Mining Company against Richard A. Riepe and others. From judgment against defendant Bertha Ives on her counterclaim, she appeals. Reversed and rendered.

G. A. McElroy, of Los Angeles, Cal., Wm. E. Billings, of San Francisco, Cal., and Chandler & Quayle, of Ely, for appellant. S. W. Belford, of Reno, for respondent.

COLEMAN, J. This is the second appeal taken in this case, the former appeal having been taken by plaintiff. Robinson Mining Co. v. Riepe, 37 Nev. 27, 138 Pac. 910. This appeal is taken by defendant Bertha Ives, from a judgment rendered against her on her counterclaim. The appeal is upon the judgment roll, and it is asserted that the conclusions of law as made by the trial court are contrary to the facts as found. The court found as follows:

"That on the 21st day of June, 1907, said defendant Bertha Ives was the owner and entitled to the possession of 27,500 shares of the capital stock of the said plaintiff company, the value of which was then the sum of $11,000, and not the sum of $82,500 as alleged in said counterclaim, and was in possession of 2 certificates representing said 27,500 shares of said capital stock, one of which was for 25,000 shares and the other was for 2,500 shares of said capital stock, being the same shares of stock specified in paragraph 6 of plaintiff's complaint. That on said 21st day of June, 1907, said defendant Bertha Ives presented said certificate to said corporation at its office in Ely, White Pine county, Nev., and demanded that said corporation issue to her new certificates in smaller denominations representing a less number of shares each than the said original certificates in lieu of said original certificates for 27,500 shares, which said old certificates she then and there tendered to said corporation for cancellation upon the issuance of said new certificates. That said corporation then and there refused, failed, and declined to issue such or any new certificates and as reason for and part of said refusal, failure, and declination wrongfully asserted title in itself to the whole of said stock, and denied that counterclaimant, Bertha Ives, had any title or interest therein whatsoever. That at that time shares of stock of the plaintiff company represented by certificates of smaller denominations were much more readily salable in the Ely district than shares represented by certificates as large as those so held by the said defendant Bertha Ives and by her so presented for cancellation as aforesaid. But it is not true, as alleged in said counterclaim, that said plaintiff company did then or there, by reason of said facts or otherwise, wrongfully, unlawfully, maliciously, or otherwise, or at all, take or convert the said 27,500 or any shares of stock to its own or any use, or to the damage of said defendant Bertha Ives, or any one else, in the sum of $82,500 or any other sum."

It is the contention of appellant that the facts found by the court show a conversion by the respondent of the stock owned by appellant. Counsel for respondent concedes in his brief that:

"The action of conversion arises when the corporation refuses to transfer stock upon its books to a person entitled to such transfer."

The authorities sustain this rule. Kimball v. Union Water Co., 44 Cal. 173, 13 Am. Rep. 157; Ralston v. Bank of California, 112 Cal. 213, 44 Pac. 476; Humphreys v. Minn. Clay Co., 94 Minn. 469, 103 N. W. 338; Herrick v. Humphrey H. Co., 73 Neb. 809, 103 N. W. 685, 119 Am. St. Rep. 917, 11 Ann. Cas. 201. But it is contended that this case does not fall within this rule, since appellant merely sought to have her stock certificates canceled and new certificates, of smaller denominations aggregating 27,500 shares, issued to her in lieu thereof. The only case that we know of in which an allusion is made to the right to cut up a stock certificate is that of Schell v. Alston Mfg. Co. (C. C.) 149 Fed. 439. To our mind, the case at bar does not turn upon the right of appellant to have her stock certificate cut up, but upon the reason given by respondent for not doing so. When appellant presented her certificate and asked that new certificates be issued therefor, the refusal to do so was not based upon the ground that a stockholder of the company could not, as a legal right, demand that his stock certificate be cut up, but upon the ground that the respondent company owned the stock in question.

Hence it seems to us that the question of the legal right of appellant to demand that her two certificates for 27,500 shares of stock be canceled, and several certificates for a small number of shares, but all aggregating the 27,500 shares owned by her, is out of the case. We think the logic of the rule laid down by Cook with reference to a refusal of a company to transfer stock is applicable to this situation. He says:

"When the corporation refuses to allow a registry for reasons other than those connected with the mere formalities of registry, or for reasons not given to the applicant, it waives the right to insist on them, and cannot afterwards claim that the appellant did not conform to such technicalities." Stock and Stockholders (Cook) § 383; Richardson v. Longmont S. & D. Co., 19 Colo. App. 483, 76 Pac. 546.

In the case at bar the respondent refused to cut up appellant's stock certificates for reasons other than those connected with the mere formality of cutting them up.

If appellant, after the refusal of the re-

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spondent to cut up the certificates, had obtained purchasers for the stock on condition that she would have it transferred to them, and the company had then refused to make the transfer for the reason that it asserted ownership, it is conceded by counsel for respondent that it would have been guilty of a conversion of the stock.

We believe that it is a well-recognized rule that the law does not require the doing of a vain thing. Appellant knew that respondent claimed to own the stock, and for that reason would not transfer it. Why, then, should she be compelled to do the vain thing of obtaining purchasers for the stock, knowing that she could not deliver it because respondent claimed to own it? In fact, how could appellant, in good faith, make a sale of the stock while respondent was asserting ownership of it? Suppose she had offered it for sale, and the person to whom she had offered it had said:

"The company claims to own this stock. You have no title to it, and no right to sell it. At best, if I buy it, I buy a lawsuit; therefore I will have nothing to do with it."

Was it necessary that respondent go to useless trouble to find a purchaser, when she knew that it would avail nothing?

Now, it seems to us that the question for us to determine is this: Did respondent violate any right of appellant? To our mind, it clearly did. Respondent not only declined to cut up the stock certificates for the reason that it claimed to own the stock, but its defense in the trial court to appellant's counterclaim was based upon the ground that it was the owner of the stock. Lord Blackburn, in Hollins v. Fowler, decided by the House of Lords (Law Journal Reports 1875, vol. 44 [N. S.] p. 169), in determining whether certain acts constituted a conversion, said:

"I own that it is not always easy to say what does and what does not amount to a conversion. * * * It is generally laid down that any act which is an interference with the dominion and right of property of the plaintiff is a conversion, but this requires some qualification. From the nature of the action, as explained by Lord Mansfield, it follows that it must be an interference with the property which would not, as against the true owner, be justified, or at least excused, in one who came lawfully into possession of the goods. And in considering whether the act is excused against the true owner it often becomes important to know whether the person doing what is charged as a conversion had notice of the plaintiff's title.

"There are some acts which from their nature are necessarily a conversion, whether there was notice of the plaintiff's title or not. There are others which, if done in a bona fide ignorance of the plaintiff's title, are excused, though, if done in disregard of a title of which there was notice, they would be a conversion. And this, I think, is borne out by the decided cases. Thus a demand and refusal is always evidence of a conversion. If the refusal is in disregard of the plaintiff's title, and for the purpose of claiming the goods either for the defendant or a third person, it is a conversion."

See, also, Pollock on Torts (8th Ed.) pp. 357, 358.

It appears to us that the rule laid down by Lord Blackburn is of peculiar and striking application to the case at bar. The trial court found that respondent refused to comply with appellant's request, for the reason that it claimed to own the stock. The court also found that respondent's claim of ownership was without legal right. Appellant was helpless. An attempt by her to sell the stock in small quantities, or at all, would have been in vain. Her dominion over the stock was absolutely terminated by the assertion of ownership by the company and a denial, of the ownership of appellant.

Another highly respected court uses the following language:

"In McCombie v. Davis, 6 East, 540, Lord Ellenborough said: 'According to Lord Holt, in Baldwin v. Cole, 6 Mod. 212, the very assuming to one's self the property and right of disposing of another man's goods is a conversion; and certainly a man is guilty of a conversion who takes my property by assignment from another, who has no authority to dispose of it.'" Gilmore v. Newton, 6 Allen (Mass.) 171, 85 Am. Dec. 749.

Again we quote:

"In Glaze v. McMillion, 7 Port. (Ala.) 279, 281, Golthwaite, J., said: 'It is believed that all conversions may be divided into four distinct classes: (1) By a wrongful taking; (2) by an alleged assumption of ownership; (3) by an illegal user or misuser; and (4) by a wrongful detention. In the three first named classes, there is no necessity for a demand and refusal, as the evidence arising from the acts of the defendant, is sufficient to prove the conversion.'" Strauss v. Schwab, 104 Ala. 672, 16 South. 692.

"It is enough that the rightful owner has been deprived of his property by some unauthorized act of another assuming dominion or control over it. No manual taking, on the defendants part, is necessary." Pease et al. v. Smith et al., 61 N. Y. 481.

It will be seen from the last three quotations that those courts go even further than did Lord Blackburn, and hold that no action is necessary on the part of the owner to make liable one who wrongfully assumes to own property, and in pursuance of such claim exercises exclusive dominion over it, as in the case at bar. Such a statement of the law may seem exaggerated in a case where a horse, cow, or other personal property which is capable of being recovered in an action of replevin is involved; but in a case where the property is intangible, as in this case, and where a mandamus will not lie to compel the transfer of stock (State v. Jumbo Ex. M. Co., 30 Nev. 198, 94 Pac. 74, 133 Am. St. Rep. 715, 16 Ann. Cas. 896; Turley v. Thomas, 31 Nev. 181, 101 Pac. 568, 135 Am. St. Rep. 667), the full force of the rule thus announced can be fully appreciated. Since replevin is not available, and since our courts hold that mandamus will not lie to compel a transfer of stock, what recourse would appellant have, if not to an action for conversion? None that we know of. It seems to us that in the very nature of things appellant, and others similarly situated, are at the mercy of corporations unless conduct

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such as respondent was guilty of is held to be a conversion.

We are of the opinion that the judgment of the trial court should be reversed, and that judgment should be entered in favor of appellant and against respondent in the sum of $11,000, the amount found by the court to have been the value of the stock at the time of the conversion, together with interest thereon at 7 per cent. per annum from June 21, 1907, the date of the conversion, and for costs in both courts.

It is so ordered.

NORCROSS, C. J., and McCARRAN, J., concur.

(40 Nev. 131)

STATE ex rel. HAIGHT v. WILSON, County Clerk, et al. (No. 2261.)

(Supreme Court of Nevada. Nov. 29, 1916.)

ELECTIONS ⟸147 — MANDAMUS ⟸74(3) — NOMINATIONS—VACANCIES.

St. 1915, c. 285, § 44, the general election law, provides that, should a vacancy occur in the nominees for any office, it may be filled before election day by the committee to which such power has been delegated, and St. 1915, c. 283, regulating nominations for public office by primaries, conventions, petitions, etc., by section 26 provides that vacancies in nominations occurring after any party convention shall be filled by the party committee, etc. The Democratic county convention nominated a candidate for clerk and treasurer, and on his declination took no further action and left the place blank in the certificate of nomination, and adjourned without delegating any authority to its committee, but the executive board of the committees filed a certificate of nomination. *Held*, that the filing of such certificate was unauthorized, and that mandamus would issue to compel the county clerk to exclude from the ballots at a coming general election the name of the candidate contained in such certificate.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 122; Dec. Dig. ⟸147; Mandamus, Cent. Dig. § 150; Dec. Dig. ⟸74(3).]

Original proceeding in mandamus by the State of Nevada, on the relation of A. L. Haight, against A. E. Wilson, as County Clerk of Churchill County, State of Nevada, and others. Writ issued.

A. L. Haight, of Fallon, for petitioner. E. T. Patrick, Deputy Atty. Gen., for respondents.

McCARRAN, J. This is an original proceeding in mandamus, instituted by petitioner to compel the respondent, as county clerk of Churchill county, to exclude from all ballots to be used at the coming general election in that county the name of Hattie E. Ferguson as candidate for the office of county clerk and treasurer.

Petitioner predicated his right to the issuance of the writ upon the action of the Democratic county convention, inasmuch as that convention, according to the allegations of the petition, did not, during its session or prior to its adjournment, or at any time or at all, nominate any person as the candidate of the Democratic party for the office of county clerk and treasurer of Churchill county. The petition contains the following allegation:

"That on October 26, 1916, at said city of Fallon, one Fulton H. Sears presented to the above-named A. E. Wilson, as county clerk as aforesaid, a purported certificate of nomination, in words and figures as follows, to wit:

" 'Certificate of Nomination.

" 'At a meeting of the executive board of the Democratic county central committee of Churchill county, Nev., held in the city of Fallon, in said county and state, on Saturday, the 21st day of October, A. D. 1916, at the hour 1:30 p. m., due notice having been given to all committeemen of such meeting, among other things, the following resolution was unanimously carried, a quorum being present:

" 'Be it resolved: The Democratic county central committee of Churchill county, Nev., has designated its executive board, by proper resolution, to act in its stead during the interim of any regular meeting; and

" 'Whereas, it now appears that there exists a vacancy in the Democratic nominations for the office of county clerk and treasurer of said Churchill county; and

" 'Whereas, this committee feels that it is to the best interests of the Democratic party of this county that this said vacant nomination be filled:

" 'Be it resolved: That the said executive board now proceed to fill said vacant nomination.

" 'Thereupon the chair called for nominations to fill said vacancy, and Hattie E. Ferguson was duly nominated and seconded, and, there being no further nominations, the chair declared said nominations closed.

" 'Thereupon Hattie E. Ferguson was unanimously nominated for the office of county clerk and treasurer for said Churchill county, Nev., and declared the official Democratic nominee thereof. E. L. Bingham, Chairman.

" 'Fulton H. Sears, Secretary.' "

This certificate of nomination, so called, is duly verified by its chairman and secretary. It is alleged in the petition that upon this certificate of nomination, so termed, the respondent, as county clerk, unless prevented from so doing by an order of this court, will print upon the official election ballot the name of Hattie E. Ferguson as a candidate for the office of county clerk.

Attached to the petition as an exhibit we find what purports to be the minutes of the Democratic county convention, in which said minutes there appears, among other things, the following as a second transaction in the order of business:

"Second. Clerk and Treasurer. Mr. G. W. Goebel nominated and seconded. Mr. G. W. Goebel declined. Nomination left open."

At the conclusion of the minutes, we find the following item:

"A motion was made empowering the county central committee to fill any vacancies on the ticket; but, as this is already authorized by law, the motion was withdrawn."

From the record as it is before us, it would appear that the Democratic county convention had nominated a candidate for the office of clerk and treasurer. That nom-

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inee having declined to accept such nomination, no further action appears to have been taken by the convention relative to this office; and in the certificate of nomination filed with the county clerk the place was left without a nominee. The minutes of the convention declare that the body adjourned without conferring authority upon its committee or upon any committee or board or constituted body to do anything in behalf of, or in the name of, or by the authority of the convention.

The general law of this state applicable to elections (Session Acts 1915, p. 479) makes special provision for the filling of vacancies where such vacancies occur from any cause in the list of nominees for any office. The statute is as follows:

"Should a vacancy occur, from any cause, in the list of nominees for any office, such vacancy may be filled any time before the day of election by the committee to which has been delegated power to fill such vacancies. * * *"

The statute regulating nominations for public office, and which is to a certain extent called in question here, is found in Session Acts 1915, p. 453, and is entitled:

"An act regulating the nomination of candidates by political parties, providing for the holding of primaries and conventions, and regulating the manner of nominating candidates by petition."

Section 26 of the act (Session Acts 1915, p. 460) provides:

"Vacancies in nominations occurring for any cause after the holding of any party convention shall be filled by the party committee of the county, or state, as the case may be."

It is clear from the record as it is before us, and especially from the minutes of the proceedings of the Democratic county convention of Churchill county—in fact, it is admitted by counsel for respondents—that power to fill vacancies existing in or that might for any cause occur in the list of Democratic nominees for county offices was not delegated by the Democratic county convention of Churchill county to its county committee nor to any other committee or board.

The act of filing the certificate of nomination in question here was, as we view the record, one for which the convention itself had extended no authorization. The convention during its session had attempted to nominate a candidate for the office of clerk and treasurer. The party receiving the nomination had declined. No further action was taken by the convention, and no authority was extended by the convention to its county committee, much less to any other body, committee, or board, to make any other nomination, or to fill the vacancy which the convention had itself created by failing to nominate a candidate for the office.

The writ, as prayed for, was by order of the court, at the conclusion of the argument, issued.

NORCROSS, C. J., and COLEMAN, J., concur.

(52 Mont. 596)

E. B. RYAN CO. v. RUSSELL. (No. 3704.)

(Supreme Court of Montana. Nov. 8, 1916. On Motion for Rehearing, Dec. 14, 1916.)

1. PLEADING ⟸239(2)—SALES ⟸413—"MATERIAL VARIANCE" — "IMMATERIAL VARIANCE"—"FAILURE OF PROOF."

Rev. Codes, § 6585, provides on a material variance the court should permit the pleading to be amended. Section 6586 provides that on an immaterial variance the court may direct the facts to be found in accordance with the evidence, or permit amendment without imposing terms. *Held*, that where a complaint alleged a written contract to deliver cattle at a place named and the proof showed failure of defendant to comply with a subsequent modification, as the denial of this modification would have raised an issue requiring proof, and as evidence of a breach of the contract pleaded would not show breach of the modification, there was a material variance, and plaintiff's request to amend should have been granted upon terms enabling defendant to plead to the amendment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 627–629; Dec. Dig. ⟸239(2); Sales, Cent. Dig. §§ 1166–1169; Dec. Dig. ⟸413.]

On Motion for Rehearing.

2. APPEAL AND ERROR ⟸926(6)—REVIEW—PRESUMPTIONS.

On review of an order, refusing a motion to amend a complaint, alleging a written contract by alleging a modification, where the question was whether there was a material variance between pleading and proof, if the modification is one required to be in writing, the law presumes it was in writing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3744; Dec. Dig. ⟸926(6).]

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

Action by the E. B. Ryan Company against Edward Russell. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Reversed and remanded.

John G. Skinner, of Red Lodge, and O. F. Goddard, of Billings, for appellant. Johnston & Coleman, of Billings, for respondent.

HOLLOWAY, J. In 1912 the E. B. Ryan Company and Edw. Russell entered into a contract in writing, by the terms of which Russell sold and agreed to deliver to the company 800 head, more or less, of mixed cattle then running on the range, at $40 per head, delivery to be made on or about September 22, 1912, at Billings, but the expense of moving the cattle from Leverton bridge to be borne by the company. Two thousand dollars was paid on the purchase price, and the balance was to be paid upon delivery. This action was brought to recover damages for an alleged breach of the agreement.

[1] The complaint makes the contract a part of it, and alleges that defendant deliv-

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ered only 617 head of the cattle, and failed and refused to deliver the remaining 183 head, to plaintiff's damage in the sum of $1,830. The answer admits the execution of the contract, but denies any breach or any damages. As a further defense, it is alleged that defendant actually gathered from the range and turned over to the plaintiff 767 head of the cattle, but through the negligence of plaintiff 150 head escaped back to the range; that it was then mutually agreed by the parties that the delivery of 617 head should be deemed a substantial compliance with the terms of the agreement, and that defendant should be absolved from further compliance. These affirmative allegations were put in issue by reply. Upon the trial E. B. Ryan testified for the plaintiff that, after a portion of the cattle had been gathered from the range, it was mutually agreed between the parties that 110 head should be turned over to a party at Absarokee to whom plaintiff had resold them; that the remainder of those already gathered should be driven to Billings, counted and paid for, and that this was all done; that 507 were actually delivered at Billings; that it was further agreed that defendant should have a reasonable time thereafter to gather the remaining 183 head; and that, when gathered, defendant should deliver them at Columbus, where plaintiff would receive them for shipment to Billings. At the conclusion of plaintiff's case in chief, defendant moved for a nonsuit, upon the ground of a material variance between the plaintiff's pleading and proof. Before the motion was passed upon, plaintiff asked leave of court to amend the complaint so as to plead the modification, as well as the original contract. Each of these applications was denied. The trial resulted favorably to plaintiff, and defendant appealed from the judgment and from an order denying him a new trial.

Counsel for respondent concede that there was a variance between plaintiff's pleading and proof, but insist that it was not of sufficient consequence to warrant a new trial. The purpose of pleadings is to present the issues for trial. The complaint in this case is intended to set forth in legal and logical form the plaintiff's cause of action, and, with the answer and reply, to present a proposition affirmed on the one hand and denied on the other. The object of the complaint is to apprise the defendant of the precise points upon which he will be called to offer proof.

Our Codes recognize three degrees of disagreement between pleadings and proof. A material variance is one which actually misleads the adverse party to his prejudice in maintaining his action or defense upon the merits. Section 6585, Rev. Codes. An immaterial variance is a discrepancy between the pleading and proof of a character so slight that the adverse party cannot say that he was misled thereby. Section 6586. A failure of proof results when the evidence offered so far departs from the cause of action pleaded that it may be said fairly that the allegations of the pleading in their general scope and meaning are unproved. Section 6587. If the variance is a material one, the court should permit the pleading to be amended, upon such terms as may be just. Section 6585. If the variance is immaterial, the court may direct the facts to be found according to the evidence, or may permit the pleading to be amended without the imposition of terms. Section 6586. If there is a failure of proof, of course there is no ground for amending, and the offending party is out of court. From necessity these statutes are very general in their terms. No hard and fast rule can be prescribed for determining whether in a given instance a party has actually been misled to his prejudice. Every case must depend upon its own peculiar facts and circumstances.

In this action plaintiff gave notice in the complaint that reliance would be placed upon the written contract pleaded, and that defendant must be prepared to meet the claim that a breach of that particular contract would constitute the gist of plaintiff's case. The evidence offered by plaintiff disclosed that the original contract as written had been modified by a subsequent agreement, and that it was the failure of defendant to comply with this modified portion that gave rise to plaintiff's principal complaint. To determine whether this variance was a material one, the trial court should have applied either of two tests: (1) If the modification had been pleaded in the complaint and defendant in his answer had denied that any such modification had ever been made, would the issue thus raised have been a material one calling for proof? or (2) would the evidence of a breach of the contract pleaded be sufficient to show a breach of the contract as modified?

The modification changed the time of delivery of the 183 head of cattle, changed the place of their delivery from Billings to Columbus, and imposed upon the defendant the expense of their delivery. At least this is the implication from Ryan's testimony. He said:

"We agreed, while it was storming, to bring these cattle on to Billings and then he [defendant] was to go back and put up his hay and gather the balance of these cattle and deliver them at Columbus, in the stockyards there, and I was to ship them."

It is often difficult to distinguish between a material variance and a failure of proof, and this record illustrates the difficulty as well as one could. We are inclined to the view that it cannot be said that the allegations of the complaint in their general scope and meaning were unproved; but the variance was such as in the ordinary course of the trial of a lawsuit would prejudice the defendant. He may not have been able to dem-

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onstrate that he was unable to meet the changed conditions solely because he had not been notified of plaintiff's claim that the original contract had been modified; but the character of the variance was such that the statement by his counsel that defendant was taken by surprise, that he was not prepared to meet the evidence of the modification, and that he would be prejudiced in making his defense on the merits, should have been accepted as sufficient proof of the facts.

In the absence of any request by plaintiff to amend, the defendant would have been entitled to a nonsuit on account of the variance. The request to amend should have been granted upon such terms as would enable defendant to plead to the amendment and prepare to meet the issue thus raised. Without the amendment in the record, the defendant's motion should have been granted.

The justice of the case requires that a new trial be had, in order that the pleadings may be redrafted properly and the cause tried upon its merits and upon a correct theory. The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

SANNER, J., concurs. BRANTLY, C. J., being absent, takes no part in the foregoing decision.

On Motion for Rehearing.

HOLLOWAY, J. [2] In their motion for rehearing, counsel for respondent direct our attention to the fact that in the opinion heretofore rendered we held, in effect, that the original contract had been modified by an unexecuted oral agreement. Such was not our purpose. The use of the word "oral" in the opinion was a mere inadvertence, and the term will be eliminated. There is nothing in the evidence to warrant the assumption that the subsequent agreement was oral. If it is one required to be in writing, the law presumes it was in writing. It was not our purpose to prejudge the character of the subsequent agreement or to consider it further than was necessary to determine that there was a material variance between plaintiff's pleading and proof, rather than a complete failure of proof, and we reached our conclusion by adopting respondent's theory—repeatedly referred to in his brief—that the subsequent agreement amounted only to a modification of the original contract, rather than a substitution for it.

We considered the case from the standpoint of the parties when the motion for nonsuit was made, and it was our purpose to leave them in the position which they occupied when respondent asked leave of court to amend his complaint. We said: "The request to amend should have been granted"—and we remanded the cause in order that plaintiff might have the relief which he asked from the trial court, but which was denied him. It is not for this court to say what proceedings shall be had in the case after the amendment is made, or whether it is possible for plaintiff to succeed upon his complaint as amended.

The opinion heretofore delivered is amended as indicated, and the motion for rehearing is denied.

Rehearing denied.

SANNER, J., concurs. BRANTLY, C. J., being absent, took no part in the original opinion, and takes no part in this.

(53 Mont. 18)

STATE ex rel. EVANS v. STEWART, Governor, et al. (No. 3940.)

(Supreme Court of Montana. Nov. 13, 1916.)

1. STATUTES ⟸35½ — ENACTMENT — INITIATIVE.

No distinction is to be made between a statute enacted by the people directly and one enacted by the Legislative Assembly with the approval of the Governor; for the result is the same in either case.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. ⟸35½.]

2. STATUTES ⟸4—LEGISLATIVE POWER.

The Legislature of the state possesses plenary legislative power and authority except as limited by the Constitution of the United States, the treaties made and statutes enacted pursuant thereof, and by the Constitution of the state.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 3; Dec. Dig. ⟸4.]

3. AGRICULTURE ⟸1 — VALIDITY OF FARM LOAN ACT.

The Montana Farm Loan Act (Laws 1915, p. 486) does not transgress any provision of the Constitution of the United States nor affect any treaty right.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 1, 3, 13, 14, 51; Dec. Dig. ⟸1.]

4. SCHOOLS AND SCHOOL DISTRICTS ⟸18 — SCHOOL FUNDS—LOANS—FARM LOAN ACT.

The "primary" plan of procedure of the Farm Loan Act, imposing on the state board of land commissioners the duty to invest the specified state funds in securities which include farm mortgages, to prepare forms, etc., does not conflict with the Enabling Act, granting public lands to the state for the benefit of the common schools, etc., and providing that certain lands granted shall be held, appropriated, and disposed of exclusively for the purposes mentioned, in such manner as the Legislatures of the respective states may provide, since the Enabling Act does not attempt to regulate the manner in which the permanent funds derived from these grants shall be invested.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 25–33; Dec. Dig. ⟸18.]

5. SCHOOLS AND SCHOOL DISTRICTS ⟸18 — LOANING FUNDS—FARM LOAN ACT—"RESTRICTION"—"RESTRICT."

In view of Const. art. 11, § 12, providing that the permanent funds of certain state institutions shall be "invested under such regulations as may be prescribed by law," such "primary" plan in omitting from the list of securities available for the investment of permanent public funds, county, city, and town bonds, and warrants and school district bonds which do not

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constitute the only outstanding issue, does not conflict with article 11, § 3, providing that public school funds shall be invested so far as possible "in public securities within the state," including school district bonds issued for the erection of buildings, "under the restrictions to be provided by law"; for the phrase "under the restrictions provided by law" gives the Legislature power to make the discrimination excluding certain securities from the list of those available for investment, the word "restriction" meaning "limitation or confinement within bounds," etc., and the word "restrict" meaning "to restrain within bounds; to limit; to confine" (quoting Words and Phrases, First and Second Series, Restriction; Restrict).

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 25–33; Dec. Dig. ⟸18.]

6. Schools and School Districts ⟸18 — States ⟸124 — Fiscal Management — Loaning Funds—Farm Loan Act.

Under the "primary" plan of the Farm Loan Act, the state board of land commissioners, after having given preference to the public securities enumerated in Const. art. 11, § 3, in the investment of the public school funds, is charged with the duty to employ the residue of those funds, and all the permanent funds belonging to the higher educational institutions and to the reform school, deaf and dumb asylum, and capitol building, in the other securities named, including first mortgages upon good, improved farm land in the state.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 25–33; Dec. Dig. ⟸18; States, Cent. Dig. §§ 123, 124; Dec. Dig. ⟸124.]

7. Agriculture ⟸1—Farm Loan Act.

The "primary" plan of the Farm Loan Act is not invalid as failing to provide for the working details thereof, since whatever authority is necessary to execute the power given is conferred by implication, and matters of detail are left to the board for control by appropriate rules or regulations.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 1, 3, 13, 14, 51; Dec. Dig. ⟸1.]

8. Agriculture ⟸1—Statutes—Validity.

The validity of the Farm Loan Act is to be tested, not by what is certain to be done under it, but by what may be done under it.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 1, 3, 13, 14, 51; Dec. Dig. ⟸1.]

9. Counties ⟸153½—Fiscal Management —Loan of Credit.

The "contingent" plan of the Farm Loan Act, in providing for loans by counties and constituting any county a statutory guarantor of loans made by it, is invalid as violating Const. art. 13, § 1, forbidding counties to loan their credit in aid of an individual.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 221, 222; Dec. Dig. ⟸153½.]

10. Counties ⟸132—Fiscal Management—Farm Loan Act.

The "contingent" plan of the Farm Loan Act in providing, in case sufficient unloaned money remains, that the state board of land commissioners may divide such moneys among the organized counties to be loaned by such counties, etc., and making each county responsible and accountable for the principal and interest of moneys received by it, is invalid as conflicting with Const. art. 11, §§ 3 and 12, imposing liability for the integrity of the funds upon the state.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 208; Dec. Dig. ⟸132.]

11. Counties ⟸150(1)—Indebtedness—Limitation—Farm Loan Act.

The "contingent" plan of the Farm Loan Act in providing for loan of state funds by counties and compelling a county to pay out of its general revenues the expense of operation under the plan and to issue its warrant or evidence of indebtedness therefor if funds are not on hand, without reference to its outstanding obligations, is invalid as violating Const. art. 13, § 5, limiting county indebtedness.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 165, 166, 215; Dec. Dig. ⟸150(1).]

12. Counties ⟸153½ — Expenditures — Public Purposes.

The "contingent" plan of the Farm Loan Act, in providing for making loans through counties and requiring counties to guarantee loans made by it, is invalid as violating Const. art. 12, § 11, providing that taxes imposed and collected by a county can be expended only for public purposes.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 221, 222; Dec. Dig. ⟸153½.]

13. Statutes ⟸64(2)—Partial Invalidity.

The invalid provisions making counties liable for funds loaned through them are so intimately related to the remaining portions of the "contingent" plan of the Farm Loan Act that the whole "contingent" plan is unconstitutional.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 59, 195; Dec. Dig. ⟸64(2).]

14. Statutes ⟸181(1), 215—Construction—Intent.

In construing a statute, the court must, if possible, ascertain and carry into effect the legislative intent, which is to be gathered from the terms of the statute considered in the light of surrounding circumstances.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 291; Dec. Dig. ⟸181(1), 215.]

15. Constitutional Law ⟸38—Amendment —Mode.

The Constitution can be changed or modified only in the manner indicated in article 19 thereof, and the people of the state, acting as a legislative body through the initiative, can no more transgress the state Constitution than can the Legislative Assembly.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 36; Dec. Dig. ⟸38.]

16. Statutes ⟸64(2) — Farm Loan Act — Partial Invalidity.

The validity of the "primary" plan of the Farm Loan Act is not affected by the invalidity of the "contingent" plan thereof, but the latter may be disregarded.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 59, 195; Dec. Dig. ⟸64(2).]

17. Statutes ⟸64(1) — Severing Invalid Portion.

If, when an unconstitutional portion of a statute is stricken out, the remainder is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58, 195; Dec. Dig. ⟸64(1).]

Mandamus by the State of Montana, on the relation of Charles Evert Evans, against Samuel V. Stewart, Governor, and others. Peremptory writ directed to issue.

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W. D. Rankin and A. H. Angstman, both of Helena, and C. F. Holt, of Great Falls, for appellant. J. B. Poindexter, Atty. Gen., and W. H. Poorman, Asst. Atty. Gen., for respondents.

HOLLOWAY, J. At the general election in 1914 the people of this state, acting under the authority reserved to them in section 1, art. 5, of the Constitution, adopted by the initiative a statute familiarly known as the Farm Loan Act (Laws 1915, p. 486). Because the state board of land commissioners (for brevity designated the board) failed and refused to perform certain duties devolved upon it by the act in question, and failed and refused to receive or consider an application for a loan on improved farm lands within this state, made by Charles Evert Evans, this proceeding in mandamus was instituted. In defense of its action the board insists that the statute is: (1) Unconstitutional and void in whole or in part, and (2) in any event impossible of administration.

[1] No distinction is to be made between a statute enacted by the people directly, and one enacted by the Legislative Assembly with the approval of the Governor. The result is the same in either case. In this instance the people performed the function of the Legislature, and for convenience will be referred to as such.

[2] We enter upon our consideration of the questions involved, with the fundamental principle established that the Legislature of this state possesses plenary legislative power and authority, except in so far as it is limited by the Constitution of the United States, the treaties made and statutes enacted pursuant thereof, and by the Constitution of this state. In re Pomeroy, 51 Mont. 119, 151 Pac. 333.

[3] The act does not transgress any provision of the Constitution of the United States, and no treaty right is involved; but it is insisted that it conflicts with the Enabling Act and with several provisions of the Constitution of this state. Section 1 provides that the permanent common school fund and the other permanent educational, charitable, and penal institution funds shall be invested by the state board of land commissioners in: (a) Certain school district bonds; (b) in bonds of this state; (c) in bonds of the United States; (d) in certain state warrants; (e) in capitol building bonds of this state; (f) in irrigation district bonds; and (g) in first mortgages on good, improved farm lands of this state. Section 2 provides that applications for farm loans shall be filed by the board as rapidly as possible and in the order in which they are received. The same section contains a proviso under the terms of which there may be a distribution of certain of these funds among the several counties and loans upon farm lands, made directly by the counties. It is to this latter portion of the statute that the principal attack is directed.

[4] Counsel for the board assume in the first instance that the act in question provides but a single plan for loaning these funds upon farm lands, and upon that assumption condemn the entire measure. The assumption is unwarranted. The statute in very clear terms provides two distinct plans of procedure, one of which we shall designate the "primary" and the other, the "contingent" plan.

1. The Primary Plan.

Sections 1 and 2 above impose upon the board the duty to invest the specified funds in the securities enumerated therein, including farm mortgages. Section 5 commands the board and the Attorney General to prepare necessary blank forms for applications and for mortgages; each mortgage form to "contain a provision that default in the payment of interest thereon at any time for a period of thirty days after the same shall become due, shall cause the whole principal and interest on said mortgage to become at once due and payable, and said mortgage may be foreclosed in the manner provided by law." This completes the primary plan, and the statute, in so far as it provides this plan of procedure, is proof against any attack made upon it. It does not conflict in the least with any provision of the Enabling Act. By that act the federal government made generous grants of public lands and other property to this state for the benefit of: (a) The common schools; (b) the state university; (c) the agricultural college; (d) the state normal school; (e) the school of mines; (f) the reform school; (g) the deaf and dumb asylum; (h) the capitol building; and (i) the penitentiary.

With respect to the lands granted for common school purposes, the Enabling Act fixes a minimum sale price and declares that the proceeds from such sales, together with 5 per cent. of the proceeds from the sales of public lands in the state, shall constitute a permanent school fund the interest from which only shall be expended. It also provides that the lands granted may be leased under regulations prescribed by the Legislature of the state, with a limitation upon the term of any such lease and upon the quantity which may be let to any individual, company, or corporation. Sections 11 and 13. Of the lands granted for university purposes, it declares that they shall not be sold for less than $10 per acre, but may be leased in the same manner as provided in section 11. With reference to the grants for capitol building and penitentiary purposes, it prescribes no restrictions or regulations whatever. Sections 12 and 15. The only limitation imposed with reference to the other grants enumerated above is that:

"The lands granted by this section shall be held, appropriated, and disposed of exclusively

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for the purposes herein mentioned, in such manner as the Legislatures of the respective states may severally provide."

It will thus be seen that the Enabling Act does not attempt to regulate the manner in which the permanent funds derived from these grants shall be invested; and, as the Farm Loan Act deals only with the investment of those funds, no possible conflict can be discovered between the two acts.

[5] Section 1 of the Farm Loan Act omits from the list of securities available for the investment of permanent public funds county, city, and town bonds, and warrants and school district bonds which do not constitute the only outstanding issue. Whether this omission was the result of inadvertence or design is not material here; but, because of the apparent attempt at discrimination, it is insisted that the section is in conflict with the provisions of section 3, art. 11, of the Constitution. Section 2, art. 11, defines public school funds. Section 12 of the same article deals with the permanent funds belonging to the higher educational institutions, the university, agricultural college, school of mines, and normal. There is still a third group made up of the permanent funds belonging to the reform school, deaf and dumb asylum, and capitol building. The Constitution makes no reference whatever to the investment of the funds belonging to this last group, and therefore the Legislature was left free to prescribe such regulations as might seem fit and proper. With reference to the higher educational institution funds constituting the second group, the mandate of the Constitution is that they shall be invested under such regulations as "may be prescribed by law." Section 12, art. 11. Clearly, then, it was within the power of the Legislature to make the discrimination contained in section 1 of the Farm Loan Act, and to exclude certain securities from the list available for the investment of funds belonging to the second and third groups above.

But what, if any, authority has the Legislature over the investment of the public school funds constituting the first group? Section 3, art. 11—the only constitutional provision touching the subject—goes no further than to declare that:

> They shall "be invested, so far as possible, in public securities within the state, including school district bonds issued for the erection of school buildings, under the restrictions to be provided by law."

This concluding clause must be given meaning. The framers of our Constitution were discriminating in their choice and use of language. They apparently experienced no difficulty in choosing apt words to express the particular shade of meaning which they intended to attach to any provision; and therefore, when they employed the expression "under the restrictions to be provided by law," we must assume that they meant to have that language construed according to its ordinary meaning. "Restriction" means:

> "The act of restraining or the state of being restrained; limitation; confinement within bounds; that which restricts; a restraint, reservation, reserve." Century Dictionary.
>
> "That which restricts; a limitation; a restraint." Webster's Internat. Dictionary.
>
> "Limitation or confinement within bounds." 7 Words and Phrases, 6187.

"Restrict" means:

> "To prevent (a person or thing) from passing a certain limit in any kind of action; limit; restrain. To attach limitations to (a proposition or conception) so that it shall not apply to all the subjects to which it would otherwise seem to apply." Century.
>
> "To restrain within bounds; to limit; to confine." Webster.
>
> "To restrain within bounds; to limit; to confine." 4 Words and Phrases (2d Ser.) 364.

Viewed in the light of these definitions expressing the common understanding of the term "restriction," we think it must be held to have been the intention of the framers of the Constitution in drafting section 3, art. 11, and of the people in adopting it, that while the Legislature cannot proscribe all securities or all school district bonds, it may classify such securities and include one class and exclude another. It may require the board to invest in state bonds and warrants, and forbid it to invest in county, city, or town bonds or warrants. It may include in the favored class school district bonds constituting an only outstanding issue and exclude the bonds of a school district which do not constitute the only issue of the particular district. From the fact that public securities are mentioned specifically, it was doubtless intended that, when the Legislature had prescribed the restrictions contemplated in section 3, such public securities thus hedged about shall be given preference in the employment of the public school funds, but further than this the section does not go.

We cannot subscribe to the doctrine that the Legislature may provide restrictions for the investment of only such portion of the public school funds as may be invested in public securities, and that the remaining portion must lie idle, or, at best, be deposited under the provisions of section 14, art. 12. The language of section 3, art. 11, if standing alone, does not require such construction, and when read in connection with other provisions of the Constitution, particularly the terms of section 12 of the same article, the purpose to confide to the lawmakers a wide discretion in the investment of all permanent school funds is apparent. The authority of the Legislature, otherwise plenary, will not be held to be circumscribed by mere implication. He who seeks to limit the power of the lawmakers must be able to point out the particular provision of the Constitution which contains the limitation expressed in no uncertain terms.

[6] Our conclusion upon this branch of the case is that the board, after having given preference to the public securities enumerated, in the investment of the public school funds, is charged with the duty to employ

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the residue of those funds and all the permanent funds belonging to the higher educational institutions and to the reform school, deaf and dumb asylum, and capitol building in the other securities named, including first mortgages upon good, improved farm land in this state. This construction harmonizes section 1 of the act with section 3, art. 11, of the Constitution, and leaves intact a complete, workable statute, absolved from any of the objections lodged against this plan.

[7] It is no argument against the act that it fails to provide for all the working details of this primary plan. It is an elementary rule of law that:

"The grant of a specific power or the imposition of a definite duty confers, by implication, authority to do whatever is necessary to execute the power or perform the duty." 36 Cyc. 1113.

By sections 1 and 2 of the Farm Loan Act the specific power is conferred and the specific duty is enjoined upon the board to invest the public funds designated therein, in the securities enumerated, including farm mortgages, and whatever authority is necessary to execute that power and perform that duty is conferred by implication, and matters of detail are left to the board for control by appropriate rules or regulations.

While the statute declares that loans made by the several counties shall bear interest at 6 per cent. per annum, no such restriction is laid upon the board. Under the law in force at the time the Farm Loan Act was adopted, there was conferred upon the board a very wide discretion in investing these public funds. The details of such investments were not covered by specific legislation, and yet it is a part of the history of the state that the board experienced no difficulty in making investments in public securities offered by the state, by the several counties and by municipalities in the state. The same wide latitude in matters of procedure is retained by the board under this act. It seeks to classify public securities and to designate such of them as may be employed hereafter for the investment of these funds to utilize the funds to a much greater extent than heretofore, and to place the agricultural class in a more advantageous position towards the money market by including farm mortgages as available securities for loans. Under the former statutes the board could invest in one class of public securities bearing 5 per cent. interest, and in another bearing 4 per cent. or less. It could accept one issue and decline another. It could go into the market and bid as a private individual upon offered public securities of the classes mentioned, or it could waive its right to bid. So likewise it may now exact 6 per cent. for loans made upon farm mortgages, or it may accept a lower rate if in the exercise of a wise discretion it deems it for the best interest of the state to do so; for the purpose of the law as declared in the title and body of the act is to secure the continuous, safe investment of these public funds, and to the wisdom and integrity of the board are confided all matters of detail essential to the execution of the trust in conformity with the spirit of the act.

2. The Contingent Plan.

[8] That it was not the intention of the Farm Loan Act to deprive the board of all control over these funds and to commit to the several counties exclusive authority to loan on farm mortgage security in the first instance is made as certain as plain, terse English can ever be made to express an idea. Primarily the investment of the funds in farm mortgages is intrusted to the board by sections 1 and 2 of the act, and the board is commanded to make the loans in the order in which the applications are received by it. It was doubtless realized, however, that the contingency might arise in which the board would find itself unable to employ all of these funds available for investment in public securities and farm mortgages, and for the purpose of supplementing the primary plan, and, by bringing the borrower and lender into closer contact, encourage the utmost use of these funds by qualified landowners who might seek long-time loans at an attractive rate of interest, this proviso was added to section 2:

"Provided, however, that if enough of such moneys remain on hand in the state treasury uncalled for, to warrant them doing so, the state board of land commissioners shall divide such moneys among the organized counties of the state, in proportion to the population, as nearly as may be, subject to the following provisions."

Then follow the provisions for loaning such residue by the several counties in the event that the contingency arises and the residue on hand is sufficient to warrant the board in making a division of it. There may never be any funds for distribution. The board may be able to keep all of the funds securely and continuously invested in public securities and farm mortgages. The contingency provided for in section 2 may never arise, and yet it may arise at any time, and the validity of the act in so far as it provides for this contingent plan is to be tested, not by what is certain to be done under it, but by what may be done under it. State ex rel. Holliday v. O'Leary, 43 Mont. 157, 115 Pac. 204.

Whenever the contingency contemplated actually arises, the apportionment and distribution of such residue is to be made among the several counties according to population as nearly as may be done. Applications for loans are to be made to the county auditor (or, if there be no auditor, to the county clerk); the county attorney then examines the abstracts of title; the county commissioners appraise the lands offered as security, and loans may be made directly by the county, but the mortgages securing them

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must run to the state. No loan can be made upon land appraised at less than $10 per acre, no loan may exceed two-fifths of the appraised value of the security offered, and not more than $5,000 shall be loaned to any one individual, association, or corporation.

Section 8 provides that, if any county receiving its distributive share of these funds is unable to loan them after giving the required notice, it shall return such funds to the board, with interest thereon for 60 days.

Section 9 provides that, if a borrower fails to meet the requirements of his obligation, the county attorney shall foreclose the mortgage. The same section then proceeds:

"If no other person shall bid the full amount due upon said mortgage upon the foreclosure sale of the same, with the cost and expenses of the foreclosure and sale, the county attorney or county auditor shall bid in the land in the name of the county for the amount due and all costs and expenses incurred, and such county shall at once pay to the state board of land commissioners such full amount due and interest out of the general fund of the county, and if the same is not redeemed, as provided by law, the sheriff's deed shall be made to the county and the county shall thereby become the owner of said land."

By section 12 each county is made responsible and accountable for the principal and interest of all moneys received by it, and in case of loss such county shall, out of its common revenues, repay the same to the board.

Notwithstanding such funds are distributed to the several counties, and the board releases all control over them, and the counties are charged with the duty to loan or return them with interest, the state nevertheless retains title to such funds. They belong to the state in the sense that they are realized out of the grants to the state by the federal government. County of Des Moines v. Harker, 34 Iowa, 84.

[9] By sections 8, 9, and 12 of the Farm Loan Act every county is made primarily liable for the funds received by it. It is required by section 8 to return the funds if no loans are made, in which event it must pay interest for 60 days out of its revenues raised by general taxation, though it receives no benefit from the transaction whatever. By section 9 it is constituted a statutory guarantor of every loan made by it. If the borrower fails to pay principal or interest, the county is ultimately liable for the loss or deficiency, notwithstanding the Constitution in section 1, art. 13, provides:

"Neither the state, nor any county, city, town, municipality, nor other subdivision of the state shall ever give or loan its credit in aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association or corporation, or become a subscriber to, or a shareholder in, any company or corporation, * * * except as to such ownership as may accrue to the state by operation or provision of law."

[10, 11] The primary liability for the integrity of the funds distributed is sought to be fastened upon the counties by this act, while the Constitution imposes such liability upon the state. Sections 3 and 12, art. 11. By the terms of this act a county is compelled to pay out of its general revenues raised by taxation all the expense of operating under this plan, including interest on funds not loaned, and the principal and interest of loans foreclosed (in the absence of another purchaser at the foreclosure sale), excepting only the cost of abstract and recording fee; and if the funds to make these payments are not on hand in the county treasury, the county must perforce issue its warrant or evidence of indebtedness, and all this without reference to its outstanding obligations. Section 5, art. 13, of the Constitution limits the indebtedness which a county may incur for any purposes whatever to an amount not exceeding 5 per cent. of the value of its taxable property; but the act in question makes no distinction between the county which has reached the limit of indebtedness and the one which has not. It attempts to impose this additional burden upon all alike, doubtless to avoid the charge that the measure is obnoxious class legislation. The borrower who secures his loan from the county becomes indebted to the state, not to the county. His obligation runs to the state and his mortgage is made to the state; but by this act the county is compelled to raise by taxation money to extinguish the private debt of a delinquent borrower to the state, notwithstanding the Constitution forbids it to do so.

Whatever may be said of other provisions constituting this plan—for instance, of the provision of section 2 requiring the funds to be distributed to the several counties according to population, without any means available to the board for ascertaining the population, or of the provision of section 3 requiring the board to relinquish control of these funds without any additional security from the county treasurer who receives the funds for the county, or of the provision of section 2, subd. (c), requiring the county auditor to give public notice of the funds on hand available for farm loans, and the apparently contradictory provision of section 6 which requires such notice to be given by the county commissioners, or of the provision of section 10 which requires the county in its own name to give a release and satisfaction for a debt due to the state and paid by the borrower, or of the provision of section 6 (a) which attempts to impose upon a judicial officer purely ministerial duties—this much is certain: Sections 9 and 12 violate the plain mandates of the Constitution.

It is beyond the power of legislation to compel a county, or the several counties, to assume a burden imposed upon the state itself by terms of the Constitution which are mandatory and prohibitory.

A county cannot be compelled to loan its credit in aid of an individual or to make good the loss incurred by a delinquent bor-

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rower's failure to discharge his obligation to the state.

The county which has already reached the constitutional limit of indebtedness cannot be burdened by further liabilities of this character imposed by statute, or at all, without an amendment to the Constitution itself.

[12] Taxes imposed and collected by a county can be expended only for public purposes. Const. § 11, art. 12. They cannot be diverted to liquidate the debt of a private individual.

Whether the invalid provisions of sections 9 and 12 shall operate to defeat the contingent plan depends upon the answer to the inquiry: Are those provisions so intimately related to the remaining portions of the statute creating the plan that it may be said fairly they were an inducement to the lawmaker to provide the plan?

[13, 14] In construing a statute the court must, if possible, ascertain and carry into effect the intention of the Legislature enacting it (Power v. Board, 7 Mont. 82, 14 Pac. 658); and such intention is to be gathered from the terms of the statute, when considered in the light of surrounding circumstances (Jay v. School District No. 1, 24 Mont. 219, 61 Pac. 250). In so far as we are able to ascertain the intention of the lawmakers in providing for this contingent plan, it would seem reasonably certain that the provisions requiring the county to be responsible and accountable for the funds received by it and to guarantee each loan made by it were intended to constitute the mainstay or principal support of the entire plan. So long as the funds are committed to the custody of the board for investment, the state guarantees their integrity under the provisions of the Enabling Act and the Constitution requiring it to do so; but when by the terms of this plan the board is required to relinquish entire control and the county, through its officers, assumes exclusive management, the guaranty of the funds by the county was apparently deemed necessary to their safety and security and without which the plan would never have been devised. Under this view, the entire plan must be deemed abortive, and the statute, in so far as it provides for it, unconstitutional and void.

[15] The people of this state, acting as a legislative body, can no more transgress the provisions of the state Constitution than can their representatives in the Legislative Assembly. The terms of the Constitution can be changed or modified only in the manner indicated in article 19 of the Constitution.

[16, 17] But it does not follow that because this contingent plan must be disregarded the entire act is invalidated. The respective portions of the act providing the two plans are entirely distinct; that is to say, the provisions constituting the primary plan are in no wise dependent for their vitality upon the remainder of the act. The primary plan is complete in itself, and will not be affected by a disregard of the remaining portions of the act. The rule applicable here was stated by this court in Dunn v. City of Great Falls, 13 Mont. 58, 31 Pac. 1017, as follows:

"If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained." Hill v. Rae, 52 Mont. 378, 158 Pac. 826.

Under the views herein expressed, the county auditor of Cascade county is not a necessary or proper party to this proceeding, and he is dismissed from further consideration.

The peremptory writ will issue directed to the remaining defendants constituting the state board of land commissioners, commanding them to receive and consider the application of this relator, and to take such further steps as will render effective the primary plan of the Farm Loan Act as indicated herein.

SANNER, J., concurs.

BRANTLY, C. J. While I did not hear the argument in this case, I have examined carefully the provisions of the statute and the sections of the Constitution by which its validity must be determined. I am satisfied that Mr. Justice HOLLOWAY has stated the only conclusion permissible, and therefore concur therein.

(29 Idaho, 377)

In re DRAINAGE DIST. NO. 1 OF CANYON COUNTY.

BURT et al., Drainage Com'rs, v. FARMERS' CO-OPERATIVE CANAL CO. et al.

(Supreme Court of Idaho. Aug. 19, 1916. On Rehearing, Dec. 13, 1916.)

1. DRAINS ⟸70—SPECIAL ASSESSMENTS—EXEMPTION.

A canal or ditch company corporation not organized for profit and by statute exempt from general taxation is not relieved from liability for assessments for the construction of a drainage system required to protect the lands under it from becoming alkaline or water-logged, for the drainage of land where such canal or ditch company contributes by seepage or otherwise to make such drainage system necessary.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 74; Dec. Dig. ⟸70.]

2. CONSTITUTIONAL LAW ⟸290(1) — DRAINS ⟸70—ASSESSMENTS—IMPOSITION.

Held, that the assessment made by the commissioners, so far as the waste ditch is concerned, is not directly against such ditch, but against the corporation by reason of its being relieved of the necessity or burden of maintaining such waste ditch, or keeping it in repair.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 871, 874, 875; Dec. Dig. ⟸290(1); Drains, Cent. Dig. § 74; Dec. Dig. ⟸70.]

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8. DRAINS ⟸71 — ASSESSMENTS — "SPECIAL BENEFITS."

Special benefits for which a canal or ditch company may be assessed, as distinguished from general benefits, are whatever increase the value of the land or easement or relieve it from a burden.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 74; Dec. Dig. ⟸71.

For other definitions, see Words and Phrases, First and Second Series, Special Benefits.]

4. DRAINS ⟸76—ASSESSMENTS—MODE OF ASSESSMENT.

Held, that the rights of way of the respondents are easements, and it was proper for the commissioners to consider each right of way as one entire easement, and the provisions of section 9 (Sess. Laws 1913, p. 63) does not require that each right of way or easement shall be divided up into small parcels and the assessment fixed against each parcel.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 76–81; Dec. Dig. ⟸76.]

5. DRAINS ⟸82(5)—ASSESSMENTS—PROCEEDINGS TO ANNUL OR SET ASIDE.

Held, that the question as to whether such assessments are arbitrary, unjust, and void because of the amounts assessed is not before this court. The question presented is as to whether any assessment whatever against such corporation can be legally made under the facts of this case.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 84, 86; Dec. Dig. ⟸82(5).]

6. DRAINS ⟸82(1) — DRAINAGE DISTRICTS — ASSESSMENTS.

The question of the reasonableness or unreasonableness of the assessment levied against the respondents is a matter that the law has provided may be determined on the trial of the issues of fact before a jury under proper instructions, and the determination of the commissioners must be construed as prima facie correct as to the amount of such assessments until the proper court has held otherwise.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 87; Dec. Dig. ⟸82(1).]

7. WATERS AND WATER COURSES ⟸262—IRRIGATION DITCHES—SEEPAGE—"RESPONSIBLE."

Held, that the word "responsible," as used in section 9a (Sess. Laws 1915, p. 124), to wit, that "such lands are responsible for damages to lower lands from seepage and saturation by irrigation water," may be construed to mean physical responsibility whether legally liable for damages under the law or not.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 323; Dec. Dig. ⟸262.

For other definitions, see Words and Phrases, First and Second Series, Responsible.]

8. DRAINS ⟸67 — DRAINAGE DISTRICT—POWER OF LEGISLATURE.

Held, that the Legislature has authority under the provisions of the Constitution to provide for assessments for the construction of a drainage system in a drainage district and make all lands or easements within such districts subject to such assessments that are physically responsible for damages that result from seepage or percolation of water from lands or canals or easements therein.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 73, 76, 91; Dec. Dig. ⟸67.]

9. DRAINS ⟸70—ASSESSMENTS—CANAL COMPANIES.

Where water escapes either by seepage or percolation from a ditch or canal to the injury of another, and a drainage system is necessary to protect the lower land from becoming alkaline or water-logged, proper assessments may be made against such canal or ditch to assist in the construction of a drainage system that will protect lower lands from damage because of such seepage or percolation.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 74; Dec. Dig. ⟸70.]

On Rehearing.

10. REVERSAL—REMAND—DIRECTIONS.

Held, upon rehearing, that the order of the lower court appealed from in this case be reversed, and that the cause be remanded for trial, with direction to the lower court to frame the necessary issues by allowing proper amendments to all pleadings, and that evidence be received touching the liability of respondents, as well as that of all other property owners claimed to be liable to assessment for the purpose of making the proposed improvement, whether now in the district or properly sought to be included therein, and that the conclusions of the court as announced in its opinion following the original hearing be not deemed to be the law of the case or as binding upon the trial court upon the trial of this case; this court reserving the right to place a/ final construction upon the legislative acts involved in this proceeding when the whole matter relating thereto has been properly submitted to it.

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

In the matter of Drainage District No. 1 of Canyon County. Protest by the Farmers' Co-Operative Canal Company and the Noble Ditch Company against an assessment by C. G. Burt and others, commissioners of the district. From an order setting aside the assessment, the commissioners appeal. Reversed and remanded, with directions.

Harry S. Kessler, of Boise, for appellants. Richards & Haga, of Boise, for respondents. B. F. Neal, of Boise, amicus curiæ.

SULLIVAN, C. J. This is an appeal from an order of the district court sustaining the remonstrance of the Farmers' Co-Operative Canal Company, a corporation (which will hereafter be referred to as the Canal Company), and the remonstrance of the Noble Ditch Company, a corporation (which will hereafter be referred to as the Ditch Company), against the assessments of benefits against the rights of way of each of said companies, by which order the court adjudged and held null and void such assessments, and ordered such assessments stricken and excluded from the report of the commissioners of drainage district No. 1, Canyon county, which board of commissioners was appointed by said court for the purpose of assessing the benefits to the several corporations and persons owning land and property in said drainage district. The following facts appear from the record:

After the organization of said district and the appointment of said board of commissioners, they entered upon the discharge of their duties. They employed an engineer and

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surveyor for the purpose of securing and compiling the necessary data, examined the lands included within the boundaries of the district, determined and assessed benefits against each tract of land, made their report to the court, and asked for the confirmation thereof. In this report the commissioners assessed benefits against the respondent corporations, and thereupon said corporations filed remonstrances against the confirmation of said report, and the lower court sustained such remonstrances and dismissed the proceedings as to said two respondents.

The report of said commissioners was made in conformity with section 9 of the Drainage Act of 1913. The report contains: (1) The route and location of the proposed drainage system; (2) the estimated cost of the proposed works as $117,844; (3) the probable yearly cost of keeping the drainage district in repair as $1,000; (4) a list of the lands that will be injured for right of way, etc., and the amount of such injury as $3,219.01; (5) the estimated aggregate benefits to the land within the district from the construction of said works as $589,220, and the list of the lands that will be benefited and the amount of such benefit set opposite the description of each tract; (6) a list of municipalities and corporations which the commissioners had determined would be especially benefited by the proposed drainage system, together with a description of the lands belonging to such corporations and the amount of benefits assessed against each; (7) a determination of the proposed permanent boundaries of the district.

The benefits assessed against the farm lands in the district range between $35 and $40 a year per acre, and the assessments thereon between $7 and $8 per acre.

It appears that the respondent corporations are irrigation corporations owning canals which take water out of the Payette river and carry it in the main canals through the drainage district and deliver it to farmers further down the valley. The Canal Company has a right of way within the district 7.61 miles in length and 100 feet in width, and also a waste ditch 2¾ miles in length and 2 rods in width. The Ditch Company has within the district a right of way for its ditch 7.41 miles in length. A portion of it is 100 feet in width and the remainder 75 feet in width. The amount of benefits determined by the commissioners against the Canal Company was $100,000, and the assessment is one-fifth of that amount or $20,000, and the benefits to the Ditch Company $50,000, and the amount of assessments $10,000, and the net benefits assessed against both companies result, quoting from the commissioners' report, in their "being relieved from responsibility for damages done to low lands from seepage, saturation by irrigation by water from canal on high land, and the necessity for carrying off waste water from canal."

The amount of the assessments against the respondent corporations is not an issue on this appeal. The sole question here for determination is whether or not assessments of the nature specified and made by the commissioners can be levied against such corporations, and the determination of that question requires a construction of the Drainage Act and its amendments.

The constitutionality of the act known as the Drainage District Law (see Sess. Laws 1913, p. 58), under which said drainage district was organized, was before this court in 1914. See In re Drainage Dist. No. 1 of Canyon County, 26 Idaho, 311, 143 Pac. 299, L. R. A. 1915A, 1210, where it was held that said act is constitutional. In 1915 the Legislature amended sections 7 and 24 of said drainage law and added thereto section 9a. Sess. Laws 1915, p. 124.

The commissioners determined from the information they had that the two respondent companies were largely responsible for the damage and injury to the lands within said drainage district, and based their assessments against them on the theory and under the authority of section 9 of the original drainage law of 1913 (see Sess. Laws 1913, p. 63), and added section 9a which was an amendment to the original act (see Sess. Laws 1915, p. 124).

Subdivision 5 of section 9 of said act directs the commissioners to "apportion and assess the estimated cost of the same [drainage] on the lands so benefited by setting opposite the correct description of each tract, lot or easement, the portion of such cost assessed as benefits thereon. * * * And if any municipality or corporation should in their judgment bear a part of the expense or as such will derive a public or special benefit from the whole or any part of such proposed work, they shall so report and assess the amount of such benefits." Under the provisions of that section the commissioners are given two grounds on which they may base assessments: First, against the land or any easement therein as such; second, against municipalities or corporations, on the theory that they may be especially benefited independent of any land owned or possessed.

In said report of the commissioners the respondent companies are listed as corporations receiving special benefits; but, on the other hand, the particular land they own within the district is described and the amount of assessment set opposite such description so that the assessments can be considered either as being against corporations that are especially benefited or against the land owned by them that is benefited. The report of the commissioners is so framed as to make either provision of the law applicable to the respondents. In said report the nature of the benefits is specified substantially in

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the language of said added section 9a, which is as follows:

"In determining the amount which each tract of land will be benefited by such proposed drainage system the commissioners shall consider the damage done to low land from seepage and saturation by irrigation water from high land, and the necessity for the carrying off of waste water, and such high lands shall be considered as being benefited to the extent and in the amount that such lands are responsible for damage to low lands from seepage and saturation by irrigation water."

It appears that the commissioners acted on the theory that subdivision 5 of section 9, above quoted, and section 9a directed or commanded them to do as they have done in making said assessments, and that said provisions of section 9 required them to assess, for the purpose of bearing a share of the cost of the construction of the proposed drainage works, lands that would be benefited, also all municipalities or corporations that would derive a public or special benefit from such works, and that section 9a declared the law or rule for equitable determination and assessing special benefits in cases where seepage or saturation by irrigation water contributed to the necessity for a drainage system.

The respondent corporations have filed separate remonstrances. That of the Canal Company is considerably longer than that of the Ditch Company, and contains some 17 paragraphs, which include all of the objections urged by the Ditch Company and several additional ones. The principal objections presented by said remonstrances are substantially as follows:

(1) That the Canal Company is a corporation, not organized for profit, and that it is simply a trustee for the farmers who use the water carried through the ditch, and that such water and the easement in the canal are appurtenant to the land irrigated, and therefore the Canal Company or corporation is not assessable separate and apart from the land using the water.

(2) That inasmuch as the Canal Company has a waste ditch which not only cannot be benefited, but will actually be destroyed by the drainage system, therefore the assessment against it is improper and void.

(3) That the Canal Company's lands have not been assessed by setting opposite each tract of land the benefits assessed thereon.

(4) That inasmuch as the estimated benefits to the Canal Company amount to about $1,000 per acre, such assessment is arbitrary, unjust, and therefore void.

(5) That the alleged benefits are prospective, conjectural, and therefore void.

[1] 1. As to the first objection. Counsel for appellants concede that the purpose of said canal corporation is merely to hold the legal title to the canal and appurtenant water rights in trust for the farmers and users of water, but, on the other hand, it is contended that these farmers have taken it upon themselves to organize the Canal Company for convenience and economy in operating their system of irrigation; that the corporation itself is a legal entity recognized by law, which the farmers by their act of incorporation voluntarily created for convenience and economy. And it is also contended that no action will lie against the various stockholders of said corporation; that the corporation holds the legal title itself and is responsible for the repair and upkeep of the canal, and that if such canal by breakage or seepage damages any owner's land, it is the Canal Company that is sued and is in law the only proper party to sue, and that all taxes and assessments, if any, against the canal system, as distinguished from the land under the canal, are properly assessed and levied against said corporation; and it is contended that it therefore follows that if the system of drainage affords relief from liability for damages of lessens the expense of maintenance, it is the corporation that is benefited.

Counsel for respondents contend that said canal and ditch companies are not organized for profit and are exempt under the law from taxation, and it may be inferred from the argument in their printed brief that they claim that exemption from taxation carries with it exemption from special assessments.

It is a well-recognized rule that a constitutional or statutory exemption from taxation is generally held to apply only to taxation for the general purposes of government, city, county, or municipality, and not to relieve from liability for local assessments for municipal and other like improvements. 12 Am. & Eng. Ency. of L. 314, and cases cited; also People v. Pitt, 169 N. Y. 521, 62 N. E. 662, 58 L. R. A. 372, and authorities cited.

There is, therefore, nothing in the contention of counsel that because canal and ditch companies are exempt from taxation that that exempts them from special assessments for improvements.

[2] 2. We will next consider the contention that the waste ditch of the Canal Company will not be benefited, but will actually be destroyed by the drainage system, which contention applies only to the Canal Company.

It appears that the Canal Company has and is required to keep up for the purpose of carrying off its surplus water a waste ditch about 2¾ miles long and 2 rods wide, which costs the Canal Company considerable money each year to clean and maintain, and it seems that it was the theory of the commissioners that with the construction of the proposed drainage system, such system would largely take care of the surplus water and relieve the Canal Company from maintaining at least the principal portion of said waste ditch and thus would be a saving and benefit to the Canal Company. Counsel for the Canal Company contended that by the construction of the proposed drainage system

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said drainage ditch would become unnecessary and useless, and therefore of no value, and that the construction of the drainage system would deprive them of property without due process of law.

There is nothing in this contention, if it be true that the drainage system would relieve the Canal Company of the burden of keeping up and maintaining said waste ditch. The assessment made by the commissioners is not against the waste ditch, as such, but against the corporation by reason of being relieved of the necessity or burden of maintaining the waste ditch. It appears to us that this would be clearly a special benefit.

In the text (9 R. C. L. p. 654) it is stated as follows:

"Special benefits for which a landowner may be assessed, as distinguished from general benefits for which he may not be assessed, are whatever increase the value of the land, relieve it from a burden, or make it especially adapted to a purpose which enhances its value."

To the same effect is Lipes v. Hand, 104 Ind. 508, 1 N. E. 871, 4 N. E. 160, Heffner v. Cass & Morgan Counties, 193 Ill. 439, 62 N. E. 201, 58 L. R. A. 353, and notes to the latter case.

[3] 3. The third objection is to the effect that the Canal Company's lands have not been assessed by setting opposite each tract of land the benefits assessed thereon. By referring to section 9 (Sess. Laws 1913, p. 63), it will be observed that the amount of assessment is to be set "opposite the correct description of each lot, tract, or easement." The rights of way of the respondents are easements, and it is proper to consider each right of way as one entire easement. The statute does not require that each right of way or easement shall be divided up into small parcels and an assessment fixed against each parcel. See In re Johnson Drainage Dist. No. 9, 141 Iowa, 380, 118 N. W. 380.

[4] 4. The fourth contention is that since the assessment against the Canal Company is $20,000, and that against the Ditch Company is $10,000, and that the Canal Company's right of way, figured on the acreage basis, would be assessed at $200 per acre and the Ditch Company's at $100 per acre, such assessments would be arbitrary, unjust, and void.

As before stated, the question as to whether such assessments are arbitrary, unjust, and void because of the amount is not before this court in this proceeding. The findings of the commission no doubt were based on some evidence, and this court cannot in this proceeding determine whether they are arbitrary and unjust without the evidence that the commissioners had before them.

It was held in Reclamation District No. 70 v. Sherman, 11 Cal. App. 399, 105 Pac. 277, that:

"The duty of the commissioners is to make an estimate of the whole expense of the proposed reclamation works, and then assess the lands embraced in the district in proportion to the whole expense thereof and according to the benefits which will result to each parcel of land from such reclamation. It is clear that the statute contemplates that considerable discretion shall be exercised by the commissioners in the determination of the question as to benefits which will accrue to the several tracts of land included in the district. By this we mean to say that, while an arbitrary assessment cannot be levied, the judgment of the commissioners upon the assessment, after a view of the land as contemplated by the statute, must be presumed to have been the result of a consideration of all the elements necessary to a just apportionment of the assessment."

See, also, Riverdale Reclamation Dist. No. 805 v. Shimmin, 24 Cal. App. 595, 141 Pac. 1070.

In Re Johnson Drainage Dist. No. 9, 141 Iowa, 380, 118 N. W. 380, it was held that the benefits to a railroad right of way were entirely different from farm land and should not be assessed on the same basis as 40-acre tracts. In that case the court said:

"Neither railroad property nor highways are used as lands are ordinarily used, and hence the benefits to be derived by such property from the improvement are of an entirely different character from those conferred upon agricultural lands." Leonard v. Arnold, 244 Ill. 429, 91 N. E. 534; Jackson v. Board of Supervisors, 159 Iowa, 673, 140 N. W. 849.

The reasonableness or unreasonableness of an assessment levied against the respondents is a matter that the law provides is to be determined on the trial of the issues of fact. That question may be submitted to a jury under proper instructions from the court, but until there is proof to the contrary the determination of the commissioners must be construed as prima facie correct as to the amount of such assessments.

[5-9] 5. The fifth contention, that the alleged benefits assessed against the respondents are prospective and conjectural and therefore void, is without merit. It is true that it is difficult to assess benefits that will accrue in the future with any particular degree of certainty even against farm lands, and the courts uniformly hold that an approximate estimate is all that is necessary. The fact that an exact measurement of the benefits which may accrue to land in a drainage district cannot be ascertained with accuracy until after the completion of the system, and perhaps not then, does not render the damages so speculative and conjectural in their nature as to be impossible of reasonable ascertainment before the improvement is made. In the case of Nemaha Valley Drainage Dist. No. 2 v. Marconnit, 90 Neb. 514, 134 N. W. 177, the court had under consideration an objection to the effect that benefits which may accrue are so speculative and conjectural in their nature as to be impossible of ascertainment until after the construction of the improvements, and said:

"This objection, however, would be equally applicable to proceedings in the ascertainment of damages occasioned by the laying out of highways or the building of railroads. Furthermore, if no assessment and levy could be made until

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after an improvement of this nature was completed, common prudence on the part of engineers and contractors would no doubt operate so that it would be a long time before the land would be relieved from overflow."

This court held in Woodland v. Portneuf Marsh-Valley Irr. Co., 26 Idaho, 789, 146 Pac. 1106, that exact and definite measurements of the respective quantities of water from different sources are not essential to sustain the verdict of a jury in determining what amount of damages a defendant corporation as an independent tort-feasor should pay as compensation for the injury caused by its part of such water, although some evidence in that respect is essential.

Courts have not refused to award damages occasioned by seepage or saturation because such damages were indefinite or conjectural. McCarty v. Boise City Canal Co., 2 Idaho, 245, 10 Pac. 623; Arave v. Idaho Canal Co., 5 Idaho, 68, 46 Pac. 1024; Stuart v. Noble Ditch Co., 9 Idaho, 765, 76 Pac. 255; Verheyen v. Dewey, 27 Idaho, 1, 146 Pac. 1116.

Counsel for respondents contend that the assessments made against the defendant corporations are levied upon an erroneous basis and in total disregard of any benefits that they may or can receive from the construction of said drainage system, and that in so far as said section 9 of the Drainage Law of 1913 and said section 9a of the 1915 Laws can be construed to justify such assessments, they are unconstitutional and void. It is conceded by counsel for respondents that in this case the amount of actual assessments levied is immaterial from their viewpoint; that their attack is on the basis of the assessment rather than merely on the amount, and the real question is whether the statutory provisions just referred to and the assessments based upon them are constitutional and valid or whether they amount to a denial of due process of the law and equal protection of the law and would result in the taking of property without compensation, and also in violation of the constitutional guarantee of uniformity in taxation.

The position taken by counsel for respondents seems to be that unless the seepage from their canals occurs through the Canal Company's negligence, and that by reason of such negligence damages may be recovered in an action, the Canal Company is not benefited by the drainage of such lands, and in construing the word "responsible," as used in the last clause of said section 9a, above quoted, to wit, "that such lands are responsible for damages to low lands from seepage and saturation by irrigation water," they concede that it may mean either their legal responsibility or physical responsibility; that we would then have a legislative declaration that "highlands" and "canals" are benefited to the extent that the use of water thereon in a lawful and necessary manner has resulted in the percolation of a portion of such water to lower lands, and counsel contend that the "use of water in a lawful and necessary manner," under the contention of appellants, seems to go to the very basis of the law of irrigation in the arid states and is absolutely contrary to the holdings of this court in the cases of Stuart v. Noble Ditch Co., 9 Idaho, 765, 76 Pac. 255; Woodland v. Portneuf, etc., Co., 26 Idaho, 789, 146 Pac. 1106; Verheyen v. Dewey, 27 Idaho, 1, 146 Pac. 1116. Those cases involve actions to recover damages because of seepage from canals and irrigated lands resulting from negligence. If the term "responsible," as used in said section, may be construed to mean physically responsible, whether legally responsible under the law or not, then under said act ditch companies and corporations may be assessed whether the damage results from negligent construction or not.

The English common law as well as the early American rule was to the effect that any person who conveyed or accumulated water upon his land by artificial means did so at his peril, and if any water should escape by means of seepage, and damage result, liability therefor was conclusively presumed. During the years of the development of irrigation in the Western country, the courts, with the desire, evidently, of lending every encouragement to the reclamation of arid lands, required proof of negligence in the construction of canals before permitting the recovery of damages from seepage. Fleming v. Lockwood, 36 Mont. 384, 92 Pac. 962, 14 L. R. A. (N. S.) 628, 122 Am. St. Rep. 375, 13 Ann. Cas. 263. The authorities on this question are generally collected in the annotations to the above case found in the L. R. A. and Annotated Cases.

It seems in this irrigated country the question of drainage is now confronting almost every irrigated section, and there seem very cogent reasons for a return to the former rule above stated, at least to the extent of assessing lands for the construction of a drainage system from which seepage or percolation damages or injures other lands. The early settlers of the arid regions were not confronted with the question of drainage, but time and experience have proven that a drainage system is absolutely necessary where large areas of desert land are reclaimed by irrigation. It has been argued that the drainage law, as enacted, applied only to lands that had become swampy, alkaline, or water-logged because of natural conditions. However that may be, this court held in Elliott v. McCrea, 23 Idaho, 524, 130 Pac. 785, which case involves the drainage district law, that said act might well be termed the complement of the irrigation act. New conditions have arisen in this state, and the Legislature has the right to enact any legislation not in conflict with the provisions of the Constitution which is necessary to meet new conditions whereby substantial justice may be done.

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In the very recent case of Mallett v. Taylor, 78 Or. 208, 152 Pac. 873, the court said:

"Beyond the fact that some of the courts hold that the owner of a ditch or dam causing damage by seepage or overflow is liable irrespective of negligence, while others hold that he is liable only for negligently permitting water to escape from such causes, the courts generally make no distinction between cases of damage arising from water escaping by overflow and those arising from seepage, and logically there can be no reason for any distinction. * * * But to hold that a man may lawfully construct a ditch which from the manner of its construction must necessarily occasion substantial injury to the land of his neighbor either by overflow or by percolation, or that he can lawfully so irrigate his land as to do such substantial injury, would be to grant him an easement in such adjacent land without compensation, and this the law will not permit."

In the case at bar the court need not go to the extent that the Oregon court has gone in the above case, but we think it was the intention of the Legislature to provide for the assessment of all lands and canals within a drainage district and make them responsible for assessments according to the damage that has been caused by overflow, from such lands and canals, seepage, or percolation. It is a well-recognized rule of law that an owner of property ought not to be permitted to use it to the injury of the property of another, but recognizing that there are some injuries which result in damage for which compensation cannot be recovered in an action in court, we are satisfied that the Legislature has full authority under the Constitution to provide for assessments and make all property subject to such assessments that is physically responsible for damages that result from acts for which no legal responsibility under an action to recover damages attaches, and that the Legislature has done so under and by virtue of the drainage laws enacted by it.

Suppose that one-half of the land in this drainage district was made worthless by reason of percolation and seepage from said canals, and suppose, also, that said canals were properly constructed and operated, that there was no negligence in either construction or operation, and that by reason thereof the landowners could not recover damages from those companies: Would it not appear to be contrary to the public policy of the state to hold that those companies could not be required to pay their proportionate part of the cost of a drainage system to protect the landowners from the seepage and overflow waters of such canals? The canals being physically responsible for much of the injury done to such lands, ought these companies not, in justice and equity, be required to pay their proportionate part of the cost for constructing a drainage system to carry off the seepage and overflow waters from their systems?

It is a well-recognized fact that under many of the irrigation systems of our state thousands of acres of land which were reclaimed from an arid condition and which for a time produced valuable crops have now become alkalined or water-logged and thus ruined, and grow nothing but willows and tules because of the seepage of waters from canals and the irrigation of higher lands. And it certainly is not the public policy of the state to permit thousands, if not hundreds of thousands, of acres of lands that were once productive to be ruined and made worthless, and leave the owners thereof remediless. It is only equitable and just that all who cause or assist in causing damage to, or the ruination of, such lands, pay their proportionate part of the cost of a drainage system to protect the lower lands from being made worthless.

It is well known that the cost of drainage systems will in all probability be less than to require the canal companies to cement their canals or to otherwise make them impervious.

It is clearly the policy of the state to have the great irrigation schemes of the state so conducted as not to ruin thousands of acres of fine agricultural land and bankrupt the owners and leave them remediless. One who permits water to escape from his canal, either by seepage or percolation, to the injury of another, ought at least be required to assist in the construction of a drainage system that will protect the lower lands from damage because of such seepage or percolation.

We therefore conclude that assessments of the nature specified and made by the commissioners against said corporations can be legally levied against such corporations, and since the trial court held that such assessments could not be legally made and were illegal and void, the order of the district court must be reversed, and the cause remanded for further proceedings. Costs are awarded to appellants.

MORGAN, J., concurs. BUDGE, J., sat at the hearing, but took no part in this decision.

On Rehearing.

BUDGE, J. A rehearing was granted in this case on October 14, 1916, and the case was reargued at this present term of court. Upon an examination of the petition for a rehearing and the briefs of respective counsel, and after listening to the arguments of counsel for the respective parties interested in this appeal, it is quite evident that there is an unusual situation confronting this court, growing out not only of the question involved, but also of the form of the pleadings required by the statutes in cases of this character.

The only pleading on the part of the appellant required by the statutes is the report of the commissioners of the appellant drainage district; and a remonstrance thereto is the only pleading permissible on the part of the respondents, which is more in the nature of an answer than a demurrer, and by which

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mixed questions of both law and fact may be presented and were presented in this case in the remonstrances filed by the respondents.

Under the terms of the statutes providing for the creation of drainage districts, the trial court is required to determine all questions of law and fact, save the two questions of benefits assessed and damages awarded, and as to these questions the court on demand of the person assessed, or to whom damages may be awarded, is required to frame the issues and submit them to a jury.

[10] An examination of the record before us discloses the fact that the questions of law and fact, arising by reason of the report of the drainage commissioners and the remonstrances of the respondents made thereto, are more or less confusing, and questions have been suggested by counsel on the arguments and in their briefs that may become very material in the proper determination of the questions involved in this case, and especially as to the proper construction of the drainage act, upon which this case is based and the future policy of the law with reference to the creation of drainage districts within the state and the assessment of benefits. In this case the trial court construed and acted upon the remonstrances as demurrers to the report of the drainage commissioners, thereby ignoring the numerous issues of fact presented by such remonstrances, the determination of which may have an important bearing upon the final determination of the legal questions presented by such remonstrances. It further appears to this court that whatever questions this court may determine on the record before it, still the case must go back for trial. It seems hardly proper to call upon this court to definitely determine many of the legal questions that may be presented on the present record, and especially to construe the drainage act and amendments thereto as applicable to this case, when it is apparent from the record and suggestions of counsel that other facts should be pleaded and the questions of law and fact should be segregated, and such questions of fact supported by testimony.

In view of the foregoing, the trial court will proceed to frame the necessary issues by allowing proper amendments to all pleadings, and will receive evidence touching the liability of respondents, as well as that of all other property owners claimed to be liable to assessment for the purpose of making the proposed improvement, whether now in the district or hereafter included or properly sought to be included therein, and the legal questions considered by the court on the former hearing will not be deemed the law of this case, or as binding on the trial court upon the trial of this case, and this court hereby expressly reserves the right to place a final construction upon the drainage act and the amendments thereto as contained in the Session Laws of 1913, at page 58, and the Session Laws of 1915, at page 124, until such time as these acts are before this court in proper form as herein indicated.

The order of the district court is therefore reversed, and the cause remanded for further proceedings, with the privilege allowed to the parties to this proceeding to amend the pleadings in the trial court in such manner as may be proper. Costs are awarded in favor of appellant.

SULLIVAN, C. J., and MORGAN, J., concur.

(29 Idaho, 357)

ADAMS et al. v. TWIN FALLS-OAKLEY LAND & WATER CO. et al.

(Supreme Court of Idaho. July 15, 1916. Rehearing Denied Dec. 13, 1916.)

1. WATERS AND WATER COURSES ⇐258 — IRRIGATION—LIENS.

Under federal and state Carey Act legislation (Act Cong. June 11, 1896, c. 420, 29 Stat. 434, and section 3288, Rev. Codes), first liens for the cost of construction of irrigation works are authorized to be created on the land and water right in order to insure the construction company a return of the initial cost of construction and a reasonable profit on the investment. Any lien thus created for the original cost of construction, together with the interest thereon, is subject to foreclosure and sale under the provisions of section 1629, Rev. Codes, and upon default by the settler in the payment of installments of principal or interest in accordance with his contract with the construction company for the purchase of water right, the company should resort to the security afforded it by the creation of such liens and the enactment of such statutory procedure which constitutes an exclusive remedy.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. ⇐258.]

2. WATERS AND WATER COURSES ⇐258—IRRIGATION DISTRICTS—LIENS.

Where a person, association, or corporation contracts to deliver a certain quantity of water to any party or parties, and the amount to be paid by said party or parties for the delivery of such water is fixed by contract or provided by law, it becomes a first lien upon the land for the irrigation of which said water is furnished and delivered, independent of the lien fixed by contract for the initial cost of construction of the irrigation works; and if the title to said tract of land is in the United States or the state of Idaho, then the said amount becomes a first lien upon any crop or crops which may be raised upon said tract of land during such irrigation season; and these liens may be recorded and collected as provided by law. Section 3288, Rev. Codes.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. ⇐258.]

3. WATERS AND WATER COURSES ⇐257(1)—IRRIGATION PROJECTS — PAYMENT OF CHARGES.

Paragraph 1 of the contract between the defendant construction company and the settler recites that: "This agreement is made in accordance with the provisions of said contract between the state of Idaho and the company, which, together with the laws of the state of Idaho under which this agreement is made, shall be regarded as defining the rights of the respective parties." The contract between the state and the construction company contains no pro-

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vision authorizing the construction company to withhold delivery of water for nonpayment of principal or interest by the settler on his water contract; neither do the laws of the state sanction such provision in the contract between the company and the settler.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 312; Dec. Dig. ⊂⊃257(1).]

4. WATERS AND WATER COURSES ⊂⊃257(1)—IRRIGATION DISTRICTS—CONTRACTS—VALIDITY.

The contract between the construction company and the plaintiffs in this case contains the following provision: "It is agreed that no water shall be delivered to the purchaser from said irrigation system while any installment of principal or interest is due and unpaid from the purchaser to the company or while any toll and assessment is due and unpaid from the purchaser to the Oakley Canal Company. * * *" It being admitted in this case that plaintiffs have paid the fixed charges made by the construction company through the operating company for the operation and maintenance of the irrigation works during the season of 1916 for the lands held by them respectively, and that there is an ample supply of water available for distribution, said provision contravenes section 3240, Rev. Codes, and in particular the final clause of said section, which is as follows: "And the right to continue the use of any such water shall never be denied or prevented from any other cause than the failure on the part of the user thereof to pay the ordinary charges or assessments which may be made to cover the expenses for the delivery of such water." Said provision in the contract is therefore unenforceable and void.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 312; Dec. Dig. ⊂⊃257(1).]

5. WATERS AND WATER COURSES ⊂⊃257(1)—IRRIGATION DISTRICTS—REFUSAL TO FURNISH WATER.

The enforcement of a provision in a contract between a Carey Act construction company and a settler empowering the company to deprive the settler of the right to the use of water on his failure to make payments upon the original contract debt might prevent the settler from making proof which would entitle him to a deed, and prevent the state from procuring patent to the lands within the Carey Act project. This result would destroy the security out of which the construction company seeks reimbursement for the cost of construction and thereby render valueless its lien upon the land. It would also result in the public waters of the state not being applied to the highest beneficial use. Even from these considerations alone, such contractual provision is contrary to public policy and can only be resorted to as provided by law for the collection of ordinary charges for maintenance of works and operating expenses properly incident to the delivery of water.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 312; Dec. Dig. ⊂⊃257(1).]

Original application for writ of mandamus by Rome Adams and others against the Twin Falls-Oakley Land & Water Company, a corporation, and others. Peremptory writ issued.

W. L. Dunn, of Oakley, J. H. Peterson, Atty. Gen., and D. A. Dunning and Herbert Wing, Asst. Attys. Gen., for plaintiffs. S. H. Hays and P. B. Carter, both of Boise, for defendants. Richards & Haga, of Boise, A. M. Bowen and Longley & Walters, all of Twin Falls, and W. G. Bissell, of Gooding, amici curiæ.

BUDGE, J. This is an original proceeding brought in this court upon plaintiffs' petition for writ of mandate to compel the defendants to deliver water for irrigation purposes to the plaintiffs who are settlers upon what is commonly known as the Oakley Carey Act project, situated in Cassia county.

The Twin Falls-Oakley Land & Water Company, which, for brevity, will hereafter be called the construction company, entered into a contract with the state of Idaho through its state board of land commissioners on August 12, 1909, wherein and whereby it was agreed that certain irrigation works should be constructed for the purpose of irrigating a large area of land located in Cassia county. After the state contract was entered into a form of contract was prepared by the construction company to be entered into between the settlers upon the project and the construction company, and was presented to and approved by the state board of land commissioners. Thereafter the land included within the project was thrown open for entry and settlement.

When the land was thrown open for entry and settlement a considerable portion of it was regularly filed upon by various persons who entered into the contracts with the construction company previously approved by the state board of land commissioners. These contracts were duly executed by the entrymen and the construction company. Under the terms of these contracts, the first deferred payment became due April 1, 1912, and upon the first day of April each and every year thereafter until the entire purchase price, together with accrued interest, was paid.

By reason of the failure of the construction company to complete the construction work of the project within the time stipulated in the original contract, and the inability of certain settlers to promptly meet their payments, by mutual agreement between the construction company and the settlers, payment of both principal and interest was extended, and thereafter an extension agreement which became a part of the original contract was entered into between some of the settlers and the construction company whereby the principal debt was extended to 1919, but in the meantime interest payments were to be made.

Among the settlers there were a few who are known as "old settlers" who had patented lands or had made filings on government lands within the project prior to the segregation. These old settlers entered into what is known as the extension agreement, and, so far as this case is concerned, occupy the same position with reference to the question to be determined here as the regular Carey Act entrymen, for the reason that their rights

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under the contract with the construction company appear to be identical with the rights of the entrymen.

Some of the plaintiffs here who were Carey Act entrymen failed or refused to sign the extension agreement. But they, with the plaintiffs who did sign the extension agreement, will be affected by the conclusions reached in this case in the same manner and to the same extent as though they had signed the extension agreement.

It is, we think, admitted that none of the plaintiffs herein have made payments of either the principal or interest on the initial indebtedness, according to the terms and conditions of the contract with the construction company. But it is equally true that all of the plaintiffs have paid the fixed charges made by the construction company through the operating company (Oakley Canal Company) for the operation and maintenance of the irrigation works for the irrigating season of 1916, for the lands held by them respectively.

[3-5] The contention between the construction company and all of the plaintiffs involves the validity of a portion of paragraph 6 of the original contract which was also by the construction company made a part of the extension agreement, and is as follows:

"It is agreed that no water shall be delivered to the purchaser from said irrigation system while any installment of principal or interest is due and unpaid from the purchaser to the company or while any toll and assessment is due and unpaid from the purchaser to the Oakley Canal Company. * * *"

It is the contention of the plaintiffs that the above portion of paragraph 6 of the contract is void and unenforceable for the reason that it is against public policy and, we might add, in contravention of the statutes of this state regulating the right to the use of the waters of the state for irrigating purposes, and is repugnant to other provisions of the contract.

Paragraph 1 of the contract, among other things, provides:

"This agreement is made in accordance with the provisions of said contract between the state of Idaho and the company, which, together with the laws of the state of Idaho under which this agreement is made, shall be regarded as defining the rights of the respective parties."

Paragraph 8 of the contract provides:

"This contract is made pursuant to and subject to the contract between the company and the state of Idaho and the existing laws of said state."

An examination of the contract between the state and the construction company shows that it contains no provision which authorizes the construction company to refuse the delivery of water where the entryman is in default in the payment of either principal or interest on his water contract with the construction company. This clearly indicates that such a procedure was not contemplated by the state or the construction company when that contract was entered into. Nor, as we view it, could such a provision have been legally inserted in the contract between the state and the construction company.

And since such a provision was clearly not authorized by the contract between the state and the construction company, in order to determine whether or not the construction company could legally refuse to deliver water from its irrigating system to the entryman under his contract during any irrigating season for failure to pay an original indebtedness, we must ascertain what particular provisions of the statutes of this state defining the rights of the construction company and the entryman were in force when the contract was made.

Section 3240, Rev. Codes, provides that:

"Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved. All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose, and the right to the use of any of the waters of the state for useful or beneficial purposes is recognized and confirmed; and the right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied, shall not be considered as being a property right in itself, but such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied; and the right to continue the use of any such water shall never be denied or prevented from any other cause than the failure on the part of the user thereof to pay the ordinary charges or assessments which may be made to cover the expenses for the delivery of such water."

The foregoing statutory provision was enacted by the Legislature in harmony with and to carry out the provisions of section 1, art. 15, of the Constitution of this state, which provides, in substance, that the use of all waters now appropriated or that may hereafter be appropriated for sale, rental, or distribution is declared to be a public use and subject to the regulation and control of the state in the manner prescribed by law.

The same may be said of section 3288, Rev. Codes, which provides, among other things:

"The amount to be paid by said party or parties for the delivery of said water, which amount may be fixed by contract, or may be as provided by law, is a first lien upon the land for the irrigation of which said water is furnished and delivered. But if the title to said tract of land is in the United States or the state of Idaho, then the said amount shall be a first lien upon any crop or crops which may be raised upon said tract of land, which said lien shall be recorded and collected as provided by law for other liens in this state. And any mortgage or other lien upon such tracts of land that may hereafter be given, shall in all cases be subject to the lien for price of water as provided in this section."

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These statutory provisions limit the expense which will authorize a refusal by a construction company, a quasi public corporation, to deliver water, where, as in the case at bar, the construction company has ample water for delivery, to the ordinary charges or assessments necessary to cover the maintenance and operating expenses for the delivery of such water, and this does not extend to any prior or initial indebtedness. And where the title to the land is in the United States or the state of Idaho, the ordinary charges or assessments to cover the expense for the delivery of such water becomes a first lien upon any crop or crops which may be raised upon the lands furnished with water. This lien is subject to foreclosure in the manner provided by law, and constitutes a prior lien upon the crops raised on the lands thus furnished with water.

It is evident from a careful reading of the contract made between the construction company and the settler that the company did not rely upon paragraph 6 of its contract for the penalty to be imposed for the failure on the part of the settler to comply with the conditions of the contract in the matter of making deferred payments together with the interest therein provided for, but it relied upon other provisions of the contract. Paragraph 3 of the contract provides, among other things:

"Interest * * * at 6 per cent. per annum, shall be paid annually, but if interest is not paid within thirty days from the date the same falls due, then in such case it shall be computed for the entire period at the rate of 8 per cent. per annum."

Paragraph 4 provides:

"The purchaser hereby covenants and agrees that upon default in the payment of any of the payments above specified, or of the interest thereon, or of any annual charge, toll, or assessment, for the operation and maintenance of the irrigation system hereinbefore provided for, the company may declare the entire amount of the principal purchase price for said water rights due, and may proceed either in law or equity to collect the same, and to enforce any lien which it may have upon the water rights hereby contracted, or upon the lands to which said water rights are dedicated, or may at its option proceed to enforce any remedy given by the laws of Idaho to the company against the purchaser.

"And the purchaser hereby further covenants that he will and by these presents does hereby grant, assign, transfer, and set over, by way of mortgage or pledge to the company to secure the payment of the amounts due and to become due on the purchase price of the water rights hereby contracted to be sold, any and all interest, and all rights which he now has or which may hereafter accrue to him under his contract with the state of Idaho, for the purchase of the lands to which the water rights hereby contracted for are dedicated, and further, that immediately upon transfer to him of the legal title to said lands or any part thereof, he will, upon demand, execute to the company in proper form a mortgage or deed of trust with power of sale in such form as may be approved by the state board of land commissioners to secure the performance by him of the provisions of this contract, which said mortgage the purchaser hereby covenants and agrees shall be a first lien upon the lands so mortgaged, superior to any and every incumbrance in favor of any persons whomsoever."

It will therefore be readily seen that the construction company contracted with the purchaser that, upon his default in the payments of the interest within thirty days after due, the penalty would be the increase in the computation of the interest rate from 6 to 8 per cent. per annum, and that a prior lien was to be created in favor of the construction company upon the water right contracted for and upon the lands to which the water was dedicated immediately upon the vesting of the title in the Carey Act entryman.

[1, 2] The federal government when making the grant of the Carey Act land to the state authorized the creation of a lien thereon for the cost of the construction of the works (29 Stats. at Large, 434), and the state, by legislative enactment (section 3288, Rev. Codes), created a lien on both the land and the water right to insure to the construction company a return of the initial cost of construction and a reasonable profit on the investment (Childs v. Neitzel, on rehearing, 26 Idaho, 133, 141 Pac. 77). Two separate and distinct liens were thereby created to secure the payment of the cost of the construction of the works and the operation. One was a lien on the land itself which lien attaches when the necessary proof has been made by the entryman and patent issued to the state and a conveyance by the state to the entryman. The existence of this lien depends primarily upon the completion of the construction works and the delivery of water through the works by the construction company as stipulated in its contracts with both the state and the entryman. The other was a lien on the water right which, under the terms of the contract, is mortgaged or pledged to the construction company. It hardly seems reasonable to indulge the presumption that the construction company, without resorting to an action to foreclose either of these liens, would be authorized to summarily and at any time during the life of the contract with the entryman deprive him of water when it had an abundance, and thus cut off his right of redemption under the lien upon the land and of his right of defense, if he had any, to proceedings instituted under the mortgage or pledge of his stock in the operating company to the construction company, for the purpose of collecting the initial cost of construction, regardless of whether a portion of the same were in dispute at the time of the refusal to deliver water or at a subsequent time during the life of the contract.

The construction company, under the terms of the contract, upon the failure of the entryman to make payment of principal or interest as therein specified, is authorized to declare the entire indebtedness due. In our opinion, when it so declares the indebtedness due, it becomes vested with the right to proceed as provided by section 1629, Rev.

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Codes. Said section of the statutes authorizes the lien and foreclosure for the purchase price of the water right contracted for, and is to the effect that the construction company securing water for any tract of land "shall have a first and prior lien on said water right and land upon which said water is used, for all deferred payments for said water right; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land; said lien to remain in full force and effect until the last deferred payment for the water right is fully paid and satisfied according to the terms of the contract under which said water right was acquired." Then follows the remedy provided in the event the unpaid purchase price of the water right shall not have been paid. It is provided that upon default of deferred payments secured by any of the liens under the provisions of this chapter, the construction company holding or owning said lien "may foreclose the same according to the terms and conditions of the contract granting and selling to the settler the water right." Next follows the provision with reference to the manner of foreclosure, the publication of notice and the sale by the sheriff, at which sale it is provided that no person or company owning or holding any lien shall bid in or purchase any land or water right "at a greater price than the amount due on said deferred payment for said water right and land, and the costs incurred in making the sale of said land and water right." And, further, that at any time within nine months after the foreclosure sale by the sheriff of the land and water rights, the original owner may apply to the person or company purchasing at such sale, "to redeem such land and water rights, and the purchaser shall assign the certificate of sale of such land and water rights to such original owner, upon the payment by him within such nine months, of the amount of the lien for which the same was sold at such foreclosure sale, together with the interest, costs, and fixed charges thereon."

It is also provided that where the lienholder becomes the purchaser at such foreclosure sale, if such land and water rights are not redeemed by the original owner within nine months, then at any time within three months after the expiration of such nine months, any person desiring to settle upon and use such land and water rights, "may apply to the purchaser at such foreclosure sale to redeem such land and water rights, and such purchaser shall assign the certificate of sale of such land and water rights to the person desiring to redeem the same, upon the payment by him, within such three months, of the amount of the lien for which the same was sold at such foreclosure sale, together with the interest, costs, and fixed charges thereon."

From a careful consideration of the foregoing statutory provisions, it would seem to be clear that the Legislature never intended to authorize persons, associations, or corporations engaged in the delivery of water for the irrigation of the arid lands of this state to deprive the citizens of the state of the right to the use of such waters, except upon their failure to pay the ordinary charges or assessments to cover the actual expenses incurred for the maintenance, operation, and any other necessary expense incident to the delivery of such water. Any lien created for the original cost of construction, together with interest thereon, is subject to foreclosure and sale by a procedure somewhat analogous to the general procedure for the foreclosure of mortgages, as provided for in section 1629, supra. It was clearly the intention of the Legislature, as well as the construction company, that the individual contract holder or settler should be the owner of the water right upon completion of the construction works. This water right was to be represented by corporate stock in the operating company organized by the construction company. The operating company was to operate the canal and the waters flowing therein for the benefit of the settlers who ultimately, upon making final payment, were to become the owners of all the capital stock of the operating company.

The construction company has organized the operating company, known as the Oakley Canal Company, but retains control, under its contracts with the settlers, of this operating company and its administration of the functions of the completed irrigation works of the construction company. From this it might be contended that the construction company could in no wise be benefited by the entrymen's payment of the cost of maintenance and operating charges for the delivery of the water through the irrigating system, because that would not reduce the initial cost of construction. While the initial cost of construction may not be immediately reduced in this manner, yet the security of the construction company's investment is increased proportionately with the improvements made by the settlers upon the project, and the entrymen's ability to meet the initial payments, together with interest thereon is augmented. The cultivation and reclamation of the lands located on by the entrymen fulfills the terms of the grant from the general government of the lands within the project, and makes the security of the construction company tangible.

It is apparent that the Legislature intended to fully protect the construction company to the extent that it be reimbursed for the moneys expended in the construction of the works, together with reasonable profit on the investment. To this end it provided the statutory liens heretofore defined and a complete, exclusive statutory procedure for the

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foreclosure of those liens. But the entire plan of the Carey Act, the segregation of the land, the authorization for the state to make contracts with the construction companies, to induce settlement and cultivation of such lands, the creation of liens upon the lands and the water rights, and the provisions for the foreclosure of the same, all clearly tend to establish that it was also the intention of the Legislature that the settler should obtain at least a part of the funds necessary for the payments of his water rights from the profits resulting from his investments in the lands upon the segregation, his occupancy and reclamation of the same. This object cannot be attained if the enjoyment of the right to the use of the water be denied the settler. The deprivation of the settler's right to the use of the water by reason of his failure to make payments under the terms of his contract with the construction company upon the initial indebtedness, together with interest thereon, might frustrate the purposes of the Carey Act and the legislation of this state, and result in decreasing the security of the construction company under its contract.

Thus, if we sustain the provisions of paragraph 6 of the contract, and thereby empower the construction company, through the operating company, to deprive the settler of the right to the use of the waters on his failure to make payments upon the original contract debt, it might prevent the settler from making proof which would entitle him to a deed, and the state from procuring patent to the lands within the project. This would destroy the security the construction company has out of which it is to be reimbursed for the initial cost of construction with reasonable profit, and render valueless the construction company's lien upon the land. It would also result in the public waters of the state not being applied to the highest beneficial use at all times and under all circumstances, which is contrary to the policy of this state as declared by the Constitution and laws, as well as the decisions of the courts.

We think it is safe to say that it has always been the policy of this state that no interruption other than that expressly provided for by statute may be interposed to defeat the highest possible use of the public waters of the state.

In our opinion the above-mentioned provision of paragraph 6 of the contract is too harsh and unreasonable to be resorted to for the collection of the initial indebtedness due the construction company under its contract with the entrymen. Such a provision could only be resorted to as provided for by the statutes for the collection of the ordinary charges for maintenance and operating expenses for the delivery of the water.

Reference has been made to the case of Bennett v. Twin Falls, etc., Co., 27 Idaho, 643, 150 Pac. 336, wherein paragraph 6 of the contract now under consideration was incidentally discussed. The question raised in the case at bar was not before the court in that case, and was not determined.

In that case, the land to which the water had theretofore been applied was lawfully assessed for taxes for the year 1910, which were not paid and became delinquent. The land was thereafter sold for taxes to Lincoln county. No redemption being made, a tax deed issued to Lincoln county, and was subsequently by Lincoln county sold to the plaintiff Bennett, who contended that the unpaid water right, being appurtenant to the land, was also sold with the land for taxes, and that he was entitled to a conveyance of the water right from the defendant company. This court held that under the provisions of section 1629, Rev. Codes, the water right referred to therein did not attach or become such an appurtenance to the land that the title to such water right was conveyed under a tax deed which conveyed the title to the land, where the purchase price of the water right had not been paid, and that the plaintiff under his tax deed occupied the same position as the original entryman, and in order to secure the water right under the contract with the construction company it was incumbent upon him to make payments in accordance with the terms and conditions of the water contract, and that the water company could be compelled to furnish water in accordance with the terms of the contract upon the plaintiff's making payments as therein stipulated.

But it was not the intention of this court in that case to hold that the water company could deprive a Carey Act entryman of the use of water upon his failure to make payment of principal or interest on the initial indebtedness.

For the reasons above given, the writ of mandate prayed for must issue directing the said defendants to deliver water to each of the plaintiffs herein in the quantity available, and to which they are severally entitled, for the irrigation of their lands. Costs of this proceeding are awarded to plaintiffs.

SULLIVAN, C. J., and MORGAN, J., concur.

(62 Okl. 36)

FIRST NAT. BANK OF SOPER v. BEECHER. (No. 7966.)

(Supreme Court of Oklahoma. Nov. 14, 1916. Rehearing Denied Dec. 12, 1916.)

(Syllabus by the Court.)

1. USURY ⊜117—ACTIONS—RECOVERY.
To entitle plaintiff to recover under section 5198, U. S. Comp. St. 1901, for usurious interest paid, it must be shown by a preponderance of the evidence "that the taking, receiving, reserving, or charging of interest greater than al-

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lowed by the preceding section, was knowingly done."

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 328-340; Dec. Dig. ⟸117.]

2. APPEAL AND ERROR ⟸1061(4)—REVIEW—HARMLESS ERROR.

An instruction of the court, directing a verdict to be rendered for the plaintiff in an amount in excess of the amount shown by the evidence, that the plaintiff is entitled to recover, is prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4211; Dec. Dig. ⟸ 1061(4).]

3. APPEAL AND ERROR ⟸1176(5)—DETERMINATION—REVERSAL.

Where it appears that the court committed prejudicial error in directing and rendering the judgment rendered, and only questions of unmixed law are involved, and the record of the court discloses what judgment should have been rendered, this court will not reverse and remand the cause for another trial, but will reverse and remand said cause, with instructions to the trial court to render the judgment which it properly should have rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4593, 4594; Dec. Dig. ⟸ 1176(5).]

4. COSTS ⟸42(6)—RECOVERY—OFFER TO CONFESS JUDGMENT.

Where on the trial of a cause the defendant offers to confess judgment in the amount stated, in full of plaintiff's demand, which is refused by plaintiff, and upon trial of the cause the plaintiff does not recover a judgment for more than that so offered to be confessed, the plaintiff is liable for all costs accruing subsequent to the time such offer to confess such judgment was made.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 154; Dec. Dig. ⟸42(6).]

Commissioners' Opinion, Division No. 1. Error from County Court, Choctaw County; W. T. Glenn, Judge.

Action by F. L. Beecher against the First National Bank of Soper, a corporation. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded, with instructions.

McDonald & Jones, of Hugo, for plaintiff in error. W. T. Banks, of Henryetta, for defendant in error.

COLLIER, C. This is an action instituted by the defendant in error, hereinafter designated plaintiff, against the plaintiff in error, hereinafter designated defendant, to recover usurious interest paid the defendant as the successor of the Bank of Soper. The petition contains nine counts, to which petition a demurrer was interposed, and said demurrer sustained as to counts 1, 2, 7, 8, and 9, and overruled as to counts 3, 4, 5, and 6, and such action of the court as to the demurrer was duly excepted to, but is not assigned as error and therefore said demurrer will not be considered. The defendant answered said petition, and offered to confess judgment under the fifth and sixth counts of said petition for the sum of $40.46, the same being double the amount of usurious interest alleged by said counts 5 and 6 to have been collected by the plaintiff, and denied the allegations contained in counts 3 and 4 of said petition. To said answer, plaintiff filed a reply, alleging that the officers and principal stockholders of the Bank of Soper, Okl., were about the same as the officers and stockholders of the first National Bank of Soper, Okl., and the First National Bank of Soper was liable for the usurious interest as alleged in the third and fourth counts of said petition, and denied the allegations of the answer as set forth in the second and third paragraphs thereof. The cause was tried to a jury, and the only witness examined was the plaintiff, who testified that he knew the First National Bank of Soper, Okl.; that he knew the Bank of Soper, Okl.; that he executed to the Bank of Soper his note, a copy of which is attached to the pleadings, and that said note was for the sum of $265; that he received from the bank for said note the sum of $225; that he paid the note to the First National Bank of Soper, which note showed on its face, by stamp, that it was paid to the First National Bank of Soper, and which original note was offered in evidence. The witness was then handed a note made to the Bank of Soper, dated January 26, 1913, which he testified he had executed to said bank; that he received from said bank for said note $50; that he paid said note to the First National Bank of Soper, and offered in evidence said original note, which shows on its face, by stamp, that it had been paid to the First National Bank of Soper. The said note for $265 is the note counted upon in the third count of the petition, and said note for $59 is the note counted upon in the fourth count of said petition. The foregoing being all the evidence, the defendant demurred to the evidence, which demurrer was overruled and duly excepted to. Thereupon the plaintiff requested the court to direct a verdict in favor of plaintiff on said counts 3 and 4, and against the defendant on its answer as to counts 5 and 6, the latter two of which had been confessed by defendant. Whereupon the court instructed the jury to return a verdict for the plaintiff upon the said four counts, for the total sum of $138.46 and costs, and thereupon the jury returned into court a verdict against the defendant for the said sum of $138.46, and judgment was entered accordingly.

Within statutory time defendant filed a motion for a new trial, upon the grounds: (1) Error of the court in overruling the demurrer to the evidence of plaintiff; (2) error of the court in granting peremptory instructions, requested by plaintiff, which motion was overruled and duly excepted to.

There is no evidence tending in the most remote degree to sustain the allegations of the third and fourth counts of said petition, or any part thereof. The amount of usurious

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interest alleged in said count 5 of said petition is $3.50, and in said count 6, $16.73, twice the amount of which is $40.46, the amount of judgment offered by the defendant to be confessed. In order to entitle the plaintiff to recover, it is an elementary principle that where the allegations of the petition are denied by the answer, the burden is upon the plaintiff to sustain the allegations of his petition by a preponderance of the evidence, and unless the evidence or the inferences that can be drawn therefrom, notwithstanding the evidence is uncontradicted, tends to support the allegations of the petition, it is reversible error for the court to direct a verdict. We are unable to understand upon what theory the court directed a verdict as to said counts 3 and 4 of said petition. We are astonished at the contention of plaintiff in his brief, found on page 2 thereof, "that the defendant by demurring to that part of the petition acknowledged the truth of the allegations set up in that part of the petition of the plaintiff," as it is a fundamental law that a demurrer to the petition relates solely to the legal effect of the facts stated in the petition, and the interposing of the demurrer to the petition by the defendant does not, in the slightest degree, admit, or tend to support, on the trial of the cause, the allegations of the petition which are denied by the answer.

[1] This action is predicated, as averred by plaintiff, upon section 5198, U. S. Compiled Stat. 1901, the controlling provision of which is:

"The taking, receiving, reserving, or charging * * * of interest greater than * * * allowed by the preceding section, when knowingly done."

There is not the slightest evidence in this case that the First National Bank of Soper was the successor of the Bank of Soper, or knowingly received, by the payment of said notes which were paid to it, usurious interest, other than by the offer to confess judgment in said sum of $40.46.

[2-4] That the defendant knowingly received a greater amount of interest than allowed by law was essential to be proven to entitle the plaintiff to recover.

"One who seeks to recover the penalty under said section has upon him the burden to establish that he has paid a greater amount of interest than the legal rate, and that the bank received said usurious amount knowingly." Merchants' & Planters' Nat. Bank of Mill Creek v. Horton et al., 27 Okl. 689, 117 Pac. 201; Henderson Nat. Bank v. Alves, etc., 91 Ky. 142 [15 S. W. 132]; First Nat. Bank of Mill Creek v. Ellis, 27 Okl. 699 [114 Pac. 620, Ann. Cas. 1912C, 687].

There being no evidence or inference that might be drawn from the evidence to support the verdict for $138.46, the directed verdict for plaintiff for the said sum was reversible error. The only liability of the defendant under the evidence in this case, or the inferences to be drawn therefrom, was the sum of $40.46, the exact amount the defendant offered to confess judgment for, and the court should have instructed the jury to find a verdict for that amount, and all costs accruing prior to the time of such tender, and tax the plaintiff with the remaining costs. Leitch v. Union R. Trans. Co., Fed. Cas. No. 8,224, 7 Chi. Leg. News, 291; Talla v. Anderson, 156 Pac. 670. Section 4782, Revised Laws 1910, provides:

"When a tender of money is alleged in any pleading, it shall not be necessary to deposit the money in court when the pleading is filed, but it shall be sufficient if the money is deposited in court at trial, or when ordered by the court."

Section 5306, Revised Laws 1910, provides:

"After an action for the recovery of money is brought, the defendant may offer in court to confess judgment for part of the amount claimed, or part of the causes involved in the action; whereupon, if the plaintiff, being present, refuse to accept such confession of judgment in full of his demands against the defendant in the action, or, having had such notice that the offer would be made, of its amount, and of the time of making it, as the court shall deem reasonable, fail to attend, and on the trial do not recover more than was * * * offered to be confessed, such plaintiff shall pay all the costs of the [action] incurred after the offer. The offer shall not be deemed to be an admission of the cause of [the] action, or the amount to which the plaintiff is entitled, nor be given in evidence upon the trial."

The defendant having offered to confess judgment for the entire amount shown by the evidence in this case that the plaintiff was entitled to recover, which was refused by the plaintiff, the plaintiff is liable for all costs of the case subsequent to the time the defendant offered to confess judgment for the said sum of $40.46. It necessarily follows that the court also committed prejudicial error in overruling the motion of defendant for a new trial. Section 5258, Revised Laws 1910, provides:

"When a judgment or final order shall be reversed on appeal, either in whole or in part, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment."

This cause should be reversed and remanded, with instructions to the trial court to render judgment for the plaintiff in the sum of $40.46, with interest from the time the defendant offered to confess judgment therefor; tax the plaintiff with all costs that has accrued in this case in said court since said offer to confess judgment was made by defendant. The costs of this appeal in this court should be taxed against the plaintiff.

PER CURIAM. Adopted in whole.

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(13 Okl. Cr. 19)

CASTEEL et al. v. STATE. (No. A-2697.)

(Criminal Court of Appeals of Oklahoma. Dec. 15, 1916.)

(Syllabus by the Court.)

1. RIOT ⊂=5 — UNLAWFUL ASSEMBLY ⊂=2 — INFORMATION—SUFFICIENCY.

An information alleging that three persons named "did unlawfully and willfully use force and violence upon the person of T. L. H., while the said persons [naming them] were then and there assembled and had so assembled prior to said acts of force and violence," is insufficient to charge either the offense of riot, rout, or unlawful assembly as defined in Penal Code (sections 2558–2561, Rev. Laws 1910).

[Ed. Note.—For other cases, see Riot, Cent. Dig. §§ 8–10; Dec. Dig. ⊂=5; Unlawful Assembly, Cent. Dig. § 3; Dec. Dig. ⊂=2.]

2. RIOT ⊂=1 — OFFENSES — NATURE OF OFFENSE.

To constitute the offense of riot, there must be, not only a common intent on the part of three or more persons, acting together, to do an unlawful act by use of force or violence or by threats to use force or violence, accompanied by immediate power of execution, but also concert action in furtherance of such intent.

[Ed. Note.—For other cases, see Riot, Cent. Dig. §§ 1–5; Dec. Dig. ⊂=1.

For other definitions, see Words and Phrases, First and Second Series, Riot.]

Appeal from County Court, Beaver County; John A. Spohn, Judge.

Charles E. Casteel, Mary R. Harris, and Harry B. Wright were convicted of riot, and they appeal. Reversed.

Dickson & Dickson and Loofbourrow & Rizley, all of Beaver, for plaintiffs in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. The plaintiffs in error, Charles E. Casteel, Mary R. Harris, and Harry B. Wright, were jointly charged, tried, and convicted in the county court of Beaver county of a riot under section 2558, Rev. Laws, which reads as follows:

"Any use of force or violence, or any threat to use force or violence if accompanied by immediate power of execution, by three or more persons acting together and without authority of law, is riot."

From the judgment entered in pursuance of the verdict they appealed by filing in this court on March 28, 1916, petition in error with case-made.

[1] The errors assigned are, in effect, that the court erred in overruling the demurrer to the information, and that the verdict and judgment are contrary to law and to the evidence.

The charging part of the information is as follows:

"That Charles E. Casteel, Mary R. Harris, and Harry B. Wright late of the county aforesaid, on the 18th day of April, A. D. 1914, in the county of Beaver and the state of Oklahoma aforesaid, did unlawfully and willfully use force and violence upon the person of Thomas L. Howe while the said Charles E. Casteel, Mary R. Harris, and Harry B. Wright were then and there assembled and had so assembled prior to said acts of force and violence, contrary to," etc.

In answer to plaintiffs' in error brief, the Attorney General has filed a confession of error in part as follows:

"We do not deem this a sufficient information in a case of riot. See section 2558, Rev. Laws; May on Criminal Law, pars. 165, 166; Wharton on Criminal Law, par. 153; Clark on Criminal Law, par. 152; McLain on Criminal Law, 992; Bishop on Criminal Law, 1143; Chitty on Criminal Law, 488. In all the informations the words 'riotously,' 'tumultuously,' or words of similar kind are necessary in the accusation that the community of purpose may be shown. See Chitty, 488; McLain, 999; Wharton, 1862; Pleading and Practice, 18–1200; Bishop Proc. 992; Enc. of Forms, 18057. See, also, Proctor v. State, 5 Okl. Cr. 553, 115 Pac. 630; Cochran v. State, 4 Okl. Cr. 383, 111 Pac. 974. The language of the statute is not enough; all the elements of the offense must be charged. Porter v. State, 4 Okl. Cr. 654, 111 Pac. 1023; Simpson v. State, 5 Okl. Cr. 57, 113 Pac. 549. We think the demurrer to the information should have been sustained."

We are of the opinion that the information, to have been sufficient to charge a riot, should have alleged that the defendants (naming them) did unlawfully assemble with the common intent to use force and violence against the person of another (naming him), and then and there, in furtherance of such unlawful intent, and acting together willfully, unlawfully, and riotously, used force and violence against the person named; nor is it sufficient to charge a rout or an unlawful assembly as defined in our Penal Code. Sections 2560, 2561, Rev. Laws. See 3 Bishop's Crim. Proc. § 992.

In Proctor v. State, 5 Okl. Cr. 553, 115 Pac. 630, it is said:

"To constitute the offense of riot, there must be, not only a common intent on the part of three or more persons, acting together to do an unlawful act by use of force or violence, or by threats to use force or violence, accompanied by immediate power of execution, but also concert of action in furtherance of such intent."

Says Bishop:

"Though, in law, people lawfully together may commit riot, still the assemblage must first become unlawful; that is, the riotous purpose must be entertained. Hence the unlawfulness of the assemblage must in some way appear in allegation." 3 Bishop, New Crim. Proc. § 995.

[2] The information filed in this case is fatally defective in that it fails to allege facts showing either an unlawful assemblage, its purpose, or a lawful assemblage and a subsequent agreement of the persons so assembled to commit the unlawful act. It follows that the judgment appealed from should be reversed.

The judgment of the county court of Beaver county is hereby reversed, and the cause remanded, with directions to proceed in accordance with the views herein expressed.

ARMSTRONG and BRETT, JJ., concur.

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(13 Okl. Cr. 9)

Ex parte ROWE. (No. A-2847.)

(Criminal Court of Appeals of Oklahoma. Dec. 12, 1916.)

(Syllabus by the Court.)

BAIL ⊂⇒42—ADMISSION TO BAIL—RIGHT TO.

Where a defendant in a criminal action says he was met by a certain named person a week before the offense was committed, and told by this person to meet him at a stated time and place, and then and there join him in the commission of a crime, and that this person threatened to kill him if he did not comply with this demand, and that he did comply with the demand to save his life, and through fear and intimidation. *Held*, that such contention is absurd, that during the time which elapsed between the date of the alleged conversation and the commission of the crime the defendant had the full and free exercise of his will, and that what he did under this state of facts was his own voluntary act.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 139–144, 147–152; Dec. Dig. ⊂⇒42.]

Ex parte application by Arthur Rowe for habeas corpus to compel admission to bail. Writ denied.

McNeill & McNeill, of Pawnee, for petitioner. R. McMillan, Asst. Atty. Gen., for the State.

BRETT, J. A complaint was filed in the county court of Pawnee county charging Arthur Rowe, the petitioner herein, with murder, and at a preliminary hearing before the county judge, as examining magistrate, said petitioner was held on said charge without bail, to await the action of the district court. And by habeas corpus proceedings the petitioner seeks to have this court admit him to bail.

It is insisted that the corpus delicti was not properly established, and that the evidence is insufficient to hold the petitioner to answer for any crime. But we cannot agree with either of these contentions.

To establish the corpus delicti in this case, it was only necessary to prove that the body of the deceased was found with marks of violence upon it, or other circumstances that indicated that he came to his death by violent or unnatural means. And at the preliminary hearing it was shown that deceased was dead and buried, and that he came to his death by a gunshot wound inflicted in the back of the head. This evidence unquestionably established the corpus delicti; and the petitioner's own voluntary confession certainly justified the county judge, as examining magistrate, in holding him without bail. It is true that the petitioner claims that one Joe Hobson coerced and compelled him to assist him in the commission of this murder. But his own statement refutes any such contention, for he claims that Hobson came to him about a week before the murder was committed and told him that if he did not assist him in the commission of this crime he would kill him. And at the same time told petitioner when and where to meet him, and that at a stated time he would be at a certain point near the deceased's house, and would fire a shot about 8 o'clock to indicate to the petitioner his exact whereabouts, and that petitioner could then come to him. If this be true, it does not even bear the semblance of coercion, for there was a whole week that the petitioner and Hobson were separated, and the petitioner had the full and free exercise of his will during all that time; and according to this statement he went voluntarily to the spot designated by Hobson as the meeting place, waited for the shot to be fired, and then, by the assistance of this signal, voluntarily joined Hobson in the commission of this crime.

But we feel that in justice to Joe Hobson we should say that it has come to the attention of this court that he was arrested and brought to Oklahoma, charged with the commission of this murder; that at an examining trial he proved by his neighbors in Kansas that he was a man of good character and unsullied reputation; and further proved that he was miles from the scene of the crime at the time the crime was committed, and had been there at all times for weeks both prior and subsequent to the date of the murder; and, further, that the petitioner in this case refused to take the stand against him at this examining trial, and he was discharged by the examining magistrate.

We have no hesitancy in saying the district judge to whom application for bail was made, before coming to this court, was fully justified in denying petitioner bail.

The writ is therefore denied.

DOYLE, P. J., and ARMSTRONG, J., concur.

(13 Okl. Cr. 11)

ABRAMS v. STATE. (No. A-2640.)

(Criminal Court of Appeals of Oklahoma. Dec. 15, 1916.)

(Syllabus by the Court.)

1. PROSTITUTION ⊂⇒3—PANDERING—INFORMATION.

An information charging a person with the crime of pandering which only pleads the general terms of the statute, and alleges that the accused "did by promise and device and scheme persuade and encourage" a female named to become an inmate of a house of prostitution, is insufficient, when properly challenged by demurrer, for the reason that it is impossible for the accused, under the information, to know what kind of promise the state intends to prove, whether a promise of employment or remuneration, gift or forbearance, or which one of the almost innumerable and inconceivable devices and schemes the state intends to rely upon, and ignores the constitutional and statutory safeguard and guaranty that an indictment or information must contain a statement of the acts constituting the offense, in ordinary and concise language, and in

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such manner as to enable a person of common understanding to know what is intended.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 3; Dec. Dig. ⊂⊃3.]

2. PROSTITUTION ⊂⊃1 — PANDERING — NATURE OF OFFENSE.

The gist of the offense of pandering is not that a woman is in a house of prostitution, but that she has been procured or induced by some of the means named in the statute to enter or remain in a house of prostitution. Hence a state of facts must be pleaded that will show that the person charged did in reality, by some one or more of the means named in the statute, procure or induce the female to enter or remain in such house.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. ⊂⊃1.]

3. INDICTMENT AND INFORMATION ⊂⊃60—PRESUMPTION OF INNOCENCE.

Since every person is presumed to be innocent until proved guilty, it logically follows that he must be presumed also to be ignorant of what is intended to be proved against him, except as he is informed by the indictment or information.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 182, 266, 267; Dec. Dig. ⊂⊃60.]

4. INDICTMENT AND INFORMATION ⊂⊃110(4)—SUFFICIENCY—LANGUAGE OF STATUTE.

Where words or terms used in the statute have no technical or precise meaning which of themselves imply or define the offense, then the indictment or information must set forth the particular things or acts charged to have been done with reasonable certainty and distinctness.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 291–294; Dec. Dig. ⊂⊃110(4).]

5. INDICTMENT AND INFORMATION ⊂⊃71—NATURE OF OFFENSE—CERTAINTY.

It is not a technical, but a sound and fundamental, rule of criminal procedure that the accused must be apprised at the outset by the indictment or information with reasonable certainty of the nature and cause of the accusation against him.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 144, 174, 193, 194; Dec. Dig. ⊂⊃71.]

Error from District Court, Comanche County; Cham Jones, Judge.

Minnie Abrams was convicted of violating the pandering statute, and she brings error. Reversed.

J. F. Thomas, of Lawton, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

BRETT, J. The plaintiff in error in this case, Minnie Abrams, who will be referred to as defendant, was charged jointly with her husband, George Abrams, of violating our statute on pandering. A severance was had, and the defendant, Minnie Abrams, was tried, convicted, and sentenced to two years in the penitentiary and to pay a fine of $500, and from this judgment and sentence she appeals to this court.

The appeal is by transcript, and the complaint urged is the insufficiency of the information, which objection was properly raised by demurrer, and motion in arrest of judgment. And it is our judgment that this complaint is well taken.

[1, 2] The charging part of the information is that:

"* * * On the 5th day of August, 1915, George Abrams and Minnie Abrams, then and there being, did then and there willfully, unlawfully, and feloniously procure a female, to wit, Rose Stanfield, to become an inmate of a house of ill fame, to wit, a place where prostitution was encouraged and allowed, in the said state of Oklahoma, to wit, at the rooming house of the said defendants, George Abrams and Minnie Abrams, at No. 317 E avenue, in the city of Lawton, Comanche county, Okl., and did by promise and device and scheme persuade and encourage the said Rose Stanfield to become an inmate of said house of prostitution contrary to the form of the statute in such case made and provided and against the peace and dignity of the state."

The state insists that the information uses the very language of the statute in charging the offense, and that that is sufficient to make the information good. In reply to this we will say that there are many cases in which an information or indictment drawn in the language of the statute is good, but there are also many other cases in which this is not true. Hence it is a general rule, and the statutory rule in this state, that the particular circumstances of the offense, and the acts constituting it, must be charged, when they are necessary to constitute a complete offense, or to inform the court, or person charged, as to what is intended.

The gist of this offense is not that a woman is in a house of prostitution, but that she has been procured or induced by some of the means named in the statute to enter or remain in a house of prostitution. Hence a state of facts must be pleaded that will show that the person charged did in reality, by some one or more of the means named in the statute, procure or induce the female to enter or remain in such house. There might be a promise made to a female which would be so insignificant and trivial that it would appear upon its very face that it was not the inducement or procuring cause of her entering or remaining in such house of prostitution, but that she, in fact, entered or remained in such house of prostitution of her own volition, and not by reason of such trifling and trivial promise, which the court could see at once was too insignificant to influence the conduct of any human being.

[3] Besides, since every person is presumed to be innocent until proved guilty, it logically follows that he must be presumed also to be ignorant of what is intended to be proved against him, except as he is informed by the indictment or information. People v. Marion, 28 Mich. 255; State v. McKenna, 24 Utah, 317, 67 Pac. 815. Hence it has been well said that:

Where "* * * the words or terms used in the statute have no technical or precise meaning, which of themselves imply the offense, or where the particular facts or acts which shall consti-

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tute it are not specified, but, from the general language used, many things may be done which may constitute an offense, it is then necessary, in charging an offense claimed to be embraced within the general language of the statute, to set forth the particular things or acts charged to have been done, with reasonable certainty and distinctness, so that the court may determine whether an offense within the statute is charged, or one over which it has jurisdiction, and so that the defendant may be advised of the particular nature of it, in order to defend against it, and to plead in bar a judgment of conviction or acquittal thereof, if subsequently prosecuted." People v. Perales, 141 Cal. 581, 75 Pac. 170.

[4] Utah has a statute very similar to ours on the subject of pandering, and in State v. Topham, 41 Utah, 39, 123 Pac. 888, in passing upon an indictment very similar to the information under consideration, the Supreme Court of that state, in a very able and elaborate opinion, held that the mere language of the statute was too general and indefinite, and was not sufficient to inform the defendant of the particular acts or conduct complained of, and says:

"Should one assert to another that he had a 'device or scheme' to accomplish a particular result, would that 'in ordinary and concise language enable a person of ordinary understanding to know what was intended' or meant? To enable such a person to know what was intended, would not the first question necessarily be, 'What is the device or scheme?'

"When the defendant was charged that she had 'by divers devices and schemes' accomplished a particular result, who but the pleader knew what was intended or expected to be proved against her in such respect? Or, if it should be claimed that she by 'threats' had accomplished such result, again, who but the pleader could know with reasonable certainty what menacing act or conduct of hurt, or fear, or threatening menace to inflict pain or punishment or injury to person, reputation, or property, or to restrain freedom of action, was intended or expected to be proved? Should one complain of another that he 'threatened' him, would not again the first question necessarily be, in order to 'enable a person of common understanding to know' what was meant or intended, 'What did he say or do?' And, if it should be claimed that the defendant by 'promises' had accomplished such result, again, could any one but the pleader know with reasonable certainty just what particular acts or conduct in that regard was intended or expected to be proved? This information may be looked at with the utmost liberality, and yet what facts or circumstances or acts are there set forth from which the court may determine whether a promise or promises in law were made by the defendant, if it should be claimed that she, by such means, accomplished the charged result, or a threat made or device or scheme used or employed, if by either of these it be claimed the defendant accomplished such result? Neither she nor any one else except the pleader could know whether he intended to prove some kind of a promise or a threat or a device or scheme. Under the information, if it is good, the state would be permitted to prove anything which the prosecution thought tended to show a promise, anything a threat, anything a device, anything a scheme, and no objection to the offer of any such evidence could properly be made by the defendant. If that be true, then the state might as well be permitted in an information to generally charge the defendant 'with having committed the offense of pandering' and be allowed to prove anything tending to show the commission of such an offense.

"Under this information neither the court nor the defendant, until the evidence was adduced, could know what particular acts or conduct would be claimed had been committed by the defendant, and until then the court could not know whether an offense had been charged, nor the defendant what she was called upon to meet and answer. * * * Should one either in a civil or criminal pleading charge another at a specified time and place 'with having cheated and defrauded' him, without alleging the acts, the conduct, the facts constituting the cheat or fraud, certainly no one would contend that to be a sufficient pleading to withstand a demurrer. What more has been done here? The pleader has stated his conclusion that the defendant has said or done something, that she has been guilty of some kind of conduct, or committed acts of some kind, which in his opinion amount to a promise or a threat or a device or a scheme, but withheld from the court and the defendant a statement of any acts committed, or things said or done, by her, or any facts or circumstances from which it may be determined whether in law a promise or threat was made, or a device or scheme used or employed, by her. The acts and conduct of the defendant, and the facts and circumstances constituting the promise, the threat, the device, the scheme, were required to be alleged in the information, so that the court could judge whether the accused should have been put upon trial, and that she might then know what she was to defend against."

And it cites numerous cases in support of this position.

[5] In the case at bar it was impossible for the defendant under the information to know what kind of promise the state intended to prove, whether a "promise of employment or remuneration, investment, gift, forbearance, or to do or not to do one or more of almost innumerable and inconceivable things"; for no one could know from the information until the evidence was in what character of promise the state did intend to prove, nor which one of the almost innumerable and inconceivable devices or schemes the state intended to rely upon. And we hold with State v. Topham, supra, that:

"It is not a technical, but a sound and fundamental, rule in the law of criminal procedure that the accused be apprised, not by the evidence adduced, but at the outset, by the indictment or information, with reasonable certainty, of the exact nature of the accusation against him. This rule cannot be bent to meet exigencies of a particular case, nor the class or grade of the person accused. The Constitution and the statute prescribe the rules by which the sufficiency of an information may be determined, and they apply to all alike. They do not prescribe one rule for a keeper or director of a house of prostitution and another for a nun, nor one rule for one offense and another for another offense."

Hence we think in the case at bar the information fails to comply with the constitutional guaranty and the statutory safeguard that:

An "indictment or information must contain: * * * A statement of * * * acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." Section 5738, Revised Laws 1910.

The judgment is therefore reversed, and the cause remanded, with directions to the trial court to sustain the demurrer to the

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information. And the warden of the penitentiary at McAlester is directed to surrender the plaintiff in error to the sheriff of Comanche county, who shall hold her in custody subject to the further orders of the district court of said county.

DOYLE, P. J., and ARMSTRONG, J., concur.

(22 N. M. 337)

STATE v. WILLIAMS. (No. 1908.)

(Supreme Court of New Mexico. Sept. 20, 1916. On Motion for Rehearing, Dec. 15, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW ⊂⊃1064(1)—APPEAL—ASSIGNMENTS OF ERROR.
Unless the assignment of error in the motion for a new trial clearly specifies the legal ground of objection, the objection will not be considered on appeal, where the question is not one of jurisdiction.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2676; Dec. Dig. ⊂⊃1064(1).]

2. CRIMINAL LAW ⊂⊃742(2)—ACCOMPLICES—JURY QUESTION.
Where the facts as to whether a witness is an accomplice are in dispute, the requested instruction, charging that the witness is an accomplice, is properly refused.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1098, 1138, 1720; Dec. Dig. ⊂⊃742(2).]

On Motion for Rehearing.

3. CRIMINAL LAW ⊂⊃1133 — APPEAL — REHEARING.
A new and original question cannot be considered for the first time on motion for rehearing.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2984; Dec. Dig. ⊂⊃1133.]

4. BRIBERY ⊂⊃1(2)—OFFENSE—WHAT CONSTITUTES.
The corrupt act of a justice of the peace in delivering to a third person papers of a case tried and determined by him and appealed to the district court, instead of delivering same to proper authority, constitutes bribery under section 1670, Code 1915, and indictment therefor *held* sufficient.
[Ed. Note.—For other cases, see Bribery, Cent. Dig. § 2; Dec. Dig. ⊂⊃1(2).
For other definitions, see Words and Phrases, First and Second Series, Bribery.]

Appeal from District Court, Curry County; McClure, Judge.

Robert N. Williams was convicted of wrongfully accepting a bribe, and he appeals. Affirmed.

O. O. Askren, of Roswell, and W. A. Gillenwater, of Clovis, for appellant. H. S. Bowman, Asst. Atty. Gen., for the State.

HANNA, J. The appellant, Robert N. Williams, was convicted of the offense of receiving and accepting a bribe. He appeals from the judgment of the court sentencing him to serve a term in the state penitentiary of from not less than 3½ years nor more than 4 years.

The appellant's brief omits a statement of facts; hence the following statement of facts appearing in the brief of the state will be considered as the facts of this case on appeal:

The appellant was elected to the office of justice of the peace of precinct No. 2, Curry county, N. M., January 13, 1913, for a term of 2 years, and qualified as such officer immediately thereafter. Late in the month of November, 1913, there were filed with appellant, as such justice of the peace, two complaints, each charging one Ray Moss with the offense of unlawful carrying of deadly weapons. Upon a hearing Moss was found guilty and a fine of $50 and a jail sentence of 50 days was imposed in each case. A motion for a new trial was filed, and the motion was granted by the justice, but upon consultation with the assistant district attorney and learning that the motion for a new trial had been erroneously granted, because there was no jurisdiction in the justice of the peace court to grant a new trial, this action of the court was vacated, and an appeal from the judgment of the court imposing the fine and jail sentence was prayed for and granted, and appeal bonds were filed. Upon request of appellant the docket was written up by the assistant district attorney. The transcript of the docket entries and the papers in the two cases were never transmitted to the clerk of the district court, as required by statute in cases appealed from justice of the peace courts.

From this point the material evidence, as shown by the record, was conflicting. George B. Moss, father of Ray Moss, testified for the state: That he was approached by appellant on the streets of Texico, and in conversation that ensued appellant agreed to dismiss the two cases of the state against Ray Moss upon the payment to him by the senior Moss of the sum of $50. That he (Moss) then procured $45, which appellant agreed to accept, and ordered the witness to go up to his office and place the money in appellant's desk. Witness complied, and later the same day appellant called witness to the front door of the former's office and delivered to him the papers in the two cases. These papers were later burned by the witness. Later he examined the docket entries of the two cases, and found they had not been marked "Dismissed," as appellant had agreed should be done. That he went to appellant's house and suggested to the latter's wife that the docket be destroyed to prevent appellant "getting into trouble." All of this incriminating testimony was denied by appellant and his witnesses. The testimony of the appellant was to the effect that during his absence from the state because of sickness the docket of his court and the papers in the Moss case had been taken from his office and had never been returned.

[1] The first five points made in appellant's

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brief concern the admission of evidence over his objection. The state contends that these points are not properly before the court for consideration because the motion for a new trial does not set forth the reasons why the admission of such testimony is erroneous. An examinaton of the record discloses that no reasons were assigned in the motion for a new trial as to why the admission of such evidence was erroneous. An illustration of the method pursued by appellant with reference to these points is as follows:

"(6) The court erred in admitting the testimony of the witness George B. Moss, and in overruling the defendant's objection proponded to said Moss as follows: 'You were asked, Mr. Moss, if you did not get these papers yourself out of the office of Mr. R. N. Williams, the justice of the peace. I will ask you to state to the jury whether or not you know of this defendant, Williams, accepting money from other persons to drop cases on his docket.' And to which the witness answered: 'Well that is just hearsay, not of my own personal knowledge; I wasn't an eyewitness.' And to which ruling of the court the defendant at the time excepted."

The two statutory provisions of this state referring to motions for a new trial (sections 4226 and 1407, Code 1915) are silent as to what the motion must contain in order to constitute a proper assignment of error.

In Dutton v. State, 92 Ga. 14, 18 S. E. 545, the second paragraph of the syllabus reads as follows:

"Several grounds of the motion for a new trial complaining that evidence was admitted over objection, but not stating what the objection was, these grounds of the motion are not sufficiently definite to be considered."

In Hoffer v. Gladden, 75 Ga. 532, the court said:

"The assignments of error on the first, second, third, and fourth grounds of the motion [for the new trial] cannot be considered here, because they all go to the admission of evidence, and the ground on which that evidence was objected to is not specified in either of the several grounds of the motion above numbered."

In Georgia Railroad & Banking Co. v. Bohler, 98 Ga. 184, 26 S. E. 739, the court said:

"We do not think the exception to the charge of the court as stated in the motion for a new trial was well taken. The language complained of in this instruction is substantially the language employed in section 3018 of the Code, which gives a right of action for the character of injuries complained of, and is a fair statement of a sound proposition of law. It will be seen, from reading the ground of the motion wherein complaint is made because the court permitted the plaintiff to testify to certain facts, that it affords no reason for the reversal of a judgment denying a new trial, for the reason that, while it appears that the plaintiff objected to the introduction of the evidence, it is not stated what objection was made by him at the time it was offered. Therefore we cannot say whether the court ruled properly upon the objection or not. To say in the motion for a new trial that the movant objected to certain evidence, and there said that the objection should have been sustained because the evidence offered was irrelevant, does not imply that at the time it was offered the same reason was assigned why it should be rejected as was assigned as a reason why a new trial should be granted because of its admission. In other words, there was as to this ground no legal assignment of error, and the court could properly disregard it in passing upon the motion for a new trial."

In Bray v. Walker, 112 Ga. 364, 37 S. E. 370, the court said:

"One of the grounds of the motion for a new trial is 'because the court erred in admitting the fi. fa. in said case in evidence over the objections of claimants.' It has been repeatedly ruled that a ground in a motion for a new trial complaining of alleged error in admitting evidence cannot be considered by this court when it does not appear from the assignment of error in the motion what objection was made by the movant to the introduction of the evidence. This court will not look through the brief of evidence in order to ascertain, if possible, therefrom what objection, if any, was made to the admission of evidence. Taylor v. State, 105 Ga. 847, 33 S. E. 190."

In passing upon a similar question the Indiana Appellate Court, in Stout v. Harlem, 20 Ind. App. 200, 50 N. E. 492, 48 N. E. 235, said:

"A motion for a new trial must be sufficiently certain and specific to enable the court to identify the rulings without resort to any other part of the record. This court cannot look to the bill of exceptions to aid the motion, for the reason that the bill was not on file at the time the motion was presented to the trial court. It must appear that the ruling was fairly presented to the trial court for review before any question can be presented to the appellate tribunal."

In 12 Cyc. 745, the doctrine is thus stated:

"The moving papers should specify with clearness and certainty the grounds on which a new trial is sought. * * *"

See, also, Chestnut v. State, 112 Ga. 366, 37 S. E. 384, and 3 C. J. 967.

We cannot assume that, because appellant objected to the introduction of this evidence on certain grounds at the trial, the same objections were argued by him on the hearing of the motion for a new trial. It was his duty to clearly specify the grounds of his objection in his motion for a new trial, and, not having properly done so, no question on these points is presented for our consideration.

[2] 2. Appellant argues that the court erred in not instructing the jury that George B. Moss was an accomplice, and as to the effect to be given the testimony of such a witness. The proposition of law for which appellant contends was contained in an objection to the instructions given by the court. The Assistant Attorney General contends that, as the instructions of the court and the exceptions thereto were not a part of the record by bill of exceptions, they are not before the court for any purpose. Without deciding what constitutes record proper or whether or not the instructions of the court in this case, and the exceptions mentioned, are a part of the record in this case, either by way of record proper or by bill of exceptions, we will assume that the question urged by appellant is properly before us. The objection of the defendant reads as follows:

"(5) The defendant excepts to the failure of the court to instruct the jury that the witness

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George B. Moss is an accomplice in the commission of the crime charged, if in fact there was such crime, and that the jury should receive his testimony with caution and suspicion, and that they should not convict the defendant upon the testimony of the said George B. Moss unless they believe this testimony to be true after a careful and cautious scrutiny of the same."

The evidence on the part of the state tended to show that George B. Moss delivered to appellant the sum of $45, and appellant thereafter delivered the papers in the two cases to George B. Moss. This testimony was denied in whole by appellant, and he attempted to account for the loss of the custody of the papers in the two cases by stating that, while he was absent from the state those papers had been taken from his office and had never been returned. Assuming that evidence introduced by the state showed the witness Moss was an accomplice, the evidence on the part of the appellant tended to contradict that conclusion. The requested instruction or exception assumes that Moss was an accomplice, whereas it appears that there was a conflict of evidence on the question.

In 39 L. R. A. (N. S.) 704, 705, will be found reported the case of People v. Coffey, 161 Cal. 433, 119 Pac. 901. The appellant was convicted of having agreed to receive and receiving a bribe. He was incumbent of the public office of supervisor. The court, among other things, said:

"When the question of an accomplice arises in the trial of a case, the general and accepted rule is for the court to instruct the jury touching the law of accomplices, and leave the question whether or not the witness be an accomplice for the decision of the jury as a matter of fact. * * *

"Whenever the facts themselves are in dispute, that is to say, whenever the question is whether the witness did or did not do certain things, which, admittedly, if he did do them, make him an accomplice, the jury's finding upon similar principles is not disturbed. But * * * where the acts and conduct of the witness are admitted, it becomes a question of law for the court to say whether or not those acts and facts make the witness an accomplice."

This is in harmony with the view that the court cannot charge as a matter of fact when the fact is in dispute. It is unnecessary to cite further authority on this proposition. Suffice it to say that whether as a matter of law the witness was an accomplice would depend upon the facts, and, the facts being in dispute, the court was not authorized to assume the truth of one or the other side. Therefore the requested instruction was properly refused.

The judgment of the court is therefore affirmed; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

On Motion for Rehearing.

HANNA, J. Appellant has filed a motion for rehearing in this case. He relies on three separate propositions therein.

[3] 1. The first is that an instruction given by the court of its own motion was erroneous. Counsel for appellant admit that this point was not raised in this case in the first instance, but insist that it was raised at the oral argument, and that the court failed to pass thereon. The rule announced in the case of State v. McKnight, 21 N. M. 14, 48, 153 Pac. 76, viz. that new and original questions cannot be presented for the first time on motion for rehearing, is controlling on this point. The duty of counsel was to make the point in his brief, as required by section 1, rule 8 (153 Pac. xix), of the rules of this court. Not having done so, the point cannot be considered as having been presented properly in the first instance. Had appellant made the point first on the oral argument and filed a supplemental brief thereon, the situation might be such as to permit us to hold otherwise. Not having properly presented the point in the first instance, it cannot be presented as a new question on motion for rehearing.

[4] 2. The indictment was drawn under section 1670, Code 1915. That section provides:

"Every person who shall give any sum or sums of money * * * to any * * * justice of the peace acting within the state, in order to obtain or procure any opinion, judgment or decree or to influence or corrupt any such judge or justice to be more favorable to one party than to the other in any cause or action or suit or matter pending or to be brought before said judge or justice; * * * and the * * * justice of the peace * * * who shall in any way accept or receive * * * said money * * * shall be deemed guilty of bribery. * * *"

The indictment alleged the following, in so far as the same is material hereto:

"That * * * on the 1st day of January in the year one thousand nine hundred and fourteen Robert N. Williams was the duly elected, qualified, and acting justice of the peace, * * * whereupon one Ray Moss being then and there charged with an offense against the laws of the state of New Mexico, to wit, with the crime of carrying concealed weapons in and about a settlement in said county and state, the said Ray Moss being charged by complaint with said crime before said Robert N. Williams, and the said Robert N. Williams, then and there having jurisdiction to hear and determine said cause, upon investigation thereof and hearing of evidence therein, rendered judgment in said cause, and adjudged and sentenced the said Ray Moss to make and pay a fine to the state of New Mexico in the sum of $50, and adjudged and sentenced him to serve a term of 30 days in the county jail, * * * whereupon the said Ray Moss prayed an appeal from said judgment and sentence aforesaid to the next term of the district court of Curry county to be holden thereafter * * * on the 9th day of February, nineteen hundred and fourteen, and thereupon the said Ray Moss executed an appeal bond to the state of New Mexico, which said appeal bond was accepted and filed by the said Robert N. Williams, as justice of the peace aforesaid, and said appeal was allowed, and the defendant, Ray Moss, was released from custody, and thereafter, on the 15th day of January in the year one thousand nine hundred and fourteen, * * * the said Robert N. Williams, being then and there justice of the peace as aforesaid, * * * then and there did un-

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lawfully, feloniously, and corruptly accept and receive from one George B. Moss the sum of $45 * * * as a bribe and pecuniary reward to influence and induce him, the said Robert N. Williams, to dismiss and deliver over all the papers * * * pertaining to and concerning the case of the State of New Mexico v. Ray Moss, * * * and not to send up said papers to the county clerk of Curry county, as required by law, and he did then and there, by reason of said pecuniary reward aforesaid, deliver up and surrender the warrant * * * and other papers pertaining to and concerning the case, to George B. Moss, to be by him destroyed and withheld from the clerk of the district court to prevent the further prosecution of the said Ray Moss. * * *"

The indictment is subject to criticism in many respects. The appellant contends that it is defective in that it fails to show that the matter was pending before the justice of the peace and affirmatively shows that the case of State of New Mexico v. Ray Moss was not pending before the appellant, as justice of the peace, at the time the alleged act of bribery took place. The appellant either misconceives the terms of the indictment or the requirements of the statute under which the indictment was drawn. The statute not only includes acts of bribery in pending causes, actions, and suits, but includes also pending "matters." The money must be paid by the person and received by the justice of the peace for an opinion, judgment, or decree of the latter, or to influence the latter to be more favorable to one party than to the other in any "matter" pending or to be brought before the said justice of the peace. The appellant assumes that no official matter was pending before the appellant as justice of the peace at the time the act of bribery is alleged to have taken place, because the case of State of New Mexico v. Ray Moss had been tried and determined, and the appellant, as such justice, had lost jurisdiction thereof by virtue of the fact that he exhausted his official power in that case by his judgment and sentence and the granting and perfecting of an appeal therein to the district court of Curry county. We assume, without so deciding, that the proceedings had in that case exhausted the power of the court of the justice of the peace to proceed further on the merits, but it should be noted that the matter of the transmittal, as well as possession of, the papers and records of that case was still lodged with the justice of the peace and concerned his official duties as such justice of the peace. Section 3222, Code 1915, provides that:

"On or before the first day of the next term of the district court for the county, the justice shall file in the office of the clerk of said court a transcript of all the entries made in his docket relating to the case, together with all the papers relating to the suit."

The statute under which this prosecution was begun is very broad, and we are not justified in narrowing its plain import by interpretation. The statute, it is clear, includes any matter over which the justice has jurisdiction, and, as the statute cited supra makes it the duty of the justice of the peace to retain all papers in cases theretofore pending before him and transmit them on appeal to the proper authority within a specified time, the act charged in the indictment falls within the terms of the statute. The justice of the peace did not lose jurisdiction of the matter of certifying these papers to the proper authority simply because he had exhausted his jurisdiction of the case theretofore tried and determined by him, assuming that he did lose jurisdiction thereof. Therefore the indictment is not insufficient in the respect mentioned by appellant.

3. The third and last point concerns the holding of this court in the former opinion on the question of the extent to which counsel must go in pointing out alleged errors of the trial court in the motion for a new trial. We held in the former opinion that the grounds of error in the motion for a new trial, so far as the same concerned the first five points made in this court by appellant, were not sufficiently specific. Counsel would have us hold that, because all of such alleged errors concerned the admission of certain evidence, which he characterizes as wholly incompetent and highly prejudicial to appellant, the necessity for clearly pointing out to the court the objection to such erroneous action does not exist. He cites numerous cases and argues the proposition from several standpoints, but we are convinced that the rule laid down by us is correct and is applicable to this case.

The motion for rehearing will therefore be denied; and, it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

(22 N. M. 275)

STATE v. RUCKER. (No. 1875.)

(Supreme Court of New Mexico. July 18, 1916. Rehearing Denied Dec. 13, 1916.)

(Syllabus by the Court.)

1. ANIMALS ⇐48—HERDERS—DUTIES OF.
Section 31, Code 1915, makes it the duty of a drover, when the stock of any resident shall intermix with any drove of animals, to immediately cut out and separate such stock from such drove.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 143, 144; Dec. Dig. ⇐48.]

2. CRIMINAL LAW ⇐744—TRIAL—JURY QUESTION.
The credibility of witnesses is, in all cases, a question for the jury, and the rule applies, although the testimony of the party or of interested witnesses or of other witnesses is uncontradicted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1715, 1727, 1728; Dec. Dig. ⇐744.]

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3. CRIMINAL LAW ⊂⊃1032(7) — APPEAL — QUESTIONS PRESENTED BELOW.
The question of variance between the brand alleged in the indictment to have been upon the alleged stolen animal and the certificate of brand, introduced in evidence upon the trial, will not be considered in the appellate court, where such question was not raised in the trial court. State v. Klasner, 19 N. M. 474, 145 Pac. 679, followed.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2642; Dec. Dig. ⊂⊃1032(7).]

4. CRIMINAL LAW ⊂⊃1064(1)—APPEAL—NEW TRIAL.
No alleged errors, unless they are jurisdictional, will be considered, except those set out in the motion for a new trial.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2676; Dec. Dig. ⊂⊃1064(1).]

5. CRIMINAL LAW ⊂⊃628(2) — TRIAL—WITNESSES.
Section 3142, Code 1915, which provides: "When an indictment is found, the names of the witnesses examined before the grand jury, must in all cases be inserted at the foot of the indictment or indorsed thereon before it is presented to the court"—is directory, and it is not error for the trial court to permit a witness, who testified before the grand jury and whose name was not properly indorsed upon the indictment, to testify, where defendant did not claim or attempt to show surprise or prejudice by reason of the omission of the name of such witness from the indictment.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1409; Dec. Dig. ⊂⊃628(2).]

6. CRIMINAL LAW ⊂⊃471—EVIDENCE—OPINION EVIDENCE.
Where the jury has an equal opportunity of determining whether a character appearing upon a certificate of brand corresponds with a similar character shown in the indictment, as has a tendered witness, there is no error upon the part of the court in refusing to permit such witness to testify as to whether such characters are the same or dissimilar.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1059; Dec. Dig. ⊂⊃471.]

Appeal from District Court, Rio Arriba County; E. C. Abbott, Judge.

Sam Rucker was convicted of larceny of cattle, and he appeals. Affirmed.

J. H. Crist, of Santa Fé, for appellant.
H. S. Bowman, Asst. Atty. Gen., for the State.

ROBERTS, C. J. Appellant was tried in the district court of Rio Arriba county, at the June, 1915, term of court, upon an indictment charging him with the larceny of one head of neat cattle, the property of Cipriano Peña. The indictment alleged that the cow in question was branded "C I P" on the left side. Appellant was found guilty by the jury, and sentenced by the court to serve a term in the state penitentiary and to pay a fine to the state. From this judgment he appeals.

The facts established by the state were: That on the 16th day of June, 1912, appellant was driving a bunch of cattle northward along the public highway at a place called Chupadero, in Rio Arriba county. Cipriano Peña lived near Chupadero, said place possibly being within the limits of his cattle range. Before he reached Chupadero a man employed by Mr. Peña, Fernando Torrez, accompanied by Leonardo Chavez, joined appellant a half mile or so south of Chupadero, and accompanied him to that place, where appellant stopped with the cattle. At that place he cooked and ate dinner, and while he was so engaged the two men named and Julio Gallegos rode through the herd looking for cattle belonging to Mr. Peña. They found a cow branded with his brand, and Gallegos asked appellant where he got the animal, to which appellant replied that he had purchased her from the Córdovas. Within a few days Peña searched diligently for his animal and failed to find her. Appellant denied this conversation; admitted that the three men visited his camp; denied that he had seen the cow described by them, and stated that at Chupadero, after he and his brother had eaten their dinner, together with two other men named Lee and Houghton, who had joined them while there, he proceeded to and did cut out all the stray cattle in the herd, numbering some eight or ten head. His brother and Lee and Houghton all testified to substantially the same facts, except the three last named stated that they saw the cow described by the state's witnesses, and that she was cut out at that place and started back with the other cattle eliminated from the herd. The cattle inspector who inspected the cattle before their delivery in Colorado testified that he found no cow branded "C I P," or bearing any similar brand; that the only brands found upon the cattle were those disclosed by his inspection certificate, which was produced and offered in evidence.

The indictment was predicated upon that portion of section 1613, Code 1915, reading as follows:

"Any person who shall steal, embezzle or knowingly kill, sell, drive, lead, or ride away, or in any manner deprive the owner of the immediate possession of any neat cattle * * * shall be punished by imprisonment [etc.]."

[1] Section 31, Code 1915, makes it the duty of a drover, when the stock of any resident shall intermix with any drove of animals, to immediately cut out and separate such stock from said drove. This section was designed to protect the cattle raisers of the state from larceny of their cattle by people passing through the country with herds of cattle and permitting the cattle of others to become intermingled with those being so driven. In such case, without the above statute, it would be, in many instances, impossible to establish the guilty intent of the drover.

In this case appellant argues that the evidence is insufficient to sustain the verdict of the jury. But this cannot be true, if the evidence of the witnesses for the state is accepted as true, and that given by appel-

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lant's own witnesses be disbelieved. Accepting the state's evidence as true, we have the facts established: That appellant was driving a herd of cattle through the country. That Peña's animal was found in his herd, and had been driven in said herd for some distance. When confronted with the fact that he was driving away an animal that did not belong to him, he claimed that he had purchased the animal from one of the Córdovas. All this, if true, established all the elements essential to constitute an offense under section 1613, supra.

[2] Appellant argues, however, that the jury had no right to disbelieve the witnesses who testified in his behalf, to the effect that at Chupadero, immediately after the state's witnesses left, he cut out the "C I P" cow, and the evidence of the cattle inspector, to the effect that at the Colorado line appellant had no cow branded "C I P" in his herd. Appellant, however, in this contention disregards the well-established rule "that the credibility of witnesses is, in all cases, a question for the jury." 38 Cyc. 1518. It would, if appellant's view were to prevail, be almost impossible in any case to secure a conviction, for the defendant in a criminal case could always testify to a state of facts which could not be contradicted by others. The rule applies, although the testimony of the party or of interested witnesses or of other witnesses is uncontradicted. 58 Cyc. 1518. Here the jury saw all the witnesses and observed their manner and demeanor while testifying, sensed the atmosphere of the trial, and it was within its province to believe or disbelieve the testimony of appellant and his witnesses. Certainly, even from the record, there were facts and circumstances appearing which might tend to cause a reasonable mind to entertain grave doubts as to whether the appellant and his witnesses were testifying to the truth. For example, the cattle inspector's certificate had been changed so as to show more cattle bearing a designated brand than had originally been made to appear. The cattle inspector testified that he made the change, but this labored attempt to explain away admissions theretofore made to the district attorney to the contrary evidently destroyed the value of his testimony with the jury. Likewise, the evidence of Lee and Houghton, who appeared upon the scene immediately after the state's witnesses left, was not very convincing. They were not able to state satisfactorily how they were able to arrive at Chupadero without having met the state's witnesses, or any other person. They attempted to explain the fact by saying they came by an "unused trail," leaving the main road some two or three miles below Chupadero. The jury elected to disbelieve them, and under the facts and circumstances we cannot say that there was an arbitrary disregard of the evidence.

[3] Appellant's next contention is that there is a fatal variance between the allegation of brand in the indictment and the brand as proven on the trial by the certificate introduced in evidence. This question, however, was not raised in the trial court; hence cannot be considered here. State v. Klasner, 19 N. M. 479, 145 Pac. 679.

It is true appellant objected to the admission in evidence of the brand certificate, because it did not correspond with the allegation in the indictment; but he is not here complaining of the action of the court in permitting the brand certificate to go to the jury.

In preparing indictments it is unnecessary to describe the brand found upon alleged stolen animals, and by so doing the district attorneys may frequently be confronted with questions of variance.

[4] The defendant failed to request the court to charge that it was incumbent upon the state to prove that the brand upon the animal found in defendant's possession was the same brand as that described in the indictment. It is true he did except to the failure of the court to charge that "the brand, 'C I P,' alleged in the indictment, was a material allegation, and that the proof must show that that was the brand used on the animal in question," but he failed to incorporate this alleged error in his motion for a new trial; hence under the well-established rule, that "no alleged errors, unless they are jurisdictional, will be considered, except those which are set out in the motion for a new trial" (U. S. v. Cook, 15 N. M. 124, 103 Pac. 305; State v. Holloway, 19 N. M. 528, 146 Pac. 1066, L. R. A. 1915F, 922), this question is not here for review.

Whether the brand upon the animal in question corresponded with the brand as alleged in the indictment, and also with the certificate of brand introduced in evidence, was for the jury to determine, under proper instructions from the court, unless the variance was so patent that the court could say, as a matter of law, that the variance existed. And, even so, it was incumbent upon the defendant to invoke a ruling by the court upon the question of variance by a motion for an instructed verdict, or in some other appropriate manner, before he can here raise the question. In the case of State v. Klasner, 19 N. M. 474, 145 Pac. 679, we said:

"The courts generally hold that the question of variance, unless raised in the court below, cannot be reviewed in an appellate court."

Appellant insists that the court erred in permitting the brand certificate to be introduced in evidence, because the brand therein exhibited did not correspond with the brand described in the indictment. The brand described in the indictment was "C I P," while that shown upon the certificate was "C / P." Whether the middle character of the latter brand was intended for an "I" or a "slash," as contended by appellant, was for the jury

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to determine, under proper instructions from the court. As stated, no question is here for review upon the instructions in this regard; hence there is no reversible error shown.

[5, 6] Appellant next complains of the refusal of the court to permit him to show by the witness Daggett the custom of stray cattle to intermingle with a drover's herd while driving them through the country, and the practice of such drovers to stop at stated periods and cut them out. The statute, referred to, requires the drover to cut out such cattle immediately, and makes him subject to indictment for larceny upon a failure so to do. Certainly it would not be permissible to invalidate the statute, or render its provisions nugatory by proof of a custom or practice by drovers in contravention of the express provisions of the statute. This was offered, so counsel states, to negative a guilty intent. This could only be negatived by proof of compliance, or bona fide attempt to comply, with the requirements of the statute. Here the defendant stated, as shown by the proof offered by the state, that he had purchased the cow in question from a man named Córdova, which was untrue, and this statement by him, unexplained, certainly was sufficient to establish a guilty intent, if such was required by proof other than the fact that he had the cow in his possession.

Upon the trial the state, over appellant's objection, offered one Julio Gallegos as a witness, who testified that he saw the cow in question in appellant's herd, and that appellant stated to him that he had purchased the animal from one of the Córdovas. This witness, so the record shows, testified as a witness before the grand jury, and his name was indorsed upon the indictment as "Julian." The names "Julio" and "Julian," in Spanish, are not idem sonans; hence the question arises as to whether the statute (section 3142, Code 1915) is mandatory or directory. This section reads as follows:

"When an indictment is found, the names of the witnesses examined before the grand jury, must in all cases be inserted at the foot of the indictment or indorsed thereon before it is presented to the court."

In many of the states statutory provisions of a somewhat similar import will be found. While different language is employed, the object of all such statutes is to require the indorsement of the names of all the material witnesses upon the indictment, in order that the defendant may know the names of his accusers, and thus be enabled to prepare his defense; in other words, to prevent his being taken by surprise upon the trial, to his prejudice. The courts, as a general rule, hold such statutes directory. Bishop's New Criminal Procedure, § 869a. In some of the states it is expressly provided that witnesses whose names are not so indorsed shall not be permitted to testify, and in others, that the indictment, so failing in this regard, shall be quashed. Here we have no statute prescribing the effect of such omission. To hold that the trial court could not properly permit a witness to testify, whose name had not been so indorsed, in the absence of a showing of surprise or injury to the defendant, would be the placing of form before substance.

In the present case the appellant stated his objection upon the single ground that the witness' name had not been indorsed, as required by the statute. He made no claim that he was surprised or prejudiced by the failure of the state to so indorse the name of the witness, and, indeed, the record in the case fails to disclose any possibility of surprise or prejudice. Every one present at the time of the alleged conversation was present and testified as witnesses in the case, and we fail to see how appellant could have been benefited had the name been indorsed as required.

We conclude that the statute in question is directory; and, where a defendant objects to a witness testifying for the state whose name has not been indorsed upon the indictment, he having testified before the grand jury, he must show surprise or prejudice before the trial court is warranted in excluding the testimony of such witness, or continuing the cause until the defendant can prepare to meet the evidence of the witness.

Appellant complains of the failure of the court to permit him to show by certain witnesses, who had testified to a state of facts which showed that they were experienced cattle men and familiar with the marks and brands used upon animals within the state, that the brand set out in the indictment and that exhibited by the certificate of brand were not the same, thus enabling him to establish a variance between the allegation in the indictment and the proof. In justification of his claimed right he relies upon the cases of Askew v. People, 23 Colo. 446, 48 Pac. 524, and Miller v. Territory, 9 Ariz. 123, 80 Pac. 321. These cases, however, are not authority for the proposition for which he contends. In the former case the court permitted the state to show, by expert testimony, that a portion of a brand remaining upon the hide of an animal was a part of a named brand. In that case the hide from an alleged stolen animal was found with a part of the brand cut out. There remained, however, sufficient of the brand to enable the experienced cattle men to testify as to the original brand upon the animal. But there the court permitted the testimony as to the brand upon the hide of the animal, placed there by a branding iron. The court said:

"It is well known to all judges of experience in this western country, where animals are branded and turned loose upon the public range, that brands may be accurately deciphered by experts which are unintelligible to those who have not had special skill and experience in observing the same."

The court then proceeds to point out the reason why the testimony of experts is em-

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ployed in deciphering the brand upon the animal, and says:

"Among other things which experienced stockmen take into consideration in deciphering brands may be mentioned the following: The age of the animal when branded, as the brand enlarges with the growth of the animal; the condition of the branding iron as to the degree to which it is heated when applied to the animal; the length of time of contact of the hot brand with the hide; the age of the animal and the time of the year the hide is removed; and the state of preservation of the hide at the time of the examination. We are satisfied that these are all matters with reference to which witnesses may become expert and upon which opinions may be given by those qualified as the result of experience and observation."

But appellant, in this case, was not calling for an expert opinion as to the brand upon the animal in question, but was attempting to exhibit to the witness the certified copy of the brand, which was composed to two typewritten characters, viz. "C" and "P," with an oblique character made by a pen and ink, and the characters exhibited in the indictment, which likewise were written on a typewriter. The only matter which the jury were to determine was whether the character upon the brand certificate was a letter "I" or some other character. This they were as fully capable of determining as were the witnesses who testified that they were familiar with the manner and method of branding cattle and had had long experience in such matters and in deciphering brands upon the animals. If some question had been raised as to the brand appearing upon the animal in question, which could only be determined by deciphering the brand upon the hide of the animal, a different question would be presented, because of the many things which might enter into the deciphering of the same correctly, as shown by the expert quoted from the Colorado opinion. Wigmore in his work on Evidence (volume 3, § 1918), in discussing the question as to when opinion evidence is admissible, says:

"But there is also a third group in which exclusion must take place, though courts seldom find it necessary to point it out, namely, where the witness would detail the data of personal observation (and not only mere inferences), but the tribunal has an equal opportunity of personal observation."

See, also, Jones on Evidence, vol. 2, § 359 et seq.

Whether the character upon the brand certificate was the letter "I" or some other character could be as readily and easily determined by the jury as by the tendered witness; hence there was no error in excluding the evidence.

Appellant complains of the refusal of the court to give his requested instruction No. 1, but he cannot complain of this refusal, because the court, by its instruction No. 10, which was even more favorable to the accused that the requested instruction, covered the same ground.

For the reasons stated, the judgment will be affirmed; and it is so ordered.

HANNA and PARKER, JJ., concur.

(93 Wash. 563)

VANCE LUMBER CO. v. UNITED STATES TRUST CO. (No. 13614.)

(Supreme Court of Washington. Dec. 6, 1916.)

1. PRINCIPAL AND AGENT ⇐23(5) — EXISTENCE OF AGENCY — SUFFICIENCY OF EVIDENCE.

In an action to recover the stumpage reserved by the owner of land, brought against a bank in which part of the proceeds of the sales of the logs cut had been deposited, evidence *held* not sufficient to warrant setting aside the finding of the trial court that the bank was not made the agent of the buyer of the standing timber to pay the stumpage.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. ⇐23(5).]

2. PRINCIPAL AND AGENT ⇐92(1)—INSTRUCTIONS TO AGENT—MODIFICATION.

The buyer of growing timber who directs the bank in which the proceeds from sales thereof were deposited to pay the stumpage reserved to the landowner can modify such instructions either by act or direction.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 245, 592; Dec. Dig. ⇐92(1).]

3. BANKS AND BANKING ⇐134(7)—DEPOSITS—CONVERSION OF TRUST FUND—LIABILITY OF BANK.

A bank which diverts a trust fund to the payment of the personal debt of a depositor is liable to the true owner.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 362; Dec. Dig. ⇐134(7).]

4. BANKS AND BANKING ⇐134(7)—DEPOSITS — TRUST FUNDS — APPLICATION TO DEBTS DUE TO BANK.

Where a contract for the sale of growing timber did not reserve a lien on or any interest in the logs cut for the stumpage or even provide that such stumpage should be first paid out of the proceeds, there is no trust imposed on the proceeds which will render the bank in which they were deposited liable to the landowner for the amount paid out for supplies to the buyer or applied by the bank to the payment of advances made by it to the buyer to enable him to cut the timber.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 362; Dec. Dig. ⇐134(7).]

Department 1. Appeal from Superior Court, Grays Harbor County; Ben Sheeks, Judge.

Action by the Vance Lumber Company against the United States Trust Company. Judgment for defendant, and plaintiff appeals. Affirmed.

W. H. Abel, of Montesano, for appellant. Hogan & Graham, of Aberdeen, for respondent.

CHADWICK, J. Appellant Vance Lumber Company and one C. W. Jensen entered into

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a logging contract. It was therein agreed that appellant would sell all the merchantable timber upon a certain portion of sections 29 and 32, township 17 north, range 5 west; that Jensen would cut the timber and market the same at the mills upon Grays Harbor. The material parts of the contract follow:

"It is agreed by and between the Vance Lumber Company, a corporation, hereinafter called the party of the first part and C. W. Jensen, hereinafter called the party of the second part, as follows:

"The party of the first part hereby agrees to sell to the party of the second part, and the second party agrees to buy from the said party of the first part, all of the merchantable timber of every kind, now situate upon [certain land].

"In consideration whereof the said second party agrees to pay to said first party the sum of $2.85 per thousand feet for said timber; that he will cut and remove said timber from said land within one year from this date. The party of the second part agrees to commence logging operations upon said lands within thirty days from date hereof, and to fully complete the same within one year from date hereof, and to cause the logs cut from said land to be conveyed to the market and mills upon Grays Harbor and sold.

"Payment for said timber shall be made at the rate of $2.85 per thousand, at the time said logs are sold as follows: The first party has an option of being paid in cash, less 2 per cent. or to take what is known as ninety day mill paper, at face value for said logs."

Twelve rafts of logs were cut and delivered to purchasing mills between May 29, 1915 and September 17, 1915. The proceeds from the sale of the first four rafts were deposited by the purchasers to Jensen's credit in respondent bank. Under Jensen's instructions, cashier's checks to the extent of $2.85 per 1,000 feet board measure were mailed to Jensen, and he, in turn, sent them to appellant in accordance with the terms of the contract. Payment for the fifth raft was made by the purchasing mill company direct to Jensen. The proceeds received from the sales of the sixth, seventh, eighth, ninth, and tenth rafts were deposited with, and retained by, respondent. No remittance to cover the contracted stumpage on these rafts was made either by the bank or Jensen. It is to recover this amount that the present action was brought. The case was tried to the court without a jury, and resulted in a judgment of dismissal for the defendant.

Appellant contends first: That respondent was an agent of Jensen for the purpose of paying the stumpage, and that it should be permitted to recover as for money had and received; second, that the contract operated as an equitable assignment of the proceeds of the sales to the extent of $2.85 per thousand.

[1] The record does not establish, in that degree of certainty that would warrant us in overturning the findings of the trial court, that there was an agency on the part of respondent either to collect or disburse all or any definite part of the proceeds of the sale of the several rafts for the account of Jensen or for the benefit of appellant. The testimony, when considered as a whole, warrants the conclusion, and no more, that respondent was acting under the direction of Jensen, and that it made such disbursements as it was from time to time directed by him to make. Some of the testimony given by Jensen would indicate that he expected respondent to pay the stumpage out of the proceeds, but this testimony, if otherwise sufficient, is greatly weakened by circumstances and by the conduct of Jensen, who collected and disbursed the proceeds of one or more rafts on his own account, and who must have known the state of his account with the bank. The testimony clearly shows that the bank was helping him to finance his enterprise even to the extent of allowing an overdraft against rafts not yet made up or delivered.

[2] There was no privity between appellant and the respondent. The obligation of the respondent to meet Jensen's contract with appellant must, if sustained at all, rest upon the grounds of an express direction on the part of Jensen to respondent to pay the stumpage first out of any funds coming into its hands. If we grant that there was such direction, we must grant that it was Jensen's lawful right to modify his instructions either by act or direction. We have said that he collected and disbursed the proceeds of raft 5 without the aid of the bank. As for the remaining rafts, it cannot be said that there was any agency. Jensen says:

"Q. Did you have a subsequent arrangement with the bank as to these later rafts, including raft 6 and subsequent rafts, that as soon as these rafts were in tidewater or it was certain that they were coming in, you could draw against them, against the prospective proceeds, in your checking account in the bank, and that that money would be paid back? A. Yes, I did. We made those arrangements from time to time. Q. Now, what were those arrangements? A. Call Mr. Vandevort up and tell him it was necessary to draw against the account and tell him where the logs were. Perhaps they would be at the mill and the logs were not scaled yet or they were at the boom. Q. So you drew against the proceeds of the logs before the logs were at the market? A. I did sometimes. Q. Wasn't that the reason, Mr. Jensen, that there was no money left to pay stumpage because it had been drawn out? A. Yes, I expect that had a great deal to do with it. Q. Wasn't that the actual reason? A. Well, yes. * * * A. As I remember it, Mr. Vandervort told me at different times when I went down there just how I stood. Q. And that the stumpage was not paid? A. Yes. Q. And that you had overdrawn your account, and there was not anything to pay it? A. Yes, sir. Q. You knew you were spending this money operating your camp? This money that should have gone to Vance you spent it? A. Yes. * * * Q. You came to my office Sunday of this week? A. Yes, sir. Q. And you met Mr. Vandevort there? A. Yes, sir. Q. And at that time didn't you say that the first charge against those logs at all times was to take care of the overdraft? A. Yes, sir; I said that. Q. And didn't you say also that every check you drew against that of any kind, except perhaps a little personal check, went to the operation of that logging camp, bills that had to be paid? A. Yes, sir. Q. Didn't you say also that if you had not had that fire? * * * Q. Didn't you say that if you had not had that fire you would have had

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money to pay Vance? A. I said that if it had not been for the fire the logging operations up there would have been all right."

[3, 4] Counsel further contends that, inasmuch as Jensen had agreed to pay appellant $2.35 per thousand stumpage "at the time said logs are sold," and respondent knew that he had so agreed, it is to be charged as a trustee, and is liable as for a conversion of a trust fund. That a bank which diverts a trust fund to the payment of the personal debt of a depository, is liable to the true owner is well settled by authority.

We find no element that would attach a trust to the specific fund. The contract does not in any way reserve an interest in the logs sold, or the fund to be realized therefrom. Appellant is not, as to third parties, either the legal or equitable owner of the fund. The relation of debtor and creditor exists between Jensen and appellant, and nothing more. No lien is reserved; nor does the contract even provide that appellant shall have the first proceeds from the sale of the rafts. If Jensen had used the proceeds, as he did part of them, to pay for the expenses of logging, it could not for a moment be asserted that the ones who had been paid were bound to account to appellant, although it were shown that they knew the terms of the contract. Neither can an equitable title be asserted as against other creditors who furnished money to carry on the work, or contributed to Jensen's general credit and needs, pending the performance of the contract. This feature of the case is disposed of by the reasoning of the court in Hossack v. Graham, 20 Wash. 184, 55 Pac. 36.

Affirmed.

MORRIS, C. J., and MAIN, ELLIS, and PARKER, JJ., concur.

(92 Wash. 685)

VIOLETTE v. INSURANCE CO. OF PENNSYLVANIA. (No. 13275.)

(Supreme Court of Washington. Nov. 28, 1916.)

TRIAL ⟸164—MOTION FOR JUDGMENT—EFFECT.

A defendant does not waive, by moving for judgment of nonsuit upon plaintiff's evidence, his right to have the issues tendered by his answer setting up an affirmative defense and claiming contribution against codefendants determined by trial thereof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 372; Dec. Dig. ⟸164.]

Department 2. Appeal from Superior Court, Chelan County; Wm. A. Grimshaw, Judge.

On rehearing. Original opinion modified, and in other respects petition for rehearing denied.

For former opinion, see 159 Pac. 896.

C. B. Hughes and Hughes & Adams, all of Wenatchee, for appellant. Granger & Clarke, of Seattle, for respondent.

PER CURIAM. The original opinion in this case ordered judgment for appellant, with costs. This was inadvertent. There is an issue tendered by respondent as to the value of the insured property which was destroyed, and an affirmative defense in the answer setting up that there was other insurance on the property and claiming contribution from such other insurers. The case was disposed of by the court below on respondent's motion for judgment of nonsuit upon plaintiff's evidence, and the cause thereupon dismissed. The respondent did not waive its right to have the issues tendered by its answer determined by trial thereof, by its motion for judgment of nonsuit. Frye & Bruhn v. Phillips, 46 Wash. 190, 89 Pac. 559, 93 Pac. 668.

For this reason a new trial is awarded instead of a judgment for appellant. To this extent the original opinion is modified, appellant to recover costs of this appeal, and in all other respects the petition for rehearing is denied.

(93 Wash. 558)

HUGHES v. EASTERN RY. & LUMBER CO. (No. 13547.)

(Supreme Court of Washington. Dec. 6, 1916.)

1. FRAUDS, STATUTE OF ⟸139(6)—EXECUTED CONTRACT—CONSTRUCTION.

Where plaintiff and defendant negotiated with the intention of reducing a contract for sale of logs to writing, without signing any formal writing, but logs were cut and delivered by plaintiff and received and paid for by defendant, at a price which seemed to be that agreed upon, between them, there was the equivalent of an executed oral contract, binding plaintiff to sell and defendant to buy.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 341; Dec. Dig. ⟸139(6).]

2. SALES ⟸384(1) — ACTION FOR BREACH OF CONTRACT—MEASURE OF DAMAGES.

The general rule is that the measure of damages for the breach of a contract for the sale of a commodity, where the vendee refuses to accept delivery, is the difference between the contract price and the market value at the time and place agreed upon for delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098, 1102–1104; Dec. Dig. ⟸384(1).]

3. SALES ⟸332—BREACH OF CONTRACT—DUTY TO RESELL.

As damages for breach of contract for sale of goods are allowed for actual monetary loss, where there is a market, it is the duty of the aggrieved party to practice diligence to sell the goods, to the end that the loss may be as small as possible.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 914–917; Dec. Dig. ⟸332.]

4. LOGS AND LOGGING ⟸34(1)—BREACH OF CONTRACT—MEASURE OF DAMAGES.

Where one who contracts to buy logs to be cut from standing timber breaks his contract, the seller may recover the difference between the cost of preparing the logs for delivery and the price agreed to be paid, subject to the defenses that there is a market, or that the logs have been sold on the market, and hence no damage has re-

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sulted, or would result, if plaintiff had availed himself of the market.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 105–107; Dec. Dig. ⟸ 34(1).]

5. LOGS AND LOGGING ⟸34(2)—SALES—EVIDENCE—ADMISSIBILITY.

Although it is assumed, in the absence of a showing by way of defense, that logs have no market value until cut and prepared for delivery in the market, where defendant was sued for breach of contract to purchase logs, evidence of a resale of the standing timber remaining on the lot he was logging was competent to prove a market.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 108–111; Dec. Dig. ⟸ 34(2).]

6. CONTRACTS ⟸28(3) — EVIDENCE—WEIGHT AND SUFFICIENCY.

If there is no written contract to be overcome by clear and convincing evidence, an oral agreement may be established by a preponderance of the evidence.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 133–140, 1820, 1821; Dec. Dig. ⟸28(3).]

Department 1. Appeal from Superior Court, Lewis County; A. E. Rice, Judge.

Action by A. B. Hughes against the Eastern Railway & Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial.

Raymond J. McMillan and Ernest K. Murray, both of Tacoma, and C. D. Cunningham, of Centralia, for appellant. Torney & Ponder, of Chehalis, and Wedmark & Grimm, of Centralia, for respondent.

CHADWICK, J. There are two questions in this case: First, whether there was a contract between respondent and appellant for the sale of logs; and, second, whether it was competent for the appellant to prove a sale of the rejected commodity to another, in defense of an action to recover the profit that would have accrued to respondent in producing the logs; that is to say, the difference between the cost of production and the price appellant agreed to pay.

[1] We find that in the negotiations of the parties, it was their intention to reduce their contract to writing; that no less than three tentative contracts were drawn up, but none of them were signed in a formal way; that nevertheless respondent proceeded to cut and deliver logs, and appellant received and paid for them at a price which seemed to have been the price agreed upon between them. We understand the rule to be that where the parties have negotiated for a written contract, and have failed to make a formal writing, but have entered into the performance of the contract, and have proceeded so far in its execution that the terms can be readily ascertained, a court will treat the contract as an executed oral contract, and measure the rights and obligations of the parties accordingly. With this rule before us, we have no hesitation in subscribing to the verdict of the jury that the parties had entered into a binding contract, and that the one party was bound to sell and the other was bound to buy.

Appellant contends that the measure of damages is the difference between the contract price and the market price at the time of the breach. Respondent, with equal zeal, insists that he is entitled to recover the difference between the cost of stumpage and logging and the price appellant agreed to pay for the logs, regardless of any after sale, or of the sum realized upon such sale.

The question came up primarily in this way: Appellant offered to show that after it had declined to receive further shipments of logs, respondent had sold all of the timber remaining on the tract he was logging. It offered a contract of sale entered into by respondent and the Wabash Lumber & Shingle Company after the breach. The court rejected the proffered exhibit as irrelevant and immaterial. He did, however, allow it to be filed in evidence as affecting the original contract, though upon what theory we are not advised. Appellant then offered to show, by proof of a number of facts and conditions, that the contract with the Wabash Company was more advantageous to respondent than was the original contract, and that respondent had, in fact, suffered no loss whatever by the default.

[2] The general rule is that the measure of damages for the breach of a contract for the sale of a commodity, where the vendee refuses to accept delivery, is the difference between the contract price and the market value at the time and place agreed upon for delivery. Baessetti v. Shenango Furnace Co., 122 Minn. 335, 142 N. W. 322; Mitchell-Taylor Tie Company v. Whitaker, 158 Ky. 651, 166 S. W. 193; Benjamin on Sales (5th Ed.) p. 806; Sedgwick on Damages (9th Ed.) par. 753. See, also, Moffat v. Davitt, 200 Mass. 452, 86 N. E. 929; Carle v. Nelson, 145 Wis. 593, 130 N. W. 467; Netter v. Trenton Whisk Broom Works, 140 App. Div. 287, 125 N. Y. Supp. 141.

[3] This rule is declared in Carver-Shadbolt Co. v. Klein, 69 Wash. 586, 125 Pac. 944, where our only consideration was whether the facts brought the plaintiff within the rule. That case also recognizes the fundamental principle that where there is a market, it is the duty of the aggrieved party to practice diligence, to the end that the loss may be as "small as possible." And we think this is the rule governing in this case. The reasoning which sustains the rule is simple. It is that damages are allowed as compensation for actual monetary loss, and if the vendor can find a market equal or better than that provided in his contract, there is no loss to compensate.

We shall refer to but one or two of the decisions of this court which have been cited by counsel. As we read them, they are

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all in harmony with the general rule. The case of Peterson v. Lone Lake Lumber Co., 58 Wash. 72, 107 Pac. 857, relied upon by both parties, is illustrative. There Peterson sold the timber on his land to the lumber company, agreeing to deliver from time to time. After a part of the lumber had been delivered, the lumber company breached its contract. Peterson brought suit to recover his damages, which were measured by the difference between the cost of delivery and the price to be paid. Upon this state of facts, the court held to the rule of damages there stated, and there is much reason to sustain the rule, for it may be assumed, in the absence of a showing made by way of defense, that logs have no market value until cut and prepared for delivery in the market. But it does not follow that one who is sued for damages cannot avail himself of such defenses as the facts may warrant and the law allow. So in this case, the issue is tendered that the logs were resold on the market, and that respondent suffered no damages whatever.

[4] The logic of our cases seems to be that where one who contracts to buy logs to be cut from standing timber breaches his contract, the vendor may recover the difference between the cost of preparing the logs for delivery and the price agreed to be paid, subject, however, to the usual defenses, that there is a market, or that the logs have been sold upon the market, and hence no damage has resulted, or would result, if the plaintiff availed himself of the market.

We are reminded, however, that we are committed to the doctrine of allowing prospective profits. The case of Bogart v. Pitchless Lumber Co., 72 Wash. 418, 130 Pac. 490, is relied on among others. Profits are allowed by way of compensation where there is no market price, or the commodity is manufactured to meet some purpose leading away from, rather than into, the market. The rule, or rather the exception to the rule, is resorted to ex necessitate, the object being, in either case, to make the unoffending contracting party whole upon his contract.

[5] The case just referred to points the rule as well as its distinctions. There, a party had contracted to sell logs to another to be manufactured into lumber. He breached his contract. The vendee had nothing to sell upon the market to save or reduce his loss, and, of necessity, he was allowed a sum equal to the amount he would reasonably have made if the logs had been delivered. In other words he was given the value of his contract. In the case at bar, respondent was not deprived of his goods by the breach of defendant. It follows that evidence of a market was competent, and should have been received. A resale is competent evidence to prove a market. Bigelow v. Legg, 102 N. Y. 652, 6 N. E. 107; Scott Lumber Co. v. Hafner, 91 Wis. 667, 65 N. W. 513; Sedgwick on Damages (9th Ed.) par. 755, p. 1577.

[6] The parties contend over a rule of evidence; the one that the burden was on respondent to prove the oral contract upon which he relies by clear and convincing evidence; the other that proof by a mere preponderance of evidence is sufficient. No written contract was entered into. If there is no written contract to be overcome by clear and convincing evidence, it is manifest that an oral agreement may be established by a preponderance of the evidence.

Respondent is entitled to recover damages, if any he has suffered, within the rule suggested. In fixing the measure, the court should take into consideration elements such as delay and expense necessarily incurred upon the resale.

Reversed and remanded for a new trial.

MORRIS, C. J., and MAIN, PARKER, and ELLIS, JJ., concur.

(93 Wash. 550)

SHAW et al. v. CARR et al. (No. 13662.)

(Supreme Court of Washington. Dec. 5, 1916.)

1. CORPORATIONS ⟸80(12) — SUBSCRIPTIONS FOR STOCK—CANCELLATION—FRAUD.

In a suit to cancel a purchase of stock in a corporation and to recover the consideration paid, there can be no recovery, where the evidence does not show that plaintiffs were induced to purchase the stock by willful fraud, but does show that the success of the corporation depended upon the marketability of a novel water pump and the failure to succeed resulted from want of sufficient working capital.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 264; Dec. Dig. ⟸80(12).]

2. CORPORATIONS ⟸376 — PURCHASE OF OWNED STOCK—SURRENDER BY STOCKHOLDERS FOR SALE.

Where the entire capital stock of a corporation was issued to its organizers in exchange for their rights in a contract not shown to have been overvalued, the surrender of a part of such stock to the corporation to be sold by it in order to obtain a working capital is not a dealing in its own stock by the corporation nor an impairment of its capital contrary to Rem. Code 1915, § 3697, and a contract for the purchase of such stock is not void for want of consideration.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1530; Dec. Dig. ⟸376.]

3. CORPORATIONS ⟸80(1) — PURCHASE OF STOCK—CANCELLATION—FRAUD.

Purchasers of the stock of a corporation which had been issued in exchange for the contract rights to manufacture a novel water pump, the value of which rights could not be definitely ascertained, cannot cancel their purchase for fraud, where they did not invest upon the valuation of the stock, but because they believed in the practicability of the machine.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 244; Dec. Dig. ⟸80(1).]

Department 1. Appeal from Superior Court, King County; John S. Jurey, Judge.

Suit by Frank S. Shaw and others against George W. Carr and others. Judgment for

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the defendants, and plaintiffs appeal. Affirmed.

H. E. Foster, of Seattle, for appellants. Flick & Frater, of Seattle, for respondents.

CHADWICK, J. Plaintiffs brought this action for the recovery from defendants, of the sum of $250 which had been paid to defendants in money, the cancellation of two promissory notes, one for $250 and one for $1,000, and for the cancellation and surrender of two deeds whereby plaintiffs conveyed to a corporation known as the Modern Irrigation Company two certain tracts of land in King county.

[1] The corporation was organized by certain of the defendants. It is alleged that defendants Carr, Jones, and Anderson fraudulently contrived, by misrepresentation and fraudulent statements and concealments, to sell to plaintiffs 5,000 shares of the stock of the irrigation company in consideration of the sum of $3,000 to be paid as above indicated. The court found in favor of the defendants. Two issues, one of fact, the other of law, are submitted by the appellants. The testimony is conflicting. The charge is fraud. From an examination of the entire statement of the facts we are not prepared to say that the preponderance is not with respondents. It is certainly not shown by clear and convincing evidence that appellants were overreached. It must have occurred to the trial court, as it does to us that appellants, after full opportunity to investigate and after full inquiry, engaged in a business venture which at the time seemed inviting, but which had only such prospects of success as were inspired by optimism. The venture was not a success. Its failure is attributable, as it seems to us, to a lack of sufficient capital to manufacture and market its wares. We shall not go into an extended review of the testimony. It is enough that a broad view of the entire record has failed to convince us that appellants were induced to purchase the stock by any willfully fraudulent inducements on the part of the respondents.

[2] The irrigation company was organized with a capital stock of $50,000. The organizers—two of them—had certain contracts giving them the privilege of manufacturing for a term of five years a certain water motor and pump which, it was believed, had proved its practicability by actual test. There were also some physical assets in the way of motors and pumps, of no greater probable value than $2,000. Carr and Jones transferred their contracts and the personal property to the corporation in full payment of the capital stock, all of which, except a nominal holding to Anderson, was issued to them in equal proportion. Whereupon, in order to provide a working capital for the company, the two incorporators mentioned voluntarily and without consideration or obligation on their part turned back into the treasury of the corporation 32,000 shares of the stock to be held by it in trust and sold for the benefit and use of the corporation.

The stock which appellants purchased was a part of this stock. It is insisted that this retransfer of the stock was a fraudulent manipulation, a dealing in its own stock by the corporation, and an impairment of its capital stock under the rule announced in Barto v. Nix, 15 Wash. 563, 46 Pac. 1033, Tait v. Pigott, 32 Wash. 344, 73 Pac. 364, Union Trust Company v. Amery, 67 Wash. 1, 120 Pac. 539, Jorguson v. Apex Gold Mines Co., 74 Wash. 243, 133 Pac. 465, and Kom v. Cody Detective Agency, 76 Wash. 540, 136 Pac. 1155, and that, the stock being for these reasons fictitious and fraudulent, no consideration passed to appellants, and they are entitled to a personal judgment against the principal respondents, and a reconveyance of the property transferred by them to the present holders of the title who are alleged to have taken with notice.

The cases cited are all declarative of our statute (Rem. Code 1915, § 3697), which discountenances an impairment of the capital stock of a corporation at the expense of its assets. The statute does not declare, and we know of no rule of public policy that would require a holding, that a corporation cannot acquire by gift and for its own benefit shares that had theretofore been issued to an individual. The vice at which the statute is directed is the disbursement of the acquired assets of a company in the purchase of its own stock. If that could be done, it would readily follow that the directors of a corporation might, in consideration of a retransfer of their stock, keep themselves financially whole, leaving nothing to the creditors. Or, to put it another way, the stock is only representative of the money worth of the corporation. If a trade in the stock impairs the money worth of the stock, it is proscribed. If it does not, it is not an unlawful thing.

That a return by a person of a part of the stock which had been issued to him to be used for the benefit of the corporation is not illegal was held in effect in Davies v. Ball, 64 Wash. 292, 116 Pac. 833, where we quoted from 1 Cook, Stock and Stockholders (3d Ed.) p. 66, § 46, as follows:

"The fact that the person to whom the stock is issued returns a part of it as a gift to the corporation or to trustees for the corporation to sell the same below par and put the proceeds in the corporate treasury for a working capital does not necessarily prove that the property was overvalued. The person receiving the stock may have been willing to sacrifice a part of his stock and property in order to make the rest more valuable."

[3] Appellants make much of a finding of the court that the agreement giving the irrigation company the exclusive right to manufacture the motor and a "square hole bit" was at the time appellants purchased the stock, and is now, worth the sum of $50,000; whereas it is and was utterly worthless. To

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measure the value of such a contract is exceedingly difficult. For that reason we have followed the rule, where the facts invite it, of Old Dominion Copper Min. Co. v. Lewisohn, 210 U. S. 206, 28 Sup. Ct. 634, 52 L. Ed. 1025. In Inland Nursery & Floral Co. v. Rice, 57 Wash. 67–69, 106 Pac. 499, we said:

"Fraud to be actionable must result in injury, and it nowhere appears that injury has resulted to anyone because of such exchange. It does not appear but that subsequent stockholders purchased with full opportunity for investigation into the condition and assets of the company, and that the stock they purchased was fully worth the sum paid therefor. If, therefore, subsequent stockholders obtained full value, there can be no element of injury or fraud as to them. No complaint is made as to creditors."

A fair reading of the testimony discloses the fact that appellants did not invest because of any allurement attributable to the amount of the capital stock measured in dollars. They knew the success of the company depended upon the manufacture and sale of a new and novel article. They invested because they believed in the practicability and salability of the machine. Their testimony reaches no further than to show that the company has failed to meet their expectations. On the other hand, there is the testimony of engineers and others, whose judgment is not impeached, that the machine is entirely practicable, while the whole testimony shows that the company has so far failed for the want of a sufficient working capital.

We find no error, and the judgment is affirmed.

MORRIS, C. J., and MAIN, HOLCOMB, and ELLIS, JJ., concur.

(93 Wash. 501)

BRICE v. STARR et ux. (No. 13102.)

(Supreme Court of Washington. Dec. 5, 1916.)

1. ABATEMENT AND REVIVAL ⟸6—ANOTHER ACTION PENDING—ABATEMENT OF FIRST ACTION.

The pendency of another action growing out of the same transaction is ground for the abatement of the second action, but never for the abatement of the first action.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 32–34; Dec. Dig. ⟸6.]

2. ACTION ⟸53(1)—SPLITTING CAUSE OF ACTION—WAIVER OF OBJECTION.

A defendant against whom two actions arising from the same transaction were begun waives his right to object to splitting the cause of action by failure to demur or plead in the second action to the pendency of the first, or by failure to appeal from an adverse judgment in the second action.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549–551, 553–565; Dec. Dig. ⟸53(1).]

3. JUDGMENT ⟸729 — CONCLUSIVENESS — MATTERS CONCLUDED—PENDENCY OF ANOTHER ACTION.

While ordinarily a judgment is conclusive as to all matters which might have been decided in the action, since it is presumed that plaintiff intended to secure in that action all the relief to which he was entitled, this presumption does not obtain where there is a prior action pending between the same parties for relief which might have been, but was not, sought in the action in which judgment was rendered, and therefore a judgment in a suit to annul a deed fraudulently obtained is not a bar to plaintiff's right to recover in a prior action the amount secured by defendant by mortgaging the property to an innocent party, which mortgage plaintiff would be compelled to pay.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1262; Dec. Dig. ⟸729.]

En Banc. Appeal from Superior Court, King County; J. T. Ronald, Judge.

On rehearing en banc. Judgment of the trial court affirmed.

For opinion on the hearing in department, see 90 Wash. 369, 156 Pac. 12.

Bryan & Colvin, of Seattle, for appellants. John W. Whitham, of Seattle, for respondent.

ELLIS, J. [1] This case is before us on a rehearing en banc. The facts are sufficiently presented in the opinion of Department 2 rendered on the former hearing. Brice v. Starr, 90 Wash. 369, 156 Pac. 12. The sole question is this: Was the pendency of the action to cancel the deed a bar to the prosecution of the action to recover the amount of the mortgage wrongfully placed upon the land by appellants? This action was the first instituted. It grew out of the same transaction set up in the second action to cancel the deed for fraud. Had appellants deemed themselves aggrieved by the prosecution of two actions, their proper course was to demur to the complaint in the second action or —if the complaint did not show on its face the fact of the pendency of the first action— to plead the pendency of the first as a bar to the second. The first action might have been invoked as a bar to the second, the second could not be invoked as a bar to the first. As said by Brewer, J., in Rizer v. Gillpatrick, 16 Kan. 564, 567:

" 'The pendency of an action will make a second action, for the same cause, and in which the same judgment can be rendered, abatable; but not vice versa.' Buffum v. Tilton, 17 Pick. (Mass.) 510; Webster v. Randall, 19 Pick. (Mass.) 13. A subsequent suit may be abated by an allegation of the pendency of a prior suit, but the converse of the proposition is, in personal actions, never true."

And again, as said by Campbell, J., in Callanan v. Port Huron & Northwestern Ry. Co., 61 Mich. 15, 21, 27 N. W. 718, 720:

"There is no case that we know of sustaining any such doctrine as will give a subsequent suit the effect of abating a prior one."

See our own decisions, Westmoreland Co. v. Howell, 62 Wash. 146, 113 Pac. 281; Olson v. Seldovia Salmon Co., 89 Wash. 547, 154 Pac. 1107. See, also, Webster v. Randall, 19 Pick. (Mass.) 13, 20; Humphries v. Dawson, 38 Ala. 199; Morton v. Webb, 7 Vt. 123;

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Welch v. Sage, 47 N. Y. 143, 150, 7 Am. Rep. 423; Blumenthal v. Taylor, 44 Ill. App. 139.

[2] We are not advised whether appellants did interpose in any way in the second action the objection that another action was pending which they now urge in this, the first action. Certain it is, however, that they did not appeal from the decision in that action, and hence they are now precluded from raising the question, since they did not raise it in the only action in which it properly could be raised, namely, in the action last instituted, or, if they raised it, acquiesced in an adverse decision on that point, as well as on all others there decided, by their failure to appeal. It follows that, having submitted to a trial of the second action without moving therein for a consolidation with the first, and without raising the objection that, by it, respondent was splitting his cause of action, appellants waived the right to raise that objection here. On the first hearing sufficient importance was not attached to the admitted fact that the action now before us was the action first instituted, and that the objection now urged could have been properly urged only in the other action. Counsel on both sides seem to have lost sight of this fact and of its significance. Nor can the appellants be permitted to invoke the decree in the second action as res judicata of the issue here. It can only be invoked as res judicata of the issue there actually tried and decided. This is demonstrable. The only wrong done to appellants by prosecuting two actions founded on the same fraud for separate branches of the relief to which respondent was entitled is the wrong of being vexed by two actions—the wrong of splitting the relief. Buffum v. Tilton, 17 Pick. (Mass.) 510. They could have avoided this by pleading the first action in abatement of the second. Not having done so, they have waived the right now to object to the two suits. They must submit to the recovery in the first suit of all relief which was not actually obtained in the second suit.

[3] In such a case it is the judgment as entered, not the judgment which might have been entered, which is res judicata. It is true that usually a judgment is res judicata, not only of what was decided, but of what might have been decided therein; but this is only because a party is presumed to intend to secure all the relief possible in a single action. But where at the very time of the bringing of the second action a prior action was pending for a part of the relief, which, though it might have been recovered in the second action, *was not recovered* therein, the presumption that he abandoned or waived that part of his relief cannot obtain. The very pendency of the other action negatives the presumption. In such a case we are clear that the judgment in the second suit ought to be held res judicata only of what it actually adjudged, not of what it might have adjudged, had all the relief possible been sought in a single action. Matters expressly omitted in one suit are not res judicata in another. 1 Van Fleet's Former Adjudication, p. 183, § 53.

A defendant is advised the moment a second action is commenced that he will have to respond to two actions, unless he plead the first in abatement of the second, or demur in the second on the ground of pendency of the first. When he fails to do either, he invites the very error of which appellants now seek to avail themselves by a plea of res judicata when the first action came to trial. In the case here presented, by submitting to a judgment in the second action, without pleading the first action in abatement and without appeal, knowing all the time that another action was pending for other relief growing out of the same fraud, appellants invited the error of the trial court in permitting the maintenance of the two actions. Appellants should not now be permitted to invoke that error as ground for res judicata. They cannot take advantage of an error which they themselves invited. A lawsuit is not a mere game in which the prize must always go to the more adroit and skillful. It is a means to an end, and that end is, or should be, justice. Substantial justice is, and always will be, possible of attainment by the rule above announced. It would often be made impossible of attainment by the rule laid down in the departmental opinion. No better illustration of this can be found than the case before us. In the suit to cancel the deed the findings declared:

"That the court finds to be true as alleged in paragraph III of plaintiff's complaint that while plaintiffs were so the absolute owners of said premises the said defendant, S. H. Starr, falsely and fraudulently pretended and represented to plaintiffs that he desired to and would purchase said property at the agreed price of $3,200; that he had arranged to borrow $2,000 from a friend who would not charge him any commission in case plaintiffs would convey title to said defendant so that he could mortgage said premises; that in that event he would pay said sum of $2,000 over to plaintiffs to be applied on the purchase price. * * *"

And again:

"That instead of borrowing said sum of $2,000, without having to pay a commission, and applying the same on the purchase price, defendants did on June 2, 1914, mortgage said premises to the Seattle Trust Company in the sum of $1,400, and left the state of Washington, appropriating the said sum to their own use. * * *"

If these findings are true—and we must so assume, since no appeal was taken from the decree founded thereon—then appellants by their plea of res judicata are now seeking to retain the fruits of that fraud by pleading it as an adjudicated fact. If the fetters of precedent were so powerful as to force such a monstrous result, it would be high time that we break them. But in every case cited in the former opinion the plea in bar was interposed in the second action, not in the first,

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and the judgment invoked as res judicata was the judgment in the first action, not in the second. There are decisions which hold that the right to plead the judgment in a second action as a bar to a recovery in the first is not waived by the failure to plead the pendency of the first action as a bar to the prosecution of the second, but that rule should only apply where the demands in the two actions are in their very nature single and entire. Here, however, the demands, though arising out of the same transaction, hence such as might have been tried in the same suit, are in their nature distinct and separable. The one was to cancel the deed; the other, to recover for the wrongful mortgaging. In such a case it seems only consonant with reason that the failure to plead the first action as a bar to the second, or to demand consolidation, ought to estop a defendant from claiming that the judgment in the second action is res judicata of anything except what it actually determined. See Fox v. Althorp, 40 Ohio St. 322.

The general observations found in 1 Herman, Estoppel and Res Judicata, § 270, seem peculiarly pertinent here:

"There are many reasons why the plea of res adjudicata should be more cautiously received under the Code system of pleadings, than is or was necessary under the common-law system of pleading. The want of certainty in the system of pleading under the Code renders it not unfrequently difficult, if not impossible, to determine what issues have been joined, and the precise rights which have been adjudicated. The united law and equity jurisdiction enables parties litigant to embrace in the same suit more than one cause of action or defense, which would be incongruous and inadmissible under a different system, and perhaps the widest range known to any system tolerated in the form and scope of code pleadings. Parties who have several causes or rights of action against the same party, of different and distinct character, are not compelled to unite them in the same suit, on penalty of being barred as to those not included; nor is this the meaning of that well-settled principle that a judgment or decree of a court of competent jurisdiction is final and conclusive, not only as to every matter determined, but also as to every other matter which the parties might litigate in the cause, and which they might have had decided. * * * The Code system of pleading does not by any means favor a multiplicity of suits, and when the proper parties are brought before them, the courts will hear and finally determine all the rights of the parties touching the subject-matter, if properly presented, whether such was the original intention of the parties or not; but if neither party demands a judgment upon the merits of the respective rights claimed, and the judgment of the court appears to have been rendered upon the merits of a mere preliminary question, it would be rendering harsh injustice, and make justice and equity a species of tyranny utterly antagonistic to the signification of those terms."

Here neither party demanded that the whole matter be determined in the second action, which was the first brought to trial, nor was the whole matter there determined. Neither party asked for a consolidation. Appellants were not deceived as to respondent's intention to pursue both actions to judgment, yet they did not move to abate the one which might have been abated. Whatever the general rule, no court ought to permit the equitable doctrine of res judicata so to operate as to defeat a recovery to which the findings and decree in the second suit clearly show respondent entitled. The judgment in the second action here involved certainly is res judicata, but it must have the opposite effect from that contended for by appellants. It is only res judicata of the things actually decided. It proves that the deed was fraudulently obtained, and hence that the mortgage was fraudulently given and the proceeds wrongfully appropriated, and conclusively establishes respondent's right to recover a money judgment in the amount of the mortgage and interest, but it does not preclude that recovery in another suit which was the first instituted.

We find no error in the refusal of the court to permit appellants to relitigate the issue of fraud by offering proof of the matters set up in their answer. The issue of fraud was the only issue in the second suit and was decided therein adversely to appellants.

The judgment of the trial court is affirmed.

MORRIS, C. J., and MAIN, HOLCOMB, FULLERTON, MOUNT, PARKER, and CHADWICK, JJ., concur.

(93 Wash. 530)

STATE v. ROSSMAN. (No. 13441.)

(Supreme Court of Washington. Dec. 5, 1916.)

1. MASTER AND SERVANT ⊂⊃14½, New, vol. 22 Key-No. Series — EMPLOYMENT AGENCIES — "WORKER"—STENOGRAPHER.

A stenographer and bookkeeper is a "worker" within the meaning of the Employment Agency Act (Laws 1915, p. 1), forbidding any person from taking a fee from one seeking employment for furnishing employment or information leading thereto.

2. MASTER AND SERVANT ⊂⊃14½, New, vol. 22 Key-No. Series — EMPLOYMENT AGENCIES — VALIDITY OF STATUTE—DEFINITENESS.

The word "worker" is capable of exact definition, and therefore its use in that statute does not render the statute void for uncertainty.

3. MASTER AND SERVANT ⊂⊃14½, New, vol. 22 Key-No. Series—CONSTITUTIONAL LAW—EMPLOYMENT AGENCIES—REGULATION—POLICE POWER.

Laws 1915, p. 1, forbidding any person from taking a fee from a person seeking employment for furnishing employment or information leading thereto, is a valid exercise of the police power, since it was enacted to prevent frauds on working people, many of whom were ignorant and without means to protect themselves, which frauds were not only possible but had become common.

4. MASTER AND SERVANT ⊂⊃14½, New, vol. 22 Key-No. Series — EMPLOYMENT AGENCIES — REGULATION—VALIDITY.

Laws 1915, p. 1, forbidding any person from taking a fee from a seeker of employment for furnishing employment or information leading thereto, is not unconstitutional as being prohibitive of the business of conducting employment agencies,

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since such agencies may still charge fees against persons desiring to employ laborers.

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

George P. Rossman was convicted of charging a fee for furnishing employment or information leading thereto, and he appeals. Affirmed.

Edgar S. Hadley, of Seattle, for appellant. Alfred H. Lundin and Lane Summers, both of Seattle, for the State.

MOUNT, J. The defendant was convicted of the crime of charging a fee for furnishing employment or information leading thereto. He has appealed from the sentence imposed upon that conviction.

The facts are stipulated in substance as follows: The defendant was operating an agency for the employment of stenographers and bookkeepers, and was charging a fee of $2 as an enrollment fee, and 20 per cent. of the first month's salary after the applicant secured employment. On the 14th day of February, 1916, the appellant demanded and received from one Elnora Hughes the sum of $2. She was then seeking employment as a stenographer and bookkeeper.

The appellant makes three contentions in this court, to the effect: First, that a stenographer and bookkeeper is not a worker within the meaning of initiative measure No. 8; second, that the word "worker" is so indefinite as to render the act void, and, third, that the act is unconstitutional under the fifth and fourteenth amendments to the Constitution of the United States, and like provisions of the Constitution of this state. We shall notice these contentions briefly.

[1] On the first point the appellant relies upon the case of Huntworth v. Tanner, 87 Wash. 670, at 680, 152 Pac. 523, 527, where we held that a school teacher was not a worker within the meaning of that act. In that case we said:

"The act has no reasonable relation to any subject other than the protection of those who may be classed as workers or laborers. It has never been contended that business and professional men, teachers, and those following scientific pursuits, are not amply equipped to protect themselves. A teacher renders the very highest class of professional service, whereas, those for whose benefit this law was passed are frequently unskilled in business affairs, and in many instances are men of foreign birth having no competent understanding of our business methods or our language."

It is contended by the appellant that a stenographer and bookkeeper, for the reasons stated in Huntworth v. Tanner, supra, is not included within the meaning of the term "worker." Some things there said might lead to that conclusion. But we are satisfied that a stenographer and bookkeeper is a worker, and therefore comes within the meaning of the act. In Georgia, in a case where a man was employed as a private secretary and stenographer to the president of a railroad and banking company at $125 per month, his duties being to receive dictation and transcribe letters, and to take care of the papers in the office, including the keeping of books and statements, it was held that he was a worker, and was entitled to have his wages exempt from garnishment. Abrahams v. Anderson, 80 Ga. 570, 5 S. E. 778, 12 Am. Rep. 274. And in Cohen v. Aldrich, 5 Ga. App. 256, 62 S. E. 1015, also a Georgia case, a stenographer was also held to be a worker. In that case it was said:

"That a stenographer is skilled and trained cannot affect the nature of the work he does, although it does affect its character. After acquiring the trade, the test is the method of carrying it on. It is difficult to conceive of anything more thoroughly manual than the work of a stenographer. Receiving the sounds from the lips of another, he registers what he hears and reproduces what he receives. He exercises no independence of thought, no initiative, no discretion. The test of his efficiency is his absolute acceptance of what is given him and its return unchanged. If his employer indulges in the pastime of murdering the King's English, he must become a 'particeps criminis,' and join in the assassination. So pronouncedly are the physical faculties involved in stenography that there comes a time when the hand refuses to work, although the mental faculties may be entirely clear. It is preeminently manual labor, work of the hand."

Under the rule in these cases, and others of a similar character which might be cited, we are satisfied that a stenographer and bookkeeper is a worker within the common acceptation of that term, and is within the meaning of initiative measure No. 8.

[2] It is next contended that the term "worker" is so indefinite as to render the act void. This contention is based upon the decision in State v. Powles & Co., 90 Wash. 112, 155 Pac. 774. In that case we held that the term "commission merchant," which was defined to be "any person, firm or corporation whose principal business is the sale of farm, dairy, orchard or garden produce on account of the shipper or consignor," was too indefinite to base a criminal charge upon by reason of the use of the words "principal business." But it was not held there that the words "commission business," if they had been used alone, were not capable of accurate definition. But because the word "principal" was used, it was held that it could not be determined with accuracy what the principal business of a commission merchant might be. The word "worker" is capable of definite definition, and is readily understood. We think there is no merit in the contention that the act is void for indefiniteness because of the use of the word "worker."

[3] It is next contended that the act is unconstitutional because it is not within the police power of the state to regulate or interfere with the right of a private citizen to pursue a lawful business. In the case of Huntworth v. Tanner, we reserved the constitutional question, because in that case it was not necessary to determine that question, for we held that a school teacher was not a

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worker within the meaning of the act. The question now presented is whether this act is within the police power of the state.

A number of cases are cited by the appellant to the effect that a citizen is guaranteed the protection of his property and the pursuit of his happiness under the Constitution of the United States, and that any person is at liberty to pursue any lawful calling and to do so in his own way when not encroaching upon the rights of others; and it is contended that the police power of the state does not extend to the right to take away or regulate a lawful business. There can be no doubt of the right of a citizen to pursue a lawful calling in a lawful way; but it is equally true that there can be no doubt of the right of the state, through its Legislature, to regulate a business which may become unlawful by improper and unlawful means.

In Munn v. Illinois, 94 U. S. 113, at page 124, 24 L. Ed. 77, it was said:

"When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. * * * From this source come the police powers, which as was said by Mr. Chief Justice Taney in the License Cases, 5 How. 583 [12 L. Ed. 256], 'are nothing more or less than the powers of government inherent in every sovereignty; * * * that is to say, * * * the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good."

In State v. Mountain Timber Co., 75 Wash. 581, 135 Pac. 645, this court said:

"Having in mind the sovereignty of the state, it would be folly to define the term. To define is to limit that which from the nature of things cannot be limited, but which is rather to be adjusted to conditions touching the common welfare, when covered by legislative enactments. The police power is to the public what the law of necessity is to the individual. It is comprehended in the maxim, 'Salus populi suprema lex.' It is not a rule; it is an evolution."

In State v. Pitney, 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916A, 209, in discussing the police power of the state, this court said:

"If a state of facts can reasonably be presumed to exist which would justify the legislation, the court must presume that it did exist and that the law was passed for that reason. If no state of circumstances could exist to justify the statute, then it may be declared void because in excess of the legislative power."

And in Munn v. Illinois, supra, at page 132 of 94 U. S., 24 L. Ed. 77, the Supreme Court of the United States said:

"For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the Legislature is the exclusive judge."

And in McLean v. Arkansas, 211 U. S. 539, at page 548 [29 Sup. Ct. 206, 208, 53 L. Ed. 315], it was said:

"If there existed a condition of affairs concerning which the Legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail."

In State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 177, 117 Pac. 1101, 1106 [37 L. R. A. (N. S.) 466], we said:

"The test of the validity of such a law is not found in the inquiry, does it do the objectionable things? but is found rather in the inquiry, is there no reasonable ground to believe that the public safety, health, or general welfare is promoted thereby? The Legislature cannot, of course, without violating this clause of the Constitution, declare a particular industry, commonly engaged in by the people, to be unlawful which, under all circumstances, must necessarily be harmless and innocent; but it can regulate and control and prohibit any industry, however innocent it may have been in its inception, whenever it becomes a menace to the employés engaged in it, the people surrounding it, or to any considerable number of the people at large, no matter from whatsoever cause the menace may arise."

We think there can be no doubt of the principles enunciated in the foregoing quotations. In the Huntworth Case, supra, the reason for this act was pointed out. We there said, at page 679 of 87 Wash., at page 526 of 152 Pac.:

"The mischief inducing the present act is not hard to find. It was to correct what society had come to regard as a wrong practiced upon those who for many reasons were unable to protect themselves against impositions and extortions. It was to protect a class that was powerless under existing conditions to protect itself. As said by the Supreme Court of the United States in Patterson v. Bark Eudora, 190 U. S. 169 [23 Sup. Ct. 821, 47 L. Ed. 1002], when speaking of the federal statute prohibiting any person from demanding or receiving remuneration for providing employment for sailors: 'The story of the wrongs done to sailors in the larger ports, not merely of the nation but of the world, is an oft-told tale.' Or, as the Court of Appeals of New York said when considering the constitutionality of a statute regulating employment agencies: 'The Legislature had the right to take notice of the fact that such agencies are places where emigrants and ignorant people frequently resort to obtain employment and to procure information. The relations of a person so consulting an agency of this character with the managers or persons conducting it are such as to afford great opportunities for fraud and oppression, and the statute in question was for the purpose of preventing such frauds and, probably, for the suppression of immorality.' People ex rel. Armstrong v. Warden of City Prison, 183 N. Y. 223, 76 N. E. 11, 2 L. R. A. (N. S.) 859."

And quoting from Moore v. Minneapolis, 43 Minn. 418, 45 N. W. 719, we said:

" 'The nature of the business, and the character of those with whom the business is likely to be conducted, in point of intelligence, experience, and capacity for self-protection from fraudulent practices, are such that it might well be deemed necessary by the Legislature, as a matter of

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proper police regulation. * * * The propriety of police regulation seems apparent when it is considered that, by means of such agencies, ignorant and credulous persons might easily be defrauded of their money under a mere pretense of employment to be afforded them in a distant part of the state, so that the fraud would not be discovered until the victim should have gone so far away as to be unlikely to trouble the fraudulent agent by prosecution.'"

We then said:

"Furthermore, the act must be determined by a consideration of its natural effect when put in operation. In operation it may tend to protect the day laborer who, as said by the examiner in the office of the labor commissioner of the city of Seattle, 'is generally poor and without means' (Wiseman v. Tanner [D. C.] 221 Fed. 694), and who, in consideration of a fee, is directed to a job which may not exist, or which may not endure because of collusion between the employment agent and a corrupt foreman."

It is apparent from these quotations from Huntworth v. Tanner, supra, that the act, and the purposes for which it was enacted, were to prevent frauds which had become common in the class of business to which the act relates, and was therefore, under the authorities above cited, within the police power of the state to regulate, and even suppress, to the extent, at least, of the frauds. The constitutionality of this act was upheld in Wiseman v. Tanner (D. C.) 221 Fed. 694, where all the authorities cited in the appellant's brief, and many not therein cited, were considered.

[4] It is further argued by the appellant that the act is prohibitive of the business, and therefore is unconstitutional. This contention, we think, is without merit, because the act does not prohibit the business. Section 2 of the act (Laws of 1915, p. 1) makes it unlawful for any employment agent to demand or receive fees from persons seeking employment. It does not prohibit the business. Fees, of course, may be charged against persons desiring to employ laborers. We are of the opinion that the act is a valid exercise of the police power, and is not unconstitutional upon either ground.

The judgment appealed from is therefore affirmed.

MORRIS, C. J., and CHADWICK and FULLERTON, JJ., concur. ELLIS, J., concurs in the result.

(93 Wash. 480)

GILSON v. WASHINGTON WATER POWER CO. (No. 13063.)

(Supreme Court of Washington. Dec. 5, 1916.)

1. CARRIERS ⇐287(1), 303(1)—DUTIES TO PASSENGERS—ENTERING CARS.

A street railway owes passengers the highest degree of care consistent with reasonable operation of its cars not only while they are riding upon the cars, but in entering or alighting.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1154, 1162, 1224; Dec. Dig. ⇐287(1), 303(1).]

2. TRIAL ⇐296(9) — INSTRUCTIONS — ERROR CURED BY OTHER INSTRUCTIONS.

An instruction that the carrier owed the highest degree of care to passengers entering or leaving cars was not prejudicial as assuming that the injured party was already a passenger when he was injured in attempting to board a street car, where further instructions permitted recovery only should the jury find that the injured party was actually entering the car and had become a passenger.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 712; Dec. Dig. ⇐296(9).]

3. TRIAL ⇐260(1)—INSTRUCTIONS—DUPLICATION OF INSTRUCTIONS.

Refusal of requested instructions substantially covered by those already given is not error, though the wording be not exactly the same.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. ⇐260(1).]

4. NEW TRIAL ⇐104(1)—NEWLY DISCOVERED EVIDENCE—SUFFICIENCY—CUMULATIVE EVIDENCE.

Where an injured party recovered verdict for injuries received when knocked from defendant's street car on the theory that his injuries were serious and prevented proper use of his limbs, and that the duration of such injuries would be uncertain, it was not error to refuse new trial on a showing of photographs of plaintiff taken shortly after the trial wherein he used only a cane instead of the crutches he used at the time of trial, and physicians deposed that they believed he was faking his injuries, and his own physician deposed that he had advised plaintiff to try walking with a cane instead of crutches, and plaintiff deposed that he could so walk for only a few minutes, and that such walking gave him pain and tired him out, and where the newly discovered evidence for the defendant was largely cumulative of that given on the trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 218, 228; Dec. Dig. ⇐104(1).]

En Banc. Appeal from Superior Court, Spokane County; M. L. Clifford, Judge.

Action by H. T. Gilson against the Washington Water Power Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Post, Avery & Higgins, of Spokane, for appellant. Plummer & Lavin, of Spokane, for respondent.

PARKER, J. This is an action to recover damages for personal injuries which the plaintiff, H. T. Gilson, alleges were received by him as the result of the negligence of one of the defendant's conductors occurring while the plaintiff was attempting to enter one of defendant's street cars as a passenger. Trial in the superior court resulted in verdict and judgment in favor of the plaintiff awarding him $3,500 damages, from which the defendant has appealed to this court.

Appellant owns and operates a street railway system in the city of Spokane. Its street car which respondent was attempting to enter at the time he was injured had a closed rear vestibule with two doors on the right side thereof, one for passengers entering, and the other for passengers leaving the car. It was a pay-as-you-enter car. It was the duty of the conductor not only to collect fares from passengers as they en-

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tered and passed through the vestibule, but also by means of a lever to open and close the doors for passengers as they entered and left the car. Respondent claims that while the car was standing still with the doors open as an invitation for passengers to enter and while he was following other passengers who were entering the car, he attempted to enter through the proper door as a passenger, and that when he had proceeded to the extent of placing one or possibly both feet on the step and taking hold of the car or handhold at the side of the opening occupied by the door when closed, the conductor suddenly closed the door, striking respondent and causing him to fall backward upon the pavement of the street, resulting in the injuries for which he claims damages. That respondent was seriously injured by his fall seems amply supported by the evidence, though the evidence is conflicting as to the extent of the injuries in so far as the opinion testimony of physicians given upon the trial is concerned. Respondent's injuries were received on November 17, 1914. On March 17 to 19, 1915, just four months thereafter, the trial occurred. Respondent suffered severe pain during the early part of this period and had suffered pain more or less up until the time of the trial. His lower extremities were partially paralyzed, resulting, in the opinion of his physician, Dr. Rigg, from a hemorrhage of the spinal cord. His recovery was slow. There was loss of power of locomotion. From an examination of respondent made a day before the commencement of the trial Dr. Rigg testified as his opinion that respondent did not then have the use of his lower extremities to the extent of more than two-thirds of their normal use, and that the period that condition would continue to exist was indefinite. Respondent testified that it was then necessary for him to use crutches to walk because "my legs give out altogether when I go to walk if I have not got crutches to support me." Respondent was at the time 36 years old, was a railway trainman and capable of earning from $100 to $125 per month.

[1, 2] It is contended in appellant's behalf that the trial court erred, to appellant's prejudice, in giving to the jury the following instruction:

"Instruction No. 2. * * * The defendant in this case is a common carrier and owed to the plaintiff the duty of using the highest degree of care consistent with the reasonable operation of its cars for his safety not only while riding upon its cars, but in entering or alighting therefrom; and for any injury which he may have sustained by the failure on the part of the defendant company to perform this duty he would have a right of recovery in this action."

This, it is insisted, was erroneous in that the language of the instruction assumes that the relation of carrier and passenger existed between appellant and respondent at the time he was injured, calling for the highest degree of care on the part of the conductor. It may be conceded that standing alone this instruction seems to have that meaning and would to that extent invade the province of the jury, since there is room for difference of opinion upon the question of respondent being then a passenger in view of the conflict in the evidence as to whether or not the car was standing still and the door open inviting passengers to enter. However, the court's instructions continue as follows:

"Instruction No. 3. In the case now on trial if you find from the evidence that the plaintiff attempted to board the car at a time when the door of the car was open and other passengers were entering, and at the time the conductor in charge of the car either saw the plaintiff attempting to enter the car, or could have seen the plaintiff if he (the conductor) had used the degree of care that a reasonably careful and prudent man would have exercised under the same or similar circumstances, and you further find that the conductor closed the door of the car while the plaintiff was so trying to enter the car and thereby caused the plaintiff to fall on the paved street substantially as alleged in his complaint, under such circumstances the defendant would be guilty of negligence; and if you further find that the plaintiff himself was not guilty of any negligence which contributed to his accident, then your verdict should be for the plaintiff.

"Instruction No. 4. If, on the other hand, you find from the evidence that the conductor in charge of the car had closed the door of the car when the plaintiff attempted to board the car, and that he fell upon the street and sustained his injuries on account of his own negligence in attempting to get upon the car at a time when the door was closed, then the plaintiff was guilty of contributory negligence, and your verdict should be for the defendant."

Reading all of these instructions together we think that the jury would not likely receive the impression that the high degree of care stated in instruction No. 2 was required of the conductor unless they found that the car door was open under such circumstances as to in effect be an invitation to respondent to enter the car as a passenger, and he was attempting to so enter. Of course, if the jury so found it was not error to have them so measure the degree of care required of the conductor. We conclude that this claimed error was not prejudicial to appellant's rights in view of all of these instructions. Morran v. Chicago, Mil. & P. S. Ry. Co., 70 Wash. 114, 126 Pac. 73.

[3] Some contention is made in appellant's behalf that the giving of the fourth instruction was erroneous, but we are clearly of the opinion that it was not so. It is also complained that the refusal of the court to give a certain requested instruction was error. An examination of this requested instruction, however, convinces us that it was given in substance by the court, and that therefore the refusal to give it in the exact language requested was not prejudicially erroneous.

[4] One of the grounds of appellant's motion for a new trial is newly discovered evidence; and error is claimed in its behalf because the trial court did not grant a new trial upon this ground. Affidavits in support thereof were filed tending to show re-

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spondent's condition on April 5th and a few days following, which was seventeen days after the trial. Three photographs were taken of respondent on April 6th and one on April 9th, at the instance of appellant without his knowledge while upon the streets of Spokane. These photographs show him apparently walking and also standing, using a cane, and without the use of crutches. Thomas Aston, a claim agent of appellant, stated in his affidavit that he saw the plaintiff on April 5th walking on a street in Spokane using only a cane. He does not describe the nature of respondent's walk, whether it appeared to be natural, laborious, or painful. Dr. O'Neill, who had been a witness for appellant upon the trial, stated in his affidavit that at the time of the giving of his testimony and ever since he was and has been of the opinion that respondent was "faking his injuires"; that on April 6th he saw respondent walking without the use of crutches, but with a cane, and that his gait or walk was materially different from that which he used at the time of the trial while walking with crutches; that "his style of walking was that of limping a little as though he had a sore foot," and that his (O'Neill's) former opinion was confirmed by what he saw of respondent's action at that time. Dr. Eikenbary, who was a witness for appellant upon the trial, stated in his affidavit, as he did at the time of giving his testimony, that he was of the opinion that respondent could use his legs as any normal man could if he desired so to do; that he had no injury which interfered with such use; that he was "faking his injuries"; that he (Eikenbary) examined the photographs taken of plaintiff since the trial, and that his opinion is confirmed by the photographs. Dr. Weisman, who was a witness for appellant upon the trial, stated in his affidavit that at the time of giving of his testimony and ever since he has been of the opinion that respondent was "faking his injuries," and that such opinion was confirmed by an examination of the photographs taken of respondent since the trial. Clyde Higgins in his affidavit states that he saw respondent April 9th walking without crutches using a cane only, but does not describe the nature of respondent's walk or the apparent effort required by respondent when walking with a cane. Dr. Rigg, the physician who attended respondent since he was injured and who was a witness for respondent upon the trial, states in his affidavit that on about April 5th he advised respondent to try to walk some and use his feet without the aid of his crutches temporarily, for short periods of time when he could do so; and also states the opinion that respondent "is not faking his injuries." Respondent in his affidavit states that he did walk short distances on April 5th and thereafter at times without crutches, using a cane, but that he could so walk only a short distance at a time and required prolonged rests; that he has not abandoned his crutches; and that it is still necessary for him to use them practically all of the time. The photographs taken of respondent furnish but little evidence as to the ease or effort with which respondent walked at those times. The reason of this manifestly is that they are not "moving pictures."

The substance of the showing made by these affidavits and photographs is, as we view it, that 17 days after the trial respondent could walk to some extent with a cane and without the use of crutches, that such walking was exhausting to him, and that he still required the use of his crutches most of the time, and that his condition had possibly somewhat improved; but this showing does not, we think, furnish any substantial ground for the conclusion that respondent was "faking his injuries" at and prior to the time of trial, or that he was not severely injured substantially to the extent claimed by himself and his physician, as testified to by them upon the trial and found by the jury. It seems to us that the facts so shown are not sufficient to call for the granting of a new trial upon the ground of newly discovered evidence. In other words, the alleged newly discovered evidence is almost wholly cumulative touching the extent of respondent's injuries, does not materially aid the defense beyond the showing made in appellant's behalf upon the trial, and would not be likely to change the result. It is worthy of note that manifestly the evidence introduced in respondent's behalf did not tend to show total or permanent disability, and the amount of the verdict plainly indicates that the award was not made upon any such theory.

Counsel for appellant call our attention to four decisions of the courts which we think come as near lending support to their contention as any to be found in the books. One of the decisions so relied upon is that of Wells Fargo & Co. v. Gunn, 33 Colo. 217, 79 Pac. 1029. The plaintiff in that case claimed, and the evidence introduced in her behalf tended to show, that her injury consisted of a fracture of the eleventh and twelfth dorsal vertebræ and a contusion of the spinal cord, thereby producing partial paralysis of the entire body; that she was totally disabled; that she might recover her speech, but would never be able to walk. The trial resulted in a verdict in her favor of $5,000. Within 36 hours after the case had been submitted to the jury, as was shown by affidavits in support of the defendant's motion for new trial, she was sitting on the side of her bed, was able to protrude her tongue and talk freely, and her paralysis had disappeared to such an extent that she was able to walk about the room without support of any kind. These facts discovered almost immediately upon the close of the trial showed all but conclusively that her injuries were

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not as claimed upon the trial and as found by the jury. It was there held that the trial court erred in denying a new trial. Manifestly the showing here made is not comparable with that showing.

Another of the decisions relied upon by counsel for appellant is that of Southard v. Bangor & A. R. Co., 112 Me. 227, 91 Atl. 948, L. R. A. 1915B, 243. The plaintiff there claimed, and the testimony introduced in his behalf tended to show, that as the result of his injuries he was suffering from an incurable disease, and that he was physically wrecked. He was awarded by the jury $8,500. The newly discovered evidence showed acts of the plaintiff very soon following the trial of such a character that he could not have been in the physical condition he claimed he was at the time of the trial. The opinion of the court does not tell us what these acts of the plaintiff were. This decision, so far as can be determined from the facts given therein, seems equally inapplicable here.

Another decision relied upon by counsel for appellant is that of Colorado Springs & Interurban Ry. Co. v. Fogelsong, 42 Colo. 341, 94 Pac. 356. Evidence introduced on behalf of the plaintiff tended to show that the plaintiff was seriously injured, the effects of which would continue indefinitely. He was awarded by the jury $7,500. Upon the hearing of his motion for new trial affidavits were produced showing acts and remarks of plaintiff occurring both before and after the trial wholly inconsistent with him being injured as seriously as claimed, such as doing heavy labor at a time when he claimed to be wholly unable to perform such labor. Among other things shown was that in a conversation he was asked why he did not throw away his crutches and go to work, to which he replied:

"I could do it all right, but it would not look well for me to do so while my case is still in court."

Plainly the decision reversing the trial court and granting appellant a new trial in that case has no controlling force here.

Another decision relied upon by counsel for appellant is that of Anshutz v. Louisville Ry. Co., 152 Ky. 741, 154 S. W. 13, 45 L. R. A. (N. S.) 87. In that case the plaintiff, a married woman, was injured, which injury and the necessary operation therefor, the evidence tended strongly to show, rendered her barren so she could never thereafter bear children, and that at the time of the trial she was affected with the growth of a tumor in her abdomen, which was also apparently the result of her injury, and would soon necessitate another serious operation. She was awarded by the jury $7,000. Subsequent to the rendering of this verdict and within the time defendant could under the laws of Kentucky petition for a new trial, several months after the trial, the plaintiff gave birth to a child, proving conclusively that the supposed tumor was in fact a fetus. This being shown as newly discovered evidence, the defendant was awarded a new trial. It is worthy of note that this decision affirmed the trial court. Plainly this decision could have no controlling force in the disposition of this case.

No decision of any court has come to our notice which has disturbed the denial of a new trial by a trial court upon a showing no stronger than is here made. Our decisions in State v. Underwood, 35 Wash. 558, 77 Pac. 863, Knapp v. Chehalis, 65 Wash. 350, 118 Pac. 211, and Hazlett v. Seattle Electric Co., 71 Wash. 377, 128 Pac. 677, lend support to the view that the trial court did not err in refusing to grant a new trial.

We are of the opinion that the judgment should be affirmed. It is so ordered.

MOUNT, MAIN, ELLIS, CHADWICK, FULLERTON, and HOLCOMB, JJ., concur.

(93 Wash. 517)

MARTIN v. CUNNINGHAM. (No. 13161.)

(Supreme Court of Washington. Dec. 5, 1916.)

1. DAMAGES ⟸20—INJURIES TO SERVANT—EXTENT OF RECOVERY.

A servant injured through the negligence of his employer can recover all damages proximately traceable to the primary negligence, extending even to subsequent aggravations whose probability the law regards as a sequence and natural result likely to flow from the original injury, such as malpractice of an attending physician furnished by the employer or employed with due care by the servant.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 55–57; Dec. Dig. ⟸20.]

2. RELEASE ⟸29(1)—RELEASE OF LIABILITY TO RAILROAD — DISCHARGE OF SURGEON NEGLIGENTLY TREATING INJURIES.

Where a railroad fireman broke his leg, and the injured limb was negligently treated by the railroad's local surgeon, but the fireman, having compromised his action against the road, the facts of the negligent treatment being known to exist by the fireman and the road, and the settlement being made with reference to them, executed with his wife a blanket release to the road reciting that it was in consideration of the payment of $8,000 for the injury received, including all claims for loss of time and services, support and society, medical, surgical, nursing, hospital, and other expenses, further reciting that the $8,000 was in full settlement of any and all claims of any kind, such release operated to discharge from liability for the negligent treatment of the injured limb the railroad's local surgeon, since the negligent treatment was necessarily a part of the original injury.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 64, 67, 70; Dec. Dig. ⟸29(1).]

3. RELEASE ⟸27—DISCHARGE OF ALL PARTIES LIABLE.

Complete satisfaction for an injury received from one person in consideration of his release operates to discharge all who are liable therefor, whether joint or several wrongdoers.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 53–56; Dec. Dig. ⟸27.]

Ellis, J., dissenting.

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Department 1. Appeal from Superior Court, Spokane County; M. L. Clifford, Judge.

Action by R. H. Martin against John G. Cunningham. From a judgment dismissing the action, plaintiff appeals. Judgment affirmed.

F. A. McMasters, of Spokane, for appellant. Harry L. Cohn and Cannon & Ferris, all of Spokane, for respondent.

FULLERTON, J. On November 7, 1913, R. H. Martin, a fireman in the employ of the Great Northern Railway Company, fractured the tibia of his left leg in jumping from an engine to avoid a head-on collision. He was taken to a hospital in Spokane, and placed in charge of the company's local surgeon, John G. Cunningham, who treated him from that date until about March 10, 1914. Satisfactory results not having been effected under the treatment accorded by the surgeon, another surgeon was called in by Martin, who operated on him and produced better results, but did not obtain a perfect cure of the injured leg.

On June 13, 1914, Martin filed a complaint for personal injuries against the railway company. On July 6, 1914, the action was compromised for $8,000, and a judgment of dismissal entered on the stipulation of the parties. On the same day Martin and wife executed a release to the Great Northern Railway Company, which recited that it was in consideration of the payment of $8,000 for the above-mentioned injury received on November 7, 1913, "including all claims for loss of time and loss of services, support, and society, and all claims for medical, surgical, nursing, hospital, and other expenses, arising, or to arise, out of any and all personal injuries sustained by me at any time or place while in the employ of said railway company prior to the date of these presents." The release further recited, under an addendum, that the $8,000 was "in full settlement of any and all claims of every kind."

After Martin had settled with the railway company and released it from all claims growing out of the injury, he began an action against Dr. Cunningham to recover damages for malpractice in the treatment of his injured leg. The defendant set up several affirmative defenses; the only one necessary to be considered here being the release before mentioned. On this release appearing in the evidence, and on it further appearing that both the plaintiff and defendant were employés of the company, the court entertained a challenge to the sufficiency of the evidence and entered a judgment dismissing the action. From this judgment, the plaintiff appeals.

[1] The trial court held that the release operated to discharge the respondent as well as the railway company, since the negligent treatment of the injury was necessarily a part of the original injury. We think this holding is in accord with the weight of judicial authority. The prevailing rule is that one who has been injured through the negligence of his employer can recover all damages proximately traceable to the primary negligence. This right of recovery extends even to subsequent aggravations whose probability the law regards as a sequence and natural result likely to flow from the original injury. Smith v. Northern Pacific R. Co., 79 Wash. 448, 140 Pac. 685; Hoseth v. Preston Mill Co., 49 Wash. 682, 96 Pac. 423. Malpractice of an attending physician, in a case where the master was liable for the original injury, has always been regarded by the law as one of the probable consequences of the injury, whether the surgeon be furnished by the master or employed with due care by the servant. This principle is well stated in City of Dallas v. Meyers (Tex. Civ. App.) 55 S. W. 742, as follows:

"If the injured party, in good faith, and in the exercise of ordinary care, employs a physician to treat his injuries, and his injuries are aggravated through the mistake or negligence of his physician in his treatment, the negligent or mistaken treatment of the physician does not become an intervening cause, breaking the causal connection between the negligence producing the original injury and the ultimate effects of such injury. In such case the original party may recover damages for the injury he has sustained, including the aggravation resulting from the negligence of his doctor."

See, also, Baldwin v. Lincoln County, 29 Wash. 509, 69 Pac. 1081; Gray v. Boston Elevated Ry. Co., 215 Mass. 143, 102 N. E. 71; Reed v. City of Detroit, 108 Mich. 224, 65 N. W. 967; Lyons v. Erie Ry. Co., 57 N. Y. 489; Chicago City Ry. Co. v. Saxby, 213 Ill. 274, 72 N. E. 755, 68 L. R. A. 164, 104 Am. St. 218; Fields v. Mankato Elec. Trac. Co., 116 Minn. 218, 133 N. W. 577; O'Donnell v. Rhode Island Co., 28 R. I. 245, 66 Atl. 578.

The reasoning of these cases is equally applicable in cases of malpractice on the part of the surgeon furnished by the master to his injured servant. In the recent case of Ross v. Erickson Construction Co., 89 Wash. 634, 155 Pac. 153, we held that a right of action for the malpractice of an attending physician upon an injured employé was presumed to be covered by an award under the Workmen's Compensation Act (Laws 1911, p. 345), saying that "the consequences of malpractice is an element which will be considered and compensated for by the state" basing the conclusion on the accepted doctrine in personal injury cases that malpractice in the treatment of an injury was so proximately connected with the injury itself as to constitute an element to be considered in any admeasurement of damages.

It thus appears to be the settled law of this state that, where the master's negligence makes him liable for the personal injuries of his employé, he is also liable for the malpractice of a physician in the treatment of the injured person.

[2, 3] Conceding malpractice on respond-

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ent's part, as charged by the complaint, we think appellant is precluded from a recovery against him. The railway company was liable not only for the injury and resulting suffering of appellant, but also for the malpractice of the attending surgeon and for the expenses of medical attendance. Having that liability in view, the company settled with him, paying him a substantial sum for a release from further liability. At the date of the release the appellant had already suffered from the alleged malpractice and had employed another surgeon to remedy it, to whom he had paid $500 for the service. These were all matters that could be enforced against the railway company under its liability for damages, and the settlement was clearly made with a view to covering all those elements of damages. They were known to exist by the parties to the release, and the settlement was made with reference to them. The release, having been made in full satisfaction of all existing claims, precludes the appellant from bringing a second action for malpractice against the surgeon, occupying somewhat the position of a joint tort-feasor, to recover double compensation for what he has already been satisfied. It is a well-settled doctrine of the law that complete satisfaction for an injury received from one person in consideration of his release operates to discharge all who are liable therefor, whether they be joint or several wrongdoers. Ayer v. Ashmead, 31 Conn. 447, 83 Am. Dec. 154; Allen v. Ruland, 79 Conn. 405, 65 Atl. 138, 118 Am. St. Rep. 146, 8 Ann. Cas. 344; Dulaney v. Buffum, 173 Mo. 1, 73 S. W. 125.

In Lovejoy v. Murray, 3 Wall. 1, 18 L. Ed. 129, it is said:

"But when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience, that the law will not permit him to recover again for the same damages."

The court in Miller v. Beck & Co., 108 Iowa, 575, 79 N. W. 344, commenting on the foregoing, adds:

"In accordance with this rule, it has frequently been held that the validity and effect of a release of a cause of action does not depend upon the validity of the cause of action, and that if the claim is made against one, and it is satisfied, all who may be liable are discharged, whether the one released be liable or not. Leddy v. Barney, 139 Mass. 397, 2 N. E. 107; Tompkins v. Railway Co., 66 Cal. 163, 4 Pac. 1166; Brown v. City of Cambridge, 3 Allen [Mass.] 474; Butler v. Ashworth, 110 Cal. 614, 43 Pac. 386; Metz v. Soule, 40 Iowa, 236."

See, also, Cleveland, etc., Ry. Co. v. Hilligoss, 171 Ind. 417, 86 N. E. 485, 131 Am. St. Rep. 258.

Here there was a complete satisfaction, and under the better rule we think the trial court rightfully decided there could be no recovery.

The judgment is affirmed.

MORRIS, C. J., and MOUNT and CHADWICK, JJ., concur.

ELLIS, J. (dissenting). It seems to me that the malpractice of a physician is his own act, and if it exists at all furnishes ground for an independent action. The railroad company performed its duty by selecting a competent physician, but even a competent physician may be negligent, and if he is negligent to another's injury I can see no reason why he should not be held to respond in damages. The physician is not a joint tort-feasor. His negligence arises subsequently to the original injury. The release of the railroad company should be held to be no more than a release from the consequences of its own negligence, not from the consequences of the independent negligence of another. I therefore dissent.

(93 Wash. 522)

RANDALL v. GERRICK et al. (No. 13223.)

(Supreme Court of Washington. Dec. 5, 1916.)

1. RELEASE ⟸29(4)—JOINT TORT-FEASOR.
The acceptance of money in satisfaction of a claim against a joint tort-feasor, even with reservation that it is not to be considered as a release of another joint tort-feasor, operates to release the latter.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 68; Dec. Dig. ⟸29(4).]

2. RELEASE ⟸29(1)—LIABILITY FOR TORT—RELEASE NOT IN SATISFACTION TO ONE NOT LIABLE.
A riveter working on a steel bridge under construction for a railway was injured. He sued the road and his employers, and dismissed the suit as to the road pursuant to stipulation when it paid him $100 to escape the expense of bringing a witness to trial. The road was not liable with the employers as a joint tort-feasor, and the payment made by it was not intended by the parties to be applied in satisfaction of the injury. *Held*, that the release of the road did not release the employers, since a party wronged can release one not liable, without releasing the wrongdoer, for a consideration not in fact accepted as a satisfaction for the injury.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 64, 67, 70; Dec. Dig. ⟸29(1).]

3. PARTNERSHIP ⟸218(3) — MEMBERSHIP — QUESTION FOR JURY.
In an action for injuries by the employé of a firm, question whether a defendant was a partner at the time of plaintiff's employment and injury *held* for the jury under the evidence.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 427; Dec. Dig. ⟸218(3).]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Suit by S. J. Randall against the Great Northern Railway Company, John Gerrick, and others, wherein plaintiff discontinued and dismissed as against the railway. From a judgment of dismissal non obstante veredicto as to all defendants, plaintiff appeals. Judgment reversed, with instructions to enter judgment on the verdict.

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John T. Casey, John F. Miller, and Heber McHugh, all of Seattle, for appellant. McClure & McClure and Milo A. Root, all of Seattle, for respondents.

FULLERTON, J. On October 25, 1910, S. J. Randall, while working for Gerrick & Gerrick as a riveter on a steel bridge in course of construction for the Great Northern Railway Company, was injured in his right eye by a chip or sliver of steel which flew from the end of a riveter. He brought suit for damages against the Great Northern Railway Company, and against John Gerrick, Joseph Gerrick, and H. W. Jack, claiming that these individuals constituted the firm of Gerrick & Gerrick, his employers. After the action had been brought, and after a continuance had been had at the instance of the defendants, the following stipulation was entered into with the defendant railway company:

"It is hereby stipulated by and between the plaintiff and the defendant Great Northern Railway Company, by their respective attorneys, that the cause of action set forth in the complaint herein against the defendant Great Northern Railway Company has been compromised and settled, and the full amount of said compromise and settlement has been paid by said defendant to plaintiff, and it is further stipulated that the above action may be dismissed as against said defendant Great Northern Railway Company, and that judgment of dismissal against said company may be entered of record with prejudice to the commencement of another action and against said Great Northern Railway Company for the same cause, and without further costs to either party."

The railway company was thereupon dismissed as a defendant in the case, and an amended complaint filed on October 14, 1914, against the Gerricks and Jack. On April 2, 1915, a second stipulation was entered into between Randall and the railway company in the following terms:

"It is hereby stipulated and agreed that on or prior to the 15th day of May, 1914, the defendant above named, through F. G. Dorety, its counsel, had advised plaintiff's attorney that plaintiff had not been in the employ of the defendant at the time of receiving the alleged injuries referred to in the complaint in this action, but had nevertheless offered to pay plaintiff the sum of $100 in order to avoid the expense of trial, and particularly of bringing a witness from St. Paul, and that on the date last above mentioned plaintiff's attorney advised defendant's attorney that plaintiff was unwilling to make any settlement or compromise that would affect any other party to this action, and that the sum of $100 was not considered as a reasonable or adequate allowance for plaintiff's injuries or as any more than a nominal payment, but that plaintiff had not much hope of being able to prove that he had been in the employment of the Great Northern Railway Company at the time of said accident, and would therefore discontinue and dismiss said action against said Great Northern Railway Company in consideration of said payment of $100, and that thereupon defendant paid said sum of $100 to plaintiff, and that the stipulation of dismissal now on file was thereupon executed, and defendant consents that the stipulation and order of dismissal heretofore filed herein may be modified and amended so far as necessary to accord to the foregoing fact."

Upon this stipulation the court made the following order:

"It appearing satisfactorily to the court that the above-named defendant, the Great Northern Railway Company, is not a proper or necessary party to the above cause for the reason that the plaintiff was not employed by or on behalf of said Great Northern Railway Company, and it further appearing to the court that the plaintiff was employed by the other defendants only, and that said railway company was made a defendant by mistake, and it further appearing to the court that there is no dispute or issue between the said plaintiff, S. J. Randall, and the said defendant Great Northern Railway Company, and that the above cause may be discontinued and dismissed as to said defendant, it is hereby ordered that the stipulation and order of dismissal entered thereon in the above cause on the 15th day of May, 1914, be and the same is hereby vacated, annulled, set aside, and held for naught, and it is further ordered that the above cause may be, and hereby is, discontinued and dismissed against said defendant Great Northern Railway Company, and without costs to plaintiff or said defendant for the foregoing reason, and without prejudice to the plaintiff pursuing, and maintaining said cause of action against the other defendants."

On April 15, 1915, the cause came on for trial, and respecting the issue as to one joint tort-feasor having been released by Randall there was the following testimony by Mr. Dorety, attorney for the Great Northern Railway Company:

"We did not consider there was any liability because the plaintiff was not working for the Great Northern Railway Company. We settled with him to avoid costs and not to avoid liability. I informed Mr. Casey, the plaintiff's attorney, that there was no liability on our part, but that we would have to send to St. Paul for a witness unless we were dismissed from the case, and that would probably cost $100 to bring the witness out; that we would rather pay that amount than to go through the form of a trial."

Randall himself testified on this point as follows:

"I do not recall just what I said to Mr. Dorety, but before I started this action defendants would not give me any information in regard to their relations with the Great Northern Railway Company. My impression was that the Great Northern Railway Company had something to do with the work. After talking with Mr. Dorety I became satisfied that I was not working for the Great Northern Railway Company at all. It was a voluntary offer on their part to pay the $100 and some witness fees; and we accepted it, not as a settlement of the case, but to avoid putting the railway company to the expense of bringing a witness from St. Paul."

The release between plaintiff and the railway company and the original stipulation founded thereon had been offered in evidence, but rejected on the ground that the answer of the Gerricks admitted the employment of plaintiff by themselves. The evidence also showed that plaintiff was not working for the railway company; that Gerrick & Gerrick employed and paid him.

There was contradictory evidence upon the issue as to whether Jack was a member of the firm of Gerrick & Gerrick. Defendants challenged the sufficiency of the evidence both when plaintiff rested his case and at the close of all the evidence, but the motions

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were overruled; the court intimating, however, that if the jury should find a verdict against Jack he would be inclined to set it aside or grant a motion for judgment in favor of Jack notwithstanding the verdict. The case was submitted to the jury, and a verdict of $2,500 returned against all of the defendants. Defendants thereupon moved for judgment non obstante veredicto, which was sustained, and judgment of dismissal entered as to all the defendants, from which judgment this appeal is taken.

[1, 2] It is the settled rule in this state that the acceptance of money in satisfaction of a claim against one joint tort-feasor, even with a reservation that it is not to be considered as a release of another joint tort-feasor, operates to release the latter. Abb v. Northern Pacific Ry. Co., 28 Wash. 428, 68 Pac. 954, 58 L. R. A. 293, 92 Am. St. Rep. 864. The question here is whether the facts of the present case bring it within the rule. We think it presents two elements that distinguish it: First, that the defendant dismissed from the action was not liable as a joint tort-feasor; and, second, that the payment made by the dismissed party was in no sense intended by the parties to be applied in satisfaction of the injury to appellant. There seems to be no question other than that respondents were working under an independent contract with the railway company. Respondents employed and paid appellant, and no relation of master and servant existed between him and the railway company. No act or neglect on the part of the railway company contributed to his injury. The injury resulted solely from the negligence of the persons who were his sole and immediate employers. While the authorities maintain the principle that a satisfaction of a wrong by one not in fact liable will operate as a release of the actual wrongdoer (Martin v. Cunningham, 161 Pac. 355), the better doctrine also recognizes the right of a party wronged to release one not liable without releasing the wrongdoer, although it may be done for a consideration, if the consideration has not in fact been accepted as a satisfaction for the injury (Sieber v. Amunson, 78 Wis. 679, 47 N. W. 1126; Wardell v. McConnell, 25 Neb. 558, 41 N. W. 548; Kentucky & Indiana Bridge Co. v. Hall, 125 Ind. 220, 25 N. E. 219; Missouri, etc., Railway Co. v. McWherter, 59 Kan. 351, 53 Pac. 135; Wagner v. Union Stockyards & Transit Co., 41 Ill. App. 408; Western Tube Co. v. Zang, 85 Ill. App. 63; Thomas v. Central R. R. Co., 194 Pa. 511, 45 Atl. 344; Atlantic Dock Co. v. New York, 53 N. Y. 64; Iddings v. Citizens' State Bank, 3 Neb. [Unof.] 750, 92 N. W. 578; Mathews v. Lawrence, 1 Denio [N. Y.] 212, 43 Am. Dec. 665).

It is true there is a respectable line of authority in support of the contrary doctrine, but we believe the view we have adopted is more in consonance with reason and equity. Even the cases holding to the contrary of the doctrine draw a distinction between a technical release and a satisfaction, basing their decision on the fact that it is the "satisfaction" of a claim by one not liable which releases the wrongdoer, and that a technical or partial release may not so operate. The distinction is stated in Miller v. Beck & Co., 108 Iowa, 575, 79 N. W. 344, as follows:

"It is important that we distinguish in this connection between what the law denominates a 'release' and what is called a 'satisfaction.' A release may be given, although no part of the damage has been paid and a technical release to one who is not a joint wrongdoer will not necessarily release another, who may have had some connection with the wrong. See, as illustrating this rule, Ellis v. Esson, 50 Wis. 138, 6 N. W. 518 [36 Am. Rep. 830]; City of Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271; Long v. Long, 57 Iowa, 497 [10 N. W. 875]; Knapp v. Roche, 94 N. Y. 329; Turner v. Hitchcock, 20 Iowa, 310. A satisfaction, however, by whomsoever made, if accepted as such, is a bar to further proceedings on the same cause of action."

A further reason why respondents were not released by the payment received from the railway company is that it cannot possibly be construed as intended for even a partial satisfaction of the claim for damages. After discovery that there was no liability on the part of the railway company, it was agreed to dismiss the action as to them; the company voluntarily agreeing to donate $100 rather than be put to the expense and delay of bringing a witness from St. Paul, Minn., to establish its nonliability. There was no meeting of minds on the subject of satisfaction, but rather one on the matter of costs and expenses which the company wished to avoid. We do not think the rigor of the rule announced in the Abb Case is applicable to such a situation. In that case a satisfaction with one joint tort-feasor was entered into. Here there is an agreement with a stranger to the case so far as liability is concerned, who pays a small sum not intended by the parties as a satisfaction of any pretended liability, but for the purpose of allowing such stranger to clear its docket of a pending case whose trial might occasion it vexation and annoyance, but which would not result in subjecting it to damages. The tendency of the courts now is in cases of joint tort-feasors to allow it to be shown that a payment made by one wrongdoer was not intended as a satisfaction of the claim against him, and the rule should concededly be more liberal in case of a payment by a stranger to the liability. See Sloan v. Herrick, 49 Vt. 327. Further, the agreement in this case, instead of being construed as a release, would fall more nearly under the category of a covenant not to sue, which by the weight of authority is not deemed to release a joint tort-feasor, provided no payment is made which partakes of the character of a satisfaction of the claim. City of Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271.

In view of the fact that the release in this case ran to one who was not liable as a tort-

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feasor, and that the payment made by such released party was made on other grounds than that of a satisfaction of the assumed claim against it, we are constrained to hold that such payment did not operate as a release of the real wrongdoer.

[3] The only remaining question is as to the liability of Jack as a partner in the firm of Gerrick & Gerrick. The Gerricks and Jack testified there was no such relationship; that Jack occupied the office adjoining them and looked after some matters in their absence. As controverting this, appellant and another witness testified that Jack hired them to go upon the bridge job where the injury occurred; that he was up there to look at the work; that a check given by Gerrick & Gerrick to appellant could not be cashed, and Jack substituted his personal check and told appellant that he was interested in the firm. The evidence further shows that in the course of the year following the injury the firm of Gerrick & Gerrick was organized into a corporation, of which Jack became the president. We think the evidence was sufficient to present a question to the jury as to whether Jack was in fact a partner in the firm of Gerrick & Gerrick at the time of appellant's employment and injury. Providence Mach. Co. v. Browning et al., 68 S. C. 1, 46 S. E. 550; In re Beckwith & Co. (D. C.) 130 Fed. 475.

The judgment notwithstanding verdict is reversed, with instructions to the trial court to enter judgment on the verdict.

MOUNT, ELLIS and CHADWICK, JJ., concur.

(93 Wash. 554)

EDENDALE LAND CO. v. MORGAN et ux.

(No. 13270.)

(Supreme Court of Washington. Dec. 6, 1916.)

1. WATERS AND WATER COURSES ⇐143—IRRIGATION RIGHTS—BENEFICIAL USE.

A lower riparian owner is entitled to the use of so much of the waters of a creek for irrigation as he had put to beneficial use before acquisition of title or claim of right by the upper riparian owner, and not to all the waters of the creek, a portion of which were not put to beneficial use.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 152; Dec. Dig. ⇐143.]

2. WATERS AND WATER COURSES ⇐143 — IRRIGATION RIGHTS—BENEFICIAL USE.

A lower riparian owner claiming right to use waters of a creek for irrigation was at least entitled to a decree for one-fifth of the waters where the adverse party claimed only four-fifths.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 152; Dec. Dig. ⇐143.]

3. WATERS AND WATER COURSES ⇐143—PRESCRIPTION — IRRIGATION RIGHTS — BENEFICIAL USE.

Where the original irrigation ditch as constructed in 1896 carried not to exceed one-half the water of a creek, and a new ditch was constructed in 1904 which carried a greater volume, the prescriptive right in 1912 ran only to the amount of water which was carried by the original ditch.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 152; Dec. Dig. ⇐143.]

4. WATERS AND WATER COURSES ⇐152(8)—NATURAL STREAMS—DIVERSION—DAMAGES—EVIDENCE.

Where the only evidence as to damages for diversion of water of a creek was based on the assumption that the plaintiff was entitled to all of such waters, whereas defendant was entitled to only a half, no verdict for damages could be had.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 156; Dec. Dig. ⇐152(8).]

Department 2. Appeal from Superior Court, Stevens County; Jos. Sessions, Judge.

Action by the Edendale Land Company against James J. Morgan and wife. Judgment of dismissal, and plaintiff appeals. Reversed and remanded, with instructions.

Murphy & Grant, of Spokane, for appellant. Rochford & Wilson, of Colville, for respondents.

MAIN, J. The parties to this action are rival claimants to the waters of the north fork of Stranger creek, which is a small stream in Stevens county. The trial of the action resulted in a judgment of dismissal of the plaintiff's complaint. From such judgment the appeal is prosecuted.

The facts are these: During the month of April, 1889, one Charles E. Potter settled upon a certain tract of land, consisting of 160 acres, having purchased an Indian squatter's right thereto. In the course of time Potter acquired this land under the federal homestead act. At about the time Potter settled upon this tract of land, three other persons, Almira J. Burr, William R. Pierce, and L. W. Cumpton, also settled upon other 160-acre tracts in the immediate vicinity, and in time acquired title from the federal government, as did Potter. Immediately after Potter settled upon his land, he began to divert the waters of the main channel of Stranger creek for domestic use and irrigation. This water was taken through what is known in the record as the Chinese ditch and the Indian ditch, the former having been constructed years before for the purpose of carrying water to a placer mining claim near the Columbia river. The Indian ditch was used by the Indian squatter for the purpose of carrying water to the land for irrigation purposes. After Potter settled upon the land, he improved these ditches, and continued, from year to year, to clear his land, and irrigate the same from the waters of Stranger creek, carried through the ditches mentioned. The other three parties above referred to also used water carried through the Chinese ditch for domestic and irrigation purposes In the

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year 1905 the appellant acquired Potter's land, and that of the other three parties. After this land was acquired by the appellant, it put in a wooden pipe irrigation system, cleared and set much of the land to fruit trees, and sold it off in small tracts.

During the year 1887 the defendants in this action settled upon a tract of land upon the north fork of Stranger creek, and in time acquired the land from the United States government. In 1896 the defendants constructed a ditch, and began taking the water from the north fork of Stranger creek for the purpose of irrigating their land. In 1904 they enlarged this ditch, and after they began taking water through the enlarged ditch, they took about four-fifths of the water flowing in the north fork of Stranger creek during the dry or irrigation season. The appellant, not having sufficient water to irrigate its land when four-fifths of the water of the north fork of Stranger creek was being diverted by respondents, brought this action, claiming that it was entitled to all of the water of Stranger creek, including that flowing in the north fork, south fork, and middle fork. The appellant's point of intake, as was Potter's, was below the point on the stream where the water from the three forks had united and formed the main channel.

[1] Without reviewing the evidence in detail, and after a most careful consideration of the same, we are of the opinion that Potter and the other three parties mentioned, who were the predecessors in interest of the appellant, acquired the right by appropriation to all the waters of Stranger creek, provided they had devoted the same to a beneficial use within a reasonable time. Up to 1905, when Potter sold to the appellant, all of the waters of Stranger Creek were not needed for the purpose of irrigating the land then under cultivation. While it cannot be determined with mathematical accuracy the amount of water which had been appropriated and devoted to a beneficial use within a reasonable time, yet it seems fairly inferable from the evidence that the appellant's predecessor in interest, at the time it acquired title to the land and water rights, had devoted an amount of water to a beneficial use equal to all the waters flowing in the south and middle forks of Stranger creek, and one-half of that flowing in the north fork. It follows, therefore, that the trial court erred in not decreeing that the appellant was entitled to this quantity of water.

What the trial court's views may have been upon the evidence there is nothing in the record to indicate. No findings of fact were made; no opinion of the trial judge appears in the record. The judgment was simply one of dismissal. The respondents had interposed the plea of the statute of limitation. The record being as it is, this is not a case where this court reverses the finding of a trial court upon conflicting oral testimony.

[2, 3] In any view of the case, the appellant was entitled to have adjudged to it one-fifth of the waters of the north fork of Stranger creek, because respondents were only claiming the right to four-fifths thereof. The respondents had not acquired by prescription a right to four-fifths of the water of the north fork of the creek. The ditch, as constructed in 1896, carried not to exceed one-half of the water. The present action was begun in 1912. No prescriptive right could be acquired, if that were relied upon, for a greater amount of water than was carried through the ditch as first constructed, and an equal amount which was a part of the flow in the enlarged ditch.

[4] The appellant claimed damages in a considerable sum. The evidence in support of the damages was that of the president of the appellant company, and was based on the assumption that the appellant was entitled to all of the waters of the north fork of Stranger creek. It only being entitled to one-half of the waters, the evidence as to damages does not show the extent of the damages based upon this fact.

By way of repetition it may be said that, taking into consideration all the evidence in the case bearing upon the rights claimed by each party to the water, justice would seem to demand that each of the respective contenders be given one-half of the water of the north fork of Stranger creek.

The judgment will be reversed, and the cause remanded, with instructions to the superior court to enter a judgment dividing equally between the parties the waters of the north fork of Stranger creek.

MORRIS, C. J., and PARKER and HOLCOMB, JJ., concur.

(93 Wash. 463)

STATE ex rel. CRISWELL v. BOARD OF TRUSTEES OF FIREMEN'S RELIEF & PENSION FUND. (No. 13444.)

(Supreme Court of Washington. Nov. 28, 1916.)

1. MANDAMUS ⇐73(1) — FIREMEN'S RELIEF AND PENSION FUND—DENIAL OF PENSION.

Under Rem. Code 1915, § 8061 et seq., as to firemen's relief and pension fund, creating a board which shall hear and decide all applications for relief and whose decisions on such applications shall be final and not subject to revision except by the board, denial by the board of an application or claim for a pension is not reviewable by mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 115, 135, 144–146, 149; Dec. Dig. ⇐73(1).]

2. CONSTITUTIONAL LAW ⇐60—CREATION OF BOARDS OF ADMINISTRATION—POWERS.

The Legislature has power, when enacting a statute creating a new right with its remedy, to vest in some board or person power to adjudicate

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all matters arising under the statute and to make such adjudication final and conclusive.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 89, 90, 93; Dec. Dig. ⊂⊃60.]

Department 1. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Mandamus by the State, on the relation of Anna Criswell, against the Board of Trustees of the Firemen's Relief and Pension Fund. From an order denying application for writ, relator appeals. Affirmed.

Wesley Lloyd, of Tacoma, for appellant. T. L. Stiles and Frank M. Carnahan, both of Tacoma, for respondent.

FULLERTON, J. The statute (Rem. 1915 Code, § 8061 et seq.) authorizes the creation of a firemen's relief and pension fund. For the maintenance of the fund, it provides that the treasurer of the city shall retain from the pay of each and every member of the fire department a sum equal to 1½ per centum of the monthly compensation paid each such member, and authorizes and empowers the city council of any city to levy, in the annual tax levy of such city, a tax not to exceed one-half of one mill until such time as the fund shall reach the sum of $25,000; no tax to be levied thereafter until the fund shall be less than that sum. The statute defines the beneficiaries of the fund. It provides for the payment of a pension to every fireman who shall become physically or mentally disabled while in, or in consequence of, the performance of his duty as such fireman, the payment of hospital expenses and nursing for sick and injured firemen, and for the payment to the widow or certain named beneficiaries of a fireman dying from natural causes the sum of $1,000. A board, to consist of the mayor and three members of the common council of the city, together with six members of the fire department, is created for the administration of the fund. After defining somewhat minutely the powers and duties of the board, the statute specifically prescribes:

"Said board shall hear and decide all applications for such relief or pensions under this chapter and its decisions on such applications shall be final and conclusive and not subject to revision or reversal except by the board." Rem. 1915 Code, § 8073, subd. 4.

William A. Criswell, the husband of the appellant, became a member of the fire department of the city of Tacoma on June 1, 1910. In the early part of the year 1912 he began to show symptoms of incipient tuberculosis of the lungs, and was granted a leave of absence, on full pay, for recuperation. On July 11, 1913, he was reported as being cured by the physician of the board at which time he returned to active duty. In December, 1913, he again became ill, and was subjected to an examination by the physician, who reported to the board under date of January 5, 1914, that he had again become infected with tuberculosis, and was unable to continue his work as an active fireman. He was then placed by the board upon the pension roll at half pay, and continued thereon until his death from the disease, which occurred on February 14, 1915, performing in the meantime no active service in the fire department. After her husband's death the appellant, as his widow, filed with the board her claim for the sum of $1,000, payable, by the terms of the act, to the widow of a fireman who has served as such for two years and dies from natural causes. Her claim was disallowed by the board, whereupon she applied for a writ of mandamus in the superior court of Pierce county to enforce an allowance of the claim. The court denied the application, on the ground that the action of the board thereon was final and conclusive. From its order made in the premises the widow appeals.

[1, 2] The conclusiveness of the order of the board of pensions is urged in this court. The contention we think must be sustained. It is within the power of the Legislature, when enacting a statute creating a new right with its remedy, to vest in some board or person power to adjudicate all matters arising under the statute, and to make such adjudication final and conclusive.

A case in point is State ex rel. Lynch v. Board of Trustees of Fireman's Pension and Relief Fund, 117 La. 1071, 42 South. 506, 8 Ann. Cas. 945. The court there had under consideration a statute similar in its provision to the statute here in question. The board of pensions was given exclusive control and management of the pension fund, with power to hear and decide all applications for relief or pensions under the statute, and its decisions thereon were made final and conclusive, and not subject to review or reversal, except by the board. On an attempt to review an order of the board, the court said:

"The question is whether this court can, in a mandamus proceeding, inquire into the correctness of the rulings of the defendant board. The statute itself answers, 'No.' Our former opinion practically nullifies that provision of the act which declares that the decisions of the board shall not be subject to review or reversal, except by the board itself. The act itself provides for the gratuitous distribution of a fund to be created out of the revenues of the state, and in our opinion it was competent for the Legislature to annex the condition that the decisions of the board in all applications shall be final and conclusive."

To the same effect is Karb v. State, 54 Ohio St. 383, 43 N. E. 920. It is there said:

"It is a rule of construction that where a new right with its remedy is given by statute, and there is no provision for a review or appeal from the determination of those who administer the statute creating the right, such determination is usually final. In such case an adverse decision cannot be overcome by appeal or original petition to a court of justice. Had the Legislature intended that the cause of the disability should be ascertained by litigation in court, it would have made provision therefor in the statute. The theory of the act seems to be that the board of trustees can be trusted to do full justice in each case."

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See, also, People ex rel. Bliel v. Martin, 131 N. Y. 196, 30 N. E. 60; Friel v. McAdoo, 101 App. Div. 155, 91 N. Y. Supp. 454.

The appellant contends that the statute, properly construed, gives the pension board exclusive jurisdiction over matters of temporary relief and pensions only, and does not include the claim made by the appellant. But a reading of the act convinces us that all questions concerning the administration of the act were vested in the board; the power to determine who were entitled to the fixed sum as well as to determine who were entitled to temporary relief or to pensions under the act.

The further claim that the right to the relief demanded is a vested right, and thus subject to a determination by the courts is also without foundation. Whether the right was vested is subject to inquiry; and, since the Legislature has vested the board of pensions with full power and authority to determine the inquiry, its conclusion on the question is as final as it is on any other matter of which it is granted complete jurisdiction.

Our opinion is that the application was properly denied, and that the judgment of the trial court should be affirmed. It is so ordered.

MORRIS, C. J., and MOUNT, J., concur.

(93 Wash. 508)

CITY OF OLYMPIA v. LEMON et al. (REED et al., Interveners). (No. 13125.)

(Supreme Court of Washington. Dec. 5, 1916.)

1. TRIAL ⊂=388(2) — FINDINGS AND CONCLUSIONS—NECESSITY.

Where, in condemnation suit by city, the owner of the property and the city stipulated to submit to the court the question whether the city already had title by prescription to the property, no findings of fact or conclusions of law were necessary; the action having by such stipulation become one in equity.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 909; Dec. Dig. ⊂=388(2).]

2. MUNICIPAL CORPORATIONS ⊂=648—STREETS —ESTABLISHMENT BY PRESCRIPTION.

Where there had been for 34 years continuously a well-defined road in a city used generally by the public under claim of right, the city had acquired title to such road as a street by prescription.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1421, 1422; Dec. Dig. ⊂=648.]

3. MUNICIPAL CORPORATIONS ⊂=648—STREETS —ESTABLISHMENT BY PRESCRIPTION—WIDTH OF STREET ACQUIRED BY USER.

Where a right to a city street is acquired by usage, the city's right is not limited to the actual beaten path, but it acquires a right to such width as is reasonably necessary for the public easement of travel.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1421, 1422; Dec. Dig. ⊂=648.]

Department 2. Appeal from Superior Court, Thurston County; John R. Mitchell, Judge.

Action by the City of Olympia against Millard Lemon and others, in which M. E. Reed and others intervened. From a judgment, Millard Lemon and others appeal. Affirmed.

Troy & Sturdevant, of Olympia, for appellants. Frank C. Owings, of Olympia, for respondent.

MAIN, J. The purpose of this action, as originally instituted, was to condemn for street purposes two certain strips of land, each 30 feet wide. The city of Olympia, desiring to extend Jefferson street south from Broadway to Eighteenth street, a distance of two blocks, brought the action against the parties who claimed to own the strips of land mentioned. After the condemnation proceeding had been instituted, the Casco Company, a corporation which claimed title to the property by conveyance from the previous owners, consented to a decree of necessity, and agreed to submit the issue as to the value of the land taken, and the damages to the land not taken, to what is referred to as a board of appraisers. As a result of this agreement, the appraisers made an award in favor of the Casco Company in the sum of $900. Subsequently a judgment was entered for this amount. After the judgment was entered, an assessment roll was prepared, which assessed the amount of the condemnation judgment against the adjacent property. Certain persons whose property was covered by the assessment roll filed objections thereto, and asserted that the land described in the condemnation judgment as belonging to the Casco Company was not in fact the private property of that company, but was public property, owned by the city for street purposes. When this issue was presented, it was stipulated by the parties that the court in this action should determine the question raised by the objections to the assessment roll. This was done, with the result that a judgment was entered which dismissed the action and decreed that the title to the property sought to be condemned was vested in the city for street purposes. From this judgment the appeal is prosecuted.

[1, 2] The first claim of error is the refusal of the trial court to make and enter findings of fact and conclusions of law. The appellants contend that an action in condemnation is a law action, and therefore the failure to make findings and conclusions is fatal to the judgment. Whether a condemnation proceeding is legal or equitable in its nature need not here be determined. By the stipulation referred to, the parties agreed to submit to the court the question whether the city had acquired title by prescription to the property sought to be condemned. By the stipulation, the action, in effect, became one on the part

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of the city to quiet title to the two strips of land covered in the condemnation action as originally instituted. If the action became one to quiet title, it will hardly be contended that it was not an equitable action. The action having become by virtue of the stipulation one in equity, no findings of fact or conclusions of law were necessary. On the merits of the case, after an attentive consideration of the entire record, we are satisfied that the city, by prescription, has acquired title to the land in controversy for street purposes. The evidence shows without contradiction that for a period of at least 34 years prior to the institution of this action there was a well-defined road of from 8 to 14 feet in width, either over the land involved, or over the 15 feet immediately adjacent thereto. This road was used generally by the public, and, as stated by one of the Casco Company's grantors, "for miscellaneous purposes." The evidence clearly establishes an actual general public use, which was uninterrupted and continuous, under claim of right, for a greater number of years than was necessary to acquire title by prescription. This right on the part of the public seems to have been recognized by the Casco Company's grantors; for, while title remained in them, they filed a plat in which they dedicated a 15-foot strip for street purposes adjacent to the 30-foot strips here in controversy. The question then arises as to the width of the strip of land acquired by user; in other words, did the user give to the public the right to only that portion actually used in travel, or did it give the right to a sufficient width for street purposes? In County of Yakima v. Conrad, 26 Wash. 155, 66 Pac. 411, it was held that after the right to a highway has been acquired by usage, the public are not limited to such width as has actually been used, but have a right to a highway of such width as is reasonably necessary for the easement of travel. It was there said:

"Under the general laws of this state, at the time the rights of the public became fixed in this road the maximum width of county roads was 60 feet, and the minimum width 30 feet. This is a circumstance that the court could take into consideration in fixing the width of the road. After the right to a highway has been acquired by usage, the public are not limited to such width as has actually been used. The right acquired by prescription and use carries with it such width as is reasonably necessary for the public easement of travel, and the width must be determined from a consideration of the facts and circumstances peculiar to the case. Whatever may be the width in any particular case, the easement, when acquired by user, cannot be limited to the actual beaten path. * * * It is generally a question of fact to be determined under the circumstances of each particular case, and the easement may be as broad as the public require for passing as well as traveling in one direction."

See, also, Whitesides v. Green, 13 Utah, 341, 44 Pac. 1032, 57 Am. St. Rep. 740; Elliott, Roads & Streets (2d Ed.) § 174, and cases cited.

[3] In view of this rule, and taking into consideration the width of the northern portion of Jefferson street, as well as the width of the adjacent streets, we conclude that the 30 feet involved in this action was acquired by usage for the exigencies of public travel.

The judgment is affirmed.

MORRIS, C. J., and PARKER and HOLCOMB, JJ., concur.

(93 Wash. 568)

DUNLAP v. SEATTLE NAT. BANK.

(No. 13105.)

(Supreme Court of Washington. Dec. 6, 1916.)

1. JURY ⇐14(3)—LEGAL OR EQUITABLE ACTION—ACCOUNTING.

A suit by the trustee in bankruptcy of a private bank against a national bank charging that the two banks had entered into a conspiracy whereby the latter was to advance to the former funds sufficient to enable it to secure enough deposits to pay its indebtedness to the national bank, and asking to recover the amount of such deposits, requires an accounting to determine the amount of such deposits as were actually turned over to the national bank, and therefore is within the jurisdiction of equity.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 60, 68; Dec. Dig. ⇐14(3).]

2. JURY ⇐13(14)—RIGHT TO JURY TRIAL—EQUITABLE AND LEGAL ACTION.

Where the complaint contains two causes of action, one legal and the other equitable, there is no right to a trial by jury, since equity has jurisdiction over the cause for one purpose and may retain it for all purposes.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 52, 53; Dec. Dig. ⇐13(14).]

3. CONSPIRACY ⇐19 — FRAUD — EVIDENCE — SUFFICIENCY.

In a suit by the trustee in bankruptcy of a private bank against a national bank, evidence *held* not sufficient to show a fraudulent conspiracy between the two banks whereby the latter was to advance to the former funds sufficient to enable it to secure enough deposits to pay its debt to the national bank.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 25, 26; Dec. Dig. ⇐19.]

4. FRAUD ⇐50 — EVIDENCE — SUFFICIENCY—CIRCUMSTANTIAL EVIDENCE.

Fraud cannot be inferred from facts and circumstances which, taken together, are consistent with an honest intent.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 46, 47; Dec. Dig. ⇐50.]

5. BANKS AND BANKING ⇐73—CONDUCT OF BANK—"INSOLVENT."

A bank is not "insolvent" if its assets are sufficient to meet its obligations within a reasonable time, although it did not have cash sufficient for its daily needs.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 154, 155; Dec. Dig. ⇐73.

For other definitions, see Words and Phrases, First and Second Series, Insolvent.]

6. BANKRUPTCY ⇐154, 166(3)—PREFERENCES—SET-OFF OF BANK DEPOSITS.

Under Bankr. Act July 1, 1898, c. 541, § 68, 30 Stat. 565 (U. S. Comp. St. 1913, § 9652), permitting set-off, a bank may, in the absence of

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fraud or collusion, set off against a debt due it from a depositor the amount of deposits made after the bank had knowledge that the depositor was insolvent, since the deposits do not in any way diminish the estate of the insolvent, and therefore do not create a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250, 251, 255, 257, 451–455; Dec. Dig. ⟸154, 166(3).]

7. BANKRUPTCY ⟸165(1)—PREFERENCES—ACCOUNT CURRENT.

Where the account between a bankrupt and his creditor during the four months prior to bankruptcy is an account current, the balance when the transaction ceased, and not the particular items, are to be considered in determining whether there has been a preference, and, where such balance shows an increase of the debt from the bankrupt, no preference can be claimed.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⟸165(1).]

8. BANKRUPTCY ⟸165(3) — PREFERENCES — MOTION TO SECURE FUTURE ADVANCES.

A mortgage given within four months preceding the bankruptcy of the mortgagor to secure future advances is not a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260; Dec. Dig. ⟸165(3).]

9. BANKRUPTCY ⟸166(4) — PREFERENCES — GROUNDS FOR BELIEF BY CREDITOR.

Under Bankr. Act, § 60 (U. S. Comp. St. § 9644), making the taking of security a voidable preference if the creditor at the time had reasonable cause to believe that the transfer of the security would effect a preference, mere suspicion of insolvency is not sufficient, but it must be shown that the creditor has reasonable cause to believe a preference would result, or knowledge of facts which if pursued at that time would have shown insolvency.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250, 251, 256; Dec. Dig. ⟸166(4).]

10. TRIAL ⟸388(2)—FINDINGS OF FACT AND CONCLUSIONS OF LAW—NECESSITY.

Findings of fact and conclusions of law need not be entered by the trial court in a suit in equity.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 909; Dec. Dig. ⟸388(2).]

11. APPEAL AND ERROR ⟸206(1) — OBJECTIONS TO TESTIMONY — NECESSITY — TESTIMONY TAKEN DURING ARGUMENT.

The taking of testimony during the argument of attorneys cannot be reviewed where no objection was made to such testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1283–1285; Dec. Dig. ⟸206(1).]

12. WITNESSES ⟸246(5)—EXAMINATION BY COURT — RECALLING WITNESS — TESTIMONY DURING ARGUMENT.

It is not an abuse of the trial court's discretion to recall a witness and question him as to a matter concerning which he did not testify during the argument after the court inquired of counsel why he had not interrogated that witness relative to those matters.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 857; Dec. Dig. ⟸246(5).]

13. BANKRUPTCY ⟸166(3) — PREFERENCES — COLLECTIONS BY BANK—KNOWLEDGE OF INSOLVENCY.

The trustee in bankruptcy of a private bank can recover from a national bank the amount of collections applied to the bankrupt's debt, which were received after the national bank knew that the private bank had closed its doors, where there was no evidence that the remittances had been mailed before the doors closed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250, 251, 255, 257; Dec. Dig. ⟸166(3).]

En Banc. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by James Dunlap, as trustee in bankruptcy, against the Seattle National Bank. Judgment for the plaintiff for a part only of the amount claimed, and both parties appeal. Affirmed.

J. L. Corrigan and E. C. Million, both of Seattle, and Thomas Smith, of Mt. Vernon, for appellant. Oldham & Goodale, of Seattle, for respondent.

MAIN, J. This action was instituted by the trustee in bankruptcy of the estate of W. E. Schricker and L. L. Andrews, copartners doing business as W. E. Schricker & Co., and W. E. Schricker and L. L. Andrews, individually. In the amended complaint two causes of action are stated.

In the first it is charged that W. E. Schricker and the officers of the defendant, the Seattle National Bank, entered into a fraudulent scheme and conspiracy whereby it was agreed between the parties thereto that the defendant bank would advance a sufficient amount of cash to enable Schricker to keep the Schricker & Co. bank open for the reception of deposits, and that these deposits, when received, should be transferred to the Seattle National Bank for the purpose of paying the indebtedness owing to that bank by the Schricker bank. It is further alleged that in pursuance of this scheme or conspiracy more than $200,000 was received by Schricker, and in turn transferred to the Seattle National Bank.

In the second cause of action it is alleged that during the four months preceding the date when the petition in bankruptcy for the Schricker bank was filed the Seattle National Bank received deposits from the Schricker bank in excess of $100,000 and a note and mortgage for the sum of $9,000. It is claimed that these remittances and the mortgage were voidable preferences under the federal Bankruptcy Act.

Upon the first cause of action a judgment is prayed for in the sum of $142,961.85, and upon the second cause of action $127,038.15.

After the issues were framed, over the objection of the plaintiff, the cause was tried to the court without a jury, and resulted in a judgment denying any recovery upon the first cause of action, and awarding judgment against the defendant in the sum of $3,485; this being the amount of certain checks collected by the defendant on the day that the Schricker bank ceased to do business, and after the Seattle National Bank had knowledge that it had closed its doors. From this judgment, both parties appeal.

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The record is long, and the briefs are exceedingly large. The facts are complicated, and, in an opinion of reasonable length, they cannot be stated in great detail. The facts which will give an understanding of the questions to be determined may be stated as follows: During the year 1889 R. E. Schricker and L. L. Andrews formed a copartnership for the purpose of conducting a private bank at La Conner, Wash., under the name of W. E. Schricker & Co. Soon after this bank began to do business the Puget Sound National Bank, located at Seattle, Wash., became its correspondent in that city. The Schricker bank was located in one of the richest agricultural communities of the state. Its customers were largely substantial and well-to-do farmers and some small merchants. During the year 1898 the Schricker bank became involved with one R. P. Thomas, who at the time was operating a sawmill at or near Anacortes, Wash., which will hereafter be referred to as owned by the Fidalgo Mill Company. The relation between the bank and the mill company continued, and the indebtedness from the mill company to the bank increased from time to time. In April, 1909, the mill company was owing the Schricker bank upon notes approximately $159,000, and an equal or greater amount by way of an overdraft. On April 29, 1909, Schricker applied to the Puget Sound National Bank for permission to overdraw his account with that bank, stating that he did not think he would need to exceed $15,000. This permission was granted.

On May 16, 1910, the Puget Sound National Bank and the Seattle National Bank were consolidated under the name of the latter, and the Seattle National Bank became the correspondent of the Schricker bank, as the Puget Sound had theretofore been. At this time there was an overdraft in favor of the Schricker bank in the sum of approximately $55,000. On November 22, 1910, this overdraft had reached the sum of $102,000, and on this day a letter was written by the vice president of the Seattle National Bank to the Schricker bank, stating that in advancing funds that bank preferred that it be arranged in another manner "instead of carrying it as an overdraft." On December 3, 1910, the overdraft having reached the sum of $106,298.59, five notes were given to cover this amount, four for $20,000 each and one for $26,298.59. No security at this time was requested or taken to secure the notes, though Schricker had previously offered certain securities.

After these notes were given, Schricker continued his overdrafts with the Seattle National Bank. Much correspondence took place between the parties, the officers of the Seattle bank objecting to the overdraft, and urging Schricker to renew certain of his paper and send it to them for rediscount. On May 22, 1911, the indebtedness of the Schricker bank to the Seattle bank upon the notes and upon the overdraft was $143,000. The amount which the Seattle National Bank was permitted to loan to any one customer was $120,000. At this time the national bank examiner appeared for the purpose of examining the Seattle National Bank. Some time during the month of May Schricker sent to the Seattle National Bank two notes secured by mortgages for $10,000 each. These notes were transferred to one John Davis or John Davis & Co., and a deposit made showing the reduction of the Schricker account to the extent of the amount of the notes and mortgages. In addition to this, one of the officers of the Seattle National Bank advanced $3,000, which, taken in connection with the mortgages, reduced the Schricker indebtedness to the legal limit of $120,000. On May 29, 1911, Schricker and his wife came to Seattle, and while there met two of the officers of the Seattle National Bank and executed a deed to an interest in certain coal lands in the state of Pennsylvania, which the Schrickers owned, for the purpose of securing the indebtedness of the Schricker bank to the Seattle National Bank.

The overdraft of the Schricker bank continued until about the middle of June, 1911, when the account shows that that bank had a credit balance with the Seattle National Bank. From this time until the middle of August there were times when the account showed an overdraft, and other times when it showed a credit balance. After the middle of August, 1911, the credit balance increased, until, on the 2d day of November, 1911, the Schricker bank had a credit balance with the Seattle National of approximately $97,000, and was owing upon the notes $106,000. Early in November Schricker paid the $26,000 note by a check against his credit balance, and at about the same time took back the two notes and mortgages for $10,000 each, and had his account charged with that sum. After November 2, 1911, when Schricker's credit balance had reached its highest point, it gradually declined until February 17, 1912, when again the overdraft appears.

From this time until the 15th day of May the overdraft was continuous. Correspondence took place between the two banks, the Seattle National urging that the overdraft be taken care of, and Schricker in turn promising that he would send down notes for rediscount, and thus cover it. On April 15, 1912, the overdraft continuing, and the notes not having been sent for rediscount which would cover it, Schricker requested a further overdraft. After this request was received, one of the officers of the Seattle National Bank went to La Conner and saw Schricker in the latter's bank. This officer of the Seattle National had $1,000 in currency with him for the purpose of delivering the same to Schricker when the latter should turn over the notes for rediscount. The

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meeting occurred in the Schricker bank. The officer of the Seattle National requested that he be permitted to see Schricker's note case, and the latter thereupon got it and placed it upon the table with the remark that the matter was all over, or something to that effect. The officer of the Seattle National opened the note case and learned for the first time that the $159,000 of one-name paper held by the Schricker bank was Fidalgo Mill Company notes, some of which had then been outlawed. The Seattle National Bank declined to make any further advances, and on the day following Schricker's bank closed. All loans and advances by the Schricker bank to the Fidalgo Mill Company were made prior to the time when the Seattle National Bank became the correspondent of that bank. The money advanced by the Seattle National was used by the Schricker bank to meet the demands of its depositors. The petition in bankruptcy was filed on May 22, 1912.

This is but a skeleton of the facts as they appear in the record. Further reference will be made to the facts in connection with the points to which they may be particularly pertinent.

[1] The first question is whether the plaintiff was entitled to a jury trial. The second cause of action may be conceded to be legal in its nature. The first cause of action, if the plaintiff should prevail, would necessarily involve an accounting. If a conspiracy existed, Schricker was a party thereto, and nothing could be recovered on his account. The amount of the recovery arising from the fraudulent scheme or conspiracy as alleged would be the costs and expenses of the litigation, and what the depositors of the Schricker bank had lost by reason of such fraudulent scheme or conspiracy. The transactions between the two banks were continuous and almost daily, and were of the same general character as exists between two correspondent banks. The amount of the deposits made by the Schricker bank in the Seattle National would not be the correct measure of recovery. For instance, if a customer with the Schricker bank should deposit $10,000 therein on one day in the form of a check drawn upon some other bank, and Schricker should send this check to the Seattle National Bank for collection and deposit in that bank, and a few days later the customer of the Schricker bank should draw out his $10,000 from the Schricker bank, and Schricker should in turn withdraw the same amount from the Seattle bank, obviously this deposit should not be included in the amount of recovery.

[2] To determine the amount of the recovery, if any were to be had, an accounting would be necessary, and consequently it is a subject of which equity takes jurisdiction. Pomeroy's Equity Jurisprudence, vol. 1 (3d Ed.) par. 140. It is a familiar rule that:

"When a court of equity has jurisdiction over a cause for any purpose, it may retain the cause for all purposes and proceed to a final determination of all the matters at issue." Pomeroy's Equity Jurisprudence, vol. 1 (3d Ed.) par. 181.

It follows, therefore, that where two causes of action are stated in the complaint, one of which is legal and the other equitable, equity takes jurisdiction for all purposes and proceeds to a final determination of all matters at issue. Cogswell v. New York, N. H. & H. R. Co., 105 N. Y. 319, 11 N. E. 518; McKinley v. Britton, 55 Ind. App. 21, 103 N. E. 349.

There are other reasons urged why plaintiff was not entitled to a jury trial in this case which it is not necessary here to review. The trial court did not err in denying a jury trial.

[3] Upon the merits the first question is whether the officers of the Seattle National Bank and Schricker entered into a fraudulent scheme or conspiracy as alleged in the first cause of action. If the officers of the Seattle bank did not know that the $159,000 of one-name paper in the Schricker bank was that of the Fidalgo Mill Company, and did not know that the overdraft to that mill company was far in excess of its value, there is nothing upon which to base the charge that appears in the complaint. Schricker did not testify upon the trial. Two officers of the Seattle National Bank had died subsequent to the failure of the Schricker bank, and prior to the trial of this action. The two officers of the Seattle bank who testified both denied positively that they at any time knew or suspected that the Schricker bank was insolvent until the afternoon of April 15, 1912, when Schricker's note case was examined for the first time. They testified that they did not know the $159,000 in notes was Fidalgo Mill paper, but believed it was largely the notes of well-to-do farmers and a few small merchants. They also testified that, while they knew from and after the 29th day of May, 1911, there was an overdraft to the Fidalgo Mill Company in the sum of $189,000, they had been assured by Schricker that this overdraft was secured upon the mill, and that the mill property was worth $250,000. The truthfulness of the testimony of these two witnesses is vigorously assailed by the plaintiff, but apparently it was not disbelieved by the trial court, and the record furnishes no reason to regard their testimony other than truthful.

[4] The plaintiff, in support of his charge, does not rely upon positive testimony, but upon circumstances, claiming that these establish the charge as made. Fraud cannot be inferred from facts and circumstances lawful in themselves and consistent with an honest purpose. If, when all the facts and circumstances are taken together, they are consistent with an honest intent, proof of fraud is wanting.

In Foster v. McAlester, 114 Fed. 145, 52 C. C. A. 107, the Circuit Court for the Eighth Circuit said:

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"Fraud cannot be inferred either by the court or jury from acts legal in themselves, and consistent with an honest purpose. The settled rule on this subject is that slight circumstances, or circumstances of an equivocal tendency, or circumstances of mere suspicion, leading to no certain results, are not sufficient to establish fraud. They must not be, when taken together and aggregated, when interlinked and put in proper relation to each other, consistent with an honest intent. If they are, the proof of fraud is wanting."

[5] It is true that the officers of the Seattle National Bank knew for some time prior to May 15, 1912, that unless they advanced money to the Schricker bank from time to time it would be necessary for that bank to close, and it is also true, as stated in one of the letters, that the condition of the Schricker bank had been a matter of concern to the Seattle bank. If the Schricker bank's $159,000 of notes was good paper, as was represented by Schricker, and the overdraft of the Fidalgo Mill was secured by a mortgage on property worth $250,000, the bank would not be insolvent, even though it did not have cash sufficient for its daily needs. If the assets were sufficient to meet the obligations within a reasonable time, the bank was not insolvent. State v. Cadwell, 79 Iowa, 432, 44 N. W. 700. Over the correctness of this rule as to insolvency, there seems to be no controversy in the briefs, and further discussion of it is unnecessary.

In order that there be a conspiracy, it would be necessary that the record show that the minds of Schricker and the officers of the Seattle National Bank co-operated. A careful reading of the entire record in this case leads to the conclusion that the minds of these men were not co-operating, but that Schricker was deceiving the Seattle bank as to the real condition of his bank. There are two circumstances which indicate very strongly that the officers of the Seattle National Bank did not know of the insolvency of the Schricker bank prior to the afternoon of April 15, 1912. One of these is the disposition of the two notes and mortgages for $10,000 each which Schricker had sent down in May, 1911, and taken back in November of the same year. When these mortgages were paid by the charge upon his account at his request for the amount thereof, the Seattle National Bank inquired of him what disposition he desired to be made of the mortgages, and was directed to return them to him. At this time Schricker still owed the Seattle National Bank upon the notes which were secured alone by a deed to the interest in the Pennsylvania coal lands, which was represented by Schricker, at the time the deed was given, to be worth from $75,000 to $100,000. Had the officers of the Seattle National at this time believed that Schricker's bank was insolvent, certainly they would have retained these mortgages as additional security.

[6] The other circumstance is that, when Schricker's deposits had reached the sum of $97,000, he was then owing his five notes aggregating the sum of $106,000. Had the officers of the Seattle bank then believed him to be insolvent and had refused to extend him further credit, they would have had the legal right, in the absence of fraud or collusion, to have had this $97,000 applied upon the notes. This proposition is strongly controverted by the plaintiff, but in the light of the holdings of the federal Supreme Court, which will be here referred to, the question is not a debatable one.

In New York County Bank v. Massey, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380, it was held that, even though the bank knew at the time certain deposits were made by its customer that his liabilities greatly exceeded his assets, the bank, under the federal Bankruptcy Act, was not required to surrender to the trustee in bankruptcy the deposits as a condition precedent to proving the balance of its claim, but it had the right to appropriate the deposit to the payment of the indebtedness of the customer of the bank. It was there said:

"As we have seen, a deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor, for when he parts with the money he creates at the same time, on the part of the bank, an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw a check against it. It is not a transfer of property as a payment, pledge, mortgage, gift, or security. It is true that it creates a debt, which, if the creditor may set it off under section 68, amounts to permitting a creditor of that class to obtain more from the bankrupt's estate than creditors who are not in the same situation, and do not hold any debts of the bankrupt subject to set-off. But this does not, in our opinion, operate to enlarge the scope of the statute defining preferences so as to prevent set-off in cases coming within the terms of section 68a. If this argument were to prevail, it would in cases of insolvency defeat the right of set-off recognized and enforced in the law, as every creditor of the bankrupt holding a claim against the estate subject to reduction to the full amount of a debt due the bankrupt receives a preference in the fact that to the extent of the set-off he is paid in full."

Further in the same opinion it is stated:

"It is true, as we have seen, that in a sense the bank is permitted to obtain a greater percentage of its claim against the bankrupt than other creditors of the same class, but this indirect result is not brought about by the transfer of property within the meaning of the law. There is nothing in the findings to show fraud or collusion between the bankrupt and the bank with a view to create a preferential transfer of the bankrupt's property to the bank, and in the absence of such showing we cannot regard the deposit as having other effect than to create a debt to the bankrupt and not a diminution of his estate."

In Studley v. Boylston, 229 U. S. 523, 33 Sup. Ct. 806, 57 L. Ed. 1313, under facts similar to those in the Massey Case, and following that case, it was held that the bank itself had the right to make the appropriation and prove its claim for the balance. It was there stated:

"If this set-off of mutual debts has been lawfully made by the parties before the petition is filed, there is no necessity of the trustee doing so. If it has not been done by the parties,

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then, under command of the statute, it must be done by the trustee. But there is nothing in paragraph 68a which prevents the parties from voluntarily doing, before the petition is filed, what the law itself requires to be done after proceedings in bankruptcy are instituted."

In Germania Savings Bank & Trust Co. v. Loeb, 188 Fed. 285–288, 110 C. C. A. 263, 266, the Circuit Court of Appeals for the Sixth Circuit stated the doctrine of the Massey Case as follows:

"It has been authoritatively decided by the Supreme Court, in considering these two sections, that the balance of a regular bank account at the time of filing the petition is a debt due to the bankrupt from the bank, and in the absence of fraud or collusion between the bank and the bankrupt, with the view of creating a preferential transfer, the bank need not surrender such balance, but may set it off against notes of the bankrupt held by it, and may prove its claim for the amount remaining due on the notes."

The trial court properly denied a recovery upon the first cause of action.

[7] Upon the second cause of action recovery is sought for the amount of deposits which were made in the Seattle bank by the Schricker bank within the four months previous to the filing of the petition in bankruptcy, and also for the note and mortgage in the sum of $9,000 which was sent by the Schricker bank to the Seattle National Bank some time during the month of February, 1912. Considering first the claim for the money which it alleged the Seattle National Bank received, it appears that during this period of time the account between the two banks was a mutual running account. Where the account between the bankrupt's estate and the person or corporation charged with having received a preference is an account current, the balance of the account, when the transactions cease, is to be taken in determining whether there has been an advancement by the bankrupt's estate which would constitute a voidable preference. If the bankrupt's estate has not been diminished by reason of the transactions, there is no voidable preference. C. S. Morey Mercantile Co. v. Schiffer, 114 Fed. 447, 52 C. C. A. 249; Dickson v. Wyman, 111 Fed. 726, 49 C. C. A. 574, 55 L. R. A. 349; Jaquith v. Alden, 189 U. S. 78, 23 Sup. Ct. 649, 47 L. Ed. 717. In the last case cited, speaking upon this question, it was said:

"The account was a running account, and the effect of the payments was to keep it alive by the extension of new credits, with the net result of a gain to the estate of $546.89, and a loss to the seller of that amount less such dividends as the estate might pay."

To constitute a preferential transfer within the meaning of the Bankruptcy Act there must be: First, a parting with the bankrupt's property for the benefit of the creditor; and, second, diminution of the bankrupt's estate. In Continental Trust Co. v. Chicago Title Co., 229 U. S. 435, 33 Sup. Ct. 829, 57 L. Ed. 1268, it was said:

"This case must be dealt with in the light of certain principles established by decisions of this court in determining the applicable provisions of the Bankruptcy Act. To constitute a preferential transfer within the meaning of the Bankruptcy Act there must be a parting with the bankrupt's property for the benefit of the creditor and a consequent diminution of the bankrupt's estate."

Applying the doctrine of these cases to the facts in the present case, it appears that at the beginning of the four months' period the bankrupt's estate had a credit balance with the Seattle National Bank, and at the time the bank was closed it had an overdraft. During this period of time the Seattle National Bank, while it had received deposits from the bankrupt's estate from time to time, had paid over to the estate or for the estate's benefit a greater sum of money than it had received. Taking the balance of the account, there was nothing upon which to predicate an action for voidable preferences.

[8] As to the $9,000 note secured by a mortgage, it must be dealt with in two aspects. The evidence shows that the mortgage was given to secure both antecedent indebtedness and subsequent advancements. Considering first the question relative to the subsequent advancements, the rule of the federal courts is that a security transferred for future advances, in the absence of fraud or collusion, does not constitute a voidable preference. Tomlinson v. Bank of Lexington, 145 Fed. 824, 76 C. C. A. 400; Van Iderstine v. National Discount Co., 227 U. S. 575, 33 Sup. Ct. 343, 57 L. Ed. 652. The doctrine of these two cases may be stated by quoting a paragraph from the syllabus of the Tomlinson Case as follows:

"Where a bank allowed a customer to overdraw on the express agreement that the customer should assign good accounts for collection to pay the overdraft, the subsequent assignment of the accounts, although the customer was insolvent, did not constitute the giving of a preference."

[9] The note and mortgage being for $9,000 and the overdraft at the conclusion of the account being for a less sum, or $7,161.11, the question arises whether the difference between the amount of the note and the amount of the overdraft would constitute a voidable preference when applied as security for the antecedent debt. The Bankruptcy Act does not prohibit the taking of such security, but makes it a voidable preference if the creditor, at the time it is received, has reasonable cause to believe that the transfer of the security "would effect a preference." Bankr. Act, par. 60. The burden is on the trustee to show that the creditor had reasonable ground to believe that the transfer of the security would effect a preference. United States v. John Reardon & Sons (C. C.) 191 Fed. 454; In re Hull (D. C.) 224 Fed. 796.

Mere suspicion is not sufficient to charge the creditor with knowledge of reasonable cause to believe that the transfer of the security will effect a preference, but there must be evidence of facts sufficient to put a reasonably prudent person upon inquiry which, if pursued, would show insolvency, and that a preference would be the result of the tak-

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ing of the security or the receiving of payments. In Nichols v. Elken, 225 Fed. 689, 140 C. C. A. 563, the Circuit Court of Appeals for the Eighth Circuit used this language:

"Mere suspicion, of course, is not sufficient to charge the defendants with knowledge of, or reasonable cause to believe, Tilden's insolvency at the time of these payments; but there must be evidence of facts sufficient to put a reasonably prudent person upon inquiry, which, if pursued, would show that Tilden was insolvent and that a preference would be the result of making these payments."

The remarks of the federal Supreme Court in Grant v. National Bank, 97 U. S. 80, 24 L. Ed. 971, are pertinent here. It was said:

"It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further, he may feel anxious about his claim, and have a strong desire to secure it, and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances, is not prohibited by the law. Receiving payment is put in the same category, in the section referred to, as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the purpose.

"The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is in fact desperate; and his creditors, if they know anything of his embarrassments, either participate in the same feeling, or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all his transactions with his creditors, made under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the bankrupt law an engine of oppression and injustice. It would, in fact, have the effect of producing bankruptcy in many cases where it might otherwise be avoided.

"Hence the act, very wisely, as we think, instead of making a payment or a security void for a mere suspicion of the debtor's insolvency, requires for that purpose that his creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man.

"It is on this distinction that the present case turns. It cannot be denied that the officers of the bank had become distrustful of Miller's ability to bring his affairs to a successful termination; and yet it is equally apparent, independent of their sworn statements on the subject, that they supposed there was a possibility of his doing so. After obtaining the security in question, they still allowed him to check upon them for considerable amounts in advance of his deposits. They were alarmed; but they were not without hope. They felt it necessary to exact security for what he owed them; but they still granted him temporary accommodations. Had they actually supposed him to be insolvent, would they have done this?"

The evidence in the present case does not show that the officers of the Seattle National Bank had reasonable cause to believe that the taking of the security would effect a preference. Neither does the evidence show that they had knowledge of facts which, if pursued, would have shown the insolvency at the time.

[10] Another contention is that the judgment should be reversed because no findings of fact and conclusions of law were entered by the trial court. This contention apparently is based on the assumption that the action was legal, and not equitable. As we have already seen, the cause was one of which a court of equity had jurisdiction. No findings, therefore, were necessary.

[11, 12] The final contention on the part of the plaintiff is that the trial court erred after the evidence had closed and during the progress of the argument in directing that one of the witnesses take the witness stand and testify upon matters relative to which he had not been interrogated by either side when previously testifying. During the argument the court inquired of counsel for the defendant why he had not interrogated this witness relative to certain matters, specifying them. Thereupon a colloquy took place between the court and counsel for defendant which resulted in the witness being called to the stand and his testimony taken. There are two reasons why this was not reversible error: First, the record does not show the interposition of any objection to the testimony; and, second, it was not an abuse of discretion reposed in the trial court.

[13] Upon the appeal of the defendant little need be said. On May 16, 1912, the day the Schricker bank closed, the Seattle National Bank received certain remittances through the mail. On the previous day, at approximately 4 o'clock in the afternoon, the officer of the Seattle National Bank who had gone to La Conner ascertained that the Schricker bank was insolvent. These remittances were received after knowledge of insolvency, and with knowledge that they would effect a preference. For a reversal of this portion of the judgment the defendant relies upon the case of McDonald v. Chemical National Bank, 174 U. S. 610, 19 Sup. Ct. 787, 43 L. Ed. 1106. In that case the remittances were made several days before suspension by a bank in Nebraska to the Chemical National Bank in New York, and were received after suspension. But the evidence in this case does not bring it within the rule of that case. There is here no evidence as to when the remittances were mailed. The only evidence is that they were received on the morning of the 16th. So far as the record shows, they may have been mailed subsequent to the time when the Seattle National Bank had actual notice of the insolvency.

The judgment will be affirmed.

MORRIS, C. J., and MOUNT, HOLCOMB, PARKER, FULLERTON, ELLIS, and CHADWICK, JJ., concur.

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(93 Wash. 544)

SHERWOOD BROS., Inc., v. SEATTLE FRUIT & PRODUCE AUCTION CO. (No. 13661.)

(Supreme Court of Washington. Dec. 5, 1916.)

1. FACTORS ⟸42 — ACTION — FINDING OF COURT—EFFECT.
In an action on a contract between commission merchants, contemplating the marketing of fruit for one by the other, where both parties asserted there was a special contract, disagreeing only as to its terms, the fact that the court did not find the agreement exactly as claimed by either, but found as to one part with defendant's evidence, and as to another part with plaintiff's was not a finding, as contended by defendant, that the minds of the parties never met, so that defendant was entitled to a reasonable compensation for its services in marketing.
[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 45–57; Dec. Dig. ⟸42.]

2. FACTORS ⟸42—ACTION AGAINST AGENT—AUTHORITY TO EMPLOY SUBAGENTS—BURDEN OF PROOF.
In an action by one commission merchant against another, which was admittedly the agent of the first, operating under an express contract to market fruit for a commission, the burden was on defendant to show that by the terms of its employment it was authorized to employ subagents and charge a commission for their services.
[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 45–57; Dec. Dig. ⟸42.]

3. FACTORS ⟸9—AUTHORITY OF AGENT TO EMPLOY SUBAGENTS.
In the absence of specific authority, a commission merchant, employed by another to market fruit, had no power to employ subagents at its principal's expense, as such authority cannot be implied from the mere fact of employment.
[Ed. Note.—For other cases, see Factors, Cent. Dig. § 10; Dec. Dig. ⟸9.]

4. FACTORS ⟸42 — ACTION—CONSIDERATION OF EVIDENCE.
In an action between commission merchants on a contract contemplating the marketing of fruit by one for the other, where the evidence as to whether defendant should market through other commission merchants and charge as an expense their commissions was in sharpest conflict, the court was justified in taking into consideration every circumstance tending to support either side.
[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 45–57; Dec. Dig. ⟸42.]

5. FACTORS ⟸32—DUTY OF AGENT TO DISCLOSE AND ACCOUNT — COMMISSION MERCHANT.
The rule, requiring open disclosure and full accounting by an agent, has its basis in considerations of common honesty, and applies to commission merchants as well as other agents.
[Ed. Note.—For other cases, see Factors, Cent. Dig. § 37; Dec. Dig. ⟸32.]

6. FACTORS ⟸45—REFUNDING COMMISSIONS OF SUBAGENTS.
Where a commission merchant contracted to market fruit for another, knowing its own facilities for disposing of the fruit, the contract not authorizing it to employ subagents and charge its principal with their commissions, it could not so charge its principal, although it had to refund to its principal commissions actually paid to subagents in sums larger than the commissions received by it, while the principal received the full market price for its fruit.
[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 60, 63, 64; Dec. Dig. ⟸45.]

7. FACTORS ⟸42 — CONTRACT OF EMPLOYMENT—SUFFICIENCY OF EVIDENCE.
In an action by a commission merchant against another on a contract contemplating the marketing of fruit for plaintiff by defendant, evidence *held* sufficient to sustain the court's finding that the contract was not as claimed by defendant.
[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 45–57; Dec. Dig. ⟸42.]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Sherwood Bros., Inc., against the Seattle Fruit & Produce Auction Company. From a judgment for plaintiff, defendant appeals. Judgment affirmed.

Flick & Frater, of Seattle, for appellant. Wettrick, Anderson & Wettrick, of Seattle, and Brown, Peringer & Thomas, of Bellingham, for respondent.

ELLIS, J. Plaintiff, a commission merchant of Bellingham, Wash., brought this action against defendant, a commission merchant of Seattle, to recover a balance claimed to be due as the proceeds of the sale of certain berries and other small fruits shipped by plaintiff to defendant at Grand Forks, N. D., for sale on commission. There were three carloads of fruit, shipped, respectively, June 25, June 30, and July 2, 1915, by express from Bellingham, consigned to defendant at Grand Forks. The fruit was delivered at that point to defendant's agent, to whom the bills of lading were forwarded. Though a conversion was claimed as to the last car, at the trial the action resolved itself into one for an accounting. We find it unnecessary to review the pleadings. Both sides claimed that the shipments were made under an express oral agreement, entered into between plaintiff and defendant early in June, 1915, at Bellingham through S. A. Sherwood, plaintiff's president, and George Bryant, defendant's president. There was a sharp conflict in the evidence as to the terms of this agreement. Sherwood testified, in substance, that it was agreed that defendant would handle the berries for a commission of 10 cents a case and 10 per cent. for the other fruits, and would guarantee $1 a case for the berries, but that nothing was said as to any commission to be charged by any broker in the Dakotas, where it was contemplated the fruit would be marketed. Bryant testified to the effect that defendant was to receive as its commission 10 per cent. of the net returns to Seattle, that there was no guaranty, and that it was understood that whatever commission was necessary would be charged and deducted as an item of expense at the other end. The evidence showed that the berries and other fruits were sold to the retail trade in the Dakotas by defendant through O. J. Barnes & Co., a commission house at Grand Forks, N. D., and that Barnes & Co. received a commission of 15 per cent. The sale statements rendered by defendant to plaintiff did

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not disclose the fact that any commission was deducted for marketing the fruit in the Dakotas. It fairly appears that plaintiff did not know that Barnes & Co. had anything to do with the matter until late in August, 1915, some time after statements on all the sales had been rendered, and did not know that any commission save defendant's 10 per cent. had been deducted until certain depositions were taken at Grand Forks late in December, 1915. The trial court did not find the contract wholly in accordance with the claims of either party, but expressed the view that the agreed commission was 10 per cent. on the net proceeds of all of the berries and fruit, that there was a guaranty of $1 a case only as to the first car, which guaranty was met, and that there was no agreement, authorizing defendant to deduct any commission paid to the Dakota broker. Judgment was rendered for plaintiff for the sum of $1,149.75, which it seems to be conceded is the amount which was deducted as the commissions of Barnes & Co., and for costs. Defendant appealed.

[1] Because the court did not find wholly with the claims of either party, appellant first contends that the court, in substance, found that there was no definite contract, in that there was no meeting of the minds of the parties, and that therefore appellant was entitled to a reasonable compensation for its services; hence was warranted in deducting the commissions paid in Dakota with the express charges and other usual marketing expense, and in retaining 10 per cent. of the resulting net proceeds. This position is not tenable. Both parties asserted that there was a special contract. They disagreed only as to its terms. What its terms were was the specific question for the court's determination. The fact that the court did not find the agreement exactly as claimed by either party, but found as to one part with the appellant's evidence and as to another part with the respondent's evidence, was not a finding, as the appellant asserts, that the minds of the parties never met. There is no rule of law requiring the court, on any controverted question of fact, to adopt as true in toto the evidence on either side, or as an alternative find the evidence on both sides false in toto. The purpose of trying questions of fact is to determine the truth from all of the evidence.

[2, 3] It is next contended that the court committed fatal error in holding that the burden of proof was upon appellant to show an agreement on respondent's part that the commission of 15 per cent. paid to the Dakota broker should be deducted as an expense chargeable to respondent. Appellant was admittedly respondent's agent, operating under an express contract to market the fruit for a commission. In the absence of specific authority it had no power to employ subagents at respondent's expense. That authority cannot be implied from the mere fact of appellant's employment. Vashon Fruit Union v. Godwin & Co., 87 Wash. 384, 151 Pac. 797; Fudge v. Seckner Contracting Co., 80 Ill. App. 35; Burke v. Frye, 44 Neb. 223, 62 N. W. 476; People's Bank v. Frick Co., 13 Okl. 179, 73 Pac. 949. The burden was therefore upon appellant to show that by the terms of its employment it was authorized to employ subagents and charge a commission for their services. The court committed no error in so holding.

[4-7] Finally, it is contended that in any event the evidence clearly established the contract as claimed by appellant. As to whether it was understood that appellant would market the fruit through commission merchants and would charge as an expense the commission paid to such merchants, the direct evidence, as we have noted, was in the sharpest conflict. The court was justified, therefore, in taking into consideration every circumstance tending to support either side. If in the original negotiations respondent's president was advised that it would have to bear the commission of a broker in the Middle West, it is inconceivable that he would not have asked what that commission would be, and insisted upon something more definite than appellant's version of the agreement. It is a further significant fact that the accounts of sales rendered by appellant to respondent, which are in evidence as exhibits, show that, though the transportation charges, drayage, labor, and repacking charges were frankly disclosed and deducted as legitimate expenses, and also appellant's 10 per cent. commission on the balance, no commission to the Dakota broker was shown, either as an expense or otherwise, nor on the face of the statements deducted. An examination of the statements fails utterly to disclose that any commission whatever, save appellant's 10 per cent., was paid to any one. Whatever the contract, good faith would dictate that these commissions, paid at the other end, should be shown, if deducted, as they admittedly were. It seems only reasonable that had respondent ever agreed to bear these commissions, as appellant claims it did, they would have been shown just as other deductible expenses were shown. That they were not shown raises a strong inference that appellant desired to conceal the fact that they had been paid and deducted from the gross proceeds, lest respondent might object. In other relations involving agency such a clandestine course of conduct would be considered at least questionable, and we know of no reason why it is less so where the parties are commission merchants. The rule requiring open disclosure and full accounting has its basis in considerations of common honesty, and applies to commission merchants as well as to others. Here the concealment was persistent. Throughout the correspondence, though Barnes was sometimes mentioned, he was referred to as "our representative," never as an independent broker to whom a commission was paid. Ap-

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pellant's answer to interrogatories propounded by respondent late in November, 1915, stated with regard to each car that the fruit was "sold to O. J. Barnes," not that it was consigned for sale on commission. So far as the record before us indicates, the fact that a commission was paid, and in what amount, did not appear until the deposition of Barnes was taken, in which it was disclosed that Barnes & Co. had taken the berries on commission, and had actually charged a commission of 15 per cent. for which appellant did not account. It is no answer to say that it is inequitable that appellant should refund commissions which it actually paid in sums larger than the commissions which it received, and that respondent in any event received the full market price for its berries. Appellant at all times knew its own facilities for disposing of the berries better than any one else knew them. If it wanted to avoid the dispute here presented, it should have disclosed the facts when it made the contract, and then advised respondent that the added commission would be charged as expenses. That it did not do so is positively asserted by respondent, and is strongly corroborated by the studied course of concealment, both of the fact and of the amount of commissions charged at the other end. Upon the whole record we cannot say that the evidence preponderates against the court's findings. The court having found that there was no contract authorizing the deduction of these commissions, the case falls distinctly within our decision in Vashon Fruit Union v. Godwin & Co., supra.

The judgment is affirmed.

MORRIS, C. J., and MAIN, HOLCOMB, and CHADWICK, JJ., concur.

(93 Wash. 588)

STATE v. WHEELER. (No. 13561.)

(Supreme Court of Washington. Dec. 5, 1916.)

1. ADULTERY ⇐12—ELEMENTS—MARRIAGE.
Marriage is an essential element of the offense of adultery, and marriage in fact, and not by inference, must be proved.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. §§ 24–27; Dec. Dig. ⇐12.]

2. ADULTERY ⇐12—ELEMENTS—MARRIAGE—EVIDENCE.
Mere testimony of one that he and the woman with whom the adultery was alleged to have been committed had been married by one M., who was a justice of the peace at one time, does not establish the marriage.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. §§ 24–27; Dec. Dig. ⇐12.]

3. ADULTERY ⇐12—ELEMENTS—MARRIAGE—EVIDENCE.
Where marriage is an essential element of the crime charged, it is necessary that there be some evidence, showing that the person performing the ceremony was authorized to perform such functions at the time.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. §§ 24–27; Dec. Dig. ⇐12.]

4. CRIMINAL LAW ⇐410.— ADMISSION BY COUNSEL—ELEMENTS.
Mere casual statement by accused's counsel that the person who, as testified by the supposed husband, performed the ceremony between such witness and the woman with whom the adultery was alleged to have been committed was at one time a justice of the peace is not an admission that at the time of the alleged ceremony he was competent to perform it, since an attorney's admission, to bind his client, must be distinct, formal, and for the express purpose of dispensing with formal proof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 897, 1254; Dec. Dig. ⇐410.]

5. CRIMINAL LAW ⇐752½—TRIAL MOTIONS—DIRECTING ACQUITTAL.
A mere general motion to dismiss a prosecution for adultery for insufficiency of the evidence, improperly referred to as a motion for nonsuit, there being no nonsuit in criminal actions, though treated as a motion to direct acquittal, is insufficient, for failure to point out in what respect the evidence is insufficient.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. ⇐752½.]

6. CRIMINAL ⇐763, 764(1)—INSTRUCTIONS—INVADING PROVINCE OF JURY.
In a prosecution for adultery, a charge that, "if from the evidence of the opportunity at that time, and from other evidence of a disposition of the parties to indulge in sexual intercourse between themselves, and from all other facts and circumstances proven on the trial, the jury was satisfied beyond a reasonable doubt that at the time and place, set out in the information, they had sexual intercourse, then this is sufficient" is erroneous, in the absence of evidence other than inference of disposition to commit the offense, as in violation of Const. art. 4, § 16, prohibiting charges as to facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1737, 1742, 1743, 1746; Dec. Dig. ⇐763, 764(1).]

7. CRIMINAL LAW ⇐1172(6)—HARMLESS ERROR—INSTRUCTIONS—INVADING PROVINCE OF JURY.
In a prosecution for adultery, the state having elected to rely on the act alleged to have been committed on a certain date, instructions which did not specifically restrict conviction to that date were nevertheless not prejudicial, where they could not have misled the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3159; Dec. Dig. ⇐1172(6).]

Chadwick, J., dissenting.

Department 1. Appeal from Superior Court, Lewis County; A. E. Rice, Judge.

Arthur R. Wheeler was convicted of adultery, and was denied new trial, and he appeals. Reversed and remanded, with instructions.

W. H. Cameron, of Centralia, and Hayden, Langhorne & Metzger, of Tacoma, for appellant. C. A. Studebaker, of Chehalis, and W. O. Grimm, of Centralia, for the State.

MAIN, J. The defendant in this case is charged with the crime of adultery. It is alleged in the information that the crime was committed on the 9th day of November, 1915, with one Louisa Wirsdorfer, who was then the wife of Mathias Wirsdorfer. At the time alleged, Mrs. Wirsdorfer was living separate and apart from her husband, and

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was conducting, in the city of Centralia, a rooming house known as the Lenox Hotel. From some time early in the month of September, 1915, until after the offense is alleged to have been committed, the defendant was a roomer and boarder at the hotel. The trial of the defendant, upon the charge stated in the information, resulted in a verdict of guilty. Motion for a new trial being made and overruled, judgment was entered upon the verdict, from which this appeal is prosecuted.

The first question is whether the state offered sufficient evidence to prima facie establish that Louisa Wirsdorfer and Mathias Wirsdorfer had been previously married. Mathias Wirsdorfer testified that he and Louisa Wirsdorfer were married in the year 1892 in the city of Chehalis. After this general testimony as to marriage was offered, the same witness testified as follows:

"Q. Going back to your marriage again, by whom were you married? A. By Maaker. Q. Do you remember his name? A. Yes, sir. Q. His initials? A. Maaker used to be a dentist here.

"Mr. Langhorne: Dr. E. A. Maaker, he used to be a dentist and justice of the peace here.

"Court: I think I have heard of him myself."

[1, 2] No other evidence of the marriage, nor of the fact that E. A. Maaker was a justice of the peace at the time the ceremony is claimed to have been performed was offered. From this testimony it does not appear that Maaker was a justice of the peace when it is said he performed the marriage ceremony. Where the charge is adultery, marriage is an essential element of the crime. Remington & Ballinger's Code, § 2457; Buchanan v. State, 55 Ala. 154; Banks v. State, 96 Ala. 78, 11 South. 404. In such a case, marriage in fact, as distinguished from one inferable from circumstances, must be proven. Wharton's Criminal Evidence, vol. 1 (10th Ed.) p. 405; Miner v. People, 58 Ill. 59. The reason for this rule is that a marriage, inferable from circumstances, is based upon a presumption, and, in a criminal action, this presumption is met by the stronger presumption of the defendant's innocence. The law upon this question cannot be better stated than by quoting an excerpt from the opinion in the case of Summerville v. Summerville, 31 Wash. 411, 72 Pac. 84. It was there stated:

"A valid marriage may be presumed to exist from general reputation among the acquaintances of the parties that such is the fact, when that reputation is accompanied by their cohabitation, and arises from their holding themselves out to the world as occupying that relation to which the law refers when marriage is mentioned. Wallace's Case, 49 N. J. Eq. 530, 25 Atl. 260; White v. White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799; Murray v. Murray, 6 Or. 26; Arthur v. Broadnax, 3 Ala. 557, 37 Am. Dec. 707; Underhill, Evidence, p. 158, § 114. The exception to the rule that marriage may be presumed from evidence of cohabitation and repute is where a public or criminal offense is involved. The exception is based upon the ground that the presumption of marriage without proof of actual marriage cannot overcome the stronger presumption of innocence. White v. White, supra; State v. Hodgskins, 19 Me. 155, 36 Am. Dec. 742; Stewart, Marriage and Divorce, section 126."

[3] Where marriage is an essential element of the crime charged, it is necessary that there be some evidence showing that the person performing the ceremony was authorized to perform such functions at the time. Underhill on Criminal Evidence (2d Ed.) p. 661; State v. Hodgskins, 19 Me. 155, 36 Am. Dec. 742; State v. Bowe, 61 Me. 171. In the case last cited, it was said:

"But we do not think the few words uttered by Hannah A. Littlefield amount to proof of a legal marriage on her part. It does not even appear that this marriage was solemnized by any one 'professing' to be either 'a justice of the peace or an ordained or licensed minister of the gospel. * * *'"

[4] In the present case, there is no evidence that Maaker was a justice of the peace at the time the ceremony was performed. It is claimed, however, that the statement of counsel for the defendant, as appears in the excerpt from the record, above quoted, amounts to an admission that Maaker was, at the time of the marriage, a justice of the peace. The statement of counsel does not admit that Maaker was a justice of the peace at the time, and was not made as an admission. It was a mere voluntary statement, suggesting that, at one time, Maaker was a dentist and a justice of the peace. An admission, by an attorney, to be binding upon his client, must be distinct and formal, and made for the express purpose of dispensing with the formal proof of some fact at the trial. Greenleaf on Evidence, vol. 1 (16th Ed.) § 186; Encyclopedia of Evidence, vol. 1, p. 561; Treadway v. S. C. & St. P. R. Co., 40 Iowa, 526; Davidson v. Gifford, 100 N. C. 18, 6 S. E. 718.

[5] The case of State v. Nelson, 39 Wash. 221, 81 Pac. 721, is distinguishable. There the testimony offered tended to show a marriage by a minister of the gospel. But, even though the marriage was not sufficiently proven, it does not follow, in this case, that the action now should be ordered dismissed. At the conclusion of the state's case, the defendant moved that the action be dismissed upon the grounds "that the evidence is totally insufficient to justify the submission of the case to the jury. * * *" This motion does not invite the court to direct a verdict of acquittal, but is, in form, a motion for dismissal, and is referred to in the briefs as a motion for nonsuit. In State v. Hyde, 22 Wash. 551, 61 Pac. 719, it was said:

"There can be no nonsuit in a criminal, as in a civil, case. Bishop, New Criminal Procedure, § 961. The proper practice is to ask the court to direct an acquittal."

Treating the motion, notwithstanding its form, as a motion addressed to the court to direct an acquittal, it was yet insufficient, because it nowhere pointed out wherein the evidence was insufficient, but was a general challenge of the sufficiency thereof. In mo-

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tions of this character, the attention of the court should be directed to the precise point made, and the grounds therefor. Quoting further from the Hyde Case on this question, it is said:

"This motion is a general one, and only challenges the general sufficiency of the evidence; that is, says, in effect, there is a total failure of evidence. Upon a motion of this kind, the only question raised is whether there is any evidence tending to prove the crime charged, not whether the evidence fails in some particular matters. The record fails to disclose that the objection to the evidence in the particular matter, as to the kind, amount, and value of money, was called to the attention of the court, and in a case of this kind the motion should direct the attention of the court and opposite counsel to the precise point made and the grounds therefor."

The objections made to the instructions will next be noticed.

[6] Instruction No. 3 concluded with this sentence:

"If from the evidence of the opportunity at that time, and from other evidence of a disposition of the parties to indulge in sexual intercourse between themselves and from all other facts and circumstances proven on the trial you are satisfied beyond a reasonable doubt that at the time and place, set out in the information, they had sexual intercourse, then this is sufficient."

There was another instruction of similar import. In the quoted part of the instruction, the court, in effect, told the jury that there was "evidence of a disposition of the parties to indulge in sexual intercourse between themselves." There is no direct evidence which shows, or tends to show, a disposition of the parties to indulge in sexual intercourse between themselves. It may be that there was evidence from which the jury had a right to infer such disposition. Had the court told the jury that if they found from the evidence that the parties had a disposition to indulge in sexual intercourse between themselves, this fact should, with all the other evidence in the case, be considered in determining the guilt or innocence of the accused, a different question would be presented. The way the instruction reads, the jury could not well have understood it differently than that, in the opinion of the court, there was direct evidence of such disposition. So instructing the jury was an encroachment upon section 16, art. 4, of the Constitution of this state, and was therefore reversible error.

[7] It is also claimed that error was committed in failing to instruct the jury with sufficient definiteness that, unless they found the act charged to have been committed on the 9th day of November, 1915, the verdict should be one of acquittal. During the trial, the state elected to ask for a conviction on account of the act charged to have been committed upon the date mentioned. While the instructions in this regard are, possibly, not as definite as they should have been, yet, when the entire charge is read, it does not seem that the jury could have been misled thereby, or misunderstood the court's meaning. The other errors assigned are such as are not likely to appear upon another trial of the cause, and for that reason will not be here reviewed.

The judgment will be reversed, and the cause remanded, with direction to the superior court to grant a new trial.

MORRIS, C. J., and PARKER and ELLIS, JJ., concur.

CHADWICK, J. (dissenting). This case is distinguishable from the case of State v. Hyde. The objection was "called to the attention of the court," and no purpose could be served by repeating it at the time of making the motion at the close of the testimony. The testimony failed in a material particular, and defendant should have been acquitted.

(93 Wash. 512)

WATSON v. WATSON et al. (No. 13211.)

(Supreme Court of Washington. Dec. 5, 1916.)

1. JURY ⟸14(1)—CLAIM AGAINST ESTATE—STATUTE.

In an action by the alleged widow of a decedent seeking to have one-half of his property set off to her, certain other property assigned to her in her separate right, to enjoin the executors from their management of the estate, and to quiet her title, the question of marriage upon which the plaintiff's right depended was for the court, and plaintiff was not entitled to a jury trial under Rem. & Bal. Code, § 314, providing therefor as to an issue of fact in an action for the recovery of money and specific real and personal property.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 66, 72, 81, 83; Dec. Dig. ⟸14(1).]

2. JURY ⟸14(1)—RIGHT TO TRIAL BY—SUIT IN EQUITY.

Action by the alleged widow of a decedent, asking to have set aside to her one-half of all the decedent's real and personal property, to have certain other property assigned to her in her separate right, to restrain the executors' management of the estate, and to quiet title, involving an account as to the proceeds and increase of her property during more than 30 years, and a determination whether the accumulation claimed by the executors was partly due to her personal efforts and to her advancements, and to have her title quieted, wherein the defendants sought to have their title quieted, was an action of equitable cognizance within Rem. & Bal. Code, § 315, and properly triable by the court.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 66, 72, 81, 83; Dec. Dig. ⟸14(1).]

Department 1. Appeal from Superior Court, Kittitas County; Ralph Kauffman, Judge.

Action by Margaret Watson against Ben F. Watson and others, with cross-complaint by defendants. Judgment for defendants, and plaintiff appeals. Affirmed.

E. K. Brown, of Ellensburg, and Martin & Jesseph, of Davenport, for appellant. Hovey & Hale, of Ellensburg, for respondents.

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FULLERTON, J. James Watson died on October 16, 1913, leaving an estate, consisting of real and personal property of the estimated value of some $50,000. By a nonintervention will he divided his estate among certain relatives, bequeathing also to an Indian woman, known as Margaret Watson, with whom he had lived for about 33 years, $1,000 in cash and a yearly allowance of $250 during her life. After the expiration of the period for filing claims, and when the estate was ready for distribution, the Indian woman, claiming as the widow of Watson, began an action, seeking to have set aside to her as the wife of the decedent one-half of all the real estate and personal property above referred to. She also asked that certain other property be assigned to her in her separate right, that the executors named in the nonintervention will be restrained from further proceeding with the control and management of such property, and that her title thereto be quieted. The defendants by their answer, in addition to denials and an affirmative defense, set up a cross-complaint, to the effect that the plaintiff's claim constituted a cloud on their title, and prayed that their title be quieted. The action was tried to the court sitting without a jury, and resulted in a judgment against the plaintiff, in which the title to the property of the estate was quieted in the executors. The plaintiff appeals.

[1, 2] The first error assigned is the refusal of the court to grant the demand made for a jury trial. The appellant contends that the action is one at law; that it presents an issue of fact for the recovery of money and specific real and personal property, which, under Rem. & Bal. Code, § 314, is required to be tried by jury, unless a jury be waived. But plaintiff's right to the real and personal property in dispute is altogether dependent upon the primary issue as to whether or not she was the legal wife of the decedent. That relationship is alleged and denied, and is the very foundation of the action. The chief question being that of marriage, it was one properly for the court to determine. But, more than this, the action is one of equitable cognizance as disclosed by the pleadings. Both appellant and respondents demand relief that can only be awarded in an action of equitable cognizance; a part of appellant's relief demanded involved an accounting as to the proceeds and increase of her property, covering a period of more than 30 years' time, and the plaintiff also sets up that the accumulation of property claimed by the executors was partly due to her personal efforts, as well as to her advancement of funds, and that the executors are dissipating the property of the estate, and will continue such acts unless restrained. This clearly presents an action of equitable cognizance. We think the principal question involved is the same as that presented in Enos v. Hamblen, 79 Wash. 583, 140 Pac. 675, where we held that an action seeking to establish plaintiff's right as widow of a decedent was an equitable one. We there said:

"The estate in this case is in the possession of the executor. The property in his possession is a trust fund: First, for the payment of the costs and expenses of administration; and, second, to be distributed to the persons lawfully entitled thereto. A person claiming to be an heir or a community owner of the estate must establish his claim at some place in the proceedings, and, when established, they are entitled to the distribution which the law authorizes. In order to establish a right to the estate as distributee, the proceeding must necessarily, we think, be an equitable one, and falls within the provisions of Rem. & Bal. Code, § 315 (P. C. 81, § 207), above quoted."

The appellant seeks to distinguish the case cited from this one on the ground that the former was an application in the probate proceedings to establish claimant's status as wife of decedent in order to fix her right to distribution, while the present case is an independent action to determine appellant's rights in a decedent's estate which, by reason of the nonintervention will, has never been in the custody of the court. But the object in both actions, the Enos Case and this one, was to fix plaintiff's status as the wife of decedent, as the basis of any claim of right to share in the estate, and this we hold is an action of equitable cognizance.

From the evidence deduced at the trial the court made findings of fact, to the effect that the decedent, James Watson, came to the territory of Washington about the year 1876, and took up his residence in what is now the county of Kittitas; that he resided within a few miles of what is now the city of Ellensburg from the summer of 1877 until about the year 1909, when he went to Okanogan county, where he lived most of the time until his death on October 16, 1913; that decedent left a will in which appellant was granted a legacy of $1,000 and an annuity of $250, and further legacies to the other respondents in this action, other than the defendant James Ramsay, one of the executors; that the will was admitted to probate in Kittitas county, Wash., on the 11th day of November, 1913, and the year's notice to creditors given, the time for presenting claims expiring about November 13, 1914; that the inheritance tax was paid to the state, and that the executors are now handling the property of the estate, the will being what is known as a nonintervention will under the laws of this state. It further found that at the time of Watson's death all his property was situate in Kittitas county, except some horses and cattle of the value of about $600, which he had with him in Okanogan county; that his property, in addition to the horses and cattle, consisted of $6,000 deposited in a bank, 160 acres of land acquired by him by purchase in the year 1877, 160 acres which he acquired under the homestead laws of the United States, a 40-acre tract which he purchased in 1900, 159 shares of stock in the Ellensburg Water

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Company, and 5 shares in the Bull Ditch Company, all of which is needed to procure water for the irrigation of the land. The court also found that in about the year 1885 the decedent commenced living with the appellant, and from that time on kept her at his house, where she performed the ordinary duties of a housekeeper; that there never was any ceremonial marriage between decedent and appellant; that they were never married, but that decedent was what was known as a "squaw man," and was so reputed in the community where he and appellant resided; that decedent at the time appellant took up residence with him was possessed of a considerable quantity of horses, a portion of which was afterwards traded for cattle; that all of the property at present belonging to decedent's estate consists of property which the decedent owned prior to beginning cohabitation with appellant, or is the proceeds or natural enhancement in value of such property, save a bequest of $2,000, which decedent received from the estate of a deceased brother; that at the time appellant went to live with decedent she was the owner of about 30 Indian ponies and some 20 head of cattle, which she always kept separate from the property of decedent, each of them employing separate brands for their own live stock; that there is no satisfactory proof that decedent ever received any portion of the proceeds of the sale of any property belonging to appellant; that the executors of decedent's estate have paid appellant the sum of $325 on account of sums due her under the will, and have at all times been ready and willing to pay over the sums provided for appellant under the will.

As conclusions of law the court found that appellant was not the wife of decedent, James Watson, and that, even if there had been a marriage between them, all of the property now comprised in the decedent's estate is the separate property of such decedent, and its disposition governed by his will; that appellant is not entitled to recover; that respondents are entitled to a decree, quieting title to all the property belonging to the estate of James Watson, deceased, and that appellant has no interest therein.

The appellant excepts to the foregoing findings of fact as being contrary to the evidence introduced, and to the conclusions of law as not supported by the evidence, the findings in the case, nor the law applicable thereto. It would subserve no useful purpose to review the evidence. We have carefully examined it, and are satisfied that it supports the findings by a strong preponderance. It seems also too clear to require argument that the findings support the conclusions of law and the decree founded thereon.

The judgment should be affirmed; and it is so ordered.

MORRIS, C. J., and MOUNT, CHADWICK, and ELLIS, JJ., concur.

(93 Wash. 489)

STATE v. BONHAM. (No. 13082.)

(Supreme Court of Washington. Dec. 5, 1916.)

1. CONSTITUTIONAL LAW ⊂⊃64—PHYSICIANS AND SURGEONS ⊂⊃2—LEGISLATIVE POWER—DELEGATION — QUALIFICATION OF PHYSICIANS.

Rem. & Bal. Code, §§ 8386–8407, regulating practice of medicine, are constitutional, although section 8391 provides that in order to secure a certificate to practice medicine the applicant must be a graduate of a medical school whose requirements are not less than those prescribed by the Association of American Colleges for that year; such provisions not granting legislative functions to the association.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 91, 92; Dec. Dig. ⊂⊃64; Physicians and Surgeons, Cent. Dig. § 2; Dec. Dig. ⊂⊃2.]

2. CONSTITUTIONAL LAW ⊂⊃70(3) — JUDICIAL FUNCTIONS—WISDOM OF LEGISLATION.

The wisdom of a legislative restriction on the right to procure a certificate to practice medicine and surgery is a question for the Legislature and not for the court.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131; Dec. Dig. ⊂⊃70(3).]

3. CONSTITUTIONAL LAW ⊂⊃43(2)—RIGHT TO RAISE CONSTITUTIONAL QUESTION.

Defendant having applied for and received a certificate to practice osteopathy, upon being prosecuted for practicing medicine and surgery without a certificate, cannot complain of the unconstitutionality of the provision of the statute restricting the right to secure a certificate to practice medicine and surgery, where such restriction does not render the whole act invalid.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 41; Dec. Dig. ⊂⊃43(2).]

4. STATUTES ⊂⊃64(2)—PARTIAL INVALIDITY.

Such provision is severable from the remainder of the statute, and, if invalid, could be rejected without affecting other provisions of the act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 59, 195; Dec. Dig. ⊂⊃64(2).]

5. PHYSICIANS AND SURGEONS ⊂⊃5(4)—PRACTICE OF "OSTEOPATHY"—RIGHT TO PERFORM SURGICAL OPERATIONS.

Under Rem. & Bal. Code, §§ 8386–8407, regulating the practice of medicine, a graduate of a college of osteopathy authorized to practice osteopathy was not authorized to administer anesthetic and cut out a patient's tonsils with a knife, such treatment not falling within the term "osteopathy" at the time of the passage of the statute, which was then understood not to sanction the internal administration of medicines or the surgical use of the knife as a means for curing disease.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 5; Dec. Dig. ⊂⊃5(4).

For other definitions, see Words and Phrases, First and Second Series, Osteopathy.]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Clyde L. Bonham was convicted of practicing medicine and surgery without a proper certificate, and appeals. Affirmed.

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Charles H. Miller, of Seattle, for appellant. Alfred H. Lundin, W. F. Meier, and Joseph A. Barto, all of Seattle, for the State.

FULLERTON, J. The defendant, Clyde L. Bonham, was convicted of the crime of practicing medicine and surgery within King county, state of Washington, without a certificate from the board of medical examiners of the state authorizing him so to do, and sentenced to pay a fine of $1, together with the cost of the prosecution. From the conviction and sentence he appeals.

The cause was tried before the lower court upon an agreed statement of facts. The statement shows that the appellant, at the time named in the information, was the holder of a valid, unrevoked certificate, issued to him by the board of medical examiners of the state of Washington, authorizing him to practice osteopathy in such state, but was not the holder of any of the other forms of certificates the medical board is authorized to issue, and was entitled to practice medicine and surgery in the state of Washington only in such manner as his certificate, authorizing him to practice osteopathy, entitled him so to do; that on the day named in the information one Ray Johnson applied to the appellant to be treated for a diseased condition of the tonsils; that the appellant thereupon undertook his treatment, and in the course thereof administered to him "an anesthetic, to wit, ether, and then and there, removed the tonsils of the said Ray Johnson, by placing a snare around each of said tonsils, and then and there cutting out said tonsils with a knife, * * * and then and there administered to the said Ray Johnson medicine, to wit, stypticin * * *"; that the method employed was the only method for removing the tonsils, and the method used "was the only method in which the said Bonham received instruction" for the removal of diseased tonsils. The stipulation further shows that the appellant matriculated in the Los Angeles College of Osteopathy, of Los Angeles, Cal., in January, 1906, and graduated therefrom in June, 1908, after having completed the course of study prescribed by such college. It is shown, also, that the college named was a legally chartered college of osteopathy, requiring actual attendance, and having a course of instruction of more than 20 months.

The statutes of this state, regulating the practice of treating the sick and afflicted (Rem. & Bal. Code, §§ 8386–8407), provide for the appointment of a board of medical examiners consisting of nine members, five of whom must be chosen from the regular profession, two from the homeopathic profession, and two from the osteopathic profession. The board is given power to issue certificates to those entitled to practice the healing art, and practicing such art without holding such a certificate is made a misdemeanor. The board has authority to issue three forms of certificates:

"First, a certificate authorizing the holder thereof to practice medicine and surgery; second, a certificate authorizing the holder thereof to practice osteopathy; third, a certificate authorizing the holder thereof to practice any other system or mode of treating the sick or afflicted not referred to in this section."

In order to procure a certificate to practice medicine and surgery applicants must present to the board "a diploma issued by some legally chartered medical school, the requirements of which shall have been at the time of granting such diploma in no particular less than those prescribed by the Association of American Medical Colleges for that year," together with certain prescribed preliminary and extraneous proofs; such, for example, as that the applicant is of good moral character, and that the diploma was not obtained by fraud. To obtain a certificate to practice osteopathy the applicant is required to present a diploma from "a legally chartered college of osteopathy, having a course of at least twenty months, requiring actual attendance, and after 1909, of three years of nine months each," together with proofs similar to those of the applicant's first mentioned. An applicant for a certificate to practice any mode or system of healing the sick or afflicted is required to file a diploma from a legally chartered college of the system or mode of treatment which the applicant claims or intends to follow. In addition to the foregoing requirements, all applicants for certificates must be personally examined by the board as to their qualifications in the "following fundamental subjects, to wit: Anatomy, histology, gynecology, pathology, bacteriology, chemistry and toxicology, physiology, obstetrics, general diagnosis and hygiene." Examinations in each subject shall consist of not less than ten questions, "none of which shall relate to treatment." Under the penalty of a misdemeanor the act makes it incumbent on holders of certificates to "use no deception in the use of titles of his or her mode of treating the sick, but shall use such titles as are designated by his or her diploma; or those not having a diploma shall use only such title as he or she holds license to practice." It is provided also that the act shall not be construed so as to discriminate against any particular school of medicine or surgery, or against osteopathy or any system or mode of treating the sick or afflicted, or so as to interfere in any way with the practice of religion, or be held to regulate any kind of treatment by prayer. The statute offers no definition of medicine and surgery, or of osteopathy, or of other modes of treatment mentioned for which certificates to practice may be issued, nor does it undertake to prescribe specifically what mode of treatment the holders of the various certificates may employ in their practice.

[1] The appellant assails the judgment of

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conviction pronounced against him on two special grounds: First that the act is unconstitutional; and, second, that his certificate entitles him to employ for the treatment of diseased tonsils the methods employed by him in the treatment of the diseased tonsils of the patient mentioned in the information.

The first objection needs no extended discussion. The question has been twice before this court with reference to this particular act; first in the case of State v. Greiner, 63 Wash. 46, 114 Pac. 897, and later in the case of State v. Pratt, 80 Wash. 96, 141 Pac. 318, in each of which the constitutionality of the act was sustained as being within the police powers of the state. The appellant's learned counsel, however, suggests a reason for holding the act unconstitutional not suggested in the arguments in the cases cited, and this it may be well to specifically notice. The objection, stated in the language of counsel, is this:

"When the Legislature of 1909 incorporated in section 8391 of the act the following language: 'In order to procure a certificate to practice medicine and surgery the applicant for such certificate must file with said board, at least two weeks prior to the regular meeting thereof, satisfactory testimonials of good moral character, and a diploma issued by some legally chartered medical school, the requirements of which shall have been at the time of granting such diploma in no particular less than those prescribed by the Association of American Colleges for that year'—they granted to the American Medical Association, a nonlegislative body outside of the state, legislative functions, and by so doing aimed to establish a medical hierarchy, which would control the people from birth to death. The bureaucratic rule which it hoped to secure by the passage of that section is un-American in principle and despotic in spirit. It is monopolistic and tyrannical in the most offensive sense of those terms."

[2] But we think it manifest that the clause quoted by counsel cannot bear the construction he places upon it. By this clause the Legislature granted legislative functions to no one. It simply defined the medical schools from which an applicant to practice medicine and surgery in the state must produce a diploma before a certificate authorizing him to do so can be issued to him. The restriction may or may not be a wise one, but this is a question for the Legislature and not for the courts. With the courts the question is one of the power of the Legislature to impose the restriction, and we see no reason to question it.

[3] Again, we think the restriction is not one of which the appellant can be heard to complain. He is in no manner affected by it. He applied for and received a certificate to practice osteopathy, and is entitled to practice that profession in the manner and to the extent the certificate permits.

[4] It may be that should it be held that this particular clause was unconstitutional, and that it so far permeated the act as to render it void in its entirety, the appellant would be entitled to an acquittal for the want of a statute on which to base the prosecution. But the statute was enacted in the interest of the public. It was for the protection of the people, and is not to be held unconstitutional as a whole because of the insertion of an unconstitutional restriction, unless no other alternative is presented. It is our opinion that we would not be driven to hold the entire act unconstitutional even though we held the particular restriction invalid, but would be required to hold that the restriction can be rejected and still leave the act enforceable as to its other restrictive and regulative features. Without further pursuing the inquiry, we conclude that the appellant is not entitled to a reversal on the ground of unconstitutionality of the act.

Passing to the second contention, the statute makes it plain, we think, that its framers regarded the practice of medicine and surgery and the practice of osteopathy as separate and distinct methods of treating the sick and afflicted, and intended to confine the practitioners of each to the particular system he professed to practice; in other words, to the system in which he had been educated. It is true no definition of these terms was offered in the statute, but this would only mean that the terms were used in their general and accepted sense, in the sense in which they were commonly understood at the time of the enactment of the statute. In considering the contention, therefore, we are not particularly concerned with the meaning of the term "medicine and surgery," but rather with the meaning of the term osteopathy; the inquiry being, Was the method adopted by the appellant in the treatment of the particular patient a recognized method for the treatment of such a disease under the school of treatment known as "osteopathy"? If it was a recognized treatment according to that school of treatment, the appellant had a right to practice it under his certificate from the medical board, if it was not so recognized, he did not.

To determine the meaning of the term "osteopathy" resort may be had to the definition and descriptions of it given by the founder of the practice, by those who teach and practice it, and by the lexicographers who define it as a science. The practice was founded by Dr. A. T. Still in about the year 1871. He was a practitioner originally of the so-called old school, and served as a surgeon in the Civil War. In the year named he was practicing his profession at Baldwin, Kan., when he announced to his patients that he had evolved a system of drugless healing, and that he had done with drugs forever. Shortly afterwards he removed to Kirksville, Mo., where he practiced his new system until 1890, when he founded a school for the instruction of others. This school was subsequently chartered by the state of Missouri under the name of the American School of Osteopathy, and was the first school organized to teach the particular form

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of treatment. Dr. Still described his system in the following language:

"Osteopathy deals with the body as an intricate machine, which, if kept in proper adjustment, nourished and cared for, will run smoothly into a ripe and useful old age. As long as the human machine is in order, like the locomotive or any other mechanical contrivance, it will perform the functions for which it was intended. When every part of the machine is adjusted and in perfect harmony, health will hold dominion over the human organism by laws as natural and immutable as the law of gravitation. Every living organism has within it the power to manufacture and prepare all chemicals, materials, and forces needed to build and repair itself, together with all the machinery and apparatus required to do this work in the most perfect manner, producing the only substance that can be utilized in the economy of the individual. No material other than food and water, taken in satisfaction of the demands of appetite (not perverted taste), can be introduced from the outside without detriment."

In the catalogue of the Los Angeles College of Osteopathy, the college from which the appellant is a graduate, osteopathy is defined in the following language:

"Osteopathy is a system of rational therapeutics which: (1) Recognizes that resistance, relief, and recovery are functions inherent in the organization of living bodies, and that a deviation from the state of health implies either the absence of some of the natural influences, agencies, or conditions that maintain these functions, or derangement in their structural or organic basis; and (2) treats disease by employing as remedies: (a) The natural causes of normal function; and (b) manipulation to restore normal anatomical relations."

In the catalogue of the College of Osteopathic Physicians and Surgeons of Los Angeles, Cal., which was formed by the amalgamation of the Los Angeles College of Osteopathy and the Pacific College of Osteopathy, the term is defined as follows:

"Osteopathy is founded on the eternal truth that each individual lives by means of his own bodily activities, and will continue to live in a state of health just so long as his body is able to adapt itself to the external influence surrounding it. When adaptation fails and disease arises, the osteopathic physician appeals to no charms; does not try to drive demons out with nostrums; knows too much about physiology to administer a cause of more disease in the form of a poison; takes out none of the pieces of which the human body—the most wonderful of all machines—is composed; nor is he so devoid of human sympathy and common sense that he can say to himself 'The suffering of others is imaginary.' Instead of these uninstructed ways of interpreting disease, the osteopathic physician views the problem as a natural event, arising under the operation of natural law and susceptible of scientific analysis and solution. He knows that the human body is a protoplasmic machine, a chemical machine, and an anatomical machine. He knows that the body as a whole must be kept in protoplasmic equilibrium, chemical equilibrium, and anatomical equilibrium. He further knows that the unceasing normal flow of nervous energy is necessary for the maintenance of protoplasmic harmony, and the unceasing, uninterrupted flow of blood is necessary for the maintenance of chemical harmony and union throughout the body. He knows that, given a body in equilibrium, anatomically, protoplasmically, and chemically, the only things needed by it are food, water, air and exercise. Therefore, when confronted with a diseased body, the osteopathic physician proceeds, first, to correct all anatomical derangements, so that nervous energy and blood may flow without hindrance between each part of the body and every other part. This restores to the body its capacity to take advantage of the beneficial and to resist the injurious in its medium. He then surrounds it with the external agencies necessary to normal life, and the result is health."

Webster's New International Dictionary, defines the term in this language:

"A system of treatment based on the theory that diseases are chiefly due to deranged mechanism of the bones, nerves, blood vessels, and other tissues, and can be remedied by manipulations of these parts."

In Funk & Wagnall's New Standard Dictionary of the English Language, the word is defined as follows:

"A system of treating diseases without drugs, propounded by Dr. A. T. Still in 1874. It is based on the belief that disease is caused by some part of the human mechanism being out of proper adjustment, as in the case of a misplaced bone, cartilage, or ligament, adhesions or contractions of muscle, etc., resulting in unnatural pressure on or obstruction to nerves, blood, or lymph. Osteopathy, through the agency or use of the bones (especially the long ones which are employed as levers), seeks to adjust correctly the misplaced parts by manipulation."

In the Century Dictionary and Cyclopedia, under the word "osteopathy," it is said:

"A theory of disease and a method of cure, advocated by Dr. A. T. Still, resting on the supposition that most diseases are traceable to deformation of some part of the skeleton (often due to accident), which by mechanical pressure on the adjacent nerves and vessels interferes with their action and the circulation of the blood. As a remedy a form of manipulation is used."

The case of Bragg v. State, 134 Ala. 165, 32 South. 767, 58 L. R. A. 925, while not in point perhaps on the main question here involved, is interesting because containing the view of a graduate of the parent school as to the teachings generally of the schools of osteopathy. He was prosecuted for practicing medicine without first having obtained a certificate of qualification from one of the authorized boards of medical examiners of the state. The case was heard upon an agreed statement of facts, which contained the following recitals:

"The method of treatment by the practitioners of osteopathy is a system of manipulation of the limbs and body of the patient with the hands, by kneading, rubbing, or pressing upon the parts of the body. In the treatment, no drug, medicine, or other substance is administered or applied, either internally or externally; nor is the knife used or any form of surgery resorted to in the treatment. The practitioner himself performs the manipulations. The teaching and theory of those skilled in osteopathy are that it is a system of treatment of disease by adjustment of all the parts of the body mechanically. It is taught that any minute or gross derangement of bony parts, contracting and hardening of muscles or other tissues, or other mechanical derangements of the anatomical parts of the body which must be in perfect order mechanically in order that it may perform its function aright, nerve centers, arteries, veins, and lymphatics, which must function properly in order that health may be maintained. It is taught that such interferences lend to congestion, ob-

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structed circulation of blood and lymph, irritation of nerves, and abnormal state of nerve centers; that the result is disease which can be cured only by righting what is mechanically wrong. * * * The essential things taught in the schools of osteopathy are anatomy, physiology, hygiene, histology, pathology, and the treatment of diseases by manipulation. The repudiation of drugs and medicine in the treatment of diseases is a basic principle of osteopathy, and a knowledge of drugs or medicines, their administration for the cure of diseases, the writing and giving of prescriptions, are not essential to the graduation of, and the issuance of diplomas to, students of osteopathy."

[5] When tested by the foregoing definitions it is manifest that the practice of osteopathy as it was originally understood, and as it was understood at the time of the enactment of our medical act, did not sanction the internal administration of medicines or the surgical use of the knife as a means for curing diseases. As founded its principal tenet was the abandonment of these means of cure. A perusal of the successive catalogues of its schools will show that their teachings are gradually being expanded, and that the more modern of them now teach in some degree much that is taught in the older schools of medicine. The parent school has been more marked in this respect than perhaps any of them. It now teaches that in "childbirth lacerations," in "certain types of congenital deformities, certain kinds of tumors, etc., surgery must step in," and that surgery must be resorted to for the removal of tissues so badly diseased or degenerated that regeneration is impossible by the process of adjustment. But this advance is modern. It was not in vogue even so late as 1909, the time of the enactment of our medical act. Moreover, it is not yet taught in the school of which the appellant is a graduate. The quotation we have made from the catalogue of the college of Osteopathic Physicians and Surgeons of Los Angeles, Cal., is taken from the issue of 1914–1915. It will be observed from its perusal that this particular school still regards the internal administration of drugs as the administration of poison, and the surgical resort to the knife as unnecessary; at least, we take this to be the meaning of the assertions that the osteopathic physician "knows too much about physiology to administer a cause of more disease in the form of a poison," and "takes out none of the pieces of which the human body—that most wonderful of all machines—is composed." But if all of the osteopathic colleges were now teaching the administration of medicines and the resort to surgery by the knife as a means of curing diseases, it would not aid the appellant. His right is to practice osteopathy as that practice was understood at the time the medical act was adopted, and this we conclude did not sanction the practice resorted to by him in the treatment of the patient mentioned in the information.

The appellant cites cases from this court and cases from the courts of many other of the states, holding that the practice of osteopathy is the practice of medicine and surgery within the meaning of the medical acts prohibiting the practice of medicine and surgery without a certificate or license so to do from the proper state authorities. But the principle of these cases we cannot think has any bearing on the question here involved. The purpose of osteopathy is to heal the sick, and it is not denied that the treatment it affords, even in its most restricted use, falls within the generic meaning of the term "practicing medicine and surgery." But the question here is not this. It is much more narrow. It is, rather, Did the appellant's certificate of practice authorize him to resort to the form of treatment he resorted to in the particular instance? It is our conclusion that it did not.

The judgment is affirmed.

MORRIS, C. J., and MOUNT and ELLIS, JJ., concur.

(93 Wash. 472)

In re WESTERN AVE.

TRIMBLE et al. v. CITY OF SEATTLE.

(No. 13486.)

(Supreme Court of Washington. Nov. 28, 1916.)

1. MUNICIPAL CORPORATIONS ⟸498—LOCAL IMPROVEMENTS—ASSESSMENT OF BENEFITS—QUESTION OF FACT.

Whether or not property is benefited by a local improvement is a question of fact to be determined by the board of eminent domain commissioners, whose decision is reviewable by the superior court.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1169; Dec. Dig. ⟸ 498.]

2. MUNICIPAL CORPORATIONS ⟸508(6)—LOCAL IMPROVEMENTS—ASSESSMENT OF BENEFITS—REVIEW—FINDINGS.

An order of the lower court confirming the action of the eminent domain commissioners finding that property is benefited by a local improvement will not be reversed because of a conflict in evidence or except in cases of fraud, mistake, arbitrary action amounting to an abuse of discretion or where based upon a fundamentally wrong basis which must clearly appear from the evidence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1181; Dec. Dig. ⟸ 508(6).]

3. MUNICIPAL CORPORATIONS ⟸502(3)—LOCAL IMPROVEMENTS — EVIDENCE — SUFFICIENCY.

In a proceeding to confirm an assessment of benefits, where there was no arbitrary action on the part of the eminent domain commission, no fraud, no action amounting to an abuse of discretion, and the assessment was not based on a fundamentally wrong basis, evidence *held* to support a finding that objectors' property situated a mile from the improvement was specially benefited.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1174; Dec. Dig. ⟸ 502(3).]

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4. EMINENT DOMAIN ⊂⊃246(3)—ABANDONMENT OF PROCEEDINGS—ORDINANCES—REPEAL BY IMPLICATION.

An ordinance condemning land for improvements which simply contemplated more extensive improvements on the same avenues did not indicate an intention on the part of the city to repeal a former ordinance under which condemnation proceedings had been commenced, or to abandon such condemnation proceedings.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 651; Dec. Dig. ⊂⊃246(3).]

5. EMINENT DOMAIN ⊂⊃246(2)—ABANDONMENT—STATUTE.

In view of Rem. Code 1915, § 7816, providing that at any time within six months after last judgment awarding compensation for an improvement in the superior court, or within two months after the final determination of an appeal, any city may discontinue proceedings for assessment of benefits by ordinance, etc., where two months had elapsed after an ordinance providing for condemnation proceedings and assessments for improvement had passed, and awards in condemnation had been made and entered, the city could not abandon proceedings by passing another ordinance.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 648, 649; Dec. Dig. ⊂⊃246(2).]

6. MUNICIPAL CORPORATIONS ⊂⊃426—"LOCAL IMPROVEMENT"—ASSESSMENT OF STATE PROPERTY—STATUTE.

Under Rem. Code 1915, § 6875, providing that all lands of the state within the corporate limits of a city except tidelands may be assessed for local improvements specially benefiting such lands which may be ordered by the proper authorities of a city, a "local improvement" being a public improvement by which the realty adjoining or near such improvement is specially benefited, and not necessarily an actual physical improvement of the land, a state armory site not on tidelands, and situated within the corporate limits of city, is liable for assessments for benefits for street improvements.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1035–1037; Dec. Dig. ⊂⊃426.

For other definitions, see Words and Phrases, First and Second Series, Local Improvement.]

7. MUNICIPAL CORPORATIONS ⊂⊃486(3)—LOCAL IMPROVEMENTS—ASSESSMENT OF STATE LAND—STATUTE—NOTICE.

Where at the time an ordinance for condemnation of property to make a proposed improvement was passed it was not known that the improvement would affect state property, but when it was determined that state property was specially benefited, notice was given to the state, or at least the state appeared and objected to the assessment, there was a sufficient notice under Rem. Code 1915, § 6877, providing that no city shall have power to levy an assessment for a local improvement against state lands until notice of the making of such proposed improvement, fixing of the time for hearing, and confirming the same by the city has been served upon the land commissioner or board of control.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1086, 1161; Dec. Dig. ⊂⊃486(3).]

En Banc. Appeal from Superior Court, King County; Boyd A. Tallman, Judge.

Petition by the City of Seattle for confirmation of an assessment of property benefited by a street improvement, objected to by Cannie Ford Trimble and others. From an order confirming the assessment as against their properties, objectors appeal. Affirmed.

Kerr & McCord and Peters & Powell, all of Seattle, for appellants. Hugh M. Caldwell and Howard A. Hanson, both of Seattle, for respondent.

MOUNT, J. This is an appeal from a judgment of the superior court for King county confirming an assessment roll prepared by the board of eminent domain commissioners of the city of Seattle. It appears that on the 10th day of January, 1910, the city council of the city of Seattle passed Ordinance No. 23040, providing for the laying off, extending, and establishing of Western avenue from West Denny way to Elliott avenue, and of Queen Anne avenue from West Denny way to Western avenue, in Seattle, and providing for the condemnation, appropriation, taking, and damaging of land and other property necessary therefor, providing for the changing and establishing of the curb grades of Western avenue and Western avenue extended, and approaches thereto, from Eagle street to Elliott avenue, of West Denny way from Western avenue to First Avenue North; of Queen Anne avenue from West Denny way to West John street, of West John street from Western avenue as extended to Queen Anne avenue, of First Avenue West to Western avenue as extended, and connecting alleys, providing for the condemnation, appropriation, taking, and damaging of land and other property necessary for the grading and regrading of said avenues, streets, approaches thereto, and connecting alleys, in conformity with such established grades, and for the construction of all necessary slopes for cuts and fills upon the property abutting upon said avenues, streets, approaches thereto, and connecting alleys, and providing that payment for such improvement be made by special assessment upon the property specially benefited and in the manner provided by law, and that any part of the cost of said improvement not finally assessed against the property specially benefited be paid from the general fund of the city of Seattle.

Pursuant to the provisions of this ordinance the city instituted a condemnation proceeding wherein a judgment was entered on May 25, 1912, on awards theretofore made by a jury impaneled in said cause in the sum of $107,676.34 in favor of the property owners affected.

On December 24, 1912, the city of Seattle filed a supplemental petition praying that an assessment be made for the purpose of raising the amount necessary to pay the condemnation damages so awarded. This petition was granted, and the board of eminent domain commissioners of the city was directed to prepare an assessment roll covering the property deemed to be specially benefited.

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The board of eminent domain commissioners did so, and assessed $98,201 of the costs of the improvement to the property found to be specially benefited, and $37,206.42 was charged against the general fund of the city.

The assessment roll was filed by the board of eminent domain commissioners on January 19, 1915, and included properties located on the four corners of Pike street and Second avenue, in Seattle. Objections to the confirmation of the assessment roll were filed on February 16, 1915, by the owners of the property on the corners of Pike street and Second avenue. A hearing was had upon these objections on September 27, 1915. The court entered an order confirming the assessment as against these properties, and the owners thereof have appealed from that order.

It is argued: First that the properties of the appellants were not specially benefited, and, in fact, not benefited at all; and, second, that the ordinance by authority of which the assessment roll was made up had prior to the time the same was prepared been repealed, and that the casting of the assessment roll was therefore without warrant of law. The state insists that state lands may not be assessed by a municipal corporation for the purpose of paying verdicts rendered in condemnation proceedings. We shall briefly notice these contentions in their order.

[1, 2] Upon the first question it is argued that, because the property of these appellants at Second avenue and Pike street is a mile away from the improvement, there is no special benefit to the property of these appellants. It is at once apparent that this is a question of fact; and evidence was introduced by the appellants to the effect that there was no special benefit to the property by reason of the fact that the improvement would in no way tend to benefit their property. Evidence was offered on behalf of the city to the effect that the appellants' property is located about the civic center of the city, and that this improvement would afford a better way for travel to the appellants' property, and that the result would be more people would pass by the appellants' property after the improvement than before. It is not claimed, as we understand the appellants, that there was any fraud upon the part of the eminent domain commissioners in levying the assessment. But it is claimed that, because of the great distance from the appellants' property to the improvement, there can be, in fact, no special benefit thereto. This, it seems to us, is a question of fact to be determined by the board of eminent domain commissioners, whose decision is reviewable by the superior court. That court concluded, after hearing all the evidence, that there was a special benefit. This court has held upon questions of this character that a conflict in the evidence is not sufficient to justify a reversal of the lower court, and that the order of the lower court confirming the action of the eminent domain commissioners will not be reversed except in cases of fraud, mistake, or arbitrary action amounting to an abuse of discretion, or when based upon a fundamentally wrong basis, which must clearly appear from the evidence. In re Westlake Avenue, 40 Wash. 144, 82 Pac. 279; In re Seattle, 46 Wash. 63, 89 Pac. 156, Spokane v. Fonnell, 75 Wash. 417, 135 Pac. 211, and cases therein cited.

[3] We are satisfied from a careful review of the evidence and the entire situation presented in this improvement that there was no arbitrary action on the part of the eminent domain commission, that there was no fraud, and no action amounting to an abuse of discretion, and that the assessment was not based upon a fundamentally wrong basis.

It is next argued that Ordinance No. 23040 was repealed by Ordinance No. 30864. It appears that after Ordinance No. 23040 had been passed, and condemnation proceedings had thereunder, and award of judgment in condemnation had been made, the city thereafter passed ordinance No. 30864 providing for an additional widening of Western avenue from Eagle street to Fourth Avenue West and Elliott avenue, and providing for the condemnation and appropriation of other property necessary therefor. This ordinance provided for the establishment of certain curb grades and other improvements upon Western avenue. Ordinance No. 23040 was not repealed by the later ordinance. The later ordinance, as we understand the record, provided for a wider street upon Second avenue and a different system of grades. After the passage of the later ordinance, and after condemnation proceedings had been instituted, the city passed another ordinance abandoning the proceedings under ordinance No. 30864. The proceedings which had been instituted under that ordinance were dismissed, and the costs thereof paid by the city.

[4] The appellants contend that the second ordinance repealed the first ordinance by implication because the later ordinance covered the subject-matter of the earlier ordinance. We think it is plain that the second ordinance simply contemplated a more extensive improvement upon these avenues than the first ordinance. Some changes would have been made if the second ordinance had been carried out according to its intention. But it seems clear to us that there was no intention on the part of the city to repeal the former ordinance. The whole intention was, as we have before stated, to make a more extended improvement by another change of the grades which were made by the first ordinance, and a double roadway in addition to that provided for in the first ordinance. There was clearly no intention on the part of the city to abandon the condemnation proceedings under the first ordinance. In fact and in law the time had expired with-

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in which the city could abandon the first condemnation proceedings under the first ordinance. Laws 1907, p. 316, ch. 153, § 49 (Rem. Code 1915, § 7768 et seq.).

[5] The two months' time (section 7816) had elapsed after the first ordinance had been passed. The awards in condemnation had been made and entered before ordinance No. 30864 was passed. Under these facts the city could not abandon the proceedings under the first ordinance. State ex rel. Murray v. Herdlick, 73 Wash. 301, 131 Pac. 1139; Spokane v. Pittsburg Land & Imp. Co., 73 Wash. 693, 132 Pac. 633. We are satisfied that the second ordinance was not intended to repeal the first ordinance, and that the proceedings under the second ordinance were abandoned, and therefore did not affect the proceedings which were had under the first ordinance.

It is argued on the part of the state that the assessment against the armory site was not authorized, and was therefore invalid. The statute provides with reference to the assessment of state lands for benefits at Rem. Code 1915, § 6875, that all lands of the state, except tidelands, situated within the limits of any incorporated city, "may be assessed and charged for the cost of local improvements specially benefiting such lands which may be ordered by the proper authorities of any such city."

[6] It is conceded that these lands are not tidelands. The lands upon which the armory site is situated are uplands within the corporate limits of the city, and therefore, under this provision, it seems, are liable for assessment for the benefits by direct authority of the statute.

It is argued by the state that the words "local improvements" mean "actual physical improvement of the land by the formation of an improvement district under the local improvement act." But we are satisfied that this is too narrow a construction of the words "local improvements" if improvements are made upon streets, and not upon the land itself, which improvements may benefit the state lands. We are satisfied it was the intention of the Legislature that state lands should be liable for the special benefits accruing to the state lands by reason of the improvement.

In 1 Page & Jones, Taxation by Assessment, it is said:

"The term 'local improvement' thus used has substantially the same meaning as that which is already discussed. It is said to be a public improvement by which the realty adjoining or near the locality of such improvement is especially benefited, or one which is confined to a locality and enhances the value of adjacent property in addition to the benefits which it confers upon the public generally. 'A local improvement within the meaning of the law is an improvement which by reason of its being confined to a locality enhances the value of property situated within the particular district, as distinguished from benefits diffused by it throughout the municipality.'"

We think this is the correct rule.

It is further argued by the Attorney General that the provisions of Rem. Code 1915, § 6877, which make it the duty of the city treasurer upon approval and confirmation of the assessment roll for any local improvement to certify a statement of the lands and the amount thereof to the commissioner of public lands, or to the state board of control, are limited by the following proviso:

"Provided, that no city * * * shall have jurisdiction to make such local improvement or levy an assessment against any of the lands of the state of Washington until notice of the making of such proposed improvement and the fixing of the time for hearing and confirming the same by the city * * * has been served upon the land commissioner or the board of control, as the case may be. * * *"

[7] It appears that no notice of intention to make the proposed improvement was served upon the land commissioner or the board of control prior to the passage of the condemnation ordinance; and it is claimed for that reason the city had no jurisdiction to make an assessment against the property of the state. It also appears that before the assessment was made the state had notice thereof, and appeared at the hearing upon the assessment roll and objected thereto. At the time the ordinance was passed it was apparently not known that the improvement would affect the property of the state. But when it was determined that the property of the state was specially benefited, notice was given to the state, or at least the state appeared at the hearing upon the assessment roll and objected thereto upon the ground that the city had no authority to levy an assessment for special benefits upon state lands. We think this was sufficient notice under the statute. All rights of the state were preserved, and it had an opportunity to be heard and was heard upon its liability to pay for the special benefits, or to object to the assessment for special benefits upon its property.

We find no error in the record. The judgment will therefore stand affirmed.

MORRIS, C. J., and ELLIS, MAIN, and HOLCOMB, JJ., concur.

(82 Or. 174)

WESTERN FARQUHAR MACHINERY CO. v. BURNETT.

(Supreme Court of Oregon. Dec. 12, 1916.)

1. BILLS AND NOTES ⇐164—NONNEGOTIABLE INSTRUMENTS—WHAT CONSTITUTE.

A promissory note, by which the maker agreed to pay a sum certain for value received on a date certain, with interest, which recited that it was given for the purchase of a threshing machine, to which title was reserved in the payee of the note, with right to declare forfei-

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ture at any time for nonpayment, even before the due date, is a nonnegotiable instrument.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 411–414, 417; Dec. Dig. ⟸164.]

2. BILLS AND NOTES ⟸318—NONNEGOTIABLE INSTRUMENT—PURCHASERS IN GOOD FAITH—RIGHTS.

The purchaser of a nonnegotiable instrument takes it subject to all the equities between the original parties, so that, where a note was given for the purchase price of a thresher under warranty and the machine was not as warranted, it was unnecessary to show that the payee was the agent of the assignee in making the sale.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 754; Dec. Dig. ⟸318.]

In Banc. Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Action by the Western Farquhar Machinery Company against B. P. Burnett. Judgment for defendant, and plaintiff appeals. Affirmed.

This was an action upon a promissory note, which is in the following form:

"$400.00. No. One. La Grande, Oregon, Sept. 10, 1915. November 15, 1915, after date, for value received, I, or either of us promise to pay to the order of the Oregon Co-operative Association four hundred and no—100 dollars, payable at La Grande, Oregon, with 8 per cent. interest from date. This note is given upon the purchase of one rake separator 22x28 with straw carrier, feeder tables and bagger, one nine horse Alamo engine mounted upon trucks upon the express condition the title or ownership does not pass from the said Union County Co-operative Association until this note and interest is paid in full, and the said Union County Co-operative Association or their assigns are hereby fully authorized and empowered to declare this note due any time they may feel insecure, even before the maturity of the note if they so elect, may take possession of said one rake separator 22x28 with straw carrier, feeder tables and bagger. One nine horse Alamo engine mounted on trucks, and upon its sale credit to the amount of the note. And in case suit or action is instituted to collect this note, or any portion thereof, I, or either of us promise and agree to pay in addition to the costs and disbursements provided by statute, such additional sum as the court may adjudge reasonable for attorney's fees to be allowed in said suit or action. P. O. Address, Hilgard, Ore. Due ——. B. P. Burnett."

It was alleged that the payee, the Oregon Co-operative Association, indorsed the note to plaintiff before due, and that plaintiff is now the owner and holder of the same. Defendant answered, admitting the execution of the note, but denied that it was transferred or delivered before due for value, and alleged that the note was executed in favor of the Oregon Co-operative Association at the request of plaintiff; that the said association was the agent of plaintiff in making the sale; that the machine described in the note was sold to the defendant at that time by plaintiff, acting through the Oregon Co-operative Association as its agent, for the sum of $850, evidenced by two promissory notes, each signed by defendant, and one of which is the note in suit here. The answer further alleges:

"That the defendant, at the time of said purchase, and at the time of the execution of said notes, was and still is a farmer, engaged in farming and raising grain in the vicinity of Starkey, Union county, Or., and purchased said threshing machine and outfit for the express purpose of threshing his own, and others' grain for a consideration, all of which plaintiff then well knew; that the plaintiff, being at the time of said sale to defendant a manufacturer and producer of threshing outfits, undertook and agreed to sell defendant said machinery, which was a threshing outfit, to thresh said grain, and as an inducement to defendant to purchase the same, sold said threshing outfit to defendant by description and under a representation and warranty by the plaintiff, at the time of so furnishing them, made to defendant, that said machinery was as represented, and would do good work when properly handled and adjusted, and that it was fit for the said purpose to which it was to be applied; that said threshing outfit was sold by plaintiff to defendant, and said notes were delivered upon the express intention and condition that this said warranty that the outfit would do good work was to operate as a condition that if it were not as warranted, it was not to be considered or in fact be a sale of same, and, further, the plaintiff, well knowing the character of the straw and grain which defendant would desire, and need to thresh with said outfit, represented and warranted and stated to said defendant that said threshing outfit would answer all needs and purposes for which defendant would desire to put said threshing outfit; that it would do good work and thresh at least 500 bushels of wheat or 600 bushels of oats in a working day; that said threshing outfit would properly thresh wheat, oats, and barley, and would properly clean and fan the grain, and would not throw or discharge any of the grain out of the machine with the straw, and would, in all respects, do good work and be a satisfactory machine to said defendant, and that it was not to be considered a sale if said machine failed to do good work; that said defendant thereafter accepted said threshing outfit on trial."

The answer sets forth the falsity of said representations, and states substantially that the machine was practically worthless for the purposes for which it was sold; that defendant notified plaintiff of the defects, and offered to return the machine, but plaintiff refused to receive it. There was a counterclaim for damages, but this was later eliminated by a ruling of the court. All the new matter in the answer was put in issue by an appropriate reply. There was a verdict and judgment for defendant, and plaintiff appeals.

Jno. S. Hodgin, of La Grande, for appellant. R. J. Green and Colon R. Eberhard, both of La Grande (Cochran & Eberhard, of La Grande, on the brief), for respondent.

McBRIDE, J. (after stating the facts as above). [1, 2] The gist of the defense in this case is that the association that sold the machine to defendant and to whom the note was given fraudulently misrepresented the machine to plaintiff, and thereby induced him to give his notes for a worthless machine. In our view of the case it makes no difference whether the seller was acting on its own responsibility or as agent for plaintiff, or whether the note was transferred with

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or without actual notice of the alleged fraud, or before or after it became due, for this reason: The note is nonnegotiable. This was decided by us in the case of Reynolds v. Vint, 73 Or. 528, 144 Pac. 526; the note there in suit being practically identical with the one here. Being nonnegotiable, the purchaser takes it subject to all the equities between the original parties. 8 Corpus Juris, p. 52, § 54, and notes. This being the law, the testimony in regard to agency was wholly irrelevant to any issue in the case, and the trial of that issue upon the whole gave the plaintiff a better case than that to which it was entitled. There was evidence sufficient to justify the court in submitting the question of the alleged deceit to the jury, and no error is directed against such ruling beyond those objections predicated upon the theory that it was necessary for defendant to prove that the Oregon Co-operative Association was the agent of plaintiff, which, as before stated, was unnecessary.

The judgment is affirmed.

(82 Or. 92)

DOERSTLER v. FIRST NAT. BANK OF ROSEBURG.

(Supreme Court of Oregon. Dec. 5, 1916.)

1. BANKS AND BANKING ⟸235—NATIONAL BANK EXAMINER—OFFICIAL OF BANK.
A national bank examiner is not an agent or officer of a bank which he examines.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 879–887; Dec. Dig. ⟸235.]

2. ESTOPPEL ⟸97—PERSONS TO WHOM ESTOPPEL IS AVAILABLE.
A statement to a national bank examiner by a depositor in reply to a question by the examiner as to whether loans by the president of the bank were authorized furnishes no basis for an estoppel in favor of the bank and against the depositor; the examiner not being an officer or agent of the bank.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 289; Dec. Dig. ⟸97.]

3. BANKS AND BANKING ⟸262—LIABILITY OF BANK FOR ACTS OF OFFICERS.
While a depositor in a national bank is presumed to know that the bank is without authority to lend his funds for his benefit as an individual, the president of a national bank, having made representations to an uneducated depositor that his deposit could be lent so as to be called within 30 days yet bring a fair rate of interest, cannot, the depositor understanding that the president was acting for the bank, make loans of the depositor's funds without rendering the bank liable.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1001–1006; Dec. Dig. ⟸262.]

4. TRIAL ⟸228(1)—INSTRUCTIONS—FORM OF INSTRUCTIONS.
An instruction submitting an issue to the jury need not follow the testimony of the witnesses if it accurately presents the situation.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 509, 510; Dec. Dig. ⟸228(1).]

5. TRIAL ⟸251(2) — INSTRUCTIONS — ISSUES PRESENTED.
Where a depositor in a national bank sued for deposits which had been loaned by the president, contending that the president was acting for the bank, while the bank contended that the president was acting individually, and that the depositor was estopped to assert liability against it, an instruction on the powers of national banks is not necessary; for the fact that the depositor attempted to authorize the bank to perform an ultra vires act in lending his money did not authorize the president to appropriate the funds and excuse the bank from liability for his misappropriation.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 589; Dec. Dig. ⟸251(2).]

6. TRIAL ⟸191(2)—INSTRUCTIONS—ASSUMPTION OF FACTS.
In an action against a national bank to recover deposits, the bank contended that the depositor consented to the act of the president in loaning his deposits, and that he was estopped to assert the liability of the bank. The court charged that an estoppel is that by which a person by his own act which he has committed precludes him from asserting the truth. Other portions of the charge clearly showed that the court did not assume that plaintiff's testimony at trial was true, and that the statement on which the estoppel was based was untrue. *Held*, that the charge was not erroneous as assuming that plaintiff's testimony at trial was true.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 422, 426; Dec. Dig. ⟸191(2).]

7. ESTOPPEL ⟸52 — EQUITABLE ESTOPPEL—DEFINITION.
An "estoppel" may be defined as where a man is concluded and forbidden to speak against his own act or deed, though it is to say the truth (quoting Words and Phrases, Estoppel).

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 121–125, 127; Dec. Dig. ⟸52.]

8. APPEAL AND ERROR ⟸1170(9)—REVIEW—INSTRUCTIONS.
Where the instructions correctly present the law, a judgment will not be reversed for mere technical inaccuracies.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4066, 4543; Dec. Dig. ⟸1170(9).]

In Banc. Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

Action by M. S. Doerstler against the First National Bank of Roseburg, a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover the balance due on alleged deposits made in defendant bank. The complaint alleged, in substance, that for many years prior to April 27, 1911, plaintiff had been a depositor of defendant bank, and that upon that date he had on deposit $5,365.90; that since said date defendant has paid him upon said deposit the sum of $6.90, and no more, leaving a balance due him of $5,359, for which he prays judgment, together with interest. The answer denied that plaintiff had on deposit the sum stated, or that there was any sum whatever due him from defendant. For a further answer defendant alleged that it was a duly authorized national bank; that on June 17, 1911, it sold all its assets, except certain overdue notes and accounts, and its good will to the Douglas National Bank, which assumed the deposit accounts of defendant; that at said date plaintiff had on deposit with defendant the

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sum of $6.90, and no more, which the Douglas National Bank afterwards paid him. There was also a plea of account stated. Another defense set forth was that plaintiff requested T. R. Sheridan, the president of defendant, to loan his money, and authorized him to withdraw it for that purpose, and that thereupon and long prior to the sale of the defendant bank to the Douglas National Bank Sheridan withdrew from the bank and loaned for plaintiff the following sums: $469 loaned to B. C. Agee, $1,700, to A. M. Kelsey, and $1,760, to T. R. Sheridan; that said sums, aggregating $3,929, were all the funds of plaintiff deposited in the defendant bank, except $6.90 paid to plaintiff as aforesaid; that Sheridan, acting solely as the agent of plaintiff, took the notes of the parties to whom the loans were made, inserted them in an envelope, marking it with the name of the plaintiff, and placed them in the vaults of defendant for safekeeping at the request of and for the sole use and benefit of plaintiff; that these notes were never mingled with the securities of the bank, but were kept separate and apart in that portion of the vaults devoted entirely to the safe-keeping of papers belonging to customers, being treated by defendant and its employés as private property, and in no sense as belonging to defendant. Then follows a plea of estoppel based upon the answer of plaintiff to a circular letter sent to him by R. W. Goodhart, United States bank examiner, which letter and answer mutatis mutandis are identical with the letter and answer referred to in Carlon v. First National Bank, 80 Or. 539, 157 Pac. 809, and are therefore not quoted in full. The plaintiff filed a reply putting in issue all the new matter in the answer except that he admitted signing the answer to the letter sent him by the bank examiner. Concerning that matter his reply is as follows:

"That at all times mentioned in the complaint and answer in this case T. R. Sheridan was and is the duly elected, qualified, and acting president of the First National Bank, and its chief executive officer, having the actual management and control of said bank; [that the business transacted between plaintiff and defendant was almost exclusively done through said Sheridan as the president, agent, and representative of said bank; that while plaintiff was a depositor of said bank, and prior to April 27, 1911, the said Sheridan, as president of defendant bank, informed plaintiff that the bank could lend some of the funds of plaintiff then on deposit in said bank, so as to earn for plaintiff 6 per cent. per annum, and that at any time plaintiff desired to use said funds said bank could call them in upon 30 days' notice; that thereafter the said bank rendered to plaintiff statements of account showing that certain funds of plaintiff had been loaned by said bank, but said bank never informed plaintiff as to the names of borrowers of said funds, or the nature of any security taken, or the length of time any such loan was to run or of any other particulars regarding the same, and plaintiff believed from said statements and from the representations theretofore made to plaintiff through said Sheridan that said bank had loaned plaintiff's funds, and that plaintiff could at any time obtain such funds from said bank by giving 30 days' notice, and that plaintiff would receive interest upon said funds; that said bank never delivered to plaintiff any promissory note or other security or evidence relating to any such alleged loans, and plaintiff was thereby led to believe, and did believe, that all securities taken for any such alleged loans were taken in the name of said bank, and plaintiff, because of said representations of said Sheridan, did not expect said bank to turn any such security or securities over to plaintiff, but plaintiff was at all times led by said bank to believe and did believe that plaintiff was simply to look to said bank for his money; that because of the foregoing facts, when plaintiff received from said bank statements showing that some of plaintiff's funds had been loaned, plaintiff made no objection, but relied upon the said representations;] that when the defendant bank ceased business in June, 1911, it was stated by the officers of the defendant bank and the officers of the Douglas National Bank of Roseburg, Or., that the said banks had consolidated, and for that reason plaintiff believed that the consolidated bank would still be responsible for his funds, and did not learn until long afterwards that the defendant bank had really gone out of business, and that the pretended consolidation was not a consolidation in fact, but that the said Douglas National Bank had simply taken over certain securities formerly held by the defendant bank, and had become responsible for certain specific deposits of the defendant bank; [that the plaintiff never learned until long after the closing of the defendant bank that it was claimed by the said bank or by said Sheridan that the said Sheridan had personally taken plaintiff's funds in the manner set forth in defendant's answer herein; that plaintiff never ratified or acquiesced in said alleged taking of his funds; that plaintiff never in any way authorized the said Sheridan to withdraw any funds whatever from plaintiff's account in said bank;] that while plaintiff's account with defendant bank was active, and while said bank was going into liquidation, plaintiff resided in Curry county, remote from any railroad communication, said bank being located at Roseburg, [and plaintiff was not informed as to the condition of said bank or as to the fact that it was going into liquidation, but at all times believed said bank to be a strong, wealthy institution, and its officers and managers thoroughly honorable and responsible;] that plaintiff is informed and believes, and therefore alleges, that B. C. Agee and A. M. Kelsey, who are mentioned in the defendant's answer herein as persons to whom the said Sheridan loaned some of the funds of plaintiff, were at the time of said alleged loans business associates of the said Sheridan, and if the said Sheridan paid into the hands of said Agee or said Kelsey any of the funds of plaintiff, it was done largely for the personal benefit of said Sheridan and done without the knowledge and consent of plaintiff; that plaintiff never directly or indirectly authorized the said Sheridan as an individual to lend any of the plaintiff's funds or withdraw any part thereof from defendant bank for any purpose, [and never authorized said bank to so dispose of plaintiff's funds that he would no longer be able to look to said bank as responsible for the repayment of same, but the only arrangement as to the lending of plaintiff's money which plaintiff ever made with defendant bank was that defendant bank, in consideration of defendant bank's putting a part of plaintiff's money to work to earn interest, that plaintiff would not call for the same except upon 30 days' notice to defendant bank;] that in the month of June or July, while plaintiff was on a visit to Hagerstown, Ind., plaintiff received the letter set out on page 5 of said answer, of R. W. Goodhard, national bank examiner; that neither at the time of the receipt of said letter nor until long afterwards did plaintiff receive

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any notice or knowledge that the defendant bank was liquidating its affairs or proposed to go out of business, [and when said letter was received by plaintiff, plaintiff assumed that the same was a mere banking formality, did not carefully read the same, and did not understand that the object thereof was to cause plaintiff to release the defendant bank from responsibility for said alleged loans;] that the statement appended to said letter which was signed by plaintiff was prepared by said Goodhart, ready for plaintiff's signature, [and plaintiff signed the same without understanding the real meaning thereof; that plaintiff supposed that by signing said letter he was simply ratifying the making of loans from plaintiff's funds by defendant bank under the arrangement hereinbefore mentioned, and that plaintiff would still have the right at any time upon 30 days' notice to demand said funds from said bank; that the plaintiff received his early education in the German language, his knowledge of the English language is limited; that he is unacquainted with banking methods and business forms generally, and when he signed said statement did not understand that the language of said statement had the meaning which it is now alleged is conveyed thereby; that plaintiff never intended to release defendant bank from liability for any of the funds which he had deposited with said bank, but only intended to ratify any loans which said bank had made to the extent that plaintiff would not seek to withdraw any of said funds without 30 days' notice; that plaintiff is informed and believes, and therefore alleges, that the said Goodhart, at the time of writing said letter to plaintiff knew that said bank's affairs were not in sound condition, and knew that the said T. R. Sheridan, its president, was in failing circumstances, and had been withdrawing from the accounts of various depositors of said bank large sums of money for the personal use or benefit of said Sheridan, under pretense of making loans therefrom, and the said Goodhart at all times concealed said knowledge from this plaintiff, and plaintiff long after the receipt of said letter believed said bank to be a sound and responsible financial institution and its officers reliable and trustworthy; that the said Goodhart thereby deceived plaintiff by his silence, and caused plaintiff to sign said statement without carefully investigating the meaning thereof; that had plaintiff been advised as to what the facts were, that said bank was going into liquidation, and that said Sheridan's conduct as president of said bank had been irregular or corrupt, plaintiff would not have signed said statement without taking legal advice so as to know the true meaning thereof; that said statement did not express plaintiff's true intent or meaning, and the signing thereof was due entirely to misapprehension and deception;] that in truth and in fact the alleged loans mentioned in said answer were really misappropriations by said Sheridan of the funds of said bank, and said Sheridan fraudulently concealed the real character thereof, [as said Goodhart well knew when he addressed said letter to plaintiff, and as the directors and other officers of said bank knew or could have known had they examined or scrutinized the affairs of said bank and the conduct of said Sheridan as president, as it was at all times their duty to do.]"

Plaintiff moved to strike out all those portions of the reply above quoted which are included in brackets, but the motion was overruled. Upon the trial defendant excepted to certain instructions given by the court and to the refusal of the court to give instructions requested by defendant. These matters will be noted in the opinion. There was a trial and verdict for plaintiff, and defendant appeals.

O. P. Coshow, of Roseburg, for appellant.
B. L. Eddy, of Roseburg, for respondent.

McBRIDE, J. (after stating the facts as above). [1-3] Many of the questions raised on this appeal have been settled in previous cases arising between the defendant and other depositors. The motion to strike out portions of plaintiff's reply to defendant's plea of estoppel was properly overruled. As held in Carlon v. First National Bank, supra, and Verrell v. First National Bank, 80 Or. 550, 157 Pac. 813, the bank examiner was not the agent of the bank, and no statement to him would estop the plaintiff from asserting the facts in an action between him and the bank. The plaintiff, however, assuming the facts to be well pleaded, replied by showing that he was not in possession of all the facts when he signed the certificate requested by the bank examiner, and, while the matter pleaded is somewhat prolix, we think it is relevant. The circumstances were not fully and fairly stated in the letter written by the bank examiner, and the certificate at the bottom which plaintiff was requested to sign was evidently framed so as to entrap the plaintiff into an affirmative answer. He was requested to sign if the statement appended was correct. It would have been but fair if the examiner had fully stated the exact condition of affairs as between the bank and Sheridan, and then asked the plaintiff to write a reply instead of making a partial statement of the circumstances and confining plaintiff to a "yes or nothing" answer. The other questions raised upon the testimony are discussed in the cases above cited, and need not here be considered. Taking the plaintiff's testimony as a whole, it tends to show that he was dealing with Sheridan as a representative of the bank, and supposed that it was the bank which was to loan his money for him. Granted that he was presumed to know as a matter of law what neither laymen nor lawyers usually know as a matter of fact, namely, that the bank could not loan his money for him, it does not follow that one of the officers of the bank had a right to use his official position and the bank's apparent responsibility as a false token to get plaintiff's money. No doubt, the method by which the bank would draw the money when a loan was made was rather hazy in his mind; as his letters introduced in evidence show that he is an uneducated, ignorant rancher. He knew that the bank had his money and was responsible, and the president of the bank in its place of business told him that he could loan it for him at 6 per cent. To him, as to most ignorant people, the president was the bank. As he expresses it in his crude way, "I supposed the bank would be security for the money;" that is, he supposed that he was dealing with the bank, and that it was responsible and able to replace his money within 30 days if he called for it. Had he presented a certificate

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of deposit for payment and Sheridan had said to him, "I will pay the certificate next week," neither he nor any one else would have understood that Sheridan intended to pay it out of his own pocket, and when Sheridan said, "I will loan your money and pay you 6 per cent. interest," he naturally supposed that Sheridan was speaking for the bank, and no doubt Sheridan intended that he should so believe. Assuming that there was technical error in the instructions, we would still be disposed to affirm the judgment under the provisions of section 3, art. 7, of our Constitution as amended; but there is no reversible error if we take the instructions as a whole.

[4] The first objection to the instructions is that the court, in stating what the plaintiff claimed, used the following language: "And that Mr. Sheridan told him [plaintiff] that he would lend the money for him at a premium." Whereas the plaintiff had actually employed this language: "So he told me he would loan it out for me and give me 6 per cent. interest." The court was not attempting to quote the testimony verbatim, but in a general way to call the attention of the jury to the issue between the parties, and the use of the word "premium" instead of "6 per cent. interest" could not mislead the jury.

[5] It is next objected that the court did not give an instruction correctly defining the limitations upon the powers of national banks. There was no occasion for such an instruction under the pleadings or evidence. The plaintiff's contention was that he had deposited his money in the bank, and the bank had refused to repay him. The defendant's contention was that plaintiff had authorized Sheridan personally to draw it out and loan it, and that he had drawn it out pursuant to such authority. The plaintiff takes issue here, and claims that he did not authorize Sheridan personally to loan the money, but that such authority was given the bank, and that Sheridan, the principal officer of the bank, drew it out and misappropriated it. If plaintiff made Sheridan his agent to loan the money and withdraw it from the bank for that purpose, and he did so, the bank is not liable, and the court, in effect, so instructed. If he attempted to make the bank his agent, and its president drew out the money and misappropriated it, no matter what the bank's limitations as to lending money for others may be, it is liable for the money so unlawfully withdrawn. It does not follow that, because plaintiff attempted to give the bank authority to do an act in relation to his deposit that was ultra vires, an officer of the bank could withdraw an amount of money equal to plaintiff's deposit, charge it up against plaintiff, and convert it to his own use. As remarked by Judge Deady in United States v. Randall, 1 Deady, 524, Fed. Cas. No. 16,118, where a postmaster was convicted of stealing gold dust from the United States mails, and the contention was made that gold dust was not mailable matter. "Because gold dust is not mailable, it does not follow that it is not stealable." So here it does not follow that because the bank had no right to act as a broker for plaintiff, and his alleged authorization of it to do so was void, the president of the bank could steal an amount and cover the theft by charging it against plaintiff's balance, and thereby relieve his bank of liability. Whether the bank under the circumstances could lawfully have loaned the money for plaintiff is a matter of no importance. It says that it did not loan it, and plaintiff says it did not loan it, so the whole question comes down to this: Did plaintiff authorize Sheridan personally as his agent to draw out and loan the amount of his deposit? This the court left to the jury, and it has found that he was not so authorized.

[6, 7] Exception is taken to some language used by the court in instructing the jury upon the law of estoppel. There are some expressions in this part of the charge which taken alone might seem to have a tendency to mislead, but when considered with the context this cannot be said to be their effect. The whole of the court's charge on that subject is as follows:

"The defendant then also, as I have already told you, has pleaded that which is denominated as estoppel. And you will remember the fact alleged with regard to that particular defense is this: That upon the inspector, Goodhart, sending to the plaintiff a letter making inquiry as to the matter of these particular charges against his account, he answered as has already been read to you with regard to it. And it is alleged in the answer that for this reason the plaintiff is estopped; that is, by his own answer. What is meant by that is that he is prevented from asserting his right or his claim to this particular money, because he made the answer which he did, and it becomes necessary for me, gentlemen, to explain the law applicable to that particular feature of the case, and it is also quite an important matter of the law for you to consider in applying it to the facts in this case. I cannot better illustrate the proposition of estoppel, gentlemen, than by this: We will suppose that one of you jurors owned a horse, and another person, a third party, came by and made a bargain with yet some one else for the horse, in your presence, the horse being yours, and you stood by and allowed the purchaser to pay his money for your horse and take it, supposing that it belonged to the seller, whereas, in truth and in fact, it belonged to you; the law says that under such circumstances as that, although the horse belonged to you in fact, you could not now assert it, because it would be fraud and imposition upon the person who was led to pay his money for the horse when you by acting at the time could have prevented it. And the law says that an estoppel is that in which a person by his own act which he has committed precludes himself from asserting the truth; and what they intend to say by this answer is that the plaintiff in this case, being asked at the time as to the facts in the matter, that he did not assert the truth, that is, contrary to what he now says, and for that reason he is estopped to state the truth, that is, to recover the money. Plaintiff says it belonged to him, he did not authorize Sheridan to make this loan to himself or these parties, and says he was dealing with the bank. They say that he should have said that at that time. Now

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as to that, gentlemen, I state to you that if you find under the law as I shall give the same to you in this case that the plaintiff has deposited the money as claimed in this bank, and that there is still due him an amount of money, if you find that under the law as I shall give it to you, applying it in this case, then he is not estopped in this case to assert his rights and to recover whatever you may find to be due him. This letter, which you have seen and which has been admitted—the plaintiff admits that he made this answer—is allowed to go before you, and you have the right to consider it. It is in the nature of a declaration made by him, you giving it such credit as you may deem it to be worth, and, after applying it, taking the answer he has made and all of the circumstances in the case, you find that the evidence is with the plaintiff, that the facts are as he claims them to be in regard to that contract or the authority which was given to the bank, then, notwithstanding the fact that he may have written the letter and which he admits that he did, he still would be entitled to recover what you find due him in this action. The reason for that is that the bank inspector did not represent the bank. And it is not in evidence that the bank in any way changed its position by reason of any answer that the plaintiff made. And so I say to you that so far as being estopped, conclusively estopped, to assert the claim which the plaintiff is making in this action, he is not estopped by the fact that he has written that letter; but if you should find from the evidence, and you have a right to consider the letter for that purpose, that he authorized Sheridan to make the loan or loans, and that the dealing was as claimed in defendant's answer as set forth, if you find that fact by preponderance of the evidence, then the plaintiff could not recover in the case. And I instruct you in connection with that fact that you have a right to consider the transaction, where it took place, the manner of dealing, under the circumstances, dealing with the bank, and then make up your mind from all of the evidence in the case as to whether or not the plaintiff authorized Sheridan to take this money from the bank, or whether he gave authority to the bank to lend his money as he stated. And I instruct you that, if he did authorize the bank to lend his money, that would not authorize Sheridan or any officer of the bank to appropriate his money."

In defendant's view of the case the vice of this instruction, the sting in the tail of the scorpion, so to speak, is embodied in these words:

"And the law says that an estoppel is that in which a person by his own act which he has committed precludes him from asserting the truth; and what they intend to say by this answer is that the plaintiff in this case, being asked at the time as to the facts in the matter, that he did not assert the truth, that is, contrary to what he now says, and for that reason he is estopped to state the truth, that is, to recover the money. Plaintiff says it belonged to him, he did not authorize Sheridan to make this loan to himself or these parties, and says he was dealing with the bank. They say that he should have said that at that time."

If we substitute the word "fact" for "truth," the instruction would substantially conform to Mr. Bouvier's definition of an estoppel, which he declares to be primarily:

"The preclusion of a person from asserting a fact by previous conduct inconsistent therewith on his own part, or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question."

While this definition may cover many instances, it is too narrow to cover all. A more comprehensive one is given in Demarest v. Hopper, 22 N. J. Law, 599, quoted with many others of like character in 3 Words and Phrases under this title:

"An estoppel is where a man is concluded and forbidden by law to speak against his own act or deed; yea, even though it is to say the truth."

Standing alone, that part of the definition given by the court in the instant case would be misleading, but, taking the whole instruction together, it is apparent that the court did not assume the truth of the statement made by plaintiff upon the witness stand in explanation of his contradictory statement made to the bank examiner. For instance, the court said in defining estoppel:

"What is meant by that is that he [plaintiff] is prevented from asserting his right or his claim to this particular money because he made the answer which he did"

—referring to plaintiff's answer to the Goodhart letter, and again:

"Plaintiff says it belonged to him; he did not authorize Sheridan to make the loan to himself or these parties. They say he should have said that at that time."

Further, it will be seen from that part of the charge first quoted that the court, while holding, as this court held in previous cases, that the letter was not technically an estoppel, instructed the jury in effect that they could consider it for the purpose of determining the question as to whether the plaintiff had, in fact, authorized Sheridan to withdraw the money, and that, if they found such to be the case, the plaintiff could not recover. The effect of the whole charge upon this subject was to submit to the jury the question of the truthfulness of his statements made in the letter to the bank examiner. We do not think that, considered as a whole, the instruction contains reversible error or that the jury could have been misled by it.

[8] Other objections are urged to expressions used by the court in its instructions, but, in our opinion, they go merely to their technical accuracy. If in the hurry of a nisi prius trial every word and sentence were weighed by this court with an eye singled to discover technical defects, there would be scarcely a law case brought here which would not be reversed, but such is not the duty of an appellate court. Here the question is: Were the issues fairly and fully given to the jury, was the law correctly stated to them, and if it transpires that the charge is in any respect inaccurate, was such inaccuracy of such a character that it might have changed the result of the verdict? We do not find such a state of affairs in this case. As we view it, there was but one question for the jury to decide, and that was whether the plaintiff authorized Sheridan as an individual and as his agent to draw against his deposit in the bank and to loan the money so withdrawn. If he did not, he should recover,

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and the verdict was right; and this issue, as well as the rules by which the evidence should be weighed, were, in our opinion, fairly stated without substantial error.

The judgment is affirmed.

(82 Or. 114)

CITY OF WOODBURN v. PUBLIC SERVICE COMMISSION OF OREGON et al.

(Supreme Court of Oregon. Dec. 5, 1916.)

1. CONSTITUTIONAL LAW ⟸81—POLICE POWER.

When an owner devotes his property to a use in which the public has an interest, he must submit to be regulated and controlled by the public for the common good.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. ⟸81.]

2. PUBLIC SERVICE COMMISSIONS ⟸7—REGULATION OF RATES.

The regulation of rates for the purpose of promoting the public health, comfort, safety, and welfare is an exercise of the police power of the sovereign.

[Ed. Note.—For other cases, see Public Service Commissions, Dec. Dig. ⟸7.]

3. CONSTITUTIONAL LAW ⟸135—IMPAIRMENT OF CONTRACTS—TELEPHONE RATES.

If a telephone company's franchise from a city, limiting rates to be charged, is deemed a contract, the mere fact that it was made prior to the enactment of the Public Utility Act (Laws 1911, p. 483), and before the state attempted to regulate such rates, does not debar the state from increasing the rates as fixed in the franchise, because when the state exercises its police power, it does not work any impairment of obligation of the contract; the possibility of the exercise of such power being an implied term of the contract.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 380–387; Dec. Dig. ⟸135.]

4. CONSTITUTIONAL LAW ⟸63(2)—RATE-FIXING POWER—DELEGATION TO MUNICIPALITY.

Since the right to regulate rates is an inherent element of sovereignty, such right can be delegated to a municipality only by clear and express terms, and all doubts must be resolved against the municipality.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 109, 111, 112, 114; Dec. Dig. ⟸63(2).]

5. MUNICIPAL CORPORATIONS ⟸64—LEGISLATIVE CONTROL—HOME RULE CHARTER.

Const. art. 11, § 2, providing that the legal voters of every city and town are granted power to enact and amend their municipal charter subject to the Constitution and criminal laws of the state of Oregon, and forbidding the Legislative Assembly to amend or repeal any charter for any municipality, etc., does not extend the authority of such municipalities over subjects not properly municipal and germane to the purposes for which municipal corporations are formed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 156, 157; Dec. Dig. ⟸64.]

6. MUNICIPAL CORPORATIONS ⟸619—REGULATION OF RATES.

The right to regulate rates is a matter of general concern, and does not pertain solely to municipal affairs.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1359; Dec. Dig. ⟸619.]

7. TELEGRAPHS AND TELEPHONES ⟸33(1)—REGULATION BY MUNICIPALITY—REGULATION BY STATE.

Where a municipality under its home rule charter, adopted under Const. art. 11, § 2, granted a telephone franchise limiting rates to be charged, and later the Public Utility Act (Laws 1911, p. 483), was enacted, the Public Service Commission had authority thereunder to authorize the company to charge higher rates.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 21; Dec. Dig. ⟸33(1).]

8. TELEGRAPHS AND TELEPHONES ⟸33(1)—REGULATION—PUBLIC SERVICE COMMISSION.

The failure of the Public Service Commission to file a statement of valuation mentioned in section 10 of the Public Utility Act (Laws 1911, p. 483) does not affect the validity of an order, allowing a telephone company to charge higher rates than those stated in its franchise, since the right to make the order does not depend upon filing the statement of valuation, and, in any event, under direct provision of section 75 of the act, technical omissions are immaterial.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 21; Dec. Dig. ⟸33(1).]

In Banc. Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Suit by the City of Woodburn against the Public Service Commission of Oregon and another. From judgment for plaintiff, defendants appeal. Reversed, and suit dismissed.

The city of Woodburn was incorporated by an act of the Legislative Assembly in 1889; but, on June 30, 1909, the legal electors of the city exercised the right of home rule conferred by section 2 of article 11 of the state Constitution, and amended their charter by enacting that the common council shall have authority:

"To grant franchises in, through and upon the streets of the city for public uses and public benefits;" and "to regulate and control or prohibit the placing of poles for electric lights or other purposes, and the suspension of electric and other wires along on cross streets of said city, and to require any or all already placed or suspended, either in limited districts or throughout the entire city, to be removed, or to be placed in such manner as it may designate beneath the surface of the streets or sidewalks."

In October, 1910, the common council granted by ordinance, and the United Telephone Company accepted, a franchise which permitted the company and its successors to construct and maintain telephone poles and wires along the streets of Woodburn. One section of the franchise fixed the monthly maximum rates to be charged for telephones. A telephone plant was installed by the United Telephone Company, but afterwards the franchise and plant owned by it were transferred to the Western Telephone Company, a corporation, and the present owner. The company has extended its lines beyond the boundaries of Woodburn, and it renders service to patrons who reside without, as well as to customers who live within, the city limits. In July, 1915, the Western Telephone Com-

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pany applied to the Public Service Commission for permission to increase the telephone rates. After giving due notice to both the company and the city, a public hearing was held, and the Commission ordered that the company be permitted to increase its rates on condition that the applicant avoid duplication by effecting a consolidation of its system with a competing telephone plant, which was then occupying the same territory. The two telephone plants were consolidated, and then on December 1, 1915, the Public Service Commission directed that the Western Telephone Company charge a specified schedule of rates. The charges specified in this schedule were greater than the rates fixed in the franchise, and for that reason the city then commenced a suit to vacate the order made by the Public Service Commission, and to enjoin the Western Telephone Company from charging any greater rates than those named in the franchise which had been granted by the city of Woodburn. After a trial the circuit court vacated the order of the Commission, and enjoined the company from exacting any charges in excess of the amounts specified in the franchise. Both the Public Service Commission and the Western Telephone Company appealed.

Charles L. McNary, of Salem, for appellant Western Telephone Co. J. O. Bailey, Asst. Atty. Gen. (Geo. M. Brown, Atty. Gen., on the brief), for appellant Public Service Commission. Geo. G. Bingham, of Salem, and Blaine McCord, of Woodburn, for respondent.

HARRIS, J. (after stating the facts as above). The decree appealed from is predicated upon the argument that the Public Service Commission was without power to permit the telephone company to charge urban customers more than the rates named in the franchise, which the city had granted prior to the creation of the Public Service Commission. Before proceeding with the discussion, attention will be called to some of the provisions of the legislation which was designed to clothe the Commission with authority to fix the rates to be charged for telephone service. An act to define public utilities and to provide for rate regulation was passed by the Legislative Assembly in 1911 (chapter 279, Laws 1911); but upon the filing of a petition in the office of the secretary of state the measure was referred to the legal voters of the state at the regular general election on November 5, 1912, when they approved the act by a majority vote, and afterwards on November 29, 1912, the Governor proclaimed that the measure was the law of the state. Laws 1913, p. 9. The Public Utility Act is similar to the legislation which has been adopted in most of the states, and confers upon the Commission the power to regulate telegraph, telephone, street railroad, heat, light, water, and power plants so that a safe and adequate service may be rendered to the public at reasonable and sufficient rates. The term "public utility" embraces every owner operating a telephone plant for the public "and whether said plant or equipment or part thereof is wholly within any town or city, or not." Section 1. Power to regulate public utilities is conferred upon a Commission which was, at that time, called the Railroad Commission of Oregon (section 6), but is now known as the Public Service Commission of Oregon. Chapter 241, Laws 1915. Every public utility is required to furnish adequate and safe service, and unjust or unreasonable charges are prohibited. The Commission may hold a hearing (section 42), on the complaint of patrons that the rates being charged are unreasonable or unjustly discriminatory (section 41), or on the complaint of any public utility "as to any matter affecting its own product or service" (section 46), or an investigation may be made on the motion of the Commission (section 45); and "if, upon such investigation, any rates * * * shall be found to be unjust, unreasonable, insufficient or unjustly discriminatory * * * the Commission shall have power to fix and order substituted therefor such rate or rates, * * * as shall be just and reasonable * * *" (section 43; and, furthermore, the Commission "shall determine and by order fix reasonable rate or rates, * * * in lieu of those found to be unjust, unreasonable, insufficient or unjustly discriminatory * * *" (section 51). The power of a municipality to regulate utilities is provided for by section 61 which declares that:

"Every municipality shall have power—(1) To determine by contract, ordinance or otherwise the quality and character of each kind kind of product or service to be furnished or rendered by any public utility furnishing any product or service within said municipality and all other terms and conditions not inconsistent with the act upon which such public utility may be permitted to occupy the streets, highways or other public property within such municipality and such contract, ordinance or other determination of such municipality shall be in force and prima facie reasonable. Upon complaint made by such public utility or by any qualified complainant as provided in section 41, the Commission shall set a hearing as provided in section 42 and if it shall find such contract, ordinance or other determination to be unreasonable, such contract, ordinance or other determination shall be void. Provided, however, that no ordinance or other municipal regulation shall be reviewed by the Commission under the provisions of this section which was prior to such review enacted by the initiative or which was prior to such review referred to and approved by the people of said municipality or while a referendum thereon is pending."

In brief, the facts present a situation where the legal voters of the city amended their municipal charter and conferred upon the common council authority to grant franchises in the streets for public benefits; the council exercised this chartered power, and granted a franchise to a telephone company, the rates to be charged to be fixed by the terms of the franchise; subsequently the Public Utility

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Act was passed by the Legislative Assembly, and then referred to all the voters of the state, who approved the measure at a general election; and, finally, upon the application of the telephone company, the Public Service Commission, acting under the authority of the Public Utility Act, specified a schedule of rates to be charged by the telephone company, and the city is now complaining because those rates exceed the charges fixed in the franchise.

The ultimate question for decision is whether the Public Service Commission was lawfully empowered to specify rates different from those fixed by the terms of the franchise. Throughout the discussion it must be borne in mind that the state, acting through the Public Service Commission, is a party to this suit, and consequently judicial precedents, arising out of controversies between none but the immediate parties to a franchise, are not controlling here. Moreover, the present juncture does not call for a decision of the relative rights of the grantor and grantee of a franchise as between themselves. Furthermore, the very purpose of this litigation is to determine whether the state has in fact empowered Woodburn to fix a schedule of rates which the state could not afterwards change, and hence we must also distinguish all those judicial utterances which followed a finding that the state had actually conferred upon a city the power unalterably to fix the rates to be charged by the grantee of a franchise.

[1, 2] Power to govern men and things is inherent in government, and when an owner devotes his property to a use in which the public has an interest, he must submit to be regulated and controlled by the public for the common good. Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; German Alliance Ins. Co. v. Kansas, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189. The right to regulate the rates to be charged by a public utility inheres in the power to govern. The regulation of rates for the purpose of promoting the health, comfort, safety, and welfare of society is an exercise of the police power, and is therefore an attribute of sovereignty. Hudson Water Co. v. McCarter, 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560; Yeatman v. Towers, 126 Md. 513, 95 Atl. 158; Benwood v. Public Service Com., 75 W. Va. 127, 83 S. E. 295, L. R. A. 1915C, 261; State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287, Ann. Cas. 1913D, 78; Idaho Power & Light Co. v. Blomquist, 26 Idaho, 222, 141 Pac. 1083. Being an inherent element of sovereignty, the whole sum of this police power may, for the purposes of this suit, be regarded as having been primarily and originally lodged in the state; and, without attempting to decide whether the state can relinquish any part of the police power to cities so as to be deprived of the right to resume the relinquished power, we shall now seek to ascertain whether the police power, to the extent of the right to regulate rates, passed from the sovereignty when the franchise was accepted by the telephone company. The inquiry involves two general questions: (1) The effect of the franchise when considered by itself; and (2) the result effected by the franchise when considered with relation to the city and state.

[3] If the franchise is deemed to be a contract between the city and telephone company, then the mere fact that it was made prior to the enactment of the public utility statute and before the state attempted to regulate the rates, does not debar the state from increasing the rates fixed in the contract between the parties, for the reason that the law wrote into it a stipulation by the city that the state could, at any time, exercise its police power and change the rates; and therefore, when the state does exercise its police power, it does not work an impairment of any obligation of the contract. The immediate parties to the franchise must contract with reference to the right of the government to exercise its inherent authority. The governed cannot, by contract, forestall the resuscitation of a dormant police power by the government; and therefore, unless the state actually divested itself of the right to exercise its police power, the agreement by which the city and company specified the rates was made subject to the right of the state to change them. Louisville & Nashville R. R. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 57 L. Ed. 297, 34 L. R. A. (N. S.) 671; Union Dry Goods Co. v. Georgia Pub. Service Corp., 142 Ga. 841, 83 S. E. 946; Yeatman v. Towers, 126 Md. 513, 95 Atl. 158; Minneapolis St. P. & S. S. M. Ry. Co. v. Menasha W. W. Co., 159 Wis. 130, 150 N. W. 411, L. R. A. 1915F, 732; Portland R. L. & P. Co. v. Railroad Com. of Oregon, 229 U. S. 397, 33 Sup. Ct. 820, 57 L. Ed. 1248; Hudson Water Co. v. McCarter, 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560; Benwood v. Public Service Commission, 75 W. Va. 127, 83 S. E. 295, L. R. A. 1915C, 261; State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287, Ann. Cas. 1913D, 78.

[4] We now come to a consideration of the result brought about by the franchise when viewed in connection with the authority of the city and state. The city argues that section 2 of article 11 of the state Constitution granted to Woodburn, and at the same time took from the Legislative Assembly, the right to legislate concerning the regulation of rates. When examining the contention urged by the municipality, we must not lose sight of the fact that the right to regulate rates by changing them from time to time as the welfare of the public may require is essentially a police power; and, since the right to regulate rates is an inherent element of sovereignty, when

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seeking to ascertain whether this part of the police power has been conferred upon the city, either with or without limitation, we are constantly governed by the rule that the delegation of the sovereign right to regulate rates must be clear and express, and all doubts must be resolved against the city. Home Telephone Co. v. Los Angeles, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176; Milwaukee Elec. Ry. v. Wisconsin R. R. Com., 238 U. S. 174, 35 Sup. Ct. 820, 59 L. Ed. 1254; Benwood v. Public Service Commission, 75 W. Va. 127, 83 S. E. 295, L. R. A. 1915C, 261; State ex rel Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287, Ann. Cas. 1913D, 78; City of Manitowoc v. Manitowoc & Northern Traction Co., 145 Wis. 13, 129 N. W. 925. Quoting from Charleston Consol. Ry. & Lighting Co. v. City Council, 92 S. C. 127, 75 S. E. 390:

"The state's power to regulate by compulsion the charges of public service corporations is one of such vast and increasing importance to the public that the courts will not attribute to the state the intention to part with it or to delegate it unless the intention is clearly and unmistakably expressed."

Unless the right to exercise the police power of regulating rates is referable to an unmistakable grant, the prices specified in the franchise are not exempt from interference by the Legislative Assembly. The city is relying upon section 2 of article 11 of the state Constitution as amended in 1906, and, which, so far as it is now material, is here quoted:

"Corporations may be formed under general laws, but shall not be created by the Legislative Assembly by special laws. The Legislative Assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the state of Oregon. * * *"

Much of the printed brief submitted for the Public Service Commission is devoted to an argument that the Legislative Assembly is not prohibited from enacting any general law, though it has the effect of amending city charters. The instant controversy, however, does not make it necessary to determine whether the Legislative Assembly is prohibited from passing general, as well as special, laws which affect city charters; and hence, waiving the question and without attempting to foreclose debate, it will be assumed that this investigation is governed by the prevailing opinion in Kalich v. Knapp, 73 Or. 558, 142 Pac. 594, 145 Pac. 22, where a majority of the court ruled that the Legislative Assembly is prohibited by section 2 of article 11 of the state Constitution from amending city charters by special or by general laws.

[5] While the Constitution grants to a city the right to enact and amend its charter and simultaneously prohibits the Legislative Assembly from enacting, amending, or repealing any charter for any city, nevertheless, neither the grant nor the prohibition includes any subjects except those "that are purely local and municipal in character" (Kalich v. Knapp, 73 Or. 558, 142 Pac. 594, 145 Pac. 22), or, as is stated in Branch v. Albee, 71 Or. 188, 205, 142 Pac. 598, the authority of the cities is not extended—

"over subjects that are not properly municipal and germane to the purposes for which municipal corporations are formed. We use the word 'municipal' as signifying what belongs to a city."

In Coleman v. La Grande, 73 Or. 521, 525, 144 Pac. 468, 470, this court ruled that:

"By granting and reserving to the people of municipalities the power to enact and amend their charters and adopt local or special laws, the state has not surrendered her sovereignty to the municipalities. Within their boundaries cities are clothed with power to regulate matters purely local. However, a city is not constituted as a sovereignty as regards all matters of legislation, but is still to a certain extent a mere agency of the state of which it is a part. Beyond such municipal boundaries and in matters of general concern not pertaining solely to local municipal affairs, cities are amenable to the general laws of the state, which do not infringe upon the right of cities to local self-government. This is so whether such laws are enacted by the Legislature or by the people of the state at large."

[6] The right to regulate rates is a matter of general concern, and does not pertain solely to local municipal affairs. Portland Ry., Light & Power Co. v. City of Portland (D. C.) 210 Fed. 667. It is true that the regulation of the rates for telephones in Woodburn may not immediately affect the pocketbooks of all the people of the whole state any more than does the prosecution of a person in a justice court for assault and battery, when taken alone and by itself, directly affect all the people of the whole state, and yet the state is just as much interested in promoting the comfort and general welfare of all the people as in preserving peace for all the people. In these modern times, when the activities of public utilities are not always confined to a single city, the people are especially concerned in the retention of the right to adjust rates to changing conditions, so that no person may be discriminated against and all may receive adequate service at reasonable rates, and at the same time affording sufficient returns to the public utility. The state guards its right to regulate rates so vigilantly that specific authority is necessary to compel a surrender of this element of sovereignty and in the language of the Supreme Court of the United States:

"The general powers of a municipality or of any other political subdivision of the state are not sufficient." Home Telephone Co. v. Los Angeles, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176; Milwaukee Elec. Ry. v. Wisconsin R. R. Com., 238 U. S. 174, 35 Sup. Ct. 820, 59 L. Ed. 1254.

The power to regulate rates does not appertain to the government of a city; it is not municipal in character; nor is it even an incident to a grant of authority to enact or amend a charter for a city or town. State

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ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287, Ann. Cas. 1913D, 78. The language appearing in State ex rel. Garner v. Missouri & K. Telephone Co., 189 Mo. 83, 88 S. W. 41, is peculiarly applicable here and for that reason we quote extensively from the reported opinion:

"Until the adoption of our Constitution in 1875 all cities in the state derived their charter powers from the General Assembly, and therefore whatever was contained in a city charter had the full force of a legislative enactment. But under that Constitution cities of certain descriptions were authorized to frame their own charters. A charter, framed under that clause of the Constitution within the limits therein contemplated has a force and effect equal to one granted by an act of the Legislature. But it is not every power that may be essayed to be conferred on the city by such a charter that is of the same force and effect as if it were conferred by an act of the General Assembly, because the Constitution does not confer on the city the right * * * to assume all the powers that the state may exercise within the city limits, but only powers incident to its municipality, yet the Legislature may, if it should see fit, confer on the city powers not necessary or incident to the city government. There are governmental powers, the just exercise of which is essential to the happiness and well-being of the people of a particular city, yet which are not of a character essentially appertaining to the city government. Such powers the state may reserve to be exercised by itself, or it may delegate them to the city, but until so delegated they are reserved. The words in the Constitution, 'may frame a charter for its own government,' mean may frame a charter for the government of itself as a city, including all that is necessary or incident to the government of the municipality, but not all the power that the state has for the protection of the rights and regulation of the duties of the inhabitants in the city, as between themselves. * * * The regulation of prices to be charged by a corporation intrusted with a franchise of a public utility character is within the sovereign power of the state that grants the franchise or that suffers it to be exercised within its borders, and that power may be, with wisdom and propriety, conferred on a municipal corporation, but it is not a power appertaining to the government of the city, and does not follow as an incident to a grant of power to frame a charter for a city government."

[7] The right of the state to regulate rates by compulsion is a police power, and must not be confused with the right of a city to exercise its contractual power to agree with a public service company upon the terms of a franchise. The exercise of a power to fix rates by agreement does not include or embrace any portion of the power to fix rates by compulsion. When Woodburn granted the franchise to the telephone company, the city exercised its municipal right to contract, and it may be assumed that the franchise was valid and binding upon both parties until such time as the state chose to speak; but the city entered into the contract subject to the reserved right of the state to employ its police power and compel a change of rates, and when the state did speak, the municipal power gave way to the sovereign power of the state. Benwood v. Public Service Commission, 75 W. Va. 127, 83 S. E. 295, L. R. A. 1915C, 261; State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287, Ann. Cas. 1913D, 78; City of Monroe v. Detroit M. & T. S. L. Ry., 187 Mich. 364, 153 N. W. 669; City of Manitowoc v. Manitowoc & Northern Traction Co., 145 Wis. 13, 129 N. W. 925; Charleston Consol. Ry. & Lighting Co. v. City Council, 92 S. C. 127, 75 S. E. 390; Duluth St. Ry. Co. v. Railroad Commission, 161 Wis. 245, 152 N. W. 887; California-Oregon Power Co. v. City of Grants Pass (D. C.) 203 Fed. 173. Other instructive cases are: Borough of North Wildwood v. Board of Pub. U. Com'rs, 88 N. J. Law, 81, 95 Atl. 749; Worcester v. Street Railway Co., 196 U. S. 539, 25 Sup. Ct. 327, 49 L. Ed. 591; City of Dawson v. Dawson Telephone Co., 137 Ga. 62, 72 S. E. 508; City of Kenosha v. Kenosha Home Telephone Co., 149 Wis. 338, 135 N. W. 848; Borough v. Ohio Valley Water Co., 245 Pa. 114, 91 Atl. 236; Phillipsburg v. Board of Pub. U. Com'rs, 85 N. J. Law, 141, 88 Atl. 1096.

The power to fix rates by compulsion as distinguished from the power to fix rates by agreement is not granted to cities or towns, nor is the right of the Legislative Assembly to legislate upon that subject curbed, by section 2 of article 11 of the state Constitution, because in its essence it is neither a municipal power nor an incident to a pure municipal power, and therefore, even under the rule announced by the majority opinion in Kalich v. Knapp, 73 Or. 558, 142 Pac. 594, 145 Pac. 22, the Legislative Assembly was not prohibited from making the Public Utility Act applicable to urban as well as extraurban territory. The defendants have vigorously contended that approval of the Public Utility Act by the vote of the people made the measure valid, even though it be conceded that the act would be invalid without the approval of the electorate. It will not be necessary, however, to decide whether a measure passed by the Legislative Assembly is validated when referred to the people and approved by them, when in the absence of such reference and approval the measure would be invalid because of the prohibition contained in section 2 of article 11; and we, therefore, leave this question open for future consideration.

The city has limited the inquiry to the question of whether the Commission possessed the necessary power to change rates, and hence we are not now concerned with the amount or reasonableness of the rates. Our conclusion is that the Public Service Commission, as the representative of the state, had lawful authority to change the telephone rates.

[8] Any failure of the Commission to file the statement of valuation mentioned in section 10 does not affect the validity of the order involved in the appeal. The right to make the order did not depend upon filing the statement of valuation with the city recorder; and, moreover, section 75 of the Pub-

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lic Utility Act provides that no order of the Commission shall be declared illegal "for any omission of a technical nature in respect thereto."

The decree of the circuit court is reversed, and the suit is dismissed.

(82 Or. 179)

HODGES v. BLAYLOCK et ux.

(Supreme Court of Oregon. Dec. 12, 1916.)

1. BILLS AND NOTES ⟸405—LIABILITY FOR ATTORNEY FEES—DEMAND OF PAYMENT.

Since the Negotiable Instruments Act (L. O. L. §§ 5903, 5905, 5906, 5907, 5911), requiring a formal demand of payment of a note, expressly relates only to the demand necessary to charge an indorser or some other person secondarily liable, it follows from the maxim "expressio unius est exclusio alterius," that any reasonable request to pay a demand note, containing a provision for the payment of attorney's fees, is sufficient to put the maker in default, if he fails to discharge his obligation.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1064–1066, 1068–1070; Dec. Dig. ⟸405.]

2. BILLS AND NOTES ⟸422(1)—DEMAND FOR PAYMENT—WAIVER OF PRESENTATION.

The maker of a demand note waived its actual presentation upon a demand for payment by not asking for it, and by refusing payment on the ground that he did not then have the money and that he needed the amount to support his family.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1196–1199, 1203–1208; Dec. Dig. ⟸422(1).]

In Banc. Appeal from Circuit Court, Malheur County; Dalton Biggs, Judge.

Action by John Hodges against S. E. Blaylock and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

This is an action founded upon a promissory note of which the following is a copy:

"$638.75. Juntura, Oregon, June 25, 1915.

"On demand after date, without grace, we promise to pay to the order of John Hodges, at Juntura, Oregon, six hundred thirty eight and 75/100 dollars in gold coin of the United States of America of the present standard value, with interest thereon in like gold coin at the rate of six per cent. per annum from date until paid, for value received. Interest to be paid annually, and if not so paid the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note, and in case suit or action is instituted to collect this note, or any portion thereof, we promise and agree to pay an additional sum, in like gold coin, as the court may adjudge reasonable, for attorney's fees to be allowed in said suit or action. S. E. Blaylock.
"Mrs. S. E. Blaylock."

The complaint is in the usual form, and alleges that the plaintiff is the owner and holder of the note; that although payment thereof had been demanded from the defendants, they had not paid any part of it; and that $75 is a reasonable sum as attorney's fees. The answer admits the execution of the note, that plaintiff is the owner and holder thereof, and that no payment has been made thereon, but denies that prior to the commencement of this action any demand for the payment was made, or that $75 or any other sum would be reasonable as attorney's fees. For a further defense it is alleged the defendants executed the note; that no demand for the payment thereof had been made upon either of the defendants who have at all times been ready, willing, and able to pay the sum so due upon reasonable demand therefor, and that the only demand that has been made was the commencement of this action; that the defendants tender to the clerk of the court for plaintiff $638.75, with interest at 6 per cent. from June 25, 1915, in full payment to December 28, 1915, when the answer was filed. The reply put in issue the allegations of new matter in the answer, and the cause, having been tried, resulted in a verdict and judgment for the amount due on the note, $34.50 as attorney's fees, and the costs and disbursements of the action, and the defendants appeal.

Robert M. Duncan, of Vale, for appellants. P. J. Gallagher, of Ontario, for respondent.

MOORE, C. J. (after stating the facts as above). It is contended that the note sued on provided for the payment of attorney's fees, or special damages, in case of default, which failure cannot arise until after a formal demand, which was never made, and hence an error was committed in giving a judgment for a greater sum than was deposited with the clerk. In support of the principle thus asserted, reliance is placed upon the case of Prescott v. Grady, 91 Cal. 518, 520, 27 Pac. 755, where it was ruled that in an action on a demand note, providing for the payment of a reasonable attorney's fee in case of suit thereon, the maker was not in default, as respects liability for special damages, until there had been a breach of the contract according to its terms, by failure to pay upon demand, and a denial that payment of the note was ever demanded raised a material issue as to such liability, which issue precluded a judgment upon the pleadings for an attorney's fee. The reason assigned for the rule insisted upon herein is practically an excerpt from the opinion in the case mentioned, where it is said:

"Appellant does not wish to open the well-settled question whether suit may be brought upon a note payable on demand without other demand than the bringing of the suit, but he claims that the contract sued on is more than a promissory note, that it contains a stipulation for special damage in case suit be brought, and that he ought not to be held to have incurred this liability until he is in default according to the terms of his contract; that is, until he has failed to pay on demand."

The testimony of the plaintiff is to the effect that about the 10th or 12th of July, 1915, and five months before this action was commenced, he met the defendant on the

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road near his home which is about three miles from Juntura, Or., and asked him for the money and the defendant said he did not then have the money with which to pay the debt.

"Q. Did he promise he would pay it at any future time? A. He said I was young and single, and I didn't need the money at the present time, and he needed it to support his family on. * * * Q. Did you have this note with you at the time you made the demand? A. No, sir."

The defendant S. E. Blaylock, as a witness in his own behalf, denied that any request was ever made for the payment of the money due on the promissory note until this action was commenced, when a copy of the complaint, containing a demand for judgment, was served upon him. P. J. Gallagher, the plaintiff's attorney, testified that he informed his client of the necessity of making a demand upon the defendant for the payment of the note before commencing an action thereon. Referring to the occasion of such advice, the witness further testified:

"Some time after that Mr. Blaylock, the defendant in this case, came into my office in Juntura, and we had a conversation relative to some other business matters that I was looking after for Mr. Hodges, and he at that time wanted to employ me to take care of his side of the case, and I told him that I could not at that time. In that conversation he made this statement to me: That Hodges was treating him unfair in the matter regarding their business transactions; that he had already made a demand on him for the amount due on this note—I think the note at that time was not hardly a month old, I think; but the demand had been made, and Hodges wasn't treating him right, and he didn't think he would pay the note, and wasn't going to pay it."

Provisions of the Negotiable Instruments Act are relied upon as constituting the manner of making demand for the payment of the amount of the note, viz.:

"Presentment for payment is not necessary * * * to charge the person primarily liable on the instrument; but if the instrument is by its terms payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part; but except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers." L. O. L. § 5903.

"Presentment for payment, to be sufficient, must be made (1) by the holder, or by some person authorized to receive payment on his behalf; (2) at a reasonable hour on a business day; (3) at a proper place, as herein defined; (4) to the person primarily liable on the instrument, or, if he is absent or inaccessible, to any person found at the place where the presentment is made." Id. § 5905.

"Presentment for payment is made at the proper place (1) where a place of payment is specified in the instrument and it is there presented; (2) where no place of payment is specified, but the address of the person to make payment is given in the instrument, and it is there presented; (3) where no place of payment is specified and no address is given, and the instrument is presented at the usual place of business or residence of the person to make payment; (4) in any other case, if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence." Id. § 5906.

"The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it." Id. § 5907.

"Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all." Id. § 5911.

[1] If these statutory requirements must be observed, in order legally to demand from a maker the payment of a promissory note on which there is no indorser or other person secondarily liable, so as to entitle the holder to recover attorney's fees provided for in the negotiable instrument, as special damages in case of default, it will be seen from the testimony referred to that there were failures to comply with the provisions of the enactment quoted. Since the formal demand so specified is required only in order to charge an indorser or some other person secondarily liable on a negotiable instrument, it must necessarily follow, from the maxim "expressio unius est exclusio alterius," that any reasonable request to pay a demand note, of the kind referred to, is sufficient to put the maker in default if he fails to discharge the obligation.

It will be remembered the plaintiff testified he did not have with him the promissory note when he demanded from Mr. Blaylock the payment thereof. A text-writer, in discussing this subject, remarks:

"To render a presentment for payment sufficient, the instrument must be exhibited to the person from whom payment is demanded. This rule has been stated as follows: 'No valid presentment and demand can be made by any person without having the note in his possession at the time, so that the maker may receive it in case he pays the amount due, unless special circumstances, such as the loss of the note or its destruction, are shown to excuse its absence.' The right of such person to an actual exhibition or production of the instrument may be waived by failing to ask for it, and refusing payment on other grounds." Selover, Neg. Ins. (2d Ed.) § 193.

In support of the last sentence repeated, the author cites the following cases: Legg v. Vinal, 165 Mass. 555, 43 N. E. 518; Waring v. Betts, 90 Va. 46, 17 S. E. 739, 44 Am. St. Rep. 890; King v. Crowell, 61 Me. 244, 14 Am. Rep. 560; Lockwood v. Crawford, 18 Conn. 361; Gilpin v. Savage, 60 Misc. Rep. 605, 112 N. Y. Supp. 802.

[2] If, therefore, the note should have been presented in order to constitute a valid demand for its payment, and if the plaintiff's testimony is to be believed, which was for the jury to determine, the defendant S. E. Blaylock waived an exhibition of the negotiable instrument by not asking for it, and by refusing payment on the ground that he did not then have the money, and that he needed that sum with which to support his family.

No error was committed by the trial court, as alleged in several assignments not particularly referred to, and the judgment is affirmed.

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(82 Or. 185)

MT. EMILY TIMBER CO. v. OREGON-WASHINGTON R. & NAV. CO.

(Supreme Court of Oregon. Dec. 12, 1916.)

1. RAILROADS ⟸481(2)—OPERATION—FIRES—ADMISSIBILITY OF EVIDENCE.

In an action for damages caused by fire alleged to have been set by defendant's locomotive, the rule justifying the admission of evidence of other fires set by defendant's locomotives will not render admissible testimony that twelve days after the fire a witness saw burned-over areas within the right of way; there being no testimony of the passing of engines at or immediately prior to the ignition of a fire.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1719; Dec. Dig. ⟸481(2).]

2. RAILROADS ⟸484(1, 4)—OPERATION—FIRES—INSTRUCTION.

In an action for damages caused by fire alleged to have been set by defendant's locomotive, where the evidence did not suggest a deficiency in number of men, and did not bear on the incompetency of mechanics, machinists, fire patrol, or laborers, an instruction withdrawing from the jury the consideration of allegations that defendant failed to employ competent or careful mechanics or machinists to repair its engines or to use careful or sufficient fire patrols, section men, or laborers to protect the right of way and adjacent land from fires, was properly given.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1740, 1743; Dec. Dig. ⟸484(1, 4).]

3. TRIAL ⟸296(3)—OPERATION OF RAILROADS—FIRES—INSTRUCTIONS.

In an action for damages caused by fire alleged to have been set by defendant's locomotive, an instruction complained of, taken with another given instruction, *held* to put the question of care required of defendant in procuring and utilizing appliances to prevent the escape of fire from its locomotives fairly before the jury and to enjoin the proper degree of care upon the defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709; Dec. Dig. ⟸296(3).]

4. RAILROADS ⟸456—OPERATION—FIRES—INSTRUCTION.

As modern science and ingenuity have not yet reached a point of perfection or state where it is possible to propel steam locomotives in such manner as to absolutely prevent the escape of sparks of fire, the law does not require of a railroad company more than such reasonable care and diligence as the state of science will admit, nor make it liable for fires caused by the escape of ordinary and usual quantities of sparks while the engine is operated in the ordinary course of business by competent employés.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1673–1676; Dec. Dig. ⟸456.]

5. RAILROADS ⟸480(4)—OPERATION—FIRES—NEGLIGENCE.

In an action for damages caused by fire alleged to have been set by defendant's locomotive, although negligence may be inferred from circumstantial evidence, in order to establish negligence plaintiff must prove by a preponderance of evidence that the fire was communicated by sparks from defendant's locomotive, excluding every other theory as to the cause or origin of such fire.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1713; Dec. Dig. ⟸480(4).]

6. TRIAL ⟸237(3)—DEGREE OF PROOF—INSTRUCTIONS.

Under L. O. L. § 688, providing that the law does not require a degree of proof beyond moral certainty or that degree of proof which produces conviction in an unprejudiced mind, and section 868, subd. 5, making it the duty of the court to instruct that in civil cases the affirmative of the issue shall be proved, and the finding on contradictory evidence shall be according to the preponderance, in an action for damages for fire alleged to have been caused by defendant's locomotive, an instruction that the law does not require absolute proof or absolute certainty and is satisfied when a jury of unprejudiced minds, after hearing the testimony, have an abiding conviction of the truth of the claim, and that it is incumbent upon plaintiff to prove the same by a preponderance of competent evidence, was proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 548; Dec. Dig. ⟸237(3).]

In Banc. Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Action by the Mount Emily Timber Company against the Oregon-Washington Railroad & Navigation Company. Judgment for defendants, and plaintiff appeals. Affirmed.

This is an action for damages to timber and trees growing on plaintiff's land caused by a fire alleged to have been occasioned by the negligence of defendant. The cause was tried to the court and jury and a verdict rendered in favor of defendant. From a resulting judgment, plaintiff appeals.

The particular allegations of negligence in the complaint are:

(1) That during the summer of 1914, and more especially on the 12th day of August, 1914, the defendant neglected and failed to keep its said right of way through said sections (21 and 22) free and clear of dry grass, weeds, and other vegetation, trash, débris, and combustible material, but wrongfully and negligently allowed the grass, weeds, and other vegetation to grow, mature, and dry and accumulate with other débris, trash, and combustible materials upon said right of way in sections 21 and 22, in large quantities, thereby rendering and making the same subject and liable to be set on fire by sparks, cinders, and brands from defendant's engines, locomotives, cars, and trains passing through said sections, and thereby communicating such fires to the adjacent lands and timber.

(2) That during said summer of 1914, and more especially on or about the 12th day of August, 1914, the defendant failed, neglected, and omitted to provide its engines, locomotives, cars, and trains with effective, sufficient, or suitable netting, spark arresters, mechanism, fire and draft apparatus, so as to prevent sparks, cinders, and brands from being blown and forced from such engines, locomotives, cars, and trains at, upon, and over said right of way and the adjacent lands thereto, or to keep the same in an effective state of repair during said time.

(3) That the defendant, during said times, and more especially on or about the 12th day of August, 1914, omitted, neglected, and failed to employ and place in charge of said engines, locomotives, cars, and trains competent, careful, or suitable engineers, firemen, or trainmen.

(4) Or to employ competent or careful mechanics or machinists to properly overhaul and keep in an effective state of repair said engines, locomotives, cars and trains, or the fire apparatus, spark arrester, netting, and drafts thereon.

(5) Or to employ and use careful, competent, or sufficient fire patrol, section men, and laborers upon said railroad track and right of way, so to keep such right of way free and clear of grass, weeds, and other vegetation, débris, trash, and combustible materials.

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Defendant denied any negligence on its part and pleaded that at or about the time the fire broke out train extra 507 west passed that point, and that no other train had passed there for two hours or more before that; that this train was pulled by two engines of first-class construction properly maintained, in good condition and repair, and each equipped with suitable and proper spark arresting devices, including proper and suitable mechanism, netting, and fire and draft apparatus, all of which appliances were continuously during the time in a proper condition and repair; that the train was operated along the track and right of way in the usual and customary course of the railroad company's business; that due and reasonable care was used by the defendant in acquiring, keeping, maintaining, and equipping its locomotives and all the parts thereof in a safe, suitable, and secure condition for the prevention of the escape of fire therefrom and to properly and skilfully operate them. The reply put in issue the most of the defendant's answer.

The evidence introduced tended to show the case as made by plaintiff substantially as follows: During all the times involved in this controversy plaintiff was the owner of a large tract consisting of several thousand acres of mountain timber lands, a portion of which is located in sections 21 and 22, township 2 S., range 36 E. W. M. The defendant owns a right of way for its railroad which passes through the sections named and adjoins the plaintiff's premises. The lands and right of way involved are located on the eastern slope of the Blue Mountains between Hilgard and Kamela, a distance of approximately four miles west of the former place, to what is known as the lower or eastern end of Glover Siding. The distance between the beginning of the siding and Glover Station, the upper point, is about three-fourths of a mile and extends up a steep grade climbing the mountain in a westerly direction to the Glover Section House. On August 12, 1914, a fire occurred along or near the defendant's right of way, and the testimony tends to show that at the lower point, known as the siding, a fire either started within the right of way and burned out to the lands of the plaintiff, or from the outside burned to and within the right of way a distance of perhaps 25 feet. At the upper point, also, a fire started at or about the same time either within the right of way or just outside, and burned a distance of 25 feet within the right of way. The tracks of each of the fires widened out as they passed out of the right of way and after getting out onto the lands of the plaintiff converged together into one large fire that spread out and burned over approximately 2,000 acres of timber and brush lands, much of which had been logged off, causing damage as claimed by the plaintiff to the extent of about $10,000. The fire, according to the testimony, started somewhere between 10 and 12:30 o'clock, either on the defendant's right of way or in the immediate vicinity thereof, and in a very short time thereafter was beyond control. The day was dry and hot. The locality where the fire originated was a steep grade. The right of way was covered with a heavy growth of dry grass which had not been mowed or cleared off during the year 1914. The day of the fire thirteen locomotives of the defendant company passed over the track and along the points where the fire occurred. Two heavy freight trains, each being hauled by two engines, passed upgrade in a westerly direction along the fire line. One of them, extra freight No. 507, drawn by engines 507 and 700, passed through the siding going west at about 11 o'clock a. m., and consisted of 51 freight cars. Engine 507 was at the head of the train, and engine 700, known as the "helper," was located 14 cars from the rear. No. 23, another freight train, passed over the line at about 12:30 o'clock going west and upgrade at the points where the fire occurred. It was drawn by two engines, Nos. 511 and 702, and consisted of a train of 40 cars. Other locomotives that passed the point in controversy during the day hauled the passenger trains or were engines passing back and forth as helpers of other trains. The two helper engines, 700 which hauled extra freight train 507, and engine 702 which hauled freight train No. 23 west, had not been inspected during the month of August, except once, on the 20th and 25th respectively. No record appears of any prior inspection of either locomotive. No. 17, a passenger train, passed the place in controversy going upgrade at 9:30 or 9:35 a. m. on the 14th, and was drawn by locomotive No. 210.

The testimony shows that this locomotive was inspected on August 15th, and the spark arrester and basket were found to be out of repair and defective. The large helper engines, 700 and 702, which drew the freight trains westward on that day, both contained wire netting known as 2½ by 2½, while the other engines were supplied with spark arrester and wire netting of a finer grade and known as 4 by 4 netting. About 12 days after the fire, Mr. J. T. Williamson visited the scene and inspected the premises. The testimony offered tends to show that for several feet outside the right of way at both the lower and upper points described and all along the line upgrade between the two, the right of way and the adjacent grounds of the plaintiff were thickly sprinkled with coal cinders varying from dust up to the size of a man's finger nail. Some of these cinders were old and others new and fresh. Between the lower and the upper points along the siding, nine separate fires had occurred within the right of way of the defendant. At the trial in making its case in chief plaintiff was compelled to rely upon circumstantial evi-

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dence to establish its case, as the place where the fire broke out is located in the Blue Mountains at rather a remote spot.

J. H. Raley, of Pendleton, and Jno. S. Hodgin, of La Grande, for appellant. C. E. Cochran, of Portland (W. W. Cotton, of Portland, and Crawford & Eakin, of La Grande, on the brief), for respondents.

BEAN, J. (after stating the facts as above). [1] The plaintiff makes eight assignments of error. The first is the exclusion from consideration by the jury of certain evidence of other fires upon the defendant's right of way in that locality and rejection of evidence of the same purport. Exceptions were saved to seven instructions given to the jury. Mr. Williamson, manager of the timber company, testified in part on behalf of plaintiff as follows:

"It is a north slope all along there inside of the right of way and in the pine grass along these cuts between the block signal station, between the siding and Glover Section House, I found where there has been nine fires started fresh; all appeared to be, might have been, at the same time, and two had been some time before. I will say that every fire I found—some of them had only burned, just were fires in the grass inside the right of way, and inside the fence and to the best of my knowledge within a hundred feet."

Counsel for defendant moved the court to take this evidence from the jury. The court ruled that the motion should be allowed unless it should be shown that an engine of defendant passed along just prior to the fires being set out. The discovery of these other fires was made by the manager of the plaintiff some 10 or 12 days after the fire of which complaint is made. By instruction 12, the court charged the jury in effect that the mere presence along the right of way of small burned-over areas was not a circumstance justifying any inference of liability of negligence on the part of defendant. These rulings constitute two of the assignments of error which we will consider together. There was no evidence tending to show that any of the defendant's engines passed this point prior to the other fires mentioned by Mr. Williamson or to connect their origin with the company's engines. The rule justifying the admission of evidence of other fires set by defendant's engines does not admit testimony to the effect that 12 days or so after the fire a witness saw burned-over areas within the right of way; there being no testimony of the passing of engines at or immediately prior to the ignition of a fire. Hawley v. Sumpter Ry. Co., 49 Or. 509, 519, 90 Pac. 1106, 12 L. R. A. (N. S.) 526; Taffe v. O. R. & N. Co., 60 Or. 177, 180, 117 Pac. 989; 67 Am. & Eng. R. Cas. (N. S.) 130; La Salle v. Central R. R. of Oregon, 73 Or. 203, 144 Pac. 414. Evidence of other fires is admissible only by showing the same to have seasonably followed in the wake of an engine from whose stack sparks were being emitted. Koontz v. O. R. & N. Co., 20 Or. 3, 16, 23 Pac. 820; Hartford Ins. Co. v. Cent. R. R. of Oregon, 74 Or. 144, 149, 144 Pac. 417. In Hawley v. Sumpter Ry. Co., supra, two witnesses deposed over objections that they had seen other fires along defendant's right of way, but there was no evidence tending to show the origin of the fires or that the defendant was in any way responsible for them. At page 520 of 49 Or., at page 1110 of 90 Pac. [12 L. R. A. (N. S.) 526], the court ruled as follows:

"The plaintiff having failed to offer in connection with the testimony of these two witnesses, to which objection was made, any testimony tending to connect, either directly or remotely, any of the fires mentioned by them with the operation of the road by defendant, such testimony was not admissible. * * *"

The ruling of the court in these respects was in conformity with the settled law.

[2] Error is predicated upon instructions Nos. 10 and 11, whereby the jury were told that they should not consider the allegation that defendant failed to employ competent or careful mechanics or machinists to keep in a state of repair its engines, or use careful, competent, or sufficient fire patrols, section men, or laborers, to protect the right of way or adjacent land from fire. By the bill of exceptions the trial judge certified the following statement:

"There was no testimony relating to the competency of the enginemen, firemen, and trainmen. Neither was there any testimony introduced tending to show that the defendant failed to employ competent or careful mechanics or machinists to properly overhaul its engines, locomotives, cars, or trains, or any part thereof. Nor was there any testimony offered that the defendant failed and neglected to employ or use careful or sufficient fire patrols, sectionmen, or laborers, whereby to protect the right of way."

It is contended by plaintiff that the testimony that defendant's right of way was covered with a growth of grass, weeds, and débris was in itself evidence tending to show that defendant had not had competent laborers upon it. In order to fully understand these instructions it is necessary to notice the other parts of the charge.

The trial court charged the jury as follows:

No. 2. "I instruct you that if you find from the evidence in this case that the property alleged in the complaint, or any part thereof, was destroyed by fire communicated to it from an engine, or engines, of the defendant railroad company, and in the manner and at the place named in the complaint, the fact that such property was so destroyed raises a presumption of negligence on the part of the defendant company, either in the construction, management, or operation of the engine or engines from which the fire was so communicated or in the exercise of proper care of its right of way, and casts upon the defendant railroad company the burden of proof of overcoming such presumption of negligence by evidence which you believe to be true."

No. 3. "I instruct you that it was the duty of the defendant railroad company to exercise reasonable diligence, care, and precaution in procuring and utilizing, and keeping in good repair, the most approved mechanical inventions and apparatus to prevent the escape of fire, coals, sparks, and live cinders; and if from

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the evidence in this case you find that the defendant railroad company did not exercise such reasonable diligence, care, and precaution in producing and utilizing and keeping in repair the most approved mechanical inventions and apparatus to prevent the escape of fire, coals, sparks, and live cinders, and that by reason thereof plaintiff's property was destroyed in the manner alleged in its complaint, then your verdict should be for the plaintiff. * * *"

No. 4. "I instruct you that it is the duty of the defendant railroad company to exercise reasonable care, precaution, and skill in the operation, handling, and management of its engine or engines, and if you find from the evidence in this case that the defendant railroad company did not use such care, precaution, and skill, and by reason thereof the plaintiff's property was destroyed by fire in the manner alleged in the complaint, then your verdict should be for the plaintiff. * * *"

No. 6. "I instruct you that if you further find that the right of way of the defendant had not been mowed during the period from the 1st day of June, 1914, to the 1st day of July, 1914, at the point where the fire started, and that the fire was started by sparks from the engine or engines of the defendant thrown upon such unmowed grass or weeds upon such right of way, then such presumption of negligence is conclusive and cannot be overcome by evidence, and your verdict must be for the plaintiff. If, however, you should find from the evidence in this case that the right of way had been mowed between the 1st day of June, 1914, and the 1st day of July, 1914, and you should further find that the fire was started by sparks from the defendant's engine or engines at some point on defendant's right of way that had been mowed between the 1st day of June, 1914, and the 1st day of July, 1914, then such presumption of negligence is not conclusive, but may be overcome by evidence which you believe that the defendant was not negligent in any of the respects charged in the complaint relating to the equipment. * * *"

See section 6984, L. O. L.

It will therefore be seen that, whether the railroad company employed 5 or 500 section men on this section, the matter of keeping the right of way free from grass and débris was fairly submitted to the jury, and so, also, was the question of the care and management of the defendant's engines. The two instructions complained of relate to the competency and skill of the employés. The evidence did not suggest that there was a deficiency in the number of men employed for those purposes, and the bill of exceptions discloses no evidence bearing upon the competency of the mechanics or machinists or concerning fire patrols or laborers. In order to direct the jury in the consideration of the issues, it was proper for the court to withdraw from them certain charges of negligence assigned in the complaint as a ground of recovery when requested to do so, when the same was not supported by the evidence. Otherwise, in case of a verdict in favor of plaintiff, it would have been impossible to know but that the complaint had been remembered by the jury as evidence and a verdict based upon the claim of negligence in those respects, when there was no evidence to support it. Chicago, St. P., M. & O. Ry. Co. v. Kroloff, 217 Fed. 525, 528, 133 C. C. A. 377. While it is a difficult and delicate matter for the trial court to bear in mind all the evidence during the trial of a cause so as to be able to so instruct, we are not referred to any competent testimony supporting the issues which was not submitted to the jury and find no error in the ruling. Evidently the jury may have found that the right of way was not kept free from grass and débris, but that the fire did not originate upon such right of way, thus eliminating the question of care in this respect. Of course, the defendant would not be liable for a want of care unless an injury resulted therefrom. The essential facts for the consideration of the jury in regard to the care and condition of the engines of defendant were whether or not the railroad company had exercised reasonable care in procuring and utilizing the most modern inventions, apparatus, and appliances to prevent the escape of fire and to properly inspect and maintain the same in good condition. By instruction No. 3, above quoted, the jury were told in effect that if they found there had been a lack of such care and precaution on the part of the railroad company, and that by reason thereof plaintiff's property was destroyed by fire, they should find a verdict for plaintiff. In other words, the jury was informed in substance that even though the employés of defendant were competent, if there was negligence in the matters detailed and injury ensued, the defendant would be liable. The instruction given requires servants of the defendant to exercise their ability, and it fairly submitted to the jury the matter of equipping, maintaining, and managing the engines of defendant.

[3] Plaintiff complains of instruction No. 13, which is as follows:

"I further instruct you that it is the duty of the defendant to exercise reasonable diligence, care, and precaution in procuring and in utilizing the most approved mechanical inventions, apparatus, and appliances to prevent the escape of fire, coals, and sparks, and to exercise reasonable care by appropriate inspection and repair to maintain such appliances in good condition. Now, if you find from the evidence that the defendant has used reasonable care and exercised reasonable diligence and precaution in obtaining and putting into practical use such appliances and to maintain them as such, then it has fully discharged its legal duty to all those subject to the danger incident to the escape of fire, and even if a fire shall occur therefrom, notwithstanding the defendant has used such care, diligence, and precaution, then it will be your bounden duty to return a verdict for the defendant."

This part of the charge, taken together with instruction No. 3, puts the question fairly before the jury and enjoins the proper degree of care upon the railroad company. Anderson v. O. R. R. Co., 45 Or. 215, 77 Pac. 119; La Salle v. Cent. R. of Oregon, 73 Or. 203, 211, 144 Pac. 414; Lesser Cotton Co. v. St. Louis, etc., Ry. Co., 114 Fed. 133, 141, 52 C. C. A. 95.

[4] Instruction No. 14 is challenged. It reads thus:

"Now the jury will note that modern science and ingenuity have not yet reached a point where

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it is possible to propel steam locomotives in such a manner as to absolutely prevent the emission of sparks or fire in their operation. The law does not require that locomotive engines used in the manner the defendant uses the same shall be so constructed, equipped, or managed so that no sparks of fire shall escape from them, and so if sparks shall be emitted from the locomotives in ordinary and usual quantities, that is to say, such quantities as naturally would be emitted from an engine upon which the railroad company shall have used reasonable care, diligence, and precaution in equipping with modern and approved spark arresting devices, and shall have operated in its usual course of business by competent employés, and a fire occurs from such sparks, the defendant will not be liable."

We approve this instruction. The law does not require of a railroad company care beyond that which the state of the art and the progress of invention and science will admit. Modern science and ingenuity have not yet reached a point of perfection or a state where it is possible to manage or propel steam locomotives in such manner as to absolutely prevent the escape of sparks of fire. Spaulding v. Chicago & N. Ry. Co., 30 Wis. 110, 125, 11 Am. Rep. 550; Menomonie Riv. Sash & Door Co. v. Milwaukee & N. R. Co., 91 Wis. 447, 65 N. W. 176, 179; Gainesville, etc., R. Co. v. Edmondson, 101 Ga. 747, 29 S. E. 213. In Chenoweth v. S. P. Co., 53 Or. 111, 119, 99 Pac. 86, 89, this court said:

"Evidence that the engine, just prior or subsequent to the fire, scattered sparks, is not sufficient to impute negligence. It is only when emitting them in unusual quantities or of unusual size that it has that effect."

[5] Instruction No. 16 is excepted to and is of the following purport: That the plaintiff could prove liability against the defendant for the consequence of the fire in question by circumstantial evidence from which the jury could reasonably infer negligence; that the facts and circumstances established to the satisfaction of the jury by the preponderance of the evidence must not only be sufficient to justify an inference of negligence, but must exclude every other theory as to the cause or origin of such fire. The instruction embodies the law of circumstantial evidence, and the purport thereof is to require the fact to be proved by a preponderance of the evidence; that is, if the facts and circumstances show two ways or conditions to exist as a result of which the railroad company would be liable, and also three other ways or conditions for which the railroad would not be liable, then the jury was charged that the evidence must preponderate in favor of one or more of the conditions for which the railroad would be liable. This charge was necessary in order to prevent the jury from speculating that the fire occurred on account of some negligent act of defendant when the evidence according to their belief might just as strongly have showed that it happened in some other manner. In 13 Am. & Eng. Enc. Law (2d Ed.) p. 512, the rule is stated:

"It must be obvious that evidence that the fire in question merely might have originated from the defendant's engines, or even proof tending to show that it did, is not entitled to much weight, unless the possibility of origin from other sources is excluded."

In order to establish a charge of negligence on the part of the railroad company, it is not enough for plaintiff to show a possibility or even a probability that the fire was communicated to the property by sparks from its locomotives, but it must prove by a preponderance of affirmative evidence that it did so originate. 33 Cyc. 1367. Plaintiff argues that this part of the charge requires proof beyond a reasonable doubt. This contention is not in accord with our views. The instruction complained of is not subject to the criticisms made by the plaintiff.

[6] Again, complaint is made of instruction No. 17, by which the court charged the jury that the law does not require absolute proof or absolute certainty and is satisfied when a jury of unprejudiced minds, after hearing the testimony, have an abiding conviction of the truth of the claim; that it is incumbent upon the plaintiff to prove the same by competent evidence whereby from a preponderance thereof they are satisfied that the claim has been established. Minn. Sash & Door Co. v. Great Northern Ry. Co., 83 Minn. 370, 86 N. W. 451, 454; Gibbons v. Wis. Valley R. Co., 58 Wis. 335, 17 N. W. 132; Gracy v. Atlantic Coast Line R. Co., 53 Fla. 350, 42 South. 903, 908; Brown v. Atl. & Air Line Ry. Co., 13 Am. & Eng. R. R. Cas. 479, 483. The information thereby imparted to the jury was in accordance with the statute.

Section 688, L. O. L., declares the standard of certainty in respect to civil cases, as follows:

"The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind."

Section 868, subdiv. 5, L. O. L., makes it the duty of the court to instruct on all proper occasions that in civil cases the affirmative of the issue shall be proved, and, when the evidence is contradictory, the finding shall be according to the preponderance of the evidence. As we understand the record, it was the theory of the plaintiff that the fire complained of originated upon the railroad company's right of way and was occasioned by the negligence of the defendant. The theory of the defendant seems to have been that the fire did not originate upon defendant's right of way and was not caused elsewhere by the negligence of the defendant.

A careful examination of the whole charge given by the trial court to the jury leads us to believe that the disputed questions of fact were fairly submitted to the jury. We have nothing to do with the weight of the evidence. It is the special province of the jury to pass upon questions involving that question. The jury found in favor of the defend-

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ant, and the judgment based thereon must be upheld.

Finding no error in the record, the judgment of the lower court is affirmed.

(82 Or. 202)

HILL et al. v. AMERICAN LAND & LIVE STOCK CO. et al.

(Supreme Court of Oregon. Dec. 12, 1916.)

1. WATERS AND WATER COURSES ⟸140—APPROPRIATION FOR IRRIGATION—DESERT LAND ACT.

Under the Desert Land Act, Act Cong. March 3, 1877, c. 107, 19 Stat. 377 (U. S. Comp. St. 1901, p. 1548), which provides that all surplus water over and above the actual appropriation and use for reclamation of desert land under the act, "together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation," etc., subject to existing rights, a defendant, whose title was derived from patent from the United States government by virtue of a homestead entry, and who had made no appropriation of water from a stream upon which his land had bordered since 1877, could not, by reason of the mere abuttal upon the stream, defeat or diminish a prior appropriation made under the act.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. ⟸140.]

2. WATERS AND WATER COURSES ⟸152(8)—APPROPRIATION FOR IRRIGATION—EVIDENCE—SUFFICIENCY.

In a proceeding to determine riparian rights, evidence *held* to support a finding that a defendant had never, by ditches or otherwise, used or appropriated water for irrigation purposes from an abutting stream, except seepage water escaping from another irrigation system.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 156; Dec. Dig. ⟸152(8).]

3. WATERS AND WATER COURSES ⟸130—APPROPRIATION FOR IRRIGATION — RIGHT TO USE OF WASTE WATER.

It being the duty of an appropriator of water for irrigation to use ordinary methods to prevent waste, while a temporary use may be made of seepage water, allowed to escape by excessive use of water, by any one who may capture it, no permanent right can be acquired to compel the continuance of the discharge or loss.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 145; Dec. Dig. ⟸130.]

4. WATERS AND WATER COURSES ⟸152(5)—APPROPRIATION FOR IRRIGATION PROCEEDINGS — PLEADING — MISJOINDER OF PARTIES PLAINTIFF.

Under L. O. L. § 393, providing that "all persons having an interest in the subject of a suit, and in obtaining the relief demanded, may be joined as plaintiffs, except as * * * otherwise provided;" and that "any person may be made a defendant who has or claims an interest * * * adverse to the plaintiff, or who is a necessary party to a complete determination * * * of the questions involved," in a proceeding to determine riparian rights to water for irrigation purposes, the thing in controversy being the whole mobile flowage of the stream, and no adequate determination being possible without the presence of all interested in the entire flowage, the joinder of a plaintiff who claimed riparian rights on the stream was proper.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 156; Dec. Dig. ⟸152(5).]

In Banc. Appeal from Circuit Court, Harney County; Dalton Biggs, Judge.

Suit by Edwin B. Hill and others against the American Land & Live Stock Company and others. From a decree declaring the rights of the parties, without mention of the defendant Pacific Live Stock Company, it appeals. Affirmed.

This is a suit to adjudicate the rights of the various parties to the use of the waters of Trout creek, in Harney county, Or. The plaintiffs describe their realty holdings, the several amounts of their appropriations of water, and the use to which they have put it. Concerning the defendants, after reciting the corporate character of some of them and the existence of the partnership of two others, the complaint states that they—

"and each and every one claims an interest in and rights to the waters of said Trout creek, but that the rights of each and every one of the said defendants, except as herein otherwise stated, are inferior to and subject to the rights of the plaintiffs as herein alleged, and that each and every one of the said parties defendant are necessary parties to this suit, in order to obtain a final determination of the subject-matter thereof."

The prayer is for a decree, determining the relative rights and priorities of the parties to the waters mentioned. The Pacific Live Stock Company, one of the defendants, and the only party appealing from the decree, answered, denying all the allegations of the complaint. After averring its ownership of 160.26 acres of land, its answer proceeds as follows:

"That Trout creek flows, and from time immemorial has flowed, through, over, and upon these said lands, and which said lands are riparian thereto, and riparian rights attached thereto, and the said defendant is entitled to have the water of said creek flow by, through, over, and upon the said lands, and to make such use of said water as a riparian owner is entitled to make thereof. That in the year 1889 the said defendant, its predecessors and grantors, entered into and upon the said creek by means of ditches, dams, and other works, and took and appropriated from the said stream to and upon the lands aforesaid 40 miner's inches of water measured under a 4-inch pressure, and applied the same to the irrigation of said lands, the watering of stock, and other beneficial uses, and ever since said time said defendant and its predecessors and grantors have continuously, uninterruptedly under a claim of right, adversely to the said plaintiffs and the defendants herein and to all the world, taken, appropriated, diverted, and used the said water, and the whole thereof, and all of the same has been, and still is being, applied to beneficial uses, and defendant is now the owner of the right to take, appropriate, and use the amount of water aforesaid. As a further defense to the said suit, the said defendant alleges that there is a misjoinder of causes of action in said suit, in that each of the plaintiffs herein as an appropriator of said water has a distinct and separate right of property not owned in common or jointly, with the

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other plaintiffs, and each of said plaintiffs has a separate cause of action to protect the said property, and the said causes of action cannot be joined, and the same are improperly joined in said suit."

This in turn was denied by the reply. After a full hearing on the issues the court, among others, made the following finding of fact:

"That one, John Porter, made homestead entry of the E. ½ S. W. ¼ and lot 4, section 18, township 39 south, range 37 east, W. M., containing 160.26 acres, for which he obtained patent from the United States in June, 1891, and by mesne conveyances the Pacific Live Stock Company, a corporation, one of the defendants herein, acquired title thereto. It appears from the evidence that no ditch was ever taken from Trout creek, and that no water is used from that stream for the irrigation of this ranch, except seepage water that arises on or near the place, from the irrigation of Frank Adrian's place. That from such seepage water about 25 acres on the north side of Trout creek is irrigated, and about 15 acres on the south side of the creek. No appropriation from Trout creek can be made for this land, for the reason that the water used is seepage water. Nothing should be construed here, however, as preventing the company from making use of the seepage water from the Adrian place."

Thereupon the court entered a decree, declaring the rights of the other parties to the suit, without mention of the Pacific Live Stock Company. As to that defendant the only feature of the decree otherwise affecting it is this last clause thereof:

"The temporary injunction heretofore granted in this case is hereby dissolved, and each and every party to this suit and those claiming by, through, or under them are hereby enjoined from using the water of any of the streams, the rights of which have been herein determined, in any manner or amount contrary to the provisions of this decree."

Only the Pacific Live Stock Company appeals.

Edward F. Treadwell, of San Francisco, Cal., and John L. Rand, of Baker, for appellant. J. W. Biggs and G. A. Rembold, both of Burns, P. J. Gallagher, of Ontario, Or., A. W. Gowan and Charles W. Ellis, both of Burns, McColloch & Wood, of Ontario, Or., and J. S. Cook, of Burns, for respondents.

BURNETT, J. (after stating the facts as above). [1] The testimony shows that the Pacific Live Stock Company, for convenience called the defendant, deraigned title from one John Porter, who in turn had it from the United States government by virtue of homestead entry, which was made by him on April 23, 1888, resulting in a patent dated June 13, 1891. This renders it subject to the act of Congress of March 3, 1877, commonly known as the "Desert Land Act," which provided that all surplus water over and above the actual appropriation and use for reclamation of desert land under the act, "together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. * * *" 19 Stat. U. S. 377, c. 107, 6 Fed. Stat. Ann. 392, U. S. Comp. Stat. 1901, p. 1548. This provision is thus construed by this court in Hough v. Porter, 51 Or. 318, 404, 98 Pac. 1083, at 1097:

"The language used in this act was clearly intended to change the rule respecting the right of riparians to the use of water for irrigation, mining, and power purposes; but, as in the last case cited, it has its limits. It does not go so far as to affect the rights originally giving rise to the doctrine of riparian rights; that is, for domestic use, including the watering of domestic animals and such stock as may be essential to the sustenance of the owners of lands adjacent to the streams or other bodies of water."

Thus it is made plain that riparian rights are not the same in essential particulars as the common-law privilege thus designated. In the arid and semiarid regions of the West the principal thing is the beneficial use of water as contrasted with its mere presence under the old common-law doctrine that a person whose lands abutted upon a stream was entitled to have it flow past his premises as it was naturally wont to do undiminished in quantity except for domestic purposes and unimpaired in quality. The rule had its rise in England, where irrigation was at the time practically unknown. The modification embodied in the act of Congress referred to and in the general legislation of the semiarid western states is founded upon the necessity of the situation and the principle of making the water do the greatest good to the greatest number. It may well be doubted, therefore, whether the allegation of the defendant's answer, to the effect that riparian rights attach to its lands by virtue of the creek running through it, is more than a conclusion of law, or presents any obstacle to the prior appropriation of other parties taking advantage of the reservation annexed by the government to its lands, permitting its appropriation by the first comer of the waters flowing thereon. If other persons, operating under the Desert Land Act had previously appropriated all the water of the stream, it seems that the riparian rights as known at common law, attaching to the land in question in favor of a subsequent taker, would be negligible. Because public land since 1877 bordered a stream, it does not necessarily follow that one holding it by subsequent title can defeat or diminish a prior appropriation made under the act. To work out such a result something more must be shown than mere abuttal upon the stream bed.

[2] All the testimony affecting the defendant appears in the abstract. John C. Beatty, a foreman for many years for the defendant, testified that the only water that goes upon the land in question is seepage water from the Frank Adrian place next above it on the stream. He says that a successor of his plowed some in an old ditch on the defendant's land, but that he never saw any water in it. It seems it was not connected

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directly or indirectly with Trout creek. He is clear in his statement that the only water going upon the place, aside from the stream, is seepage from the place above, and that the only use to which the property in question was put was for pasturage, or to hold cattle there three or four or five days during the rodeo. There is utterly no testimony to support the allegation that the defendant entered upon the creek and by means of ditches, dams, and other works appropriated water therefrom. The finding of fact quoted is amply supported by the testimony.

[3] The complaint of the defendant is that in prescribing the amount of water which Adrian was entitled to use, no provision was made for continuing the seepage upon which the defendant depends for moisture upon its land. The principle governing such a case is thus enunciated in 2 Kinney on Irrigation and Water Rights (2d Ed.) § 1115:

"In a previous chapter upon the subject of the economic use and the suppression of waste we endeavored to show that in all enterprises for the use of water there is more or less of the water lost to the appropriators from what is called necessary waste. This is the water which escapes from the ditches, canals, or other works, and which cannot be avoided by the ordinary precautions commonly used in the construction of the works. And while it is the duty of the appropriator to use ordinary methods to prevent this waste, he is not compelled, under the law, to use extraordinary methods. However, as 'water is a movable, wandering thing,' under the best methods known to man, some of the water will escape. To this necessarily lost water, while a temporary use may be made of it by any one who may capture it, no permanent right can be acquired so as to compel the continuance of the discharge or loss."

The modern doctrine in the Western states is that no person has a right to use more water under his appropriation than can be beneficially applied to some useful purpose. If, therefore, Adrian violated this rule by his excessive use of the water, he had no title to the surplus, and neither could the defendant acquire any ownership therein. The latter would be in no better position than the receiver of stolen goods. It cannot call upon the court to compel Adrian to continue in his wrongful and prodigal use of the water so that the defendant may be benefited by the resulting seepage. The allusion to seepage in the finding of the court already quoted manifestly refers to that unavoidable escape of water referred to in the excerpt from the writings of Kinney. The evidence does not disclose any impairment of riparian rights as modified by the Desert Land Act. Under the finding of fact the decree might have been made more specifically stringent upon the defendant. Its rights were not prejudiced by the conclusion of the court.

[4] It was also charged by the answer that there was a misjoinder of causes of action in that each appropriator was an owner in severalty, and could not join with others in this class of litigation; but that point has been adversely determined by this court in applying section 393, L. O. L., reading thus:

"All persons having an interest in the subject of the suit, and in obtaining the relief demanded, may be joined as plaintiffs, except as in this title otherwise provided. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein."

The rule is established in the following precedents: Williams v. Altnow, 51 Or. 275, 95 Pac. 200, 97 Pac. 539; Hough v. Porter, supra; Whited v. Cavin, 55 Or. 98, 105 Pac. 396; Lockhart v. Ferrey, 59 Or. 179, 115 Pac. 431. The thing in controversy is the whole mobile flowage of the stream. At the outset, under the very nature of things, no one can tell what particular drop of water is his own. It is the use of an aliquot part of this amount which is in question; and no adequate determination of the same can be had without the presence of all who are interested in the entire flowage of the stream. Error is not apparent in the decree. It is affirmed.

(82 Or. 130)

SORENSON v. KRIBS.

(Supreme Court of Oregon. Dec. 5, 1916.)

1. PRINCIPAL AND AGENT ⟸184(1)—AGENT'S AUTHORITY—IMPLIED WARRANTY—DAMAGES.
When an agent represents that he is empowered to make a particular contract on behalf of his principal, but in fact has no such authority, the party to whom the representation is made, and who relies thereon and complies with the terms of the supposed agreement, can maintain an action ex contractu against the agent, on the implied warranty, to recover the damages sustained.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 701, 702; Dec. Dig. ⟸184(1).]

2. ASSIGNMENTS ⟸73—RIGHT OF ACTION.
A husband's assignment to his wife of his claim against an owner for a commission for effecting a sale of land would not suffice as a transfer of the husband's cause of action against a broker, who misrepresented himself to be empowered by the owner to employ plaintiff's husband; and unless she obtained an assignment of the claim against the agent before action was brought, she could not recover against him.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 139–142; Dec. Dig. ⟸73.]

3. ASSIGNMENTS ⟸138—RIGHT OF ACTION—QUESTION FOR JURY—TIME OF ASSIGNMENT.
In an action by a wife as the assignee of her husband to recover damages from defendant for his misrepresentation of his authority from an owner to employ the husband as a broker, *held*, that it was for the jury to determine whether the assignment of the claim was made before the action was commenced.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 235–238; Dec. Dig. ⟸138.]

4. PRINCIPAL AND AGENT ⟸189(2) — AUTHORITY OF AGENT—ACTION FOR DAMAGES—CONSTRUCTION OF PLEADING.
Where the complaint alleged that defendant represented his authority to obligate an owner of land to pay a broker's commission to plaintiff's assignor on a sale acceptable to the owner, and that the defendant had no such au-

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thority, an answer denying the allegations generally, with an unqualified allegation that defendant employed plaintiff's assignor to sell the land on commission, and not stating that such engagement was made on behalf of the owner, construed most strongly against the defendant, implied that the employment was made for defendant's benefit, and that he had no authority to make such a contract on behalf of the owner.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 714; Dec. Dig. ⊂⊃189(2).]

5. Principal and Agent ⊂⊃190(1)—Agent's Authority—Presumption and Burden of Proof.

On such implication that defendant employed plaintiff's assignor on his own account to sell the land upon commission, for the payment of which the owner was not bound, L. O. L. § 799, subd. 33, raised the presumption that such want of authority continued after an option obtained by plaintiff was declared forfeited, and to overcome such presumption the burden was on defendant to show that authority was thereafter conferred upon him by the owner to engage a broker and to agree to pay him a commission for procuring a purchaser acceptable to the owner.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 718; Dec. Dig. ⊂⊃190(1).]

6. Evidence ⊂⊃93—Burden of Proof—Party Having Peculiar Knowledge.

When a fact is peculiarly within the knowledge of a party, he must, if necessary, furnish the evidence thereof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 115; Dec. Dig. ⊂⊃93.]

7. Principal and Agent ⊂⊃193—Liability of Agent—Unauthorized Act—Action for Damages—Question for Jury.

In an action for damages for defendant's misrepresentation of his authority to employ plaintiff's assignor as a broker on behalf of the owner of land, *held*, that the denial of defendant's motion for a directed verdict was not error.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 721½–726; Dec. Dig. ⊂⊃193.]

8. Trial ⊂⊃260(6)—Requested Instructions—Given Instructions.

In such action, there was no error in refusing to give defendant's instruction omitting the matter of a renewed or subsequent employment, where its substance was embraced in the instruction given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 656; Dec. Dig. ⊂⊃260(6).]

9. Appeal and Error ⊂⊃216(4)—Instructions—Necessity of Requests.

Under L. O. L. § 139, providing that the court shall state to the jury all matters of law thought necessary for their information, but shall not present the facts of the case, and shall tell the jury that they are the exclusive judges of questions of fact, and section 868, declaring the jury the judges of the evidence, unless it is declared to be conclusive, and that they are to be instructed as to precautionary matters, no failure of the court in submitting a party's theory of the case can be considered on appeal, except upon the denial of a requested instruction directly stating the law applicable to the case.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ⊂⊃216(4); Trial, Cent. Dig. § 627.]

10. Trial ⊂⊃261—Instructions—Requests—Applicability.

No error is committed in denying a requested instruction, which does not correctly announce the law applicable to the case, though such request may call the court's attention to a particular matter not covered by the general charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 484, 660, 671, 673, 675; Dec. Dig. ⊂⊃261.]

11. Appeal and Error ⊂⊃883—Instructions—Review.

In an action for damages for defendant's misrepresentation of his authority to employ plaintiff's assignor as a broker on behalf of the owner, where defendant acquiesced in the court's instruction that plaintiff was entitled to the entire commission and interest, or nothing, the defendant had no reason to complain of the court's refusal to instruct that plaintiff could not recover if the agreement was for defendant's payment to plaintiff's assignor of part of the commission to be received from the owner, or that, if the contract between plaintiff's assignor and defendant was for the division of the commission between themselves and another, the verdict should be for the defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3611; Dec. Dig. ⊂⊃883.]

12. Appeal and Error ⊂⊃839(1)—Review—Broad Equities of Case.

In a law action, where, on appeal, only alleged errors duly assigned can be considered, the argument upon the "broad equities" of the case has no place.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3279; Dec. Dig. ⊂⊃839(1).]

Department 2. Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by N. V. Sorenson against Frederick A. Kribs. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 65 Or. 78, 129 Pac. 757, 131 Pac. 1022, 51 L. R. A. (N. S.) 612, Ann. Cas. 1915A, 1127.

This is an action by Mrs. N. V. Sorenson, as the assignee of her husband, George Sorenson, a real estate broker, against F. A. Kribs, to recover damages. The material facts are that C. A. Smith, of Minneapolis, Minn., was the equitable owner of 7,480 acres of timber land in Douglas county, Or., and employed the defendant, a real estate broker, of Portland, in this state, to negotiate a sale of the real property. In order to procure a purchaser, Kribs appointed Sorenson, who on September 28, 1906, produced J. O. Storey, to whom the defendant gave an oral option to buy the land at $187,000, on account of which $50,000 was required to be paid within 60 days. Sorenson assured Storey he could have all the time desired in which to make the partial payment, and for that reason he neglected to pay the stipulated sum within the time limited, whereupon the option was declared at an end. Thereafter Storey commenced an action against Kribs to recover the damages which he had sustained, consisting of more than $2,000 expended in examining the timber growing on the land and $63,000, which extra sum he could have realized upon a resale of the premises. While that action was pending, Storey, in the name of the Storey-Bracher Lumber Company and C. P. Bratnober, entered into a written contract with Smith to

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purchase the land for $300,000; the vendees stipulating to save the vendor harmless from any claim for a commission for negotiating a sale of the land, except that of Kribs, whereupon that action was dismissed. In an action by this plaintiff as the assignee of her husband against Smith to recover a commission on account of the sale thus consummated, she recovered $15,000; but the judgment was reversed on the ground that Kribs had no authority to bind Smith to pay a commission. Sorenson v. Smith, 65 Or. 78, 129 Pac. 757, 131 Pac. 1022, 51 L. R. A. (N. S.) 612, Ann. Cas. 1915A, 1127. The facts here involved, and referred to in the opinion in that case, are set forth as matters of inducement in the complaint herein, which charges, in effect: That about July —, 1907, the defendant, assuming to act for Smith and representing that he had authority to do so, agreed with Sorenson to obligate Smith to pay a commission of 5 per cent. of the purchase price of the land, continued to employ Sorenson to procure a purchaser of the real property, and instructed the broker further to negotiate with Storey in order to induce him to pay a greater sum than he had originally offered for the land, and Kribs agreed to pay Sorenson 5 per cent. of the purchase price if he could find a buyer who was able, ready, and willing to pay a sum which was acceptable to Smith. That, pursuant to that employment, Sorenson at the defendant's request continued to negotiate with Storey until October 31, 1909, when he was induced to purchase the land for $300,000, which sum was satisfactory to Smith, whereupon Storey, in the name of the Storey-Bracher Lumber Company, and Bratnober, with whom Storey was associated, made a contract with Smith to buy the land for the sum last named, which amount has been paid. That by reason of the premises Sorenson became entitled to a commission of $15,000, the payment of which was demanded of Smith, who refused to comply therewith on the ground that Kribs had no authority to bind him to pay any commission. That in consequence thereof Sorenson was damaged in the sum of $15,000 and interest thereon at 6 per cent. per annum from October 31, 1909. That the defendant had no authority to obligate Smith to pay any sum as commission, and Sorenson's claim therefor was assigned, prior to the commencement of this action, to the plaintiff, who is the owner and holder thereof.

The answer unqualifiedly denies each averment of the complaint generally. For an affirmative defense, the facts relating to the first option and the cancellation thereof are set forth, and it is substantially alleged that when Storey's original agreement was terminated the defendant informed Sorenson thereof and notified him that his employment as a broker or otherwise was ended; that whatever services may have thereafter been rendered by Sorenson, in connection with the sale of the land, were not performed for the defendant acting for himself, or for any other person under his employment. It is further averred that, subsequent to the termination of the original option, Storey and Bratnober negotiated for the purchase of the land directly with Smith, who refused to sell to them unless Sorenson would waive any claim that he might have for a commission, whereupon Storey, acting for himself, entered into an agreement with Sorenson by the terms of which it was stipulated that, if Bratnober would furnish all the money necessary to purchase the land and appoint Sorenson and Storey brokers to negotiate a resale of the premises on or before July 1, 1910, they should be paid a commission for their services; that Bratnober complied with these conditions, and Sorenson in consideration thereof waived all claims for a prior commission.

The reply put in issue the allegations of new matter in the answer, and, the cause having been tried, the jury found for the plaintiff as demanded in the complaint, viz. $19,925, and, judgment having been rendered on the verdict, the defendant appeals.

R. R. Giltner and Guy C. H. Corliss, both of Portland, and Edwin H. Flick, of Seattle, Wash. (Giltner & Sewall, of Portland, on the brief), for appellant. Martin L. Pipes, of Portland (George A. Pipes, of Portland, on the brief), for respondent.

MOORE, C. J. (after stating the facts as above). [1] Preliminary to a consideration of the errors assigned it should be said that this action is founded upon the legal principle, established in this state, that when an agent represents he is empowered to make a particular contract on behalf of his principal and no such authority has been bestowed, the party to whom the statements were made by relying thereon and complying with the terms of the supposed agreement so concluded, can maintain an action ex contractu against the agent, on the implied warranty, to recover the damages thus sustained. Cochran v. Baker, 34 Or. 555, 52 Pac. 520, 56 Pac. 641; Anderson v. Adams, 43 Or. 621, 74 Pac. 215. See, also, Kennedy v. Stonehouse, 13 N. D. 232, 100 N. W. 258, 3 Ann. Cas. 217, and Haupt v. Vint, 68 W. Va. 657, 70 S. E. 702, 34 L. R. A. (N. S.) 519.

When this cause was submitted to the jury, the defendant's counsel moved for a directed verdict in favor of their client, on the grounds that the evidence received disclosed the claim sued on was not assigned prior to the commencement of this action; that the plaintiff introduced no testimony tending to show any want of authority on the part of the defendant to bind Smith to pay a commission; and that this action is founded upon a contract alleged to have been made in July, 1907, when no evidence thereof was offered. Consider-

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ing these matters in the order stated, attention is called to the case of Sorenson v. Smith, supra, where the broker's claim now asserted against the defendant for a commission for negotiating the same sale is alleged to have been assigned to this plaintiff. At the trial herein George Sorenson testified, on direct examination, that prior to the commencement of this action he assigned his claim for a commission to his wife, who then was the owner and holder thereof. On cross-examination, however, in answer to the inquiry, "Who did you tell her you had a commission from?" he replied, "From C. A. Smith. Q. Did you ever make any other assignment to her? A. No." On redirect examination, the attention of the witness was called to the testimony which he had thus given on cross-examination, and he was asked whether or not, before the commencement of this action, he had assigned his claim for a commission to his wife. He answered: "I misunderstood the question. I meant, I made the assignment of this $15,000. * * * Q. That is the claim in this case? A. Yes." On recross-examination he was asked: "When was it you made the assignment?" He responded: "Just before this suit was brought. Q. When was that? A. About a year and a half ago. Q. What did you say to your wife? A. I said I am assigning this claim. You will have to bring a new suit. Q. What is this claim? A. This $15,000. Q. What is this claim you assigned to your wife? A. My claim against Kribs. Q. What for? A. Commission of $15,000."

[2, 3] It needs no argument to show that the broker's claim for a commission against Smith, which was assigned to this plaintiff before she began her action against him, would not suffice as a transfer of a cause of action against Kribs, and unless she obtained an assignment of the claim against the latter before this action was instituted, she was not entitled to a recovery herein. From Sorenson's contradictory statements, relating to the assignment, the court could not, as a matter of law, say which sworn declaration was true. It was therefore the province of the jury, from a careful comparison and consideration of such testimony, to determine whether or not the assignment of the claim against Kribs was made before this action was commenced. Pacific Biscuit Co. v. Dugger, 42 Or. 513, 70 Pac. 523. No error was committed in respect to the assignment.

[4] It will be remembered the complaint charged that the defendant represented he was authorized to obligate Smith to pay a broker's commission in case a sale of the land could be made for a price acceptable to the owner, and that the defendant did not have such authority. The averments of the complaint are denied generally without any qualification in the answer which alleged that prior to September 26, 1906, the defendant employed Sorenson to sell the land on commission. The answer does not state that such engagement was made for or on behalf of Smith. Construing that pleading most strongly against the defendant, it must therefore be taken for granted that the employment was made for his benefit. It is also fairly to be inferred from the defendant's pleading that he had no authority to make such a contract on behalf of his principal.

[5, 6] It being implied from the answer that the defendant employed Sorenson on his own account to sell the land upon commission for the payment of which Smith was not obligated, the law raises the presumption that such want of authority continued after the oral option was declared forfeited. L. O. L. § 799, subd. 33. In order to overcome this presumption the burden of proof was imposed on the defendant, notwithstanding his general denial of a want of authority, to show to the satisfaction of the jury that after the option was terminated, authority was conferred upon him by his principal to engage the services of a broker and to agree to pay him a commission for procuring a purchaser of the land who would pay a price which was acceptable to the owner. Peabody v. O. R. & N. Co., 21 Or. 121, 134, 26 Pac. 1053, 12 L. R. A. 823. The conclusion thus reached is not unreasonable, for the rule is elementary that, when a fact is peculiarly within the knowledge of a party, he must, if necessary, furnish the evidence thereof. Weber v. Rothchild, 15 Or. 385, 15 Pac. 650, 3 Am. St. Rep. 162. As the burden was on the defendant in this particular, he cannot complain of any lack of proof in this respect.

[7] George Sorenson testified that about three or four months after the original option was canceled Storey made another offer to the witness to purchase the land, which bid he submitted to the defendant who said:

"'We will keep on working on the deal. We will pull it through yet.' * * * Q. Can you state during what month in 1907, if at all, you continued to act in the negotiations, to bring about that sale? A. Well, I continued all the time, trying to put it through. Q. Can you state more definitely during what months in 1907 you went to Mr. Kribs about it? A. I used to go to his office pretty near every week or so. Q. During that year? A. Yes. Q. Did you, or not, have any conversation with Mr. Storey about it in that year? A. Yes, sir; all the time. I had the same office with him. Q. During that time, 1907, you may state whether or not the parties got together on any agreement about the price of the land? A. No, they never got together."

Viewing this testimony in the light of the averment of the complaint that about July —, 1907, the defendant "continued the employment of the said George Sorenson and instructed him to negotiate further with said J. O. Storey," it will be seen that though Sorenson persisted in his efforts to bring about a sale of the land to Storey after the original option was canceled, and for that purpose frequently conferred with Kribs about the matter, no assent was given by the latter re-

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lating to such sale until about three months after the oral option was declared forfeited. Here is testimony tending to show the making of a new contract. When the agreement was consummated is unimportant, provided it was concluded prior to May 22, 1909, when the amendment of section 808, L. O. L., went into effect, declaring void any unwritten agreement thereafter entered into relating to the employment of a broker to sell land. Laws Or. 1909, c. 27. No error was committed in denying the motion for a directed verdict.

[8] An exception having been taken, it is maintained by defendant's counsel that an error was committed in denying their fourth request to instruct the jury as follows:

"Defendant claims that, when the first deal with Storey fell through, he notified George Sorenson that his employment by the defendant was ended, and that if he desired to act as broker in the matter any further he must make an arrangement with said C. A. Smith. Defendant had a perfect right to terminate the employment of George Sorenson after the first deal with Storey fell through, and if said employment was terminated at said time so far as defendant is concerned, your verdict must be in favor of the defendant. A person who employs a broker may terminate the employment at any time, provided he acts in good faith, and there is no evidence in this case warranting any finding that defendant acted in bad faith in terminating said employment at said time, if he did so terminate it."

At the defendant's request the court in its general charge said:

"A broker must perform his contract while his employment lasts, and if he fails to do so before his employment has been terminated, he cannot recover anything for any services that he might have rendered up to the time his employment was so terminated. If he desires to protect himself, he may do so by providing in his contract that his employment shall last for a specified time; and if this is not done, it is the absolute right of the person who employs him to terminate the employment at any time without any liability, provided he acts in good faith, and provided the broker has not at that time fully performed his part of the contract by obtaining a purchaser on terms acceptable to the seller of the property."

It will be observed that the fourth request desired a direction to the jury that their verdict must be for the defendant if the employment of Sorenson was terminated when Smith withdrew the land from the market. The language thus employed omits an allegation of the complaint:

"That immediately after the defendant had failed to carry out said agreement as aforesaid (to sell the land to Storey), and on or about the ——— day of July, 1907, the defendant, assuming to act as the agent for said C. A. Smith, the owner of said land, and representing that he had authority from said C. A. Smith so to act, agreed with said Sorenson to obligate the said Smith to pay said Sorenson said commission, and continued the employment of the said George Sorenson, and instructed him to negotiate further with said J. O. Storey for the purpose of procuring said J. O. Storey to pay a higher price for said property," etc.

From this allegation it is reasonably to be inferred that, though Sorenson's employment was terminated when the original option was declared at an end, he was subsequently engaged by the defendant to negotiate a sale of the land at a greater price, but upon the same terms as had been previously agreed upon. Sorenson's testimony on this issue, to which reference has been made, tends to substantiate the averment last quoted. The fourth request having omitted this matter, no error was committed in refusing to give that instruction, since its substance was embraced in the part of the charge that has already been repeated.

[9, 10] It is insisted that error was committed in denying the sixth request to instruct the jury, as follows:

"Even if you should find that employment of George Sorenson continued after the first deal with Storey fell through, and should find all of the other facts in favor of plaintiff, said George Sorenson would not earn any commission until he had actually procured a purchaser on terms acceptable to said C. A. Smith. It is not claimed by plaintiff that in the employment of George Sorenson after said deal with Storey fell through the defendant or said C. A. Smith fixed any definite terms upon which said C. A. Smith would be willing to sell the land; [but, on the contrary, it appears that said terms were not finally agreed to on the part of said C. A. Smith until after said C. A. Smith had been assured that there would be no commission to be paid by him or said Kribs to George Sorenson or any other person in said sale, but that the price he was to receive for the property would be net to him]. George Sorenson would not earn any commission until he had actually procured the purchaser for the property on terms acceptable to said C. A. Smith, and therefore, if you find that said C. A. Smith refused to sell the property, except on condition that there should be no commission paid by him or said Kribs, and said Storey communicated said fact to George Sorenson, and thereupon George Sorenson waived all right to any commission and agreed with said Storey to get his pay out of a future sale of said property by said Storey, and thereupon said Storey and those associated with him completed said purchase and entered into a contract for the purchase of the same for $300,000 net to said C. A. Smith, then plaintiff would not be entitled to recover, even though all the other facts were found in her favor."

This request was denied for the reason that the language embraced within the brackets, as indicated, assumed the existence of a fact which was in dispute. It is argued by defendant's counsel that, though the instruction requested may have been technically incorrect, it was sufficient to call attention to Sorenson's alleged waiver as set forth in the answer, and, such being the case, the duty was imposed upon the court so to modify the language suggested as correctly to state the law applicable to the issue involved. The legal principle thus involved finds expression in 1 Blashfield's Instructions to Juries (2d Ed.) § 175, p. 407, where it is said:

"In some jurisdictions it is held that a request which is properly refused for defects in form or substance may be sufficient to call the attention of the court to the matter upon which an instruction is desired, and make a failure to give an appropriate instruction thereon error."

In support of the text quoted the decisions cited, omitting criminal causes, were rendered by courts in the states of Kansas, Missouri, and Texas. In addition to the cases

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from the states mentioned, the defendant's counsel further cite decisions given upon this subject by the courts of last resort in the states of Kentucky (Western Union T. Co. v. Sisson, 155 Ky. 624, 160 S. W. 168), Massachusetts (Black v. Buckingham, 174 Mass. 102, 54 N. E. 494), Vermont (Hazard v. Smith, 21 Vt. 123), and West Virginia (Carrico v. West Va. R. Co., 35 W. Va. 389, 14 S. E. 12). "If a request," says a text-writer, "is in part incorrect, or is inappropriate as applied to the facts, the court commits no error in wholly refusing it." Branson's Ins. to Juries, § 101, citing many cases.

Another author discussing the same subject, remarks:

"In order to entitle a party to insist that a requested instruction be given to the jury, such instruction must be correct both in form and substance, and such that the court might give to the jury without modification or omission. If the instruction, as requested, is objectionable in any respect, its refusal is not error." 1 Blashfield's Ins. to Juries (2d Ed.) § 175, p. 402.

The cases cited to uphold the language last repeated, omitting decisions from states where their courts seem to have ruled on both sides of the question, are found in the reports of decisions in the courts of Alabama, Arkansas, California, Colorado, Georgia, Illinois, Indiana, Maine, Maryland, Michigan, New York, Ohio, Oklahoma, Utah, and Wisconsin. It will thus be seen that the great weight of authority is opposed to the contention now made with respect to this part of the case.

Our statute, relating to the giving of instructions, reads:

"In charging the jury, the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict, but it shall not present the facts of the case, but shall inform the jury that they are the exclusive judges of all questions of fact." L. O. L. § 139.

"The jury, subject to the control of the court, in the cases specified in this Code, are the judges of the effect or value of evidence addressed to them, except when it is thereby declared to be conclusive. They are, however, to be instructed by the court on all proper occasions" in respect to precautionary matters. Id. § 868.

In applying these provisions of the law it has been held that, though each party to an action is entitled to have his theory of the cause submitted to a jury, if any evidence has been received tending to support such plan, no failure of the court in this respect would be considered on appeal, except upon the denial of a requested instruction which correctly stated the law applicable to the case. Cerrano v. Portland Ry., L. & P. Co., 62 Or. 421, 126 Pac. 37. We adopt the rule prevailing in a majority of the states, to the effect that no error is committed in denying a requested instruction which does not correctly announce the law applicable to the case, or which contains or assumes the statement of a controverted fact, though such request may call the court's attention to a particular matter not covered by the general charge. If a contrary rule obtained, it would not be necessary for counsel carefully to prepare requested instructions, for, if merely calling attention of the court to a particular matter of law or fact were sufficient, then a request to charge on a special subject would be sufficient, though such solicitation was couched in the briefest possible sentence. Thus, in this instance: "We desire an instruction upon the question of waiver." Such a course of practice would not be fair to a court, which at the close of a trial has not the time carefully to consider all the matters that might thus be thrust upon it. Unless, therefore, the prayer for an instruction correctly states the law applicable to the case, and makes no improper allusion to controverted questions of fact, and the matters thus urged have not been given in the general charge, when considered in its entirety, no error is committed in denying the request. Clearwater v. Forrest, 72 Or. 312, 143 Pac. 998; Kemp v. Portland Ry., L. & P. Co., 74 Or. 258, 145 Pac. 274; Pfeiffer v. Oregon-Washington R. & N. Co., 74 Or. 307, 144 Pac. 762; Housman v. Peterson, 76 Or. 556, 149 Pac. 538; Johnson v. Portland Ry., L. & P. Co., 79 Or. 403, 155 Pac. 375.

[11] It is maintained by defendant's counsel that errors were committed in denying their requested instructions as follows:

"(16) Plaintiff cannot recover in this case if the original agreement between George Sorenson and F. A. Kribs was for the payment by Kribs to George Sorenson of a portion of the commission he would receive from C. A. Smith on the sale of the land, and if this original contract between George Sorenson and Kribs was never changed.

"(17) If the contract between George Sorenson and Kribs was for the division between Kribs, Sorenson, and Storey of the commission which Smith would pay Kribs on the sale, and this agreement was never altered, then plaintiff cannot recover, and your verdict must be for the defendant."

At the request of the defendant's counsel the jury were instructed as follows:

"This action is based on the theory that defendant assumed to hire George Sorenson as a broker for the sale of the land in question for a specified commission of 5 per cent., and represented that he had authority to bind C. A. Smith to such a contract. Therefore I charge you that, if you find that there was no specific agreement between George Sorenson and F. A. Kribs for the payment of 5 per cent. commission, but that the amount of the commission George Sorenson was to receive was not agreed upon, then the plaintiff cannot maintain this action, and your verdict must be for the defendant."

When the court had concluded its charge one of the jurors inquired:

"Do we have to find for the full amount?"

The court replied:

"This action is brought on a contract, and plaintiff is entitled to 5 per cent. of the amount or nothing. The jury would not have any discretion to find an intermediate amount. It is either the full amount or nothing. and to that full amount should be added interest at 6 per cent., from the 31st of October, 1909, down to this date."

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The defendant's counsel interposed no objection to the court's reply to the juror's inquiry.

The part of the charge so given at the solicitation of defendant's counsel is inconsistent with their requests last referred to, which were denied. In respect to the issue designed to be embraced in the sixteenth request, the defendant testified that, under the terms of the original agreement for the sale of the land at $187,000, the commission to be paid by the owner for procuring Storey as a purchaser was to be divided between the witness and Sorenson. Kribs further testified that after the original option was declared forfeited the broker was advised thereof, and notified that his services in negotiating contracts relating to the sale of the land were ended. Having acquiesced in the court's instruction that the plaintiff was entitled to the entire commission of 5 per cent. of the selling price and interest thereon or nothing, the defendant has no reason to complain because of the refusal to give the sixteenth and seventeenth requested instructions.

[12] A great part of the brief of defendant's counsel is devoted to what is termed the "broad equities" of the case. Thus it is stated in effect that by reason of Sorenson's representations made to Storey that, notwithstanding the limitation of 60 days specified in the original option, he could have all the time he desired in which to examine the lands offered for sale, in order to determine their value; that relying upon such statements Storey neglected to take the necessary precaution to protect his rights, whereby he incurred an expense of more than $2,000 in cruising the timber, and lost $63,000, which profit he could have made by a resale of the property; that the ultimate contract for the sale of the land was made with Smith by Bratnober, which agreement was brought about by Storey alone as the procuring cause, and the latter had only the right of a broker to negotiate a resale of the premises within a specified time; that such agency was secured by Storey, who hoped to obtain a compensation for the loss he had thus sustained; that it is undisputed, if Kribs is obligated to discharge the judgment rendered herein, Storey, in addition to the damages he has sustained in consequence of Sorenson's representations, will be obliged to repay the amount recovered in this action, thereby entailing an entire loss of about $85,000, and thus demonstrating the unreasonableness of the conclusion reached by the jury in the trial of this cause.

The plaintiff's counsel contend, as alleged in the complaint, and as their evidence tended to show, that the land was sold by Smith to Storey, in the name of the Storey-Bracher Lumber Company and Bratnober, with whom Storey had associated, and that Sorenson had negotiated with Storey in effecting a sale of the premises, which fact appears to be evidenced by the written contract therefor, from which the jury might reasonably have concluded that the broker was entitled to the commission demanded. The "broad equities" thus stated undoubtedly afford cogent reasons, when uttered, as they probably were, to the jury in order to obtain a favorable verdict for the defendant; but in a law action, where on appeal only alleged errors duly assigned can be considered, the argument now adduced has no place.

Believing no prejudicial error was committed at the trial, it follows that the judgment should be affirmed; and it is so ordered.

BEAN, HARRIS, and BURNETT, JJ., concur.

(82 Or. 149)

CLAYTON v. ENTERPRISE ELECTRIC CO.

(Supreme Court of Oregon. Dec. 5, 1916.)

1. STATUTES ⟸190—CONSTRUCTION—INTENTION OF LEGISLATORS.

Where the language of the lawmakers is plain and their intent clear, such meaning must be given effect.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 269; Dec. Dig. ⟸190.]

2. ELECTRICITY ⟸1—REGULATION—CONSTRUCTION OF STATUTES.

The title of the Employers' Liability Law (Laws 1911, p. 16) indicated that the act provided for the protection and safety of persons engaged in construction or other work upon buildings and other structures, or upon or about electrical wires, conductors, or other electrical appliances carrying a dangerous current of electricity, or about any machinery or in any dangerous occupation, and defining the liability of employers for acts of negligence, or for the injury or death of their employés. Section 1 provided that all persons whatsoever engaged in the manufacture, transmission, and use of electricity should see that all material was carefully selected, inspected, and tested, and that in the transmission and use of electricity of a dangerous voltage full and complete insulation should be provided at all points where the public or the employés were liable to come in contact with the wires, and that all persons having charge of or responsible for any work involving a risk or danger to the employés or the public should use every device, care, and precaution which it is practicable to use for the protection of life and limb. Section 4 made any person within the provisions of the act liable for any loss of life by violation thereof. *Held*, that the act was intended to safeguard members of the public from coming in contact with wires carrying a dangerous current, and was not limited to the protection of the immediate employés of electric companies.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. ⟸1.]

3. STATUTES ⟸110½(1)—VALIDITY—TITLE.

The provision of that law protecting the general public is not so foreign to or disconnected with the subject embraced in the title that the attention of the voters by whom the law was adopted would not be directed thereto, and the statute is not invalid under Const. art. 4, § 20.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 139; Dec. Dig. ⟸110½(1).]

4. STATUTES ⟸109—VALIDITY—TITLE.

To render a portion of a statute invalid because its provisions are not embraced within

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the title, as required by Const. art. 4, § 20, the provisions must be entirely disconnected with the subject, wholly incongruous, and consist of matter of which the title gives no notice, so that the adoption of the measure by means of the title would be fraudulent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 136–139; Dec. Dig. ⊂⊃109.]

5. CONSTITUTIONAL LAW ⊂⊃48—VALIDITY OF STATUTE—PRESUMPTION.

The presumption is always in favor of the validity of the statute, and its repugnancy to the Constitution must clearly appear.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. ⊂⊃48; Statutes, Cent. Dig. § 56.]

6. ELECTRICITY ⊂⊃19(11)—ACTIONS FOR INJURY—SUFFICIENCY OF EVIDENCE—OWNERSHIP OF WIRES.

In an action for the death of an employé of a patron of an electric power company, when he attempted to turn off the switch in his employer's pumping plant, evidence *held* sufficient to take to the jury the question whether the power company owned and controlled the wires and switch.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. ⊂⊃19(11).]

7. ELECTRICITY ⊂⊃14(1) — DEGREE OF CARE REQUIRED.

The care demanded of electric companies must be commensurate with the danger, and where their wires are carrying a dangerous current the law imposes upon them the utmost degree of care in the construction, inspection, and repair.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 7; Dec. Dig. ⊂⊃14(1).]

8. ELECTRICITY ⊂⊃17 — LIABILITY OF COMPANY—OWNERSHIP OF SWITCH.

Where an electric power company furnishes the current for operating a pump owned by an individual, and owned the wires leading to the switch, which was installed by the company's predecessors, the company can exercise control over the switch, even if it does not own it, and is liable under the Employers' Liability Law if the switch is defective..

[Ed. Note.—For other cases, see Electricity, Dec. Dig. ⊂⊃17.]

9. ELECTRICITY ⊂⊃14(2)—LIABILITY OF COMPANIES—INSTALLATION OF APPARATUS.

Where an electrical company undertakes to render service to a customer, and runs its wires into a building, and installs its apparatus therein, it must exercise a degree of care commensurate with the risk in protecting and insulating its wires and installing the apparatus.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 7; Dec. Dig. ⊂⊃14(2).]

In Banc. Appeal from Circuit Court, Wallowa County; J. W. Knowles, Judge.

Action by Ella Clayton against the Enterprise Electric Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The plaintiff, as the widow of W. S. Clayton, deceased, brings this action for damages under the Employers' Liability Law against the defendant to recover for the death of her husband, caused by an electric shock which he received while attempting to turn off the power furnished by the defendant to a motor pump operated by one Carl Roe, by whom he was employed. Without quoting the allegations of the complaint, it may be stated that on August 5, 1912, the defendant, Enterprise Electric Company, a corporation, was engaged in the manufacture, transmission, and use of electricity of a dangerous voltage. At the time one Carl Roe was the owner of a pumping plant on the Wallowa river, a short distance below the town of Enterprise, and was engaged in pumping water from that river to irrigate certain lands situated above the stream. The pumping plant, machinery, and motor for the same were contained in a small lumber building about 9x18 feet. Prior to the date mentioned, under an arrangement with Roe, the defendant had connected its wires and transmission system, upon which a dangerous voltage of electricity was being carried, with the motor and machinery of this pumping plant, and had placed thereon certain switches and other apparatus. Plaintiff alleges that the defendant was the owner and controlled and operated the transmission system, and the wires and appliances by which the currents of electricity were carried into and connected with the motor and pumping machinery, and was engaged in furnishing the pumping plant with electricity, conveying the same to the motor by the wiring, switches, and apparatus. Omitting the part of the complaint not relied upon at the trial, plaintiff claimed that the defendant was negligent in the following respects:

"(1) That the defendant, being the owner of and controlling and operating the transmission system and the wires and appliances by which the electric currents were carried into and connected with the motor in the pumping plant owned by Carl Roe, carelessly and negligently failed to cover and inclose the dangerous machinery, switches, and wiring by means of which said electricity was connected with said motor.

"(2) That the defendant, being the owner of and controlling and operating said transmission system and said wires and appliances by which said electricity was conveyed from said transmission system to said motor, carelessly and negligently failed thoroughly, effectively, and perfectly to insulate said wiring, switches, and apparatus. * * *

"(5) That the defendant carelessly and negligently used an insufficient and dangerous switch, the blades of which were not insulated, and negligently failed to use a fully insulated switch at a point where the public and the employés of Roe were likely to come in contact with the same, though a fully and completely insulated switch was practicable to be used without interfering with the efficiency of the pumping plant."

On the day mentioned, while in the employ of Carl Roe, W. S. Clayton, deceased, was required to attend to the operation of the pumping plant, turn off and on the electric power, set the plant in operation, and stop the same again as required by the business. In the afternoon of that day it became his duty to turn off the power, and in order to do so he entered the building and turned off the electricity from the motor, by opening the switch and disconnecting the wiring and transmission plant of the defendant with the same. While attempting this, by reason

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of the negligence of the defendant, as set forth, he received a violent shock of electricity from the wiring, switches, and apparatus of the defendant and the high and dangerous current, voltage, and amperage of electricity passed through his body killing him.

The answer of defendant denied the allegations of negligence contained in the complaint and affirmatively set forth contributory negligence on the part of Clayton. It also alleged affirmatively that at the time of the accident the defendant was not the owner of, did not have the right to, and did not exercise any supervision, control, or direction over, the interior of the pumping plant or building, or over any of the machinery, switches, apparatus, or appliances installed therein, and that it owed no duty to plaintiff's deceased. The reply put in issue the affirmative matter of the answer, except the allegation that W. S. Clayton was not in the employ of the defendant at the time of his death. The cause was tried before a jury, resulting in a verdict in favor of plaintiff for the sum of $5,000, upon which judgment was entered, from which judgment this appeal is prosecuted.

Rufus A. Leiter, of Portland (A. S. Cooley, of Enterprise, and Griffith, Leiter & Allen, of Portland, on the brief), for appellant. Daniel Boyd, of Enterprise, and A. S. Bennett, of The Dalles, for respondent.

BEAN, J. (after stating the facts as above). The defendant raises but three points upon this appeal, and relies upon three assignments of error: (1) Overruling the defendant's demurrer to plaintiff's complaint; (2) denying plaintiff's motion for a nonsuit; (3) refusing to instruct the jury to return a verdict for the defendant. These points may be considered together. The main question involved is presented as a new one. It is contended on the part of the defendant: First, that the Employers' Liability Law applies only to the relationship of employer and employé, and does not create any right of action in a member of the general public; second, that the title of the act is not broad enough to include protection to members of the general public, and if it is, that subject is not expressed in the title; and third, that section 20 of article 4 of the state Constitution was not complied with, and the act to that extent is not constitutional, within the rule announced in State v. Richardson, 48 Or. 309, 85 Pac. 225, 8 L. R. A. (N. S.) 362.

[1, 2] The title of the Employers' Liability Law (General Laws 1911, p. 16) is as follows:

"An act providing for the protection and safety of persons engaged in the construction, repairing, alteration, or other work, upon buildings, bridges, viaducts, tanks, stacks and other structures, or engaged in any work upon or about electrical wires, or conductors or poles, or supports, or other electrical appliances or contrivances carrying a dangerous current of electricity; or about any machinery or in any dangerous occupation, and extending and defining the liability of employers in any or all acts of negligence, or for injury or death of their employés, and defining who are the agents of the employer, and declaring what shall not be a defense in actions by employés against employers, and prescribing a penalty for a violation of the law."

That part of the act necessary to here note reads thus:

Section 1: "All owners, contractors, subcontractors, corporations or persons whatsoever, engaged * * * in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that all metal, wood, rope, glass, rubber, gutta percha, or other material whatever, shall be carefully selected and inspected and tested so as to detect any defects. * * * And in the transmission and use of electricity of a dangerous voltage full and complete insulation shall be provided at all points where the public or the employés of the owner, contractor or subcontractor transmitting or using said electricity are liable to come in contact with the wire, * * * and generally, all owners, contractors or subcontractors, and other persons having charge of, or responsible for any work involving a risk or danger to the employés or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb. * * *"

Section 4: "If there shall be any loss of life by reason of the neglects or failures or violations of the provisions of this act by any owner, contractor, or subcontractor, or any person liable under the provisions of this act, the widow of the person so killed, his lineal heirs or adopted children," etc., "shall have a right of action without any limit as to the amount of damages which may be awarded."

From the language of the statute, which makes three special references to the safety of the general public, or the public, it seems there can be no doubt but that the provisions of the law are intended to safeguard members of the public from injury by coming in contact with wires or appliances owned and controlled by an electric company and used in the transmission and application of electricity of a dangerous voltage. It is a cardinal principle of statutory construction that, where the language of the lawmakers is plain and its intent clear, such meaning shall be given effect. That the provisions of the Employers' Liability Law are more frequently applied to affairs between employer and employé does not lessen its force, so far as applicable, in prescribing a rule of conduct for those engaged in dealing with such a dangerous and subtle element as electricity, in order to increase the safety of those who in the performance of their duty are liable to come in contact with the agencies employed in generating and conveying such current, even though such persons may not be in the immediate employ of such manufacturer or person conveying electricity.

The act first enjoins upon the owner, corporation, or person engaged in the manufacture, transmission, and use of electricity the duty of seeing that all material shall be carefully selected, inspected, and tested so as to

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detect any defects; second, it commands that, in the transmission and use of electricity of a dangerous voltage, full and complete insulation shall be provided at all points where the public or the employés of the owner, etc., are liable to come in contact with the wire; and, third, generally, as though to leave no doubt or room for escape, the law requires that such owner or person in any work involving a risk or danger to employés or the public shall use every device, care, and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine, or other apparatus or device, and without regard to the additional cost of suitable material or safety appliances or devices. It is not necessary to decide under which of the three classes referred to the facts in the case shall be classed. The first and last seem to be particularly applicable. The general clause appears to be intended to cover all cases relating to the care required in the control of electricity, not coming within the specifications of the second class. The title of the act plainly shows the purpose, more fully set forth in the body of the act, to protect all persons working around high voltage wires, without regard to whether they are employés of the electric company or not. The enactment is for the protection of life and limb, and should be given a fair and liberal construction in the interest of public safety and protection of human life. Blair v. Western Cedar Co., 75 Or. 281, 146 Pac. 480.

[3, 4] The next question is: Is the act repugnant to our Constitution in so far as it applies to any other than the relationship of employer and employé? In order to render a portion of a statute invalid for the reason that its provisions are not embraced within the title of the act in conformity with section 20 of article 4 of the Constitution, such provisions must be entirely disconnected with the subject as embraced in the title, wholly incongruous, and consist of matter of which the title gives no notice, so that the adoption of such measure by means of the title would be fraudulent.

[5] The presumption is always in favor of the validity of a statute, and its repugnancy to the Constitution must clearly appear. If the matter is reasonably connected with and germane to the title under our Constitution requiring an act to embrace but one subject and matters connected therewith, which subject must be embraced in the title, the law will be upheld. State v. Shaw, 22 Or. 287, 29 Pac. 1028; Clemmensen v. Peterson, 35 Or. 47, 56 Pac. 1015; Pac. Elev. Co. v. Portland, 65 Or. 349, 133 Pac. 72, 46 L. R. A. (N. S.) 363. The Employers' Liability Law was proposed by initiative petition and adopted by the electors of the state. If it be assumed that the same rule would apply to it as to a legislative enactment, we think the title of the act is broad enough to include the protection of all persons who are from necessity liable to come in contact with electric wires charged with a dangerous voltage of electricity. It cannot be held that the part of the law to which reference has been made is foreign to or disconnected with the subject embraced in the title. The title to the act was sufficient to direct the voters' attention to the measure to be acted upon and was not inconsistent with the general object and purpose of the initiative and referendum amendment to the Constitution. No fraud was perpetrated upon the voters by virtue thereof. State v. Langworthy, 55 Or. 309, 104 Pac. 424, 106 Pac. 336. The enactment is not inimical to the Constitution, and is valid.

[6] It is argued by the learned counsel for the defendant that the apparatus complained of in the present case was under the control of Roe; and an electric power company furnishing current is not bound to examine nor inspect fixtures or appliances used by its customers and under their supervision. The evidence introduced tended to show substantially the following facts:

The defendant, a public service corporation, was engaged in generating electricity and furnishing it to the public, either to houses and places of business, or on the streets as there might be a demand. Carl Roe, the employer of the decedent, was engaged in operating a pumping plant on the banks of the Wallowa river by which water was pumped to the hill. The power for the plant was furnished by the defendant company. When Roe got his motor installed and lined up, he notified the electric company, which was then owned by a partnership consisting of Mr. Forsyth and Mr. Haas. The latter leased his interest in the plant to Forsyth, who was the sole manager of the concern, and who proceeded to connect up the line with the pumping plant. He wired about 150 feet from the main line to the building in which the pump was situated. He put in the wires connected with the switch, which was located just inside the building, and also installed the switch itself and the wire extending from it to the motor. The evidence as to who actually owned and controlled the switch is conflicting. It was picked up and put together from two old switches. Neither party seems willing to claim the ownership. Before the installation thereof the wire and the switch had been owned by the electric company. At the time Roe was altogether ignorant of electricity and the company knew that fact. There was no transformer or meter used, and the full current generated by the electric company for the purpose of furnishing the city of Enterprise with electricity and power was intended to pass over the line and through the motor. The pump was not supposed to run in the evening, however, when all the lights of the city were on. The usual voltage on the line was 2,300 volts,

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which was a high and dangerous current, necessarily fatal to any human life subjected to it.

The system used by the electric company was a three-wire or three-phase current, and the switch placed in the building was not an oil switch nor insulated in any way. It was a jack-knife switch, having blades about fifteen inches long and about nine or ten inches across, and which were entirely bare and uninsulated. When the switch was turned on or off, one coming in contact therewith—that is, with that portion next to the wire extending towards the main line—would receive a shock. While these switches were appropriate for a low current, where there was no danger to life or limb, they were not suitable for such voltage as was carried over the wires in question. They were exceedingly dangerous if any one came in contact with them. When the switch was opened and closed, fire would frequently flash for a distance of three or four inches from the switch. An oil switch, such as is usually used on high-voltage wires, would have entirely insulated the wire and the current, and would have been much safer for the operator. On account of the danger a stick about three or four feet long had been prepared to hook over the handle of the switch and pull it open and shut. Clayton was entirely ignorant in relation to electricity. He had turned the current off and on only a few times prior to the occurrence causing his death. On that date he went down late in the evening to shut off the motor. The building in which it was contained was situated at the front of a steep hill partly surrounded by brush and trees. There were no windows in the building and the only means of light was the door in front. In some way the decedent attempted to disconnect the wire carrying the current to the motor, and got against the uninsulated blades of the switch, and the whole current passed through his body, causing instant death. It was apparent, from the burns on his hand and on his leg, that he got against the uninsulated appliance.

It is claimed by plaintiff, and the jury must have so found, that defendant owned and controlled the current of electricity and transmitted it to the motor operated by Roe; that it also controlled and owned the wiring and switch carrying the current to the motor, at least as far as to the switch. The evidence tended to show that as a general rule an electric company owns and controls the line of wires to the meter where there is one, and where there is none to the switch or fuse blocks, which are usually combined, and that the pumping plant was located upon the land with the consent of Mr. Forsyth, the manager of the electric plant. The trial court submitted to the jury the disputed questions of fact relating to the switch and appliances by instructions of the import of the following charge:

"If you find from the evidence that the defendant did not have the right to, and did not, exercise any supervision, dominion, control or direction over the appliances, apparatus, or switches in said pumping plant, but that the right to exercise such supervision, dominion, control, and direction was vested in the owners of the pumping plant, or persons other than the defendant, then I instruct you that the defendant would not be liable for any accident caused by the condition of any such apparatus, switches, or appliances."

[7] The care demanded of electric companies must be commensurate with the danger, and where their wires are carrying a high and dangerous current of electricity the law imposes upon the company the utmost degree of care in the construction, inspection, and repair, so as to keep them in a safe condition at places where persons are liable to come in contact with them. Perham v. Port. E. Co., 33 Or. 451, 53 Pac. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730; Gentzkow v. Port. Ry. Co., 54 Or. 120, 102 Pac. 614, 135 Am. St. Rep. 821; White v. Elec. Co., 75 Wash. 139, 134 Pac. 807; McLaughlin v. Light Co., 100 Ky. 173, 37 S. W. 855, 34 L. R. A. 812; Commonwealth Elec. Co. v. Melville, 210 Ill. 70, 70 N. E. 1052, 1055. The question as to whether the defendant company owned and controlled the wires and switch at the point where the injury occurred, and whether or not it at the time transmitted electricity over the same to the motor, were questions for the jury. Taffe v. Ore. Ry. & N. Co., 60 Or. 177, 117 Pac. 989.

[8] About the question of control, let us suppose that an irrigation company was owning and operating a water ditch, and furnishing water to users for the purpose of irrigating lands; would it be said that such company could deliver its water and perform its duty by allowing the same to flow in its canal and out into the lateral ditch of a water user, without any gate or other contrivance to control the outflow? Or would such a company be required, even in the absence of a statute specifically directing the same, to establish a gate or means of controlling the discharge of the water from its ditch, so as to keep the quantity within a limit that would not ordinarily cause damage? Would not such a company be responsible for the management and control of such water until the same was delivered out through its gate onto the land of the owner? Could such an irrigation company say it was the duty of the user to supply the gate? In the present case the switch in question served a purpose similar to such a headgate, and it seems to us to mark the line of control and responsibility of the furnishing company. Indeed, it is stated in the brief of the learned counsel for the company that the defendant's control over the current ceased at the switch, contending, however, that the switch was no part of the transmission system. On the other hand, plaintiff asserts that it would be a mighty technical holding.

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if the defendant so owned the wire to the switch, to hold that it was not liable for the switch itself, which was directly connected with and part of the wire, which left the wire practically uninsulated at that end. It is contended upon the part of plaintiff that, if the jury should have found that the electricity was delivered at the switch, it would be a case of joint control, where either party would be responsible for injuries occurring at that point, and would be similar to two railroads having a joint depot at the junction, where both are or either is responsible for any defective condition of the surroundings. Louisville, N. A. & C. Ry. Co. v. Lucas, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; Lucas v. Railroad Co., 120 Ind. 205, 21 N. E. 972, 16 Am. St. Rep. 323; Harrill v. Railroad Co., 135 N. C. 601, 47 S. E. 730; Robinson v. Railroad Co., 135 Mich. 254, 97 N. W. 689; Railroad v. Wolff, 13 Ill. App. 437; Herrman v. Railway Co., 27 Wash. 472, 68 Pac. 82, 57 L. R. A. 390; Seymour v. Railway Co., 3 Biss. 43, 21 Fed. Cas. 1,113; Watson v. Railway Co., 92 Ala. 320, 8 South. 770; Railway Co. v. Treadway, 142 Ind. 475, 40 N. E. 807, 41 N. E. 794.

[9] It may be explanatory to state the general rule beyond the point of delivery or switch, which we find in 1 Joyce on Electrical Law, § 445b, as follows:

"Though an electrical company is not an insurer, yet where it undertakes to render service to a customer, and for this purpose runs its wires into a building and installs its apparatus therein, it is under the obligation, both in doing this and in maintaining the wires and apparatus, to exercise a degree of care which is commensurate with the risks involved, having in view such injury as may result either from improperly protecting or insulating its wires or from improperly installing the apparatus. And this obligation cannot be avoided by the company by hiring some one else to do the work required."

The company was not required to connect its line of wires with an improper switch or other device, nor to maintain the same without proper connections. First Nat. Bk. v. P. T. & T. Co., 159 Pac. 561. There were two ways for such installation: (1) For the company to furnish everything reasonably necessary and charge Roe therefor; or (2) to require Roe to procure the needed appliances at his own expense, which amounts to the same thing. The company is a public service corporation, and is entitled to compensation for whatever it does. The ownership of the appliance is not the controlling element. It cannot be supposed that an electric company would permit an independent person or concern to connect its wires with a motor like Roe's. Neither did this company delegate that duty to another, when the motor was installed and the connection made for furnishing the power for pumping. There was nothing to prevent the defendant from supervising and controlling the switch and apparatus in the power house. The case differs somewhat from that where an electric current to the amount needed, and not of sufficient voltage to be dangerous, is furnished for lighting a building. The case of Dygert v. City of Eugene, 72 Or. 1, 143 Pac. 643, is somewhat analogous. In that case the city and the electric company were successfully sued together for an injury caused by the hanging and maintaining of the city's wires too close to the heavily charged wires of the power company, by which the wires of the latter were overcharged, to the injury of the plaintiff, who was a customer of the power company.

Remarks which apply with much force to the case in hand were made by that eminent jurist, Bissell, P. J., in the case of National Fire, etc., Co. v. Denver Consolidated Electric Co., 16 Colo. App. 86, 63 Pac. 949, cited by defendant. In rejecting the contention that the electric company was liable for the imperfect and uninsulated condition of wires in a building to which it supplied electricity, although the company did not do the work of construction of the inside wires, he said:

"It is a matter of common knowledge, and in fact of universal knowledge, that an electric current is dangerous and must be discreetly and prudently handled in order to avoid danger either to life or to property. We are quite ready to concede that, when an electric light company undertakes to supply a dangerous current to a dwelling house or to a building, they are bound to see that the wires they put in and the connections they make are properly insulated and protected, so that no harm will come to the property. Where, however, they are only employed to deliver the current by connection with wiring already made by the individual who owns the property, it seems to us that their responsibility ends when the connection is properly made under proper conditions, and they deliver the current in a manner which will protect both life and property."

In the case at bar the connection between the electric wire of the defendant company which was indisputably placed, owned and controlled by it, and the wire inside the pumphouse leading to the motor, the control of which is in dispute, was made by means of a switch which was in a dangerous condition and the immediate cause of the injury. This connection, gate, or switch was not beyond the border line of the responsibility or control of the electric company. Whatever may be said about the control or liability for the management of the electric energy on the motor side of the connection or switch, or whoever may have borne the expense of the wiring next to the motor, or the installation of the delivering appliances or switch, under the statute of this state it was the duty of the electric company installing the switch and making the connection for power purposes to use every device, care, and precaution which it was practicable to use for the protection and safety of life and limb in the transmission of this subtle and dangerous element. This duty is clearly enjoined upon it by the Employers' Liability Act, and cannot be evaded or lessened by showing that a few years ago, when the contrivance was installed, the consumer contributed the cost thereof, and in order to render the bur-

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den light, an old, dangerous, uninsulated, and unprotected contrivance was permitted by the predecessor of the defendant company to be used as a switch. The evidence tends to show—in fact, it is practically beyond controversy—that the defendant company, in the transmission of the electric power to be used in the pumping station and for other purposes beyond that place, which was of a dangerous voltage, failed and neglected to make use of an appliance such as a switch or device with full and complete insulation or protection, or to use a transformer, so as to make the same as safe as practicable in order to protect the lives and limbs of those who would necessarily be in close proximity to the same and were liable to come in contact therewith, especially the operator of the motor of the patron of the company.

There was no error in overruling the demurrer to plaintiff's complaint. Under the facts in the case the jury was warranted in finding a verdict against defendant, and there was no error in denying the defendant's motion for a nonsuit, or in overruling its motion for a directed verdict.

The judgment of the lower court will therefore be affirmed.

(82 Or. 211)

STATE v. FARNAM.

(Supreme Court of Oregon. Dec. 12, 1916.)

1. INDICTMENT AND INFORMATION ⟸189(8) — HOMICIDE—INCLUDED OFFENSES.
The general rule is that an indictment for murder in the first degree necessarily involves all other grades of homicide which the evidence tends to establish.
[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 593; Dec. Dig. ⟸189(8).]

2. ABORTION ⟸1—ELEMENTS.
Procuring an unlawful abortion upon any woman always involves an assault in law, even when it is done with her consent and connivance, because no one can consent to an unlawful act.
[Ed. Note.—For other cases, see Abortion, Cent. Dig. §§ 1-5; Dec. Dig. ⟸1.]

3. HOMICIDE ⟸65—STATUTE—ABORTION.
The Oregon statute, making homicide from unlawful abortion manslaughter, has not created a new crime, but merely reduced the grade of the offense at common law by changing the punishment from death to imprisonment in the penitentiary.
[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 89; Dec. Dig. ⟸65.]

4. INDICTMENT AND INFORMATION ⟸189(8) —CONVICTION OF LESSER DEGREE.
An indictment for murder in the first degree is sufficient to sustain a conviction for homicide, committed in an attempt to procure an abortion.
[Ed. Note.—For other cases, see Indictment & Information, Cent. Dig. § 593; Dec. Dig. ⟸189(8).]

5. HOMICIDE ⟸185(2) — INDICTMENT — UNKNOWN MEANS.
An indictment for murder by means unknown to the grand jury is good.
[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 218; Dec. Dig. ⟸135(2).]

6. HOMICIDE ⟸142(7) — INDICTMENT — PROOF AND VARIANCE.
An indictment for murder by means unknown to the grand jury will sustain conviction in a case where accused was conclusively proved to have either murdered a girl outright or killed her in an attempt to procure an abortion.
[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 256; Dec. Dig. ⟸142(7).]

7. HOMICIDE ⟸340(1)—HARMLESS ERROR.
Where it appeared that accused either killed a girl outright or in an attempt to procure an abortion, but there was no evidence that an operation was necessary to preserve the life of the mother or child, any error in failing to point out the statutory exceptions or justification for such an operation was harmless.
[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 715; Dec. Dig. ⟸340(1).]

8. HOMICIDE ⟸229—EVIDENCE.
Evidence of the identity of deceased, whose remains were found burned in a barn, of previous preparation by accused for abortion, and of footprints of accused and the horse he was riding, etc., *held* to sustain a conviction for manslaughter by direct killing or producing an abortion on deceased.
[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 477; Dec. Dig. ⟸229.]

9. CRIMINAL LAW ⟸1169(1)—HARMLESS ERROR.
Admission of testimony of a girl friend of deceased that she (deceased) had told her that she would stay home because accused was coming to see her that evening was not prejudicial, where without objection there remained in the record, upon answer to cross-examination, a statement of a state's witness that deceased had told some girls that she had received a letter from accused, and could not go out with them because accused was coming to see her that evening.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3137; Dec. Dig. ⟸1169(1).]

10. HOMICIDE ⟸169(8) — EVIDENCE — DECLARATIONS OF DECEASED.
Declarations of deceased, made in a perfectly natural manner, on the evening of the homicide, that she was about to meet accused were admissible to show that what she intended to do was probably done, and did not violate L. O. L. § 705 or § 727, subd. 4, as to declarations, or any other Code section.
[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 347, 349; Dec. Dig. ⟸169(8).]

11. CRIMINAL LAW ⟸673(2) — EVIDENCE — COMPETENCY.
If evidence is competent for one purpose, it cannot be rejected merely because it is not competent for another purpose, although an instruction, limiting its effect, is proper.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1874; Dec. Dig. ⟸673(2).]

12. CRIMINAL LAW ⟸417(15) — EVIDENCE — DECLARATIONS OF THIRD PERSONS.
Evidence of declaration of third person, tending to show he committed the homicide, is inadmissible.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 960; Dec. Dig. ⟸417(15).]

13. CRIMINAL LAW ⟸404(1) — EVIDENCE — REAL EVIDENCE.
The admission in evidence of material objects or allowing inspection of the same, whether offered in evidence or not, is within the discretion of the court.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891, 893, 1457; Dec. Dig. ⟸404(1).]

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14. CRIMINAL LAW ⊂⊃404(1)—EVIDENCE.
The refusal six months after the homicide to allow the jury to inspect the feet of a horse upon whose tracks the prosecution relied was not an abuse of the court's discretion as to admitting in evidence material objects or allowing inspection of the same.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891, 893, 1457; Dec. Dig. ⊂⊃404(1).]

Burnett, J., dissenting.

Appeal from Circuit Court, Douglas County; G. F. Skipworth, Judge.

Roy A. Farnam was convicted of manslaughter, and appeals. Affirmed.

The defendant was indicted for murder in the second degree, the charging part of the indictment being as follows:

"He, the said Roy A. Farnam, on the 8th day of December, A. D. 1914, in the said county of Douglas, state of Oregon, then and there being, did then and there wrongfully, unlawfully, feloniously, purposely, and maliciously kill Edna Morgan in some manner and by some means unknown to the grand jury; and so he, the aforesaid Roy A. Farnam, did then and there in said county and state commit the crime of murder in the second degree by feloniously, purposely, and maliciously killing the aforesaid Edna Morgan, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon."

The jury returned a verdict, finding defendant guilty of manslaughter. The court, among others, gave the following instructions:

"Now, directing your attention to manslaughter. The statute provides that if any person shall, in the commission of an unlawful act, or lawful act without due caution or circumspection, involuntarily kill another, such person shall be guilty of manslaughter. * * * If you find beyond a reasonable doubt that the defendant, while in the commission of an unlawful act, if he did commit an unlawful act, on the night that Beamer's barn burned in Douglas county, Or., involuntarily killed Edna Morgan, then it would be your duty to find the defendant guilty of manslaughter. I instruct you that if you find beyond a reasonable doubt that the defendant by any means committed an abortion upon the person of Edna Morgan, then I instruct you that such act, if such act took place, was an unlawful act, and if you find beyond a reasonable doubt that the defendant, on the night that Beamer's barn burned in Douglas county, Or., committed an abortion upon the person of Edna Morgan, and if you further find beyond a reasonable doubt that Edna Morgan was killed as a result of such abortion, if such abortion was committed, then it would be your duty to convict the defendant of manslaughter."

The defendant by his counsel excepted generally to the instructions in regard to manslaughter. From the judgment of the court upon the verdict the defendant appeals here. The points relied upon in the appeal appear in this opinion and in the opinions of Mr. Justice HARRIS, concurring, and of Mr. Justice BURNETT, dissenting.

W. W. Cardwell, of Roseburg, for appellant. Geo. M. Brown, Atty. Gen., and George Neuner, Jr., Dist. Atty., of Roseburg (Dexter Rice, of Roseburg, on the brief), for the State.

McBRIDE, J. (after stating the facts as above.) [1-4] For the reasons stated in the opinion of Mr. Justice HARRIS we are satisfied that the defendant was guilty of an unlawful homicide, and that he either shot deceased, which would be deliberate murder, or killed her in the attempt to commit an unlawful abortion upon her, which, under our statute, would be manslaughter. The general rule in this state is that an indictment for murder in the first degree necessarily involves all other grades of homicide which the evidence tends to establish. State v. Ellsworth, 30 Or. 145, 47 Pac. 199; State v. Magers, 35 Or. 520, 57 Pac. 197; State v. Crockett, 39 Or. 76, 65 Pac. 447; State v. Megorden, 49 Or. 259, 88 Pac. 306, 14 Ann. Cas. 130. These decisions would seem to foreclose the contention of defendant's counsel here so far as this branch of the case is concerned, and the case of People v. Olmstead, 30 Mich. 431, which suggests a contrary view, we believe to be based upon an erroneous distinction between that class of homicides known as voluntary homicides, in which violence, assault, and trespass are involved, and involuntary homicides caused by the doing of an unlawful act, but with no intent that it should result in death. As observed in People v. Olmstead, the defect is not one of pleading, but of evidence. If it appears, therefore, from the evidence that the defendant, in attempting to commit an abortion upon the deceased, assaulted her, this brings the case within the ordinary rules of manslaughter. Procuring an unlawful abortion upon any woman always involves an assault in law, even when it is done with her consent and connivance, because no one can consent to an unlawful act. While as between the parties an unlawful act may sometimes be condoned, it is not within the power of any person to waive the violation of the laws of the country. Instances of this are found in cases of mutual agreements to fight, wherein it is held that both parties to such a conflict are guilty of assault and battery, and that each may recover damages from the other for injuries inflicted. 5 C. J. P. 630, and cases there cited. If procuring an unlawful abortion, therefore, is an assault, the offense comes within those involuntary killings by misdirected violence which constitute manslaughter. At common law the producing of an unlawful abortion resulting in the death of the mother was murder by violence. Our statute by making the offense manslaughter has not created a new crime, but has merely reduced the grade of an old offense by changing the punishment from death to imprisonment in the penitentiary. Thus, in Chitty's Criminal Law, vol. 3, p. 800, we find the form of an indictment for

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procuring an abortion, or rather a series of abortions, the fourth count of which we quote, omitting only formal and archaic allegations:

"And the jurors, etc., do further present that the said E. F. afterwards, etc., in and upon A. E. * *. * [she] then and there being big and pregnant with a certain other child, did make another violent assault, and her the said A. E. and then and there did violently beat, bruise, wound, and ill treat, so that her life was thereby greatly despaired of, and then and there violently, wickedly, and inhumanly pinched and bruised the belly and private parts of the said A. E., and a certain instrument called a rule, which he, the said E. F., in his right hand then and there had and held, up and into the womb and body of the said Anne, then and there violently, wickedly, and inhumanly, did force and thrust with a wicked intent to cause and procure the said A. E. to miscarry and to bring forth the said child, of which she was so big and pregnant, as last aforesaid, dead," etc.

Another count in the same indictment for another abortion attempted upon the same woman charged the defendant with an assault by administering drugs with intent to produce an abortion, and feloniously and of malice aforethought to murder said child. So it is said in Hale's Pleas of the Crown, p. 429:

"If a woman be with child, and any gives her a potion to destroy the child within her, and she takes it, and it works so strongly that it kills her, this is murder, for it was not given to cure her of a disease, but unlawfully to destroy her child within her, and, therefore, he that gives a potion to this end must take the hazard, and if it kills the mother, it is murder, and so ruled before me at the assizes at Bury in the year 1670." See, also, Margaret Tinckler's Case, 1 East's P. C. 354.

From these precedents I conclude that at common law the act of producing an abortion was always an assault, for the double reason that a woman was not deemed able to assent to an unlawful act against herself, and for the further reason that she was incapable of consenting to the murder of an unborn infant; and, as already shown, our statute, while it has reduced the grade of the homicide from murder to manslaughter, has not taken away any other element of the offense. This being true, the death of the deceased, occurring by reason of a double assault made both upon her and upon her unborn child, comes clearly within the category of those degrees of felonious homicide by violence which begins with murder in the first degree. The practice of allowing convictions for manslaughter upon indictments for murder in the first degree is no mere creature of our statute, but is as old as the common law. Thus in 1 East's P. C. 340, printed in 1716, we find the following:

"In most cases where justice requires that a man should be put upon his trial for killing another, it is usual (and proper, if there be any doubt) to charge him in the indictment for murder, because in many instances it is a complicated question; and no injury can thereby happen to the individual at all comparable to the evil example of a lax administration of justice in this respect; for the verdict and judgment will still be adapted to the nature of the offense, such as it appears upon the evidence."

In the appendix to Blackstone's Com., vol. 4, is found a form of judgment upon a verdict of manslaughter upon an indictment charging the defendant with willful murder. From all of these authorities we deduce the principle that procuring an unlawful abortion by any means is always in the eye of the law an assault, both upon the woman operated upon and upon the unborn child, and that the one who, in producing such abortion, kills the mother stands in no different relation to the law from a person who, in an attempt to shoot A., shoots wild and kills B., except in so far as section 1900, L. O. L., has modified the punishment. It seems to be the general rule that an indictment in the ordinary form for murder in the first degree is sufficient to sustain a conviction for a homicide committed in the attempt to perpetrate a felony. Titus v. State, 49 N. J. Law, 36, 7 Atl. 621; Commonwealth v. Flanagan, 7 Watts & S. (Pa.) 415; People v. Giblin, 115 N. Y. 196, 21 N. E. 1062, 4 L. R. A. 757; State v. Covington, 117 N. C. 834, 23 S. E. 337, and many others. Numerous states in which the courts have held as above have statutes similar to ours in relation to the certainty with which the circumstances of the crime shall be set forth in the indictment. The following is a résumé of some of the opinions on this point:

In State v. Foster, 136 Mo. 653, 38 S. W. 721, the court says:

"The indictment charges that the murder was committed in the attempt to rob Atwater, but such statement was wholly unnecessary, as the indictment may be drawn in common form, and then, when proof is made that the homicide was done in the perpetration of a robbery, this proof, being made, is tantamount to that premeditation, deliberation, etc., which otherwise are necessary to be proven, in order to constitute murder in the first degree."

In Titus v. State, supra, the indictment contained three counts, of which two are considered in the opinion, one being:

"And the grand inquest aforesaid, upon their oaths aforesaid, do further present that the said James J. Titus, on the said 8th day of April, in the year aforesaid, at the said town of Hackettstown aforesaid, in said county, and within the jurisdiction aforesaid, in and upon one Matilda Smith, in the peace of God and this state then and there being, did commit rape, * * * and in committing rape in and upon her, the said Matilda Smith, did kill the said Matilda Smith," etc.

This count was held bad. Another count read as follows:

"In and upon one Matilda Smith, in the peace, etc., did make an assault, and her, the said Matilda Smith, then and there feloniously, willfully and of his malice aforethought, did kill and murder, contrary," etc.

From the opinion I quote as follows:

"At the trial the jury was instructed that if it appeared that the killing was perpetrated by the defendant in committing, or in attempting to commit, a rape upon the woman, he should be found guilty of murder in the first degree, without reference to the question whether such kill-

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ing was willful or unintentional. The position of the counsel of the defendant upon the point is that, as there is no special count charging that the death of the woman occurred in the attempt to commit or in the commission of a rape upon her, the law will not permit such fact to be proved for the purpose of aggravating the killing, if it was unintentional, into the crime of murder in the first degree. This contention is based upon the sixty-eighth section of the Crimes Act, which declares that, 'All murder that shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in perpetrating or attempting to perpetrate any arson, rape, etc., shall be deemed murder in the first degree and that all other kinds of murder shall be murder in the second degree.' The argument urged in support of the position that a special count was indispensable whenever the state relied on any of the statutory particulars connected with the killing to intensify such killing into murder, was that, as the act created and defined the offense, every constituent of the crime embraced in such definition must be stated in the indictment. But this proposition cannot be sustained, for it has been conclusively settled by the Court of Errors in this state, in the case of Graves v. State, 45 N. J. Law, 205; Id., 358 [46 Am. Rep. 778]; that the section relied on did not create any new crime, but 'merely made a distinction, with a view to a difference in the punishment, between the most heinous and the less aggravated grades of the crime of murder.' This decided case seems to us directly in point, for in that instance, the indictment being in the abbreviated form given by the statute, it was insisted that as such form did not embody the statement that the alleged killing was 'willful, deliberate and premeditated,' the pleading was insufficient, as it did not appear that murder, within the statutory definition of the crime, had been committed. The objection was overruled and the indictment was sustained, and it is obvious that if it be not necessary to set out in the count that the alleged killing was 'willful, deliberate and premeditated,' which is one of the categories of murder mentioned in the section, it cannot be necessary to show that the killing was in the commission of a rape, which is another of the categories of the same section."

In the case of State v. Averill, 85 Vt. 115, 81 Atl. 461, Ann. Cas. 1914B, 1005, defendant (called respondent in the opinion) was indicted for murder in the first degree. Defendant objected to an instruction upon involuntary manslaughter. The court says:

"'A lawful act, done in an unlawful or negligent manner, is in law an unlawful act' (State v. Dorsey, 118 Ind. 167, 20 N. E. 779, 10 Am. St. Rep. 111); and we think the testimony given by the respondent tended to show that the shooting, though unintentionally done, was the result of negligence by her in handling the gun, indicating on her part a carelessness or recklessness incompatible with a proper regard for human life, which, if established, would in law render her guilty of involuntary manslaughter. * * * If an indictment so drawn sufficiently informs the accused of the cause and nature of the accusation against him for murder, it must follow that it sufficiently informs him of the cause and nature of any offense included within that of murder, for the greater contains the less."

Elsewhere in the same opinion is found the following statement:

"Thus it was established at common law, that a person indicted for the murder of another upon malice prepense may be found guilty of manslaughter, because it does not differ in kind or nature of the offense, but only in the degree—not in substance of the fact, from murder, but only in the ensuing circumstances, a variance as to which does not hurt the verdict."

The court held in the case of People v. Pearne, 118 Cal. 154, 50 Pac. 376:

"The indictment charged that the defendant 'did deliberately, willfully, and unlawfully kill one Ellen Dogan.' The evidence indicated that the killing was not done deliberately and willfully, but accidentally and unintentionally, and the jury, taking that view of the matter, in the light of the instructions of the court as to the law, found the defendant guilty of 'involuntary manslaughter.' It is now insisted that the indictment charges the crime of voluntary manslaughter, and that under such indictment a verdict of involuntary manslaughter constitutes a fatal variance. * * * This position is not well taken. If this indictment had simply charged an 'unlawful killing,' without malice, it would have charged the crime of manslaughter of both kinds, voluntary and involuntary. * * * Yet it has always been held that upon an indictment charging murder, a conviction for manslaughter was proper. In other words, when an indictment charges murder, it also charges manslaughter. An indictment laid for murder charges an intentional killing; yet, under the criminal practice and procedure in this state, there is no doubt but that a verdict of involuntary manslaughter would find support in such a pleading. This is so because involuntary manslaughter is the 'unlawful killing of a human being,' and such crime is always included in * * * murder."

In Tharp v. State, 99 Ark. 188, 137 S. W. 1097, the court gave this instruction:

"The jury cannot convict of murder unless the evidence shows a killing in the manner mentioned in the indictment, but may convict of a lower degree of homicide, if the evidence warrants a conviction for a lower degree, whether the killing was done in the manner mentioned in the indictment or not."

The jury found defendant guilty of involuntary manslaughter, and the judgment was affirmed. White v. State, 121 Ga. 191, 48 S. E. 941, is to the same effect. The case of State v. Moore, 129 Iowa, 514, 106 N. W. 16, wherein the indictment was for murder and the verdict manslaughter under an instruction by the court as to gross negligence, was affirmed. In Conner v. Commonwealth, 13 Bush (Ky.) 715, the court says:

"Both voluntary and involuntary manslaughter are included in the crime of murder, and one indicted for murder may be convicted of murder or either of the degrees of manslaughter."

In re Somers, 31 Nev. 531, 103 Pac. 1073, 24 L. R. A. (N. S.) 504, 135 Am. St. Rep. 700, the court says:

"While we are duly impressed with the fact that involuntary manslaughter does not contain the same heinous ingredients necessary to make up the crime of murder in the first or second degree, or of voluntary manslaughter, yet we are clearly of the opinion that, it being an unlawful transgression of the law against homicide, it may properly be considered a lesser degree of homicide, and that a jury * * * may properly return in proper cases a verdict of involuntary manslaughter." State v. Tucker, 86 S. C. 211, 68 S. E. 523.

In State v. Whitney, 54 Or. 438, 102 Pac. 288, the defendant was indicted for manslaughter under section 1898, L. O. L., referred to in the opinion as section 1746, B. & C. That portion of the charge in the indictment

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which was deemed material by the court alleged that the defendant "did feloniously and voluntarily kill one Mabel Wirtz by voluntarily giving and administering unto her, the said Mabel Wirtz, on the 14th day of March, 1908, in the said county and state, one suppository containing bichloride of mercury," etc. Mr. Justice Eakin, in discussing the case, says:

"It becomes important to determine whether it does state acts constituting involuntary manslaughter. The allegation in the indictment is 'By voluntarily giving and administering unto her, the said Mabel Wirtz, on the 14th day of March, 1908, in said county and state, one suppository containing bichloride of mercury, a deadly poison, from the effects of which deadly poison, so given and administered, she, the said Mabel Wirtz, became mortally sick, * * * and died.' This allegation does not state facts disclosing an unlawful act, or a lawful act done without due caution and circumspection, or any act of criminality. It is not necessary to allege malice or intent to kill. The criminal element consists in doing the unlawful act, without any intention to take the life of decedent, or do her great bodily harm. It is therefore necessary that the indictment disclose that the act causing death was an unlawful act. * * * Counsel for the state in his brief cites authorities to the effect that poison negligently administered, or administered with an evil purpose, in the event death follows, is manslaughter. However, it is not alleged that the poison was administered without due caution or circumspection, nor is an evil purpose alleged, and therefore these authorities do not aid the state. Where the charge is murder by poisoning, as is the case in some authorities cited, the indictment charges an intent to murder, thus disclosing an unlawful act, or evil purpose, and will support a verdict of involuntary manslaughter under section 1746, B. & C. Comp. This was expressly held in State v. Ellsworth, 30 Or. 145, 47 Pac. 199, but in the present case the indictment is confined to a charge of a violation of section 1746, without alleging an unlawful act."

In the case of State v. Ellsworth, cited in the above excerpt, the charge in the indictment was murder by poisoning, and this court held that under such an indictment the court could properly instruct the jury that they might return a verdict of involuntary manslaughter caused by culpable negligence. The authorities above cited indicate that where the indictment charges murder and the proof shows an unlawful, involuntary killing, the defendant may be convicted of such grade of felonious homicide as the evidence seems to warrant.

[5, 6] Another reason why the case at bar should be distinguished from the Michigan case is that an indictment in this state is good as to the means by which the offense was perpetrated if it shall appear from the evidence that such means were unknown to the grand jury. This form of indictment is sanctioned by our Code. See form No. 1, p. 1010, vol. 1, L. O. L., and forms 5 and 6, p. 1011, Id.; Bishop's Cr. Procedure, §§ 495, 553; Waggoner v. State, 155 Ind. 341, 58 N. E. 190, 80 Am. St. Rep. 237; Edmonds v. State, 34 Ark. 720. In the latter case it is said:

"No doubt the mode or instrument of death, if known to the grand jury, or if it can be ascertained by them, should be alleged in the indictment. * * * But this rule must not be carried so far as to furnish a shield from punishment, where it is plain that a crime has been committed. * * * It will be seen from the evidence in this case that if the means of death could not have been so alleged, the crime might have gone unpunished."

So here. It is conclusively proved that the defendant lured this poor, 15 year old child into a barn remote from human habitation, and that he either murdered her outright, or, in an attempt to produce an abortion to protect himself from the consequences of his own lust, so dealt with her as to bring about her death. The evidence was such that reasonable men, while they might agree as to the fact that an unlawful homicide had been committed (and I cannot see how reasonable men could come to any other conclusion), might well differ as to the means by which, or the intent with which, the offense was committed. Under such circumstances it was eminently proper for the grand jury to charge that it was committed by means to the grand jury unknown.

There is a further reason why it was unnecessary to charge that the offense was committed in an attempt to produce an abortion, and that is this: In my judgment the statute was directed at that class of abortions only wherein the actual consent of the woman, as distinguished from legal consent, is obtained. I take it that if a person should forcibly seize a woman and attempt against her consent to produce an abortion upon her, or should secretly with the same design introduce drugs into her food, and by reason of either of these attempts the woman should be killed, section 1900 of the Code would not apply, but that he would be guilty under section 1895 or section 1898, as the facts might appear. The deceased, a poor, motherless child of 15, was incapable of consenting to an assault upon herself, or upon her unborn child. It is sickening to speak of her consenting to the act. It was as much a forcible act as though some scoundrel had met her upon the road, and, knowing her condition, had seized her, and in the attempt forcibly to bring about a miscarriage had killed her. I am aware of the common-law rule in regard to rape and the defilement of children, but those were exceptions to the general rule in regard to consent which, fortunately, an improved sense of decency has removed by statute, and which should not be extended beyond the limits fixed by a generation less scrupulous than ours in regard to the chastity of children. Upon the whole I am of the opinion that the offense is included in that class of manslaughters by violence that are embraced by the general charge of murder.

[7] It is urged that, conceding that manslaughter committed in producing an abortion can properly be considered in a case where

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the indictment charges murder, the charge of the court in this instance was erroneous because the court failed to point out the exceptions mentioned in the statute. If there was error in this respect, it was harmless, because there was not the slightest testimony that the operation was necessary to preserve the life of the mother or the child. On the contrary, the evidence indicated that it was wholly unnecessary, and that, if performed at all, it was for the base and sordid purpose of enabling defendant to escape the consequences of his own unlawful act; but there was no error. Where there is no testimony whatever to bring a case within an exception in the statute, the court is not required to charge in relation to such exception. This exact question arose in the case of Weed v. People, 56 N. Y. 628. The opinion is short, and we give it in full:

"Plaintiff in error was indicted for procuring an abortion, by administering drugs causing the death of the mother. The questions above stated were raised upon the trial, and were disposed of as there stated. The court charged, among other things, that if the jury found an abortion had been committed upon deceased, or an attempt had been made causing her death, and that the prisoner was connected with it, they must convict. This was excepted to. It was insisted that the charge was erroneous, as the jury were instructed to convict, notwithstanding they found that the production of the miscarriage was necessary to preserve the life of the deceased, in which case it was not criminal. Held, that the charge was proper, as the evidence showed clearly the absence of any necessity, and no evidence whatever was given tending to show such a necessity, and that therefore there was nothing warranting the submission of that question to the jury."

Error is predicated upon the refusal of the court to permit an inspection of the feet of the horse which the state claimed was ridden by the defendant on the night of the homicide, and also upon the refusal of the court to permit evidence of the declarations of third parties, tending to show that they had committed the homicide. We all concur with Mr. Justice BURNETT in holding that there was no reversible error in either ruling.

For the reasons stated by Mr. Justice HARRIS we are of the opinion that there was no error in the admission of the testimony of Mabel Barton as to statements made to her by deceased on the evening preceding the homicide.

We also concur with Mr. Justice HARRIS in holding that the evidence as to the corpus delicti was competent and sufficient.

The judgment of the circuit court is therefore affirmed.

HARRIS, J. (concurring). [8] The scene of the tragedy as told by the record is laid in Cow Creek Valley. The places to be kept in mind are the Farnam and Morgan residences and the Beamer barn. The defendant lived with his parents, a sister, and a brother, Lester Farnam, on a farm about 12 miles east of the town of Glendale. Edna Morgan resided with her father and a younger sister, Esther Morgan, on a farm about 5 miles west of the Farnam place, and about 7 miles east of Glendale. The Beamer barn is located about three-quarters of a mile west of the Morgan home, or about 5¾ miles west of the Farnam place. A public road runs past the Farnam house, extends west down the valley by the Morgan residence, and then continues on past the Beamer barn to Glendale. The Beamer barn was located about 50 feet south of the road. The building had been erected for a dwelling house, and afterwards converted into a barn. The barn may be described as having a main part and a shed, with the main part facing the road and the shed in the rear. When the main part was changed from a dwelling house to a barn the ceilings and partitions were taken out, so that there was no loft. Hay was kept in the main part, and on December 8, seven or eight tons were spread on the floor to a depth of between 3 and 4 feet. The southwest half of the shed was used for cows, while horses were kept in the southeast portion. There were only two entrances to the barn. One was on the west side close to the south corner, and opened into the place where the cows were kept, and the other entrance was on the east side and led to the horses. A person could reach the main part by entering either one of the two doors. On the night of December 8th, the entrance to the horses had two bars across it, so as to prevent the horses from getting out, but the other door was left open, so that the cows could come and go.

About half past 1 o'clock on the morning of December 9, 1914, H. H. Beamer, whose residence is 720 feet from the barn, discovered that his barn was on fire. He went down to the barn, and "stayed until it fell out, and burned down pretty well, just like a pile of hay burning." Beamer and four other persons who were at the barn then went to bed again. About 7 o'clock in the morning Beamer returned to the fire and "saw the remains of a body in the ashes, still burning." The neighbors were immediately notified, and appeared upon the scene, and they then "saw it was the body of a lady," because "there was some hairpins laying right across, kind of back of the skull. There was two right along here, and there was one long corset stay, and one or two small ones curled up next to the long one, and then there was some more laying right side of it." The remains were found lying next to a sill, and the body was permitted to burn until about 10 o'clock that morning when, acting on the advice of the coroner, the fire was extinguished with water. When the fire started, the body was evidently on the hay inside the main part of the barn, because the remains were found at a place which would have been near the south side, but within the main part of the barn. The arms and the legs were, for the most part, consumed by the fire, and while the body had been burned beyond rec-

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ognition, there was yet enough left indubitably to establish that it was the charred, burned, and baked remnant of a once female human being. Between the thighs, and to some extent protected by them and the lower parts of the body from the fire, lay a fetus, which the medical men said had reached about the fifth month of its development. The verdict of the jury was evidently predicated upon the theory that the death of Edna Morgan resulted from an abortion produced by the defendant.

At the very outset the defendant contends that "there is no proof of the corpus delicti from which the court or the jury can say that the body found in Beamer's barn was the body of the missing girl at all," and, further, that "there is not one circumstance from which it can be said that defendant caused the death of Edna Morgan at all, in the commission of an unlawful act or otherwise." It therefore becomes necessary to examine the evidence which was submitted to the jury.

A motive can be ascribed to Roy Farnam which would have been more relentlessly pursuing and more fearfully pressing upon him than upon any other living person. Roy Farnam is an unmarried man, and was about 23 years of age. Edna Morgan would have been 15 years old on December 9, 1914. Their acquaintance with each other dated from about Christmas, 1913; acquaintanceship grew into friendship, and friendship apparently ripened into love; for, commencing with the latter part of June or the first part of July, no other boy or young man escorted Edna Morgan to dances, parties, and literary entertainments except Roy Farnam. The defendant admitted that so far as he knew he was the only person who kept company with Edna Morgan. She was a frequent visitor at the Farnam house. It was not unusual for her to be there as often as two or three times a week, and the longest period between her visits was about three weeks. More than once she remained at the Farnam home overnight, and the next day was taken home by Roy. On the Saturday preceding the day of her disappearance she stayed overnight with the Farnam family, and was escorted home the next evening by the defendant. J. J. Pollock testified that in the latter half of June, 1914, he saw the defendant and Edna come out of the Morgan barn, and observed Roy "brushing her clothing and her hair." Ira Lewis said that on the night of July 1, 1914, between 11 and 12 o'clock he saw the defendant and Edna in a compromising position. Rice Wilson and George Barton testified that on November 8th, they saw Roy and the girl in an unmistakable position. In September, 1914, Mrs. Ella McGee made a one-piece gingham dress for Edna with the waist and skirt sewed together, but so constructed that a belt could be worn if desired. Mrs. McGee found the waist measurement to be 26 inches, and made a belt 28 inches long, so that it had a 2-inch lap. This witness testified that when taking the measurement for the dress she noticed the development of the bust, "more than I had noticed her before. I remarked about it." Edna wore this belt only a few times, and soon discarded it. Margaret Wilson called at the Morgan home on the afternoon of December 8th, and, having noticed the belt on the table, picked it up and tried it on Edna, and found it to be 2 or 3 inches too short. Her father, R. M. Morgan, stated that Edna had not gone to basket-ball games for probably a month prior to her disappearance. Mrs. Emma Herald told the jury that a few days before Thanksgiving she noticed that the girl "looked too large to be normal," and that the impression made upon her was so strong that she spoke to her husband about her suspicions. Verna McGee explained some observations which she made at a basket-ball game about a month prior to December. Helen Ferbrache and Margaret Wilson stated that Edna had worn a certain short blue coat to school, and that they had not seen her with the coat off in school for a long time. There was ample evidence to warrant the jury in believing that Edna Morgan was pregnant, and that Roy Farnam was the author of her condition.

Edna Morgan was home in the sitting room during the evening of December 8th, until about 10 o'clock, when, according to the testimony of her father, he saw her alive for the last time as she left that room and stepped out into the hall. The father does not know whether she went upstairs to the bedroom which she occupied with her sister, although he supposed at the time she was going to bed. Esther Morgan retired about 8:30 and never saw Edna alive after that time. The next morning the father and Esther arose at the usual hour, and it was discovered that Edna was missing. When Edna left the sitting room a cap and a raincoat belonging to Esther and the blue short coat belonging to Edna were hanging in that room, but on the morning of the 9th those articles were gone. Three medical witnesses expressed the opinion that the remains were those of a young person, basing their conclusion on the appearance of a wisdom tooth, the condition of certain sex organs, and the upper end of the femur. Physicians also stated that the expulsion of the fetus resulted from an operation with the hand or an instrument, and that death probably occurred after the birth.

About 8 o'clock on the morning of the 9th, before any women had come from the road to view the fire, tracks, apparently made by a woman, were discovered leading from the center of the road about a rod east of a gap or bars in the fence, "right straight toward the gap" in front of the Beamer barn "in toward" the barn. These tracks were indistinct except two. One was close to the gap or bars, but within the right of

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way of the road, and the other was inside the inclosure and a few feet from the bars, through which the person making the tracks had evidently gone. Each of the two plain tracks appeared in cow manure. The imprints were made by a No. 3 shoe, and apparently the shoe had a good heel. Edna Morgan wore a No. 3 shoe, and the shoes worn by her that night were comparatively new. The length of the two tracks corresponded with the length of one of her old shoes. Moreover, the very places where the two plain tracks were found would indicate that the woman making those tracks did so in the night, when she could not plainly see where she was stepping.

On the 15th of the preceding October the father purchased a corset from A. H. Henson, a merchant in Glendale. Edna wore this corset that night, because Esther said that she could feel it when she had her arms around the sister while playing with her that evening. The corset could not be found in the Morgan home the next morning. Corset stays and supporter buckles were found with the burned body. A. H. Henson never carried or sold any corsets except W. T. corsets. Indented on the supporter buckles used with the W. T. corsets are the letters and figures: "Pat. 11. 2. 09." These letters and figures appear on buckles found with the body, and, moreover, the buckles that had been in the fire were exactly like those used on W. T. corsets. There are four supporter buckles on the sample W. T. corset received in evidence. Four buckles were found at the Beamer barn. The metallic part of three buttons or grips used in connection with the supporters were panned out from the ashes, and they were exactly like the same part of the buttons or grips found on the sample corset; and, finally, assurance is made doubly sure from the circumstance that the two clasps, which were found with the body, and are made to fit each other down the full length of the corset, are the exact counterparts of the two clasps on the sample corset.

On December 8th, Edna wore the dress that Mrs. Ella McGee had made for her in September. The material and buttons for that dress were supplied by Edna. Mrs. McGee says that Edna furnished her with three large old-fashioned pearl buttons, which the girl said had been used by her mother when living, and that she had no other buttons like them. Those three buttons were sewed on the skirt of the gingham dress. The buttons had "an oval shaped ring carved" in them, and that is what caused Mrs. McGee to "take particular notice to it." One whole button and some pieces were taken from the place where the body lay, and Mrs. McGee testified that the whole button was "exactly like those I put on the dress." There was also some testimony that Edna's front teeth had been shortened by decay, and the record discloses some evidence tending to show that the front teeth of the skull found in the Beamer barn were short. Harry Wilson was at the barn soon after the body was discovered, and he saw the form of a corpse—

"with the head lying in the barn, about the center of the barn. She was lying on her back, and the body part of the body from the hips up was in this direction, and the corset was one side of it, had fallen off on the sill. She was laying partly on the sill in the center of the barn, and the side that was laying on the sill was still burning. The clothing had burned away, and her form was lying partly on the side; it lay on the corsets, and they burned on the ground, but on the other side they were standing up, held up by the flesh. I saw also the hair of her head lying there, and the hairpins, and I saw the bones of the arm, and her arms, and the form of her legs. Saw also that she wore something of waterproof, you could see the cuffs—her arms lay this way—and you could see the cuffs of both sleeves; they looked heavier than the bottom of the dress; you could see the cuffs, and three or four inches of the balance. It looked like it had been waterproof cloth. And I could see the bones of the arms laying up this way. And the legs down to the feet. They were badly burned. You could see the form of the legs and the form of the arms."

Additional evidence appears in the record relative to the appearance of the ashes left by the burning of the wearing apparel. Hairpins and shoe buttons with wire fasteners were found with the body. Mrs. Florence Dewey told the jury that she was up the morning of the 9th on account of her sick mother, who was living in the Eliff house, 810 feet from the Beamer barn; that she stepped out on the front porch to observe the condition of the weather, and noticed a light in the Beamer barn, and "as I turned to go into the house, * * * I saw the reflection; I knew the barn was afire, and when I walked a step or two, and went into the door, * * * I stopped to look back through to the fire, and as I did so I heard a gun shot at that barn. Some small calibre gun." Underneath the body Harry Wilson found "three pieces of flat lead; it had melted and run into the crevices."

Testimony concerning oil of tansy, logwood tea, echinacea, a shoe track, and horse tracks are largely relied upon to connect the defendant with the death of the girl. Evidence concerning a letter written by the defendant and received by the deceased was an important feature of the trial. Oil of tansy is a poison and an abortive agent. Logwood tea is poisonous. Echinacea is used as a blood medicine and to treat blood poisoning. Dr. D. A. Forbes of Canyonville says that the defendant came to him on September 2, 1914, and told him:

"That he had a cousin, a young lady who had been out with a young man, and she had gotten into trouble, and wanted to know if I would take the case, and I told him I would at term. That is the expiration of the period of gestation. He wanted to know if I could not do something before that time—they did not want to let the case run—and I questioned him with regard to the time, and he said it was two months, and I told him it was not my practice at all to interfere with anything of that kind. And he wanted to know of me, when he found that I

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would not take the case at all, he wanted to know what I could advise, and I told him I would not advise anything, to begin with, and he asked me then with regard to some drugs, and I told him that anything that he could use in that line was of a poisonous nature, and I would advise him to not fool with it."

The defendant also spoke to Dr. Forbes about the use of oil of tansy with cattle, and inquired about using logwood tea and oil of tansy. H. E. Jeffries gave some extract of logwood chips to the defendant, who said that he wanted it for a girl, explaining the reason. About three days afterwards Roy secured more extract of logwood chips, and at that time told Jeffries that:

"He had inquired of a doctor in Canyonville if that stuff was any good or not, and the doctor told him that the stuff was poison, and any poison would do that, and to be careful." Roy subsequently told the witness that the "stuff is no good."

In September, 1914, the defendant asked J. E. O'Neil, a druggist in Canyonville, for oil of tansy, but the latter had none. On September 6, 1914, and again on September 20th following, B. L. Darby sold oil of tansy to Roy Farnam. On December 10th, a bottle labeled echinacea and a bottle containing oil of tansy were found in the Morgan home in a bureau drawer used by Edna. The sheriff testified that he exhibited the oil of tansy bottle to the defendant, and the latter "said he got it at Darby's drug store in Glendale." Mrs. Farnam stated that "we had a bottle just exactly like this" bottle of echinacea. R. M. Morgan testified that he had never had oil of tansy or echinacea about the house. The defendant admitted upon the witness stand that he was getting the extract of logwood chips for the purpose of an abortion, but claimed that he was getting them for another man.

Thirteen boards fell out of the gable end of the shed where the cows were kept, and were not consumed by the fire, but lay upon the ground undisturbed until turned over in the search for tracks. A shoe print was found in the mud about 3 feet from the entrance on the west side of the barn, and indicated that the person who made the track had stepped out of that entrance. This track corresponded in every particular with a shoe worn by Roy Farnam on December 8th. Large corrugated hob nails had been driven into the sole of his shoe, and a single row of small nails appeared around the edge of the sole. Similar hobnails, as well as small nails, had been driven in the heel of the shoe. The track revealed the same row of small nails, and plainly showed the imprints made by the hobnails. Measurements were made of the spaces between the nails in the track, and those measurements correspond exactly with the same spaces between corresponding nails found in the shoe. Additional, but indistinct, tracks were found, indicating that the same person had gone out to the fence and across to the north side of the road. A horse had been tied on a hill north of the road.

It will be remembered that the tracks made by a woman led from a point about one rod east of the bars in front of the barn. Commencing at this point tracks made by a horse were found leading along the north side of the road a short distance and then up a hill to a place in the brush about 180 feet from the road. There were indications showing that the horse had been tied to an oak sapling, and had stood there for an hour or two. There was a ring around the sapling showing that the rough bark had been rubbed as though by a rope tied around it. Black hair was found on the tree, and also on a tree immediately behind the prints made by the hind feet. Some rope fiber was picked up at the foot of the tree, to which the horse had evidently been tied. At about 8:30 on the morning of the 9th, Roy appeared at the scene of the fire, riding a black mare called Black Bess. He tied the mare to the fence on the south side of the road about 50 feet east of the bars at the Beamer barn. The mare was ridden back to the Farnam place that evening. On December 10th the tracks made on the hill on the north side of the road were traced to the Farnam barn. Black Bess was then taken out of the barn, and measurements were made of her hoofs. These measurements corresponded exactly, not only with the tracks made by the mare when taken out of the barn at that time, but also with the tracks made by the horse that had gone up the hill. The horse tracks in the road between the Farnam place and the Beamer barn showed that two trips had been made by the same animal, one set of tracks being slightly fresher than the other. The tracks made on one trip going west turned out of the road in toward the Morgan home, and then proceeded on west toward the Beamer barn. When the mare was taken out of the Farnam barn on the 10th, she was tied with a halter that had a rope, and Lester Farnam testified that a rope was attached to every halter that they had. Droppings left by the horse when ascending or descending the hill contained wheat, and on the 10th every manger in the Farnum barn contained wheat hay.

Allen Brown testified that he stayed at the Gilliam house on the night of December 8th. The Gilliam ranch is located between the Farnam and Morgan homes, being about three miles west of the Farnam place and about two miles east of the Morgan residence. Brown went to bed about 10 o'clock on the night of the 8th, but was kept awake by a dislocated thumb until about 2 or 3 in the morning. This witness says that about one hour and a half after he went to bed he saw a horse and a rider pass along the road going west, and about 2 o'clock in the morning he heard a horse cross a bridge not far from the house. The defendant says he retired at 10:15 the night of the 8th, and

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it appears that he arose about 5 o'clock the next morning.

About noon on December 8th, the defendant wrote and addressed a letter to Edna Morgan, and at his request his mother put it in the mail box, and then telephoned to Edna, telling her that she would receive a letter. The stage reached the Morgan home about 4 o'clock, and Edna was seen to receive a letter from the driver. She read it on the way to the house, and then put it in her bosom. That morning Mabel and Alice Barton came to the Morgan home to visit with the Morgan girls, and before the arrival of the stage, it was understood that Edna was to go home that evening with the Barton girls and stay overnight with them, at their home about two miles west of the Morgan place; but, after receiving the letter, Edna decided not to go home with the Barton girls, because she thought that Roy would come down that evening. After Roy had done the chores, and about supper time, he was called to the phone by Jimmie Pickett, who asked the defendant to come over to the Jeffries home and play cards that evening, but Roy answered, saying that he could not because he was busy. Afterwards the defendant was called to the phone by Edna, and they had some telephonic conversation.

If time and space permitted, many additional details could be recited which dovetail with, strengthen, and support the prominent features of the story of Edna Morgan's disappearance; but no attempt will be made to enlarge upon the narrative, except to note that when at the scene of the fire on the morning of the 9th, the defendant said, "I will be blamed for this," and, according to the testimony of Mrs. E. E. Wilson, a short time afterwards, and on the same morning, he said, "How much better marriage would have been than this." There was ample evidence to justify the jury to find that the defendant at some time after 10:15 left his home on Black Bess, passing the Gilliam house three miles distant, when Brown says he saw a horse and rider going west, and that, pursuant to an engagement, he picked up Edna at her home, and proceeded on towards the Beamer barn three-fourths of a mile away; that as they reached the bars Edna got off the horse at the center of the road, and went in towards the barn, while Roy rode the mare a little farther west down the side of the road, and then up the hill north of the road, and, after tying his horse, joined Edna and went in the Beamer barn with her, and subsequently produced an abortion upon her; that to conceal the crime he set fire to the barn, made his exit through the door at the west end of the shed, went to the fence, crossed to the north side of the road, and on up to the place where the mare was tied and then started for home, passing the Gilliam house at about the time when Brown heard a horse cross the bridge, and arriving home considerably before 5 o'clock on the morning of the 9th. Moreover, the shot heard by Mrs. Dewey and the three pieces of lead found by Harry Wilson furnished some evidence at least tending to show that the defendant did not stop with an abortion. While the evidence is circumstantial, still it is stronger both in quantity and quality than the record made in State v. Williams, 46 Or. 287, 80 Pac. 655, and the transcript of testimony presented here is in no respect less convincing, but in many particulars is more forceful than the case made by the prosecution in State v. Barnes, 47 Or. 592, 85 Pac. 998, 7 L. R. A. (N. S.) 181.

[9] The defendant complains of a ruling which permitted an answer given by Mabel Barton to remain in the record. When a witness for the state, Mabel Barton, was asked by the district attorney:

"Now tell the jury what Edna told you about going home with you that evening."

The witness answered:

"She said she could not because she thought Roy was coming down."

The court, however, overruled a motion to strike, on the theory that it was competent for the state to prove that Edna Morgan had planned to meet the defendant, and the testimony was offered by the state for that purpose.

Even though it be assumed that the testimony moved against was incompetent, nevertheless, the defendant is in no position to claim that he was materially prejudiced by it. R. M. Morgan was the first witness called by the state. On direct examination he testified about having seen Edna receive a letter from the stage driver on the afternoon of the 8th, and upon cross-examination counsel for the defendant asked this question:

"Now then, you say Edna received a letter the day before from Roy Farnam. How do you know the letter was from Roy Farnam?"

The witness answered:

"Charley Hobbs said he got it out of the Farnam mail box, and it was addressed to Edna. As far as my positively knowing that Roy Farnam wrote the letter that Charley Hobbs gave her, I don't know. All I know is that she got the letter. She told the girls it was from Roy; she could not go home with the Barton girls because Roy was coming that evening."

The answer was responsive to the question, and no objection was at any time made to any part of the answer. The testimony was elicited by the defendant himself, and it was a part of the record when Mabel Barton testified afterwards. Moreover, defendant himself invoked the same rule when offering a letter that had been written by Edna Morgan. The answer of Mabel Barton was substantially the same, and not materially different from the testimony given by R. M. Morgan; even if the court had taken the answer of Mabel Barton from the jury, it is nevertheless fair to assume that the testimony of R. M. Morgan would have remained

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in the record, for the reason that it was elicited by the defendant himself, and was not objected to at any time during the trial; and therefore the defendant could not have been prejudiced, as now contended by him. It is true that the failure to object to the evidence of R. M. Morgan may not operate as a waiver of any right to object to like evidence on the part of Mabel Barton if such evidence was incompetent; but, the indisputable fact still stands out in bold relief that so long as the testimony of R. M. Morgan remained in the record, any failure to eliminate the answer of Mabel Barton could not injure the defendant to the extent claimed by him.

It was competent, however, for the prosecution to show that the deceased intended to meet Roy Farnam that night. The ruling of the court is not within the ban of the hearsay doctrine, nor is it novel or startling. Judicial precedents and text-writers of recognized authority support the admission of declarations made in cases analogous to the one in hand. In State v. Hayward, 62 Minn. 474, 65 N. W. 63, Harry Hayward was convicted of having procured one Claus Blixt to murder Catherine Ging. She was shot about 7 o'clock on the evening of December 3d. A Mrs. Hazelton, a witness for the state, was permitted to testify that she was with Miss Ging in a dry goods store in Minneapolis about 4:35 p. m. on the day of the murder; that the witness and Miss Ging left the store together about 5:00 p. m. and as they were parting Mrs. Hazelton asked Miss Ging to go home with her to dinner, and the latter answered that she could not because "she had a business engagement with Mr. Hayward." The testimony was held to be competent.

In Hunter v. State, 40 N. J. Law, 495, Benjamin Hunter was convicted of the murder of John M. Armstrong. At the trial the son of the deceased was permitted to tell the jury that in the afternoon of the day of the murder his "father said he intended to go with Mr. Hunter, and he and Mr. Hunter were going to Camden that night." About one hour after the conversation with the son the deceased wrote a letter to his wife, saying:

"I will not be home much before nine o'clock. I am going over to Camden again with Mr. Hunter, on business connected with the Davis matter."

The declarations of the deceased were held to be competent, the court saying:

"The present point of inquiry therefore is whether these declarations of Mr. Armstrong to his son, and the similar declarations contained in the note to his wife, can reasonably be said to be component parts, or the natural incidents of the act of the deceased in going to Camden, which act was incontestably a part of the res gestæ. After mature reflection and a careful examination of the authorities, my conclusion is that these communications of the deceased should be regarded as constituents of that transaction, for I think they were preparations for it, and thus were naturally connected with it. In the ordinary course of things it was the usual information that a man, about leaving his home, would communicate for the convenience of his family, the information of his friends, or the regulation of his business. At the time it was given, such declarations could, in the nature of things, mean harm to no one; he who uttered them was bent on no expedition of mischief or wrong, and the attitude of affairs at the time entirely explodes the idea that such utterances were intended to serve any purpose but that for which they were obviously designed. If it be said that such notice of an intention of leaving home could have been given without introducing in it the name of Mr. Hunter, the obvious answer to the suggestion I think is that a reference to his companion who is to accompany the person leaving is as natural a part of the transaction as is any other incident or quality of it. If it is legitimate to show by a man's own declarations that he left his home to be gone a week, or for a certain destination, which seems incontestable, why may it not be proved in the same way that a designated person was to bear him company? At the time the words were uttered or written, they imported no wrongdoing to any one, and the reference to the companion who was to go with him was nothing more, as matters then stood, than an indication of an additional circumstance of his going. If it was in the ordinary train of events for this man to leave word, or to state where he was going, it seems to me it was equally so for him to say with whom he was going."

In State v. Smith, 49 Conn. 376, a conviction of murder in the first degree was affirmed, and the court held that it was competent for the wife of the deceased to testify that as he left his home he said "that he was going to arrest 'Chip Smith,' meaning the prisoner."

In State v. Mortensen, 26 Utah, 312, 73 Pac. 562, 633, the defendant was sentenced to death upon a conviction of murder. The wife of the deceased was permitted to testify that after supper on the night of the homicide, as her husband was leaving the house, he closed the door and said to her:

"I am going over to Peter's (defendant's) for a few minutes to collect some money. I will be back soon."

The question of the admissibility of the quoted evidence was considered at length, and in the course of the discussion the court used this language:

"The principal objections to the admission of this testimony urged are that the defendant was not present when the statements were made, and that it is hearsay evidence, and not a part of the res gestæ. These objections are not sound. The fact that the defendant was not present when the declarations testified to were made is wholly immaterial, and the statements are not merely hearsay evidence. They are declarations of the intention and purpose of the deceased to meet the defendant, and were admissible, as original evidence, under one of the exceptions to the rule of hearsay. Some courts admit such declarations as a part of the res gestæ, but we think they more properly come under the exceptions to the rule of hearsay evidence. Greenl. Ev. § 162a. The evidence of these declarations was not admitted for the purpose of showing that the deceased was actually at the house of the defendant, but to show what was in his mind—what his intentions were—at the time of utterance. Evidence of what a person's intentions were is relevant circumstantially to show that he afterwards carried out his designs."

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In U. S. v. Nardello, 15 D. C. (4 Mackey) 503, it was decided that it was competent to show that when last seen alive, and as he left two companions, the deceased said "he was going out to seek Nardello, to look for him."

In Thomas v. State, 67 Ga. 460, Harp Thomas was convicted of murder on circumstantial evidence. On the night of the homicide, when in the act of leaving the house, and a short time before the murder, the deceased said:

"There are two persons down the alley; I think it is Harp and his sweetheart. I will go and see."

The testimony was held to be admissible.

In Mut. Life Ins. Co. v. Hillmon, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706, the beneficiary, claiming that her husband, John W. Hillmon, was dead, attempted to recover on a policy insuring his life. The company contended that John W. Hillmon was not dead, but that he was alive and in hiding. On the trial the plaintiff introduced evidence tending to show that about March 5, 1879, Hillmon left Wichita, in the state of Kansas, and traveled in South Kansas in search of a site for a cattle ranch, and that on the night of March 18th, while in camp at a place called Crooked Creek, Hillmon was killed by accident on the discharge of a gun. The company introduced evidence tending to show that the body which was represented to be Hillmon's was not that of Hillmon, but was the body of Frederick Adolph Walters. About the first week of March Walters wrote a letter to his sister, which read in part as follows:

"I now in my usual style drop you a few lines to let you know that I expect to leave Wichita on or about March 5th, with a certain Mr. Hillmon, a sheep trader, for Colorado or parts unknown to me. I expect to see the country now. News are of no interest to you, as you are not acquainted here. I will close with compliments to all inquiring friends. Love to all."

Under date of March 1st, at Wichita, Kan., Walters wrote a letter to his fiancée, reading thus:

"Your kind and ever welcome letter was received yesterday afternoon about an hour before I left Emporia. I will stay here until the fore part of next week, and then will leave here to see a part of the country that I never expected to see when I left home, as I am going with a man by the name of Hillmon, who intends to start a sheep ranch, and as he promised me more wages than I could make at anything else I concluded to take it, for a while at least, until I strike something better.. There is so many folks in this country that have got the Leadville fever, and if I could not have got the situation that I have now I would have went there myself; but as it is at present I get to see the best portion of Kansas, Indian Territory, Colorado, and Mexico. The route that we intend to take would cost a man to travel from $150 to $200, but it will not cost me a cent; besides, I get good wages. I will drop you a letter occasionally until I get settled down; then I want you to answer it."

The communications were held to be competent evidence of the intention of Walters at the time of writing them, the court saying:

"Man's state of mind or feeling can only be manifested to others by countenance, attitude, or gesture, or by sounds or words, spoken or written. The nature of the fact to be proved is the same, and evidence of its proper tokens is equally competent to prove it, whether expressed by aspect or conduct, by voice or pen. When the intention to be proved is important only as qualifying an act, its connection with that act must be shown, in order to warrant the admission of declarations of the intention. But whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party. The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact as his own testimony that he then had that intention would be. After his death there can hardly be any other way of proving it; and while he is still alive, his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time, and under circumstances precluding a suspicion of misrepresentation. The letters in question were competent, not as narratives of facts communicated to the writer by others, nor yet as proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go, and that he went with Hillmon, than if there had been no proof of such intention."

Some of the many additional illustrations of the rule may be found in State v. Power, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902; State v. Dickinson, 41 Wis. 299; Mathews v. Great Northern Railway Co., 81 Minn. 363, 84 N. W. 101, 83 Am. St. Rep. 383; Eighmy v. People, 79 N. Y. 546; Commonwealth v. Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235; Commonwealth v. Howard, 205 Mass. 128, 91 N. E. 397; Inness v. Boston, etc., Railroad, 168 Mass. 433, 47 N. E. 193; The San Rafael, 141 Fed. 270, 72 C. C. A. 388; People v. Atwood (Mich.) 154 N. W. 112; State v. Hunter, 131 Minn. 252, 154 N. W. 1083, L. R. A. 1916C, 566; State v. Garrington, 11 S. D. 178, 76 N. W. 326; State v. Howard, 32 Vt. 380; Rogers v. Manhattan Life Ins. Co., 138 Cal. 285, 71 Pac. 348; D. & R. G. R. Co. v. Spencer, 25 Colo. 9, 52 Pac. 211; Weightnovel v. State, 46 Fla. 1, 35 South. 856; Walling v. Commonwealth (Ky.) 88 S. W. 429; People v. Conklin, 175 N. Y. 333, 67 N. E. 624; Railway Co. v. Herrick, 49 Ohio St. 25, 29 N. E. 1052; Carroll v. State, 3 Humph. (22 Tenn.) 315; Sharland v. Washington Life Ins. Co., 101 Fed. 206, 41 C. C. A. 307; Cluverius v. Commonwealth, 81 Va. 787; Tilley v. Commonwealth, 89 Va. 136, 15 S. E. 526; Harris v. State, 96 Ala. 24, 11 South. 255; State v. Peffers, 80 Iowa, 580, 46 N. W. 662; State v. Jones, 64 Iowa, 349, 17 N. W. 911, 20 N. W. 470; State v. Winner, 17 Kan. 298; Territory v. Couk, 2 Dak. 188, 47 N. W. 395; Reg. v. Buckley, 13 Cox's Cr. Cases, 293. See, also, 3 Wigmore on Ev.

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§ 1725; 16 Cyc. 1184; 7 Ency. of Ev. 622; State v. Giudice, 170 Iowa, 731, 153 N. W. 336, 342.

The concrete examples previously noted are not sporadic instances of the application of any strange and extraordinary doctrine, but, on the other hand, they are fairly illustrative of a rule of evidence which is firmly established by the overwhelming weight of judicial opinion. Jurists and text-writers, however, do not agree upon the theory of the doctrine. Declarations, like the one considered here, are, by many, and perhaps, by most, of the authorities, admitted as part of the res gestæ; they are spoken of by some as verbal acts; and they are characterized by others as original evidence admissible as an exception to the hearsay rule. An exemplification of the application of the rule and at the same time an illustration of the difference of opinion as to the basis of the rule may be found in State v. Hayward, 62 Minn. 474, 65 N. W. 63, where all the members of the court agreed that the declaration of the deceased was competent, the majority holding that:

"This statement forms a connected part of the evidence, and tends to characterize her subsequent acts and her departure on the fatal ride soon after she made the statement. This statement was not mere self-serving, hearsay evidence, but a verbal act, just as relevant as would be evidence that prior to her departure she put on her cloak or hat"

—and Mr. Chief Justice Start saying that:

"This evidence clearly falls within the rule that, when the question is whether a person did a certain act, his declarations, oral or written, made prior to and about the time he is alleged to have done an act, to the effect that he intended to do it, are admissible as original evidence, if made under circumstances precluding any suspicion or misrepresentation."

While the writer inclines to the view expressed by Mr. Chief Justice Start, 3 Wigmore on Ev. § 1726, Jacobi v. State, 133 Ala. 1, 32 South. 158, and State v. Mortensen, 26 Utah, 312, 73 Pac. 562, 633, yet the rule itself is now of more concern than the theory upon which it is founded.

If the doing of an act is a material question, then the existence of a design or plan to do that specific act is relevant to show that the act was probably done (1 Wigmore on Ev. § 102); and, considering the plan or design as a condition of the mind, a person's own statements of a present existing state of mind, when made in a natural manner and under circumstances dispelling suspicion and containing no suggestion of sinister motives, only reflect the mental state, and therefore are competent to prove the condition of the mind, or in other words, the plan or design.

[10, 11] The declaration of Edna Morgan was made in a perfectly natural manner, and there is nowhere in the record any intimation that it was made otherwise. The whereabouts of Edna Morgan was a material issue. It was important to know what she did and where she went. The state contended that she met the defendant and accompanied him to the Beamer barn. Evidence of her declaration was competent to show what was in her mind, and that what she intended to do was probably done. State v. Mortensen, supra. The language used by her was only one way of stating that she intended to meet Roy Farnam, especially when it is remembered that on the preceding Sunday the defendant had accompanied Edna Morgan to her home after her visit with the Farnams. The jurors were not obliged to conclude that the letter alone and of itself prompted the statement made by her. The letter was not produced at the trial, and was probably destroyed. Testimony concerning the utterance made by Edna Morgan was neither offered nor admitted for the purpose of showing what Roy Farnam intended to do or did, but the transcript of the evidence discloses that the prosecution offered the testimony for the sole and express purpose of showing what Edna Morgan intended to do, and consequently the admission of the evidence did not violate section 705, L. O. L. The statement made by the deceased did not recount anything that had previously occurred; it was not the statement of a fact external to the mind; it was not a narrative of a past event; and it does not belong to that class of utterances which are either expressly permitted or impliedly rejected as evidence by subdivision 4 of section 727, L. O. L. The rule making the statement of Edna Morgan admissible does not contravene any section of the Code. If, as held by most courts, the res gestæ doctrine is the basis of the rule admitting the declaration, then it is expressly sanctioned by the Code; or if the rule is founded on the idea that the utterance is a verbal act, a notion entertained by a few courts, then, strictly speaking, the evidence is not hearsay; or if, as the writer thinks, the true theory of the rule is that the statement of the deceased is original evidence of her intention, which the jury can consider as a circumstance indicating that she probably did what she intended to do, then on that theory no section of the Code is transgressed. The rule in question is analogous to the doctrine, approved by this court and recognized generally, making exclamations of pain original evidence of a circumstance tending to show a particular bodily condition when the bodily condition of the person is a relevant fact. State v. Mackey, 12 Or. 154, 158, 6 Pac. 648; Thomas v. Herrall, 18 Or. 546, 549, 23 Pac. 497; Vuilleumier v. O. W. P. & R. Co., 55 Or. 129, 132, 105 Pac. 706; 16 Cyc. 1164. If evidence is competent for one purpose, it cannot be rejected merely because it is not competent for another purpose. Being competent to show what Edna Morgan intended to do, the testimony of Mabel Barton was not rendered incompetent for all purposes merely because it was incompetent for the purpose of connecting Roy

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Farnam with the alleged crime, although it would have been proper to instruct the jury to limit the evidence to the sole purpose for which it was competent, and a failure to give a requested instruction to limit the application of the evidence to the single purpose for which it is admissible would be error; but here the contention is that the testimony was not competent for any purpose. State v. Finnigan, 160 Pac. 370. The conclusion that the testimony of Mabel Barton was competent has been reached with a full knowledge of the expressions to be found in State v. Glass, 5 Or. 73, 82; State v. Anderson, 10 Or. 448, 454; State v. Ching Ling, 16 Or. 419, 424, 18 Pac. 844.

[12] I concur in what Mr. Justice BURNETT says about the refusal to permit an inspection of the feet of the mare and the rejection of the offer to prove the declarations of another person to show that such person had committed the crime charged against the defendant. I concur in the reasoning and conclusion of Mr. Justice McBRIDE relative to the sufficiency of the indictment to support the verdict of the jury. There was sufficient evidence to show that Edna Morgan was killed, and that the defendant caused her death; and, in my opinion, no prejudicial error was committed during the trial.

BURNETT, J. (dissenting). The defendant was accused of the crime of murder in the second degree by an indictment reading thus:

"Roy A. Farnam is accused by the grand jury of the county of Douglas, state of Oregon, by this indictment, of the crime of murder, committed as follows: He, the said Roy A. Farnam, on the 8th day of December, A. D. 1914, in the said county of Douglas, state of Oregon, then and there being, did then and there wrongfully, unlawfully, feloniously, purposely, and maliciously kill Edna Morgan in some manner and by some means unknown to the grand jury; and so he, the aforesaid Roy A. Farnam, did then and there in said county and state commit the crime of murder in the second degree by feloniously, purposely, and maliciously killing the aforesaid Edna Morgan, contrary to the statutes in such cases made and provided and against the peace and dignity of the state of Oregon."

The errors assigned relate to proceedings during the trial on the plea of not guilty. The decedent, Edna Morgan, was a girl aged 15 years and resided with her father, her junior sister, and two younger brothers at a point on the Pacific Highway about seven miles east of Glendale, in Douglas county. The defendant is a man about 23 years of age, living about five miles still farther east of Glendale, with his father, mother, sister, and brother. So far as known, the last time the deceased girl was seen was by her father at their home late in the evening of December 8, 1914. About half past one of the morning of the 9th, the barn of a man named Beamer, about a mile west of Morgan's residence, was found to be in flames. Later in the morning, when the building was almost entirely consumed, there was discovered in the fire the remains of a female. The body was so nearly destroyed as to be unrecognizable. It appears that for some months previously the defendant had kept company with Edna Morgan, escorting her to various places of entertainment, and she visited at the home of his parents, where his mother sometimes did sewing for her, as her own mother was dead. Some tracks were found near the burned barn, and evidence was given, tending to show that they matched with shoes worn by the defendant, and there were other tracks which corresponded in size to shoes worn by the deceased. A fetus, said by the medical witnesses who examined it to have arrived at about the fifth month of gestation, was found between the thighs of the corpse. Mabel Barton, a witness for the prosecution, aged 15 years, testified that she and her sister went to the Morgan home about noon of December 8th to visit the Morgan girls, and in response to her invitation Edna agreed to go home with her and spend the night, but that during the afternoon the stage came along from the east, and the driver gave Edna a letter, which she read and put in her bosom. The prosecution then asked her this question:

"Now, tell the jury what Edna told you about going home with you that evening."

The witness answered:

"She said she couldn't because she thought Roy was coming down."

Defendant's counsel moved to strike out the latter part of the answer, referring to her statement that she thought Roy was coming down, but the court denied the motion, and allowed the entire response to go to the jury, over the exception of the defendant. The defense also offered to show oral statements made by a third party, tending to show that he himself had committed the murder of the woman whose body was found in the ruins of the barn. The court refused to receive that testimony, and the defendant assigns this as error. There was evidence tending to show that horse tracks were found leading from the direction of the defendant's residence to the burned barn and back again, and that they were identical with the tracks made by a mare ridden by the defendant over the same course and part way back on the day following the fire. One witness testified, in substance, that the track of the right front foot was nearly straight on the inside. At the trial in June, 1915, the defendant had the mare at the courthouse where the trial was held, and asked to have the jury inspect her foot, and afterwards offered the mare herself in evidence, but the court rejected his offer in both instances, and this is relied upon as error. At the conclusion of the argument the court stated to counsel, in substance, that the indictment charges murder in the second degree, and necessarily includes the crime of manslaughter, and that it was the view of the court that the latter offense should

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be submitted for the consideration of the jury, saying, however, that if counsel disagreed the court would hear them. Counsel for defendant then stated:

"We have no objection; I will nail my colors to the mast and sink or swim."

After some further parley with the district attorney the court said:

"I do not think there is any evidence as to the first section I read with reference to deliberation or heat of passion. I do not think there is any evidence to submit the case to the jury. I think I will submit murder in the second degree and manslaughter as by section 1898 [referring to Lord's Oregon Laws]."

No exception was taken to this remark of the court. In the course of the instructions to the jury the judge charged as follows:

"If you find beyond a reasonable doubt that the defendant, while in the commission of an unlawful act, if he did commit an unlawful act, on the night that Beamer's barn burned in Douglas county, Or., involuntarily killed Edna Morgan, then it would be your duty to find the defendant guilty of manslaughter."

"I instruct you that if you find beyond a reasonable doubt that the defendant by any means committed an abortion upon the person of Edna Morgan, then I instruct you that such act, if such act took place, was an unlawful act, and if you find beyond a reasonable doubt that the defendant on the night that Beamer's barn burned in Douglas county, Or., committed an abortion upon the person of Edna Morgan, and if you further find beyond a reasonable doubt that Edna Morgan was killed as a result of such abortion, if such abortion was committed, then it would be your duty to convict the defendant of manslaughter."

At the close of the charge the defendant by his counsel excepted to all the statements of the court in charging the jury respecting manslaughter. The jury returned a verdict of guilty of manslaughter, and from the consequent judgment the defendant appeals.

As a judicial utterance it is not by the mark to assume the guilt of the accused as an established premise, nor to declare that it is conclusively proved. Mobs argue thus. It is the office of the prosecuting advocate to array his facts and employ pathos and invective to sway the jury and secure a verdict against the defendant. The function of a court of last resort is to ascertain from the record whether the trial court has observed the law in admitting or excluding testimony and in its charge to the jury. Under such ascertained conditions alone that body of 12 men has the exclusive prerogative of declaring whether the guilt of the defendant is established conclusively or otherwise. As pithily stated by Mr. Justice McBride in State v. Rader, 62 Or. 37, 41, 124 Pac. 195:

"For the jury to find the fact, the court must see that they receive only legal evidence, and no good finding of fact can ever be predicated upon illegal evidence."

Equally important in a jury trial are accurate statements to the jurors of the law applicable to the issue in hand. Forrest v. Port Ry. L. & P. Co., 64 Or. 240, 129 Pac. 1048; Sullivan v. Wakefield, 65 Or. 528, 133 Pac. 641. Let us consider whether these requirements have been fulfilled.

The record discloses that the case was tried upon purely circumstantial evidence. It became necessary, of course, to trace the defendant to the scene of the murder. It was evidently for this purpose that the state introduced the testimony of Mabel Barton, to the effect that Edna Morgan refused to go home with her because she thought he was coming down. Evidence tending to locate the decedent at the scene of the murder would indeed be relevant. Testimony, therefore, that she refused to go home with Miss Barton, but stayed at her father's house, was competent to locate Edna Morgan, but neither her thoughts nor the expression of them could be held to bind the defendant in tracing his movements. The prosecution relies upon the case of Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706. That was an action by the beneficiary upon the policy insuring Hillmon. In response to evidence by which the plaintiff claimed to have proved the death of the assured, the defense sought to establish that the body said by the plaintiff to be that of the insured named in the policy was that of one Walters. For this purpose the company was permitted to read his letters to his sister and his fiancee, announcing his intention to go with Hillmon, the assured, into the vicinity where the corpse was found. All this was for the purpose of disclosing the movements of Walters, and not those of the insured. Commonwealth v. Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235, is a leading case on this subject, often cited to support the use in evidence of the declarations of third persons not parties to the litigation. There the defendant was on trial for the murder of Deltena Davis, a young woman with whom he had kept company. He offered to show by a clairvoyant named Hubert that a short time before her body was found in the river Miss Davis had stated that she was advanced five months in pregnancy, and declared her intention to drown herself. The trial court refused his offer, but the Supreme Court held this to be erroneous, and that in order to show the cause of death the decedent's statement of her own purpose was competent to throw light upon her own subsequent conduct. The opinion by Mr. Chief Justice Field clearly limits such declarations to the state of mind or intent of the person making them, and declares them to be hearsay as to other persons or other affairs. He says:

"The most obvious distinction between speech and conduct is that speech is often not only an indication of 'what is in the mind' of the speaker, but a statement of a fact external to the mind, and as evidence of that it is clearly hearsay. * * * Suppose that, at the interview between the deceased and the witness Hubert, if there was such an interview, the deceased had said that Trefethen was the father of her child; evidence that the deceased said this is clearly hearsay, and is not admissible to prove that he

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was the father; but suppose that it had been denied at the trial that the deceased knew that she was pregnant, testimony that she had said that she was pregnant would be some evidence that she knew it."

Likewise, in State v. Hayward, 62 Minn. 474, 65 N. W. 63, the ante mortem statements of the deceased were used in evidence in tracing her own steps to the scene of the murder, but not as affecting the movements of the defendant. Also in State v. Power, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902, the syllabus reads thus:

"Where, on a trial for manslaughter by acts intended to produce a miscarriage, the deceased, on leaving her home for the place where the acts are alleged to have been performed, made statements as to her intentions in going, such statements are admissible as verbal acts characterizing her intentions, but not as evidence that the defendant produced the abortion."

The doctrine is crystallized in section 705, L. O. L., thus:

"The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them."

By this excerpt from the Code the Legislature has removed the question from the speculations of doctrinaires and the demands of overzealous prosecutors. It renders inapplicable the precedents cited in support of Mabel Barton's testimony. Under this provision we constantly hold in civil cases, where only money or other property is involved, that the declaration or act of one person shall not be taken to bind another, unless the authority to make the statement is first shown. Here, where the lifelong liberty of the accused is at stake, the prosecution calls upon us to admit the hearsay of Edna Morgan's utterance, not of any fact, but of what she thought, all without the least showing of any authorization from the defendant. The rule in criminal cases ought to be at least as strict as in civil contentions. L. O. L., § 1535. Moreover, the reception by her of the note from the defendant is the only thing disclosed by the evidence which apparently could have influenced her to make the remark attributed to her. The only light on the contents of that letter is derived from the testimony of the defendant and his mother, to the effect that he had written to Edna that she could come to the Farnum home with his mother and sister the following Friday, as they returned from Glendale, which would save him from making a special trip for her. We cannot ignore this report of the contents of the writing, for there is no testimony to contradict it. There is nothing in it to induce her to expect the coming of the defendant, or to lead her to make the statement. On the contrary, the normal inference would be that he was not coming, and if for no other reason her statement to Miss Barton ought to be rejected, because it varies from what she would naturally say when she learned that he had planned for some one else to bring her to the home of his parents. There is nothing disclosed that gave her any right even to think he was coming. The better reason, however, is that, as against him, she had no authority to say she thought he was about to visit her. Her declarations or her thoughts on that subject are utterly incompetent as evidence as against the defendant. Respecting herself, the only material inquiry was concerning her whereabouts. Her reasons for remaining where she was are wholly immaterial and irrelevant, and cannot be admitted to the prejudice of the defendant. The error was essentially detrimental to him, because it related to the very material requisite of proving that he was at the scene of the crime when it was committed. Besides being a violation of the rule laid down in section 705, L. O. L., the testimony of Mabel Barton on that point was the purest hearsay, and falls within the condemning reasoning of Mr. Chief Justice Field in the Trefethen Case. As applied to the defendant, her statement was of a fact external to her mind within the language of that opinion above quoted, and hence the purest hearsay. As affecting the res gestæ, the best evidence of Edna Morgan's whereabouts was the testimony of her father and sister, to the effect that she was at home until bedtime of the night of her disappearance. Her refusal to go home with her friends was indicative of nothing more about her movements than what was related by her father who saw her last. In the light of his testimony her staying at home during the preceding afternoon is negligible. The sole purpose of putting in evidence her unwarranted remark that she thought Roy was coming, and the only way the jury must have understood it, was to allow them to infer that he had written her he was coming, and upon this inference to presume that he did come and, finally, to infer on top of all this that they went together to Beamer's barn. This court has condemned such procedure in State v. Hembree, 54 Or. 463, 103 Pac. 1008. In that case the prosecution deemed it important to show some motive which urged the defendant to kill his wife, for whose murder he was being tried. For this purpose the state essayed to prove that he had sustained incestuous relations with his daughter and knowledge thereof on the part of the wife. All that was shown was a possible opportunity for illicit intercourse between the father and daughter while they were at a hotel in Tillamook. From this circumstance as stated by Mr. Chief Justice Moore, who wrote the opinion, the jury was permitted to infer that the defendant had committed incest with his daughter; that from such deduction they were allowed to infer that the wife and mother had obtained knowledge of it, and that, based thereon, the jury was authorized to infer a motive for the commission of the alleged crime. A conviction was reversed for the error thus committed. On the point now under discus-

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sion that case is controlling in principle. The effort to prove the declarations of another person, tending to show that he had committed the crime in question, was properly rejected by the court under the authority of State v. Fletcher, 24 Or. 295, 33 Pac. 575. There the court held that such testimony was hearsay, and on that ground rejected it. By the same token we should rule out the testimony of Mabel Barton about the declaration of the deceased, to the effect that she expected the defendant to visit her.

Again, the statute has prescribed the instances in which the declarations of a deceased person may be admitted in evidence. Section 727, subd. 4, L. O. L., reads thus:

"In conformity with the preceding provisions, evidence may be given on the trial, of the following facts: * * * 4. The declaration or act, verbal or written, of a deceased person, in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person; the declaration or act of a deceased person, made or done against his interest in respect to his real property; and also the declaration or act of a dying person, made or done under a sense of impending death, respecting the cause of his death."

Only thus far has our Code opened the door for the admission of hearsay testimony concerning the declarations of deceased persons. The mention of these instances is the exclusion of all others. This is in accord with State v. McGrath, 35 Or. 109, 57 Pac. 321, teaching that the Code is complete on the subject of evidence. Treating of the construction of statutes, section 715, L. O. L., is as follows:

"In the construction of a statute, * * * the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all."

Section 716, L. O. L., provides thus:

"In the construction of a statute the intention of the Legislature * * * is to be pursued, if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent shall control a general one that is inconsistent with it."

We have no right to read into the statute an additional exception to the general rule against hearsay testimony. The opinion of Mr. Justice Ramsey in State v. Goddard, 69 Or. 73, 78, 133 Pac. 90, 138 Pac. 243, Ann. Cas. 1916A, 146, is a valuable writing on the doctrine of statutory construction as applied to this case and to this particular section of the Code. The general rule about the declarations of deceased persons is that they are admissible only as to such things concerning which the deceased, if alive, would be allowed to testify. State v. Saunders, 14 Or. 300, 305, 12 Pac. 441. Applying the doctrine to the present issue, we will suppose, for illustration, that the defendant had been indicted for assault with intent to kill Edna Morgan, and she had come to testify at the trial in such a case, as in this; it would be necessary to prove that she and the defendant met each other, but it is plain that she could not be allowed to declare on the witness stand that she said to Mabel Barton, "I think Roy is coming down." If, when alive, she could not tell what expression of her thoughts she made to some other person—and no one pretends that she could—hearsay evidence of it cannot be rightfully given after she was dead. Her death adds no sanction to the declaration of her expectation. On this point Mr. Justice Thornton wrote thus in People v. Taylor, 59 Cal. 640, 645:

"The law is well settled that the declarations of the deceased are admissible only to those things to which he would have been competent to testify if sworn as a witness in the cause. They must relate to facts only, and not to mere matters of opinion (1 Greenl. Ev. § 159; 1 Whart. Am. Cr. L. § 678; People v. Sanchez, 24 Cal. 26; Warren v. State, 9 Tex. App. 629 [35 Am. Rep. 745]), or belief (R. v. Sellers, O. B. 1796, Car. C. L. 233; McPherson v. State, 22 Ga. 478; Johnson v. State, 17 Ala. 618; McLean v. State, 16 Ala. 674; 2 Barn. & Cress. 608; Nelson v. State, 7 Humph. [Tenn.] 542). * * * The deceased could not have been allowed to testify as to his guesses, or as to whom he thought might have poisoned him, which was nothing more than an opinion or conjecture."

Why should Edna Morgan dead be more competent as a witness than Edna Morgan living?

It matters not that the bill of exceptions fails to show that the defendant excepted to other testimony of the same kind that was elicited on cross-examination. He is not estopped to urge the objection when properly presented. He is not required to multiply exceptions on the same point indefinitely. One specification of error of the same kind is sufficient to raise the question for adjudication without padding the record with repetitions of the same objection.

It is true that the courts have measureably receded from the old doctrine that a defendant on trial for a felony cannot waive anything in his favor, but it is going to the other extreme to hold that because his counsel by possible inadvertence fails to object to certain incompetent testimony given by one witness, the defendant thereby waives the right to except to like statements of those testifying afterwards. Waiver ought not to be pushed to such an extent, yet this is the only deduction to be drawn from the utterance of Mr. Justice HARRIS, to the effect that the defendant was not harmed by the statement of Miss Barton, because a similar declaration by Mr. Morgan was allowed to pass unchallenged. Neither is such evidence in the same category as expressions of pain or of the nature of the malady affecting the declarant as approved in State v. Glass, 5 Or. 73. Under that precedent the defendant was rightly permitted to read in evidence Edna Morgan's letter, written about a month before her alleged death, in which she spoke of her then "sick week." This was competent, as her declaration about the

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state of her own health, to show that she could not have been five months advanced in pregnancy, as the testimony tended to show was the case with the woman whose remains were found in the burning barn. The admission of that letter in evidence does not, in any manner, estop the defendant from opposing the attempt of the prosecution to bind him by hearsay testimony of Edna's unauthorized declaration of what she thought he was going to do.

On the subject of admissibility of statements of a deceased person, the victim of the homicide, the following precedents are here noted: In People v. Carkhuff, 24 Cal. 640, the defendant was indicted for the murder of his uncle, with whom he resided. A witness for the prosecution testified as follows:

"Deceased and I lunched together, about 2 o'clock p. m. My wife invited deceased to take supper with us. He declined, saying he must go home to attend to cooking apples. He said Sam, meaning defendant, would be home that night; that he had gone to the park to see a favorite officer and witness a review."

All the evidence tending to connect the defendant with the crime was circumstantial. The deceased was last seen alive about 2 o'clock p. m. on Sunday, and his corpse was found at his house between 7 and 8 o'clock on Monday. The court there says:

"The only object of the prosecution in offering in evidence the declaration of the deceased that the defendant would be at home on Sunday night was to enable the jury to presume, from the fact that the deceased expected the defendant to return that night, that he did so return, and was there at the time of the commission of the murder. It is impossible to conceive upon what theory that declaration was admissible. If the declaration had been made to the witness by any other person, it would not be contended that it was admissible in evidence, for evidently it would be obnoxious to the objection that it was hearsay testimony. The fact that the declaration was made by the deceased does not tend to remove the objection, for the declarations of the deceased are permitted to be proven in the single case when they are made in extremis, and have reference to the circumstances of the death, unless the declaration constitutes a part of the res gestæ, or can be classed with declarations against interest, etc. * * * It was not admissible as a part of the res gestæ, for it did not constitute one of the circumstances surrounding the murder. The expectation of the deceased that the defendant would return, and that, too, unsupported by any evidence of the reasons for his expectations, did not even tend to prove any fact connected with the murder. The expectation may have been without any foundation; may have been merely a surmise arising from the defendant's usual habits. His expectation or declaration that the defendant would return at the time stated would possess no more legal value as evidence to prove the fact that he did return than would the expectation of his neighbor, Burns, that the defendant would return at the given time."

Cheek v. State, 35 Ind. 492, was a murder case wherein a witness was allowed to report a conversation with the deceased, just prior to the homicide, wherein the latter said:

"Doc, I am glad you have come; there are two ruffians going up the road, and they have threatened to take my life; they have gone to my house, and I want you to go back with me."

The court there held on this point that:

"A statement of the deceased person, made before the commission of the act, and not made in the presence or hearing of the defendant, is not competent evidence against him."

In Weyrich v. People, 89 Ill. 90, a wife was indicted for the murder of her husband by poisoning. It was held to be error to admit the declaration of the deceased that he suspected his wife to be unchaste, in the absence of any proof that such suspicion was ever communicated to her. In People v. Irwin, 77 Cal. 494, 20 Pac. 56, it was said that:

"The declarations of the deceased to third parties at various times before the homicide as to his fears of murder, and that he intended to leave the country because the defendant and others were conspiring to take his life, and that he had given them no cause, etc., are not admissible in evidence, and to admit them is highly prejudicial error."

In People v. Gress, 107 Cal. 461, 40 Pac. 752, the defendant was accused of murder. A witness detailed a conversation with the decedent had the evening before the homicide. The murdered man told him:

"I am in trouble. I have a family in Sonora, and a few months ago I took a young man in as partner with me, and here lately I have discovered that he is about to get away with my wife and child, and I want to get to Sonora as quick as possible. I want to save my boy, and that's my hurry for coming here."

Treating of this subject the court said, speaking by Mr. Justice Van Fleet:

"This evidence was clearly hearsay, and was wholly inadmissible upon any possible theory of the case, or upon any principle or rule of evidence known to the law. It was no less hearsay because the declarations were those of the deceased, since proof of such declarations are only admissible when made in extremis; dying declarations, having reference to the circumstances of the death, or when they constitute a part of the res gestæ. * * * In this case they were neither. The mortal blow had not been struck, nor were they in any manner connected with the rencontre which resulted in Assalena's death. Obviously the admission of this evidence was highly prejudicial to the defendant, since its inevitable tendency would be to greatly inflame and prejudice the minds of the jury against him."

In Montag v. People, 141 Ill. 75, 30 N. E. 337, the defendant was accused of the murder of his wife. It appeared that on the day of the homicide he called at the store where the shooting occurred between 12 and 1 o'clock, and had an interview with the deceased, lasting some two or three hours. He then left the store, but in a short time returned, and then the shooting occurred. A witness was allowed to give a conversation had with the deceased, which occurred 10 minutes after the defendant had left the store and 15 minutes before he returned. In answer to the question:

"What did the deceased say to you after he had been out 10 minutes?"

—she replied:

"She told me that he warned her if he couldn't come and see her that night he would kill her. I

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asked her if she wasn't afraid, and she said no."

Quoting from the syllabus, the rule is there laid down thus:

"Declarations, to become a part of the res gestæ, must be made at the time of the act done which they are supposed to characterize or illustrate, and must be calculated to unfold the nature and quality of the facts they are intended to explain, and to so harmonize with them as obviously to constitute one transaction. What occurs before or after an act has been done does not constitute a part of the res gestæ, although the interval or separation may be very brief."

In Kirby v. State, 9 Yerg. (Tenn.) 383, 30 Am. Dec. 420, a statement of the deceased the day before he was killed that he was going on a certain trip, and that the defendant was to accompany him, is not admissible. In State v. Punshon, 124 Mo. 448, 27 S. W. 1111, a husband was prosecuted for the murder of his wife. He offered to show that their domestic relations were pleasant, also what she said as to the cause of her absence from him; her threats to kill herself, the reason therefor; that she was an expert in the use of firearms, and was in the habit of carrying a revolver. After discussion of the authorities cited, the court said:

"The statements of the wife which were offered to be proven were not part of the res gestæ as exclamations of pain, nor were they with respect to her health, as in [authorities cited] and were properly excluded; and so were her statements to the effect that she intended to kill herself, for the same reasons. She was no party to the prosecution, and the state was not bound by anything she may have said. * * * It will not be seriously contended that, if defendant's wife had been living, and he had been indicted for assault with intent to kill her, anything she might have said in regard to their amicable relations would have been admissible against the state, and, if not then admissible the fact that she was dead at the time of trial did not make such statement permissible."

In Parker v. Commonwealth (Ky.) 51 S. W. 573, a murder case, the following language appeared:

"The court allowed John A. Murray, the father-in-law of the deceased, to testify to a conversation between them before the deceased started down the road, and he allowed the witness Buck York to state a similar conversation between him and the deceased at his house, in regard to his purpose in going down the road. This evidence was incompetent. The accused was not present, and evidence could not be made against him by statements not in his presence, and not in any way connected with the shooting or throwing any light on it."

Holland v. State, 162 Ala. 5, 50 South. 215, was a murder case. The court there said:

"The conversation between the deceased and Annie Liggan before the killing, and while the defendant was absent from the house, was not admissible. Neither should the trial court have permitted Mrs. Taylor to testify that deceased told her, about five minutes before the difficulty, and before the defendant had returned to the house, that 'Holland told him he was going after a gun and was coming back to kill him, and that he could not defend himself.' This was all hearsay evidence, and was not a part of the res gestæ."

In McCray v. State, 134 Ga. 416, 68 S. E. 62, 20 Ann. Cas. 101, it is said in the syllabus:

"Declarations made by the deceased in reference to his motive in seeking to find the accused, though made while on his way to the scene of the homicide in quest of the accused, were not admissible, over the objection of the accused, for the purpose of showing that the intention of the declarant in seeking the accused was peaceful and lawful."

Another murder case was State v. Shafer, 22 Mont. 17, 55 Pac. 526. This excerpt is taken from the opinion:

"The court permitted witnesses to testify to declarations made by the deceased to them in the absence of the defendant, about 30 minutes before the homicide, that he (deceased) had had a difficulty with the defendant at Columbia Gardens that night; that he was not armed; that he was afraid of the defendant; that he wanted protection from the defendant; that he wanted defendant arrested, etc. It seems that this evidence was admitted for the purpose of showing deceased was not armed at the time he was shot by defendant. But we know of no theory upon which it was admissible. It was not a part of the res gestæ. It was clearly hearsay, and it was just as clearly error to admit it."

In Wall v. State (Tex. Cr. App.) 62 S. W. 1062, the defendant was convicted of murder in the second degree. He was the manager of a sawmill, and had discharged the decedent from employment there. The following morning the latter returned, and in the ensuing altercation the defendant killed him. We quote from the opinion:

"In bill of exceptions No. 1, appellant complains that the court permitted Jack Hall to testify that, on the morning Johnson was killed, he came to his house and told him he was going down to the mill to pay defendant what he owed him; that he intended to leave Hardin county, and did not want to leave until he had paid Wall what he owed him. And in this connection the witness further testified that, from what Johnson told him on the morning he was killed, witness had concluded that he (Johnson) and defendant had made friends after the difficulty the day before. Appellant objects to this testimony for various reasons, mainly because it shows the animus, purpose, and intent of deceased, which purpose and intent were not brought home to the knowledge of appellant. * * * In Johnson v. State, 22 Tex. App. 206, 2 S. W. 609, this exact question was raised and discussed, and we there held, where testimony was introduced for the purpose of showing that deceased had no deadly purpose or intent when he went to the place of the homicide, and that he did not go there for the purpose of executing his prior threats against defendant, that such testimony was error, because it was hearsay evidence, so far as defendant was concerned; and, secondly, because defendant could not be bound by the undiscovered and undisclosed motive of deceased, when the same were opposed and contradicted by all the facts and circumstances known to and judged by defendant from his own standpoint."

Wooley v. State (Tex. Cr. App.) 64 S. W. 1055, was a murder case. The trial court admitted the testimony of witnesses about what the decedent said to them in the absence of the defendant just before the homicide, about his object in going into the defendant's field and his purpose in going from thence to one Griffith, who lived beyond the Wooley farm, to get employment. The objection to the testimony was on the ground that the de-

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fendant was not present at the time, and knew nothing as to the purpose disclosed in the conversation, indicating that the deceased was there on a peaceful mission. The court said:

"It is true, the testimony is res gestæ of deceased's act; that is, his verbal act in connection with and explaining his conduct in being on the Wooley farm. But res gestæ is not always admissible, especially where it makes proof of a fact that is bound to materially affect a defendant, and he has no notice or knowledge of such fact. The authorities cited all bear out appellant's contention to the effect that the testimony was inadmissible, and the court committed a harmful error in permitting its introduction."

To the same effect is Adams v. State (Tex. Cr. App.) 64 S. W. 1055; Young v. State, 41 Tex. Cr. R. 442, 55 S. W. 331; State v. Rees, 40 Mont. 571, 107 Pac. 893; Brumley v. State, 21 Tex. App. 222, 17 S. W. 140, 57 Am. Rep. 612; Johnson v. State, 22 Tex. App. 206, 2 S. W. 609.

In People v. Williams, 3 Parker's Cr. R. (N. Y.) 84, the defendant and the decedent were husband and wife, and lived apart. He was accused of murdering her by administration of poison. For the purpose of showing that they were together, and hence that he had an opportunity to kill her, evidence offered of her declaration, on leaving her residence, that she was going to meet her husband, was immaterial, and not part of the res gestæ. The court there declared that the evidence was not offered to qualify an act connected with the issue, but to induce the jury to infer another act not otherwise shown to exist, that of his being in company with the deceased. In Foster v. Shepherd, 258 Ill. 164, 101 N. E. 411, 45 L. R. A. (N. S.) 167, Ann. Cas. 1914B, 572, it was held incompetent to receive the declarations of the decedent about where he was going to spend the night so as to account for his being where he was killed when mistaken for a burglar. In Chicago, etc., Ry. Co. v. Chancellor, 165 Ill. 438, 46 N. E. 269, the action was brought against the company by an administrator, to recover damages for causing the death of his decedent. At the trial a witness was permitted to testify that she was at the house of the decedent between 7 and 8 o'clock on the morning in question, and that the latter told her she was going on the 9 o'clock train; that being the hour at which she was afterwards killed. The question was material because the endeavor was thereby to show that she intended to become a passenger on that train. This materially affected the degree of care to be observed by the defendant, for if she was a passenger, the caution to be observed towards her was much greater than if she was not occupying that relation. The court held that her declarations about her purpose to take that train were inadmissible, although she went to the depot at that time and was there killed by the train. All these cases are illustrative of the attitude of the deceased towards the act in question, and are characteristic of his purpose in connection with the situation resulting in his death. The reasoning of these precedents is convincing that, in the absence of knowledge on the part of the defendant, the declarations of the decedent are entirely immaterial, are not part of the res gestæ, and cannot be admitted in evidence against the accused. In cases of circumstantial evidence, such things only serve to inflame the imagination, which always tinges that class of testimony. The declarations imputed to Edna Morgan, to the effect that she thought the defendant was coming, could not have been received, in evidence if made by any other person at the same time and place. The fact that she is dead does not add to their admissibility or relevance.

[13, 14] It has generally been held that the admission in evidence of material objects, or an inspection of the same, whether offered in evidence or not, is within the discretion of the court. We have before us, as an exhibit in the case, what purports to be a track of a man's shoe made in the soil near the barn. The earth was dug up with the track impressed thereon, was used in evidence, and is present here as an exhibit. It would not be far afield to characterize as capricious a discretion which would carry into the record a spadeful of barnyard filth and deny the jury an inspection of the feet of a horse upon whose track the prosecution relied as tending to connect the defendant with the crime. But, considering that the offer of the mare was made six months after the crime was committed, and there was no testimony tending to show that the foot was in substantially the same condition at both dates, we are not prepared to say that the court abused its prerogative in refusing the jury an inspection of the animal. On the other hand, if it had permitted an examination of her foot, no complaint whatever could have been made of such a ruling.

Regarding the correctness of the instructions on manslaughter, it is convenient as a preliminary to here set down the various provisions of the Criminal Code respecting the taking of human life:

"If any person shall purposely, and of deliberate and premeditated malice, or in the commission or attempt to commit any rape, arson, robbery, or burglary, kill another, such person shall be deemed guilty of murder in the first degree." Section 1893, L. O. L.

"If any person shall purposely and maliciously, but without deliberation and premeditation, or in the commission or attempt to commit any felony, other than rape, arson, robbery, or burglary, kill another, such person shall be deemed guilty of murder in the second degree." Section 1894, L. O. L.

"If any person shall, by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any design to effect the death of any particular individual, kill another, such person shall be deemed guilty of murder in the second degree." Section 1895, L. O. L.

"If any person shall, by previous engagement or appointment, fight a duel within the jurisdic-

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tion of this state, and in so doing shall inflict a wound upon another, whereof the person so injured shall die, such person shall be deemed guilty of murder in the second degree." Section 1896, L. O. L.

"If any person shall, without malice express or implied, and without deliberation, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, voluntarily kill another, such person shall be deemed guilty of manslaughter." Section 1897, L. O. L.

"If any person shall, in the commission of an unlawful act, or a lawful act without due caution or circumspection, involuntarily kill another, such person shall be deemed guilty of manslaughter." Section 1898, L. O. L.

"If any person shall purposely and deliberately procure another to commit self-murder, or assist another in the commission thereof, such person shall be deemed guilty of manslaughter." Section 1899, L. O. L.

"If any person shall administer to any woman pregnant with a child any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of such child or mother be thereby produced, be deemed guilty of manslaughter." Section 1900, L. O. L.

"If any physician, while in a state of intoxication, shall, without a design to effect death, administer any poison, drug, or medicine, or do any other act to another person which shall produce the death of such other, such physician shall be deemed guilty of manslaughter." Section 1901, L. O. L.

"Every other killing of a human being by the act, procurement, or culpable negligence of another, when such killing is not murder in the first or second degree, or is not justifiable or excusable as provided in this chapter, shall be deemed manslaughter." Section 1902, L. O. L.

On the postulate that it was allowable to instruct the jury on the subject of manslaughter only by the acquiescence of the defendant, his implied assent extended no further than to invite the court to correctly charge the jury on that topic. It is elementary that it is the duty of the court to declare the law and of the jury to report the fact by the verdict. The jury is not to be left to draw conclusions of law. That is the exclusive province of the court. The first instruction on manslaughter above quoted was founded upon section 1898, supra, but it left to the jury to determine the judicial question of whether the act, if any was shown, in the commission of which the defendant killed Edna Morgan, if at all, was an unlawful act. The second instruction was intended to cover the kind of manslaughter described in section 1900. It is faulty in that it declares in substance that every abortion resulting in the death of the mother is a crime. Abortion means the premature or unnatural expulsion of the fetus from the uterus prior to the completion of the period of gestation. The Cæsarean operation to which resort is sometimes had for the purpose of saving the life of the mother is itself an abortion. It does not necessarily cause the death of the mother or the child, though it generally is the death of one or both. The term does not imply crime as was held in Belt v. Spaulding, 17 Or. 130, 20 Pac. 827. The instruction leaves out of consideration, not only the intent to destroy the child, but also the lack of necessity to preserve the life of the mother, both material ingredients of the crime condemned by section 1900. If the court entered upon the task of explaining manslaughter in any of the various forms in the different sections of the statute already quoted, it should have correctly defined the offense. Its failure to do so in the instances mentioned renders the instructions amenable to the exception taken by the defendant at the close of the charge, although it might be said he consented that the court should charge the jury on manslaughter. The vice of the instruction lies in the assumption that bringing about an abortion is necessarily a crime, whereas it is only one element of an offense, the other ingredients of which were not mentioned or explained to the jury, but were taken for granted. The plea of not guilty and the presumption of innocence combat the indictment and all the testimony for the prosecution, so that, even if nothing else were shown, the court had no right to assume the other facts besides the mere abortion necessary to constitute an unlawful act or offense under section 1900.

Still further: The following sections of Lord's Oregon Laws are here set forth:

"When it appears that the defendant has committed a crime, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of those degrees only." Section 1528, L. O. L.

"Upon an indictment for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the crime or any such inferior degree thereof." Section 1551, L. O. L.

"In all cases, the defendant may be found guilty of any crime, the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit such crime." Section 1552, L. O. L.

There is no crime in this state unless the same is defined by statute. In other words, there are no common-law crimes under our system of jurisprudence. Sanction must be found in some statute for every criminal accusation. State v. Vowels, 4 Or. 324; State v. Gaunt, 13 Or. 115, 9 Pac. 55; State v. Nease, 46 Or. 433, 80 Pac. 897; State v. Ayers, 49 Or. 61, 88 Pac. 653, 10 L. R. A. (N. S.) 992, 124 Am. St. Rep. 1036; State v. Smith, 55 Or. 408, 106 Pac. 797; State v. Stephanus, 53 Or. 135, 99 Pac. 428, 17 Ann. Cas. 1146; State v. Smith, 56 Or. 21, 107 Pac. 980. Murder is the only crime classified by degrees, and so we have murder in the first and second degrees as defined by statute. Manslaughter is not a degree of murder. All the six different kinds of manslaughter are unlike either murder in the first degree or murder in the second degree in essential particulars. The question of degrees, therefore, cannot be considered in this case under section 1528, because there is no accusation for

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anything else than the lowest degree of murder as affected by sections 1528 and 1551.

Under the present indictment, in order for the jury to be allowed to convict of manslaughter, we must hold that it is necessarily included in the terms of that accusation. We note that it says the defendant "wrongfully, unlawfully, feloniously, purposely and maliciously killed Edna Morgan in some manner and by some means unknown to the grand jury." We cannot say as a matter of law that any of the six different kinds of manslaughter is necessarily included within that statement. The indictment in hand does not measure up to the terms of section 1440, L. O. L., which requires that:

"The indictment must be direct and certain, as it regards, * * * the crime charged; and, the particular circumstances of the crime charged when they are necessary to constitute a complete crime."

"The particular circumstances" mentioned in the sections defining the several kinds of murder and manslaughter serve to differentiate one sort from another, and, being thus made necessary to constitute a complete crime, must directly and certainly appear in the indictment if a conviction is to be had on any of them. The principle at stake is whether a defendant can be committed of an offense of which the indictment gives him no information. True enough, the legislative branch of the government may simplify forms, but sufficient must be left in the accusing document to preserve and satisfy the constitutional rights of the accused. State v. Learned, 47 Me. 426; State v. Mace, 76 Me. 64. It is true that the forms in the appendix to our Code allow the allegation that the means employed to commit the crime are unknown to the grand jury; but in so far as that provision deprives the defendant of the right to know the nature and cause of the accusation against him it is unconstitutional. If the grand jury has not enough evidence to justify an indictment, so much the worse is it for the prosecution. No one can tell from the accusing document whether the defendant was to be tried for either of the two classes of murder in the second degree described in section 1894, or for the killing of a person by an act imminently dangerous to others, evincing a depraved mind, regardless of human life, as defined by section 1895, or whether it was a homicide committed while fighting a duel as condemned in section 1896. Besides, it is impossible to say as a matter of law that either of the six sorts of manslaughter already mentioned is included in either of the four kinds of murder in the second degree. It is elementary that enough must be found in the indictment upon which to base a judgment of conviction. If it is proposed to convict of manslaughter under section 1897, there should be sufficient in the written accusation to show that the defendant, without malice and without deliberation, but upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible, voluntarily killed the deceased. Or, if the defendant was to blame for assisting the deceased to suicide, it should have been so stated, and likewise, as to the administering of any drug or employing any means upon a pregnant woman resulting in her death. This should appear in the indictment if the state would secure a conviction for that form of manslaughter. In short, the legislative branch of the government has seen fit to define six different classes of acts constituting manslaughter, and at least four constituting murder in the second degree, distinguishing them all as separate statutory offenses. The prosecution cannot be wiser than the lawmakers, obliterate all these points of difference, cast a dragnet in the form of a general indictment for murder, and be allowed to prove any one of the half dozen kinds of manslaughter or the four kinds of murder in the second degree. For arbitrariness such procedure excels the well-known detective stratagem of apprehending the victim on some trivial charge and holding him until a graver case can be made out against him. It is to make conviction depend, not upon indictment which gives notice to the accused of what he is called upon to oppose by his defense, but upon what the prosecution may be able to fish out of testimony given in the star chamber of the grand jury. The true knowledge of "the nature and cause of the accusation" dawns not upon him until he has heard the instructions to the jury. The state does not come into the open and give its accused citizen notice of the charge against him; but, on the contrary, conceals its real purpose in generalities and sets a snare for his feet. In making the charge the grand jury must classify it according to the distinctions laid down by the statute. To hold otherwise is to abuse the constitutional right of the defendant "to demand the nature and cause of the accusation against him, and to have a copy thereof." Section 11, art. I, Const. To have a copy of the accusation means that the indictment upon which he is tried must state the facts covering the specific crime for which the state would secure a conviction. Within the terms of the organic act nothing less will conserve the rights of the accused under its protective feature or meet his constitutional demand. The prosecution is entitled to carve as great a crime out of any transaction as it can, but it is restricted under our Constitution and laws to that accusation to the exclusion of other different crimes except so far as one is necessarily included in the other. No other conclusion is logical, unless we entirely disregard section 1442, L. O. L. saying, "The indictment must charge but one crime, and in one form only." It would mean that in criminal pleadings we must discard all legislative distinctions between the various kinds of homicide and

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sweep into the scrapheap all rules about making an accusation conform to the statute. The form for murder in the first degree appearing in the appendix to the Criminal Code will answer for the "one form only," and no prosecutor need concern himself about setting out in his indictment any of the elements contained in the legislative definitions of other varieties of homicide.

Much reliance is placed by the prosecution upon State v. Magers, 35 Or. 520, 57 Pac. 197, where the matter is thus summed up:

"The rule to be extracted from these decisions seems to be that if the manner of the killing is unknown, and circumstantial evidence only is relied upon to connect the defendant with the commission of the crime, it is the duty of the court, when so requested, to instruct the jury upon the law applicable to murder in the first degree, murder in the second degree, and manslaughter, and where it appears that the defendant has committed a crime, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of these degrees only."

There are several reasons why that case should not control the present contention. There, the defendant sought to escape the death penalty by shunting the jury onto the subject of manslaughter. Here, the defendant is arguing against being called to meet a charge of which the indictment gave him no notice. That decision makes a manslaughter instruction depend upon the request of the defendant, but here the defendant did not ask for it. His attitude is portrayed in the words of his counsel, "I will nail my colors to the mast and sink or swim." His saying at the same time, "We have no objection," cannot be construed into a request for such a direction to the jury. Again, the opinion takes no account of distinctions between different crimes and of the necessity of making an indictment conform to the statute, nor does it give any consideration to the constitutional right of the defendant already mentioned. It makes the broad statement that a manslaughter instruction should be given where and whenever circumstantial evidence is present in the case, but when we ask what one of the six different kinds of manslaughter must be described to the jury, we look in vain to the Magers' decision for an answer. Trial judges are left to conjecture on this subject. That precedent ignores the indictment as a foundation of conviction and permits the state to rely solely upon whatever theory may be developed in the testimony, irrespective of the form of the grand jury's accusation. In the instant case it would have been quite as proper to allow a verdict of arson, because there was evidence about the burning of a barn. Finally, the decision proceeded on a misapprehension of the statute, viz., that manslaughter is a degree of murder. It is, indeed, a species of homicide, but the Code has made it a distinct crime. It is not a degree of murder, nor a degree of any offense. Our legislation, without which there is no crime in this state, has made it sui generis in its several forms, and it should be so treated.

The court undertook to instruct the jury about the species of manslaughter defined in section 1898, L. O. L., aimed against one who involuntarily kills another in the commission of an unlawful act or a lawful act without due caution or circumspection. The justification for this course must be found, if at all, in section 1552, allowing the conviction of a crime, the commission of which is necessarily included in the one charged in the indictment. The accusation is that the defendant did the act "purposely and maliciously." An act done "involuntarily" is not and cannot be included in the category of those done "purposely." The two words are antonyms. They are radically distinct and opposite in meaning. It is an abuse of the statute to say that involuntary homicide is necessarily, or in other words, as a matter of law, included in that done with purpose and malice. On this subject Mr. Justice Eakin in State v. Whitney, 54 Or. 438, 102 Pac. 288, held the prosecution to a strict compliance with the statute in drawing an indictment. We read from the syllabus:

"An indictment, alleging that accused feloniously and voluntarily administered a suppository containing poison to another, from the effects of which she died, was insufficient, under section 1897, L. O. L., making it manslaughter to voluntarily kill another upon a sudden heat of passion, but without malice and deliberation, in that it did not allege facts constituting voluntary manslaughter."

On the contrary he decided, further, that:

"An indictment, alleging that accused feloniously and voluntarily administered poison to another, from the effects of which she died, did not charge involuntary manslaughter, under section 1898, L. O. L., making it involuntary manslaughter to involuntarily kill another, while engaged in the commission of an unlawful act, or a lawful act without due caution, in that it did not allege facts showing any unlawful act, or a lawful act negligently committed."

The lesson to be drawn from that decision is that where the statute makes distinctions in the ingredients of a crime, the pleader must observe them.

To approve the instruction of the court about abortion, we would be driven logically to the absurdity of holding that when the accusation says the defendant "wrongfully, unlawfully, feloniously, purposely, and maliciously killed Edna Morgan," it perforce means that, she being then pregnant with a child, the defendant administered to her some drug or medicine, or used or employed upon her some instrument or other means with intent to destroy the child, the same being unnecessary to preserve the life of the mother, by reason of all which her death was produced. Such a conclusion does violence to the constitutional rights of the accused, because it does not inform him of the nature of the real charge against him, in that it leaves out every ingredient of the manslaughter described in section 1900 except

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the death of the mother. Neither in the indictment nor in the charge of the court on that point is there a syllable about the administration of any drug or medicine, the employment of any instrument, or an intent to destroy the child, or lack of necessity to preserve the life of the mother. It would be a travesty on all rules of criminal pleading to say that an indictment, couched in the language of the court about abortion, would be a good one under section 1900, yet that would be the effect of an approval of that instruction. The defendant was entitled to accept the issue as the state tendered it, and if he chose the pure alternative of guilty of murder in the second degree or not guilty, he had a right to do so and ignore any other charge. Under this indictment, drawn as it is without reference to the particular circumstances of the case showing how the homicide was accomplished, the pleading was not sufficient to support any evidence or conviction of manslaughter. It was error to enter upon that field of inquiry. It exposed the defendant to danger of conviction from a course of which he had no notice, and invited the jury into the realm of fancy and speculation upon visionary theories with no testimony to support them.

Rayburn v. State, 69 Ark. 177, 63 S. W. 356, was a case where the defendant was charged with murder in that:

He "did unlawfully, willfully, feloniously, and of his malice aforethought, and after premeditation and deliberation, kill and murder one A. T. Carpenter."

Under this indictment the trial court charged the jury:

"If you find from the evidence beyond a reasonable doubt that defendant in the perpetration of, or in the attempt to perpetrate, the robbery of A. T. Carpenter, shot and killed Carpenter, then defendant is guilty of murder in the first degree, and you will so find."

The case was at first affirmed on appeal, but on rehearing it was reversed on this point. The Arkansas statute is substantially like our own. The case is so apropos in treating of statutory crimes that the following excerpt from the opinion is here inserted:

"According to these statutes two classes of murder constitute murder in the first degree, to wit: (1) All murder committed by any kind of willful, deliberate, malicious, and premeditated killing; and (2) all murder which shall be committed in the perpetration of, or in the attempt to perpetrate, arson, rape, robbery, burglary, or larceny. In Cannon v. State, 60 Ark. 564 [31 S. W. 150, 32 S. W. 128], this court held that it is essential to the validity of an indictment for the first class of murder in the first degree to use the words 'willful,' 'deliberate,' 'malicious,' 'premeditated,' or equivalent words, in charging the offense. The reason for the ruling is, these words are descriptive of the elements necessary to constitute that class of murder. For the same reason it is necessary to allege that the killing was done in the perpetration of, or in the attempt to perpetrate, one of the felonies named in the statutes quoted, in order to charge the second class of murder in the first degree. These two classes of murder in the first degree are separate and distinct. In the former a precedent intent to kill is necessary to constitute the offense, while in the latter it is not. While the former may be committed in the perpetration of, or attempt to perpetrate, the felonies named, an indictment for the same will not always include the latter; and when it does, it is only because the essentials necessary to constitute the former exist. The perpetration of, or attempt to perpetrate, a felony necessary to constitute the second class is not equivalent to the premeditation, deliberation and intent necessary to constitute the first, except in effect. They raise the killing to the grade of that in the first class, but the allegations necessary to charge murder in the first degree in the first class are not equivalent to those necessary to charge the offense in the second. Hence an indictment which charges only the offense in the first class will not be sufficient to accuse the defendant of murder committed in the perpetration of, or in the attempt to perpetrate, one of the felonies named in the statute, unless it is committed with the intent to kill, and after premeditation and deliberation. In support of this conclusion we cite Cannon v. State, 60 Ark. 564 [31 S. W. 150, 32 S. W. 128], and the cases and authorities cited in the same. A defendant cannot be lawfully convicted of a crime with which he is not charged in the indictment against him. Some courts have held that he can be convicted of murder committed in the perpetration of, or in the attempt to perpetrate, the felonies named in the statute, under a common-law indictment for murder. But they do so because they hold that the law dividing murder into two degrees introduced no change in the form of the indictment, created no new offense, and only reduced the punishment for one of the degrees. We disapproved of this view in Cannon v. State, 60 Ark. 564 [31 S. W. 150, 32 S. W. 128], and held that it did make a change in the form of the indictment. It follows the instruction should not have been given."

Woods v. Commonwealth (Ky.) 7 S. W. 391, was a murder case. The statute there, as in this state, defined a peculiar kind of homicide as manslaughter when perpetrated under certain circumstances. The court there held that:

"The statutory crime, as defined in Gen. St. Ky. c. 29, art. 4, § 2, as follows: 'Any person who shall stab another, not designing thereby to produce his death, and which is not done in self-defense, or in an attempt to preserve the peace, or in the lawful arrest or attempt to arrest a person charged with a felony, or in doing any other legal act, so that the person stabbed shall die thereof within six months next thereafter,' etc.—is not a degree of the offense charged in an indictment for murder; and an instruction as to the crime defined by this statute cannot be given in such a case."

To the same effect is Conner v. Commonwealth, 76 Ky. (13 Bush) 714. In Norris v. State, 33 Miss. 373, it was held that under a general indictment for larceny of property the state cannot show that the theft was committed in another state, and brought into the domestic forum, so as to punish the defendant under a special statute making that larceny.

In Huntsman v. State, 12 Tex. App. 619, Mr. Justice Hurt considers exhaustively the matter of a lesser crime being included in a charge of one of greater consequence. Among other things, he says:

"Can the Legislature remove any of these incidents? If so, which, and how many? If it

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can authorize omission of one, why not two, three, four, or all of them? If it can provide for the omission of a single necessary ingredient in the description of the offense charged, it can authorize the omission of all words descriptive of the act or omission, which, by law, is declared to be an offense. Thus it might provide for a trial of a citizen upon a written statement of a grand jury, accusing him of having violated the law, and authorize the prosecution to prove, on the trial, any act or omission violative of any provision of the written law. But it was for the purpose of preventing such unjust and tyrannical legislation and its consequences that the requirement of 'an indictment of a grand jury' was inserted in the Constitution. Were it otherwise, the grand jury might indict for theft upon a state of case sufficient, as presented to them, to warrant the charge, and on trial the defendant show his innocence of such offense, yet the prosecution could abandon that accusation and go on trying to establish embezzlement, swindling, receiving stolen goods knowing them to be stolen, obtaining property upon false pretenses, and, if in relation to live animals, driving them beyond their accustomed range; taking the chances of making a prima facie case of either or all of them, and so procure a conviction for an offense which the grand jury never heard of during their investigation, and for which they had no thought of indicting the accused. Thus the indictment presented would be made the mere stalk or stub on which the prosecution might seem least liable to be met, or, of which there might be the greatest probability of the defendant's having no information, so as to insure his conviction before he could prepare to answer. Such a construction would make the right not to be 'held to answer for any criminal offense except upon indictment of a grand jury' a deception, a fraud, a falsehood, to intrap innocent persons who confide in the truth of the law and its solemn proceedings, and to wrongfully convict them without any indictment of a grand jury, charging them with the crime for which they are held to answer. There must be such an indictment, so accusing the defendant of the very crime of which he is convicted, to sustain the judgment, and the want of it will not be supplied by one charging another offense by allegations which do not include that for which the party is convicted."

He sums up the matter thus:

"Finally: To allow the indictment for a greater to sustain a conviction for the lesser offense, it must contain the statement of every inculpatory fact and circumstance material to the description of the latter, and the two must be alike as to all the essential constituent elements of the lesser offense, so that the allegation will include it without contradicting the material averments of the greater. Whenever an indisputable constituent fact or circumstance of the lesser is not included in the greater, the latter cannot be made to include the former, no matter how many other facts and circumstances may be common to both."

In People v. Olmstead, 30 Mich. 431, the indictment was for manslaughter in killing one Mary Bowers, whom it is averred he did "feloniously, willfully, and wickedly kill and slay, contrary to the statute in such case made and provided," etc. The information did not name the offense, nor the manner, nor the means of its commission. The statute for manslaughter by producing abortion was substantially like our own. The court admitted to the jury considerable testimony designed to prove the offense thus described. The discussion of this point is contained in the following extract from the opinion:

"Respondent claims that the constitutional right 'to be informed of the nature of the accusation' involves some information concerning the case he is called on to meet, which is not given by such a general charge as is here made. And courts are certainly bound to see to it that no such right is destroyed or evaded, while they are equally bound to carry out all legislative provisions tending to simplify practice, so far as they do not destroy rights. The discussions on this subject sometimes lose sight of the principle that the rules requiring information to be given of the nature of the accusation are made on the theory that an innocent man may be indicted, as well as a guilty one, and that an innocent man will not be able to prepare for trial without knowing what he is to meet on trial. And the law not only presumes innocence, but it would be gross injustice unless it framed rules to protect the innocent.

"The evils to be removed by the various acts concerning indictments consisted in redundant verbiage, and in minute charges, which were not required to be proven as alleged. It was mainly, no doubt, to remove the necessity of averring what need not be proved as alleged, and therefore gave no information to the prisoner, that the forms were simplified. And these difficulties were chiefly confined to common-law offenses. Statutory offenses were always required to be set out with all the statutory elements. Koster v. People, 8 Mich. 431. The statute designed to simplify indictments for statutory crimes, which is in force in this state, and is a part of the same act before quoted, reaches that result by declaring that an indictment, describing an offense in the words of the statute creating it, shall be maintained after verdict. C. L. § 7928. But both of these sections must be read in the light of the rest of the same statute, which plainly confines the omission of descriptive averments to cases where it will do no prejudice. And so it was held, in Enders v. People, 20 Mich. 233, that nothing could be omitted by virtue of this statute, which was essential to the description of an offense.

"Manslaughter at common law very generally consisted of acts of violence, of such a nature that indictments for murder and manslaughter were interchangeable, by the omission or retention of the allegation of malice, and of the technical names of the offenses. In a vast majority of cases a very simple allegation would be enough for the protection of the prisoner. But where the offense of manslaughter was involuntary homicide, and involved no assault, but arose out of some negligence or fault from which death was a consequential result, and sometimes not a speedy one, the ordinary forms were deficient, and the indictment had to be framed upon the peculiar facts, and could convey no adequate information without this. See 2 Bishop's Cr. Proced. § 538.

"The offense for which the respondent in this case was put on trial originated in the statute defining it, and could not have come within any of the descriptions of manslaughter at common law. An innocent person, charged under the information, could form no idea whatever from it of the case likely to be set up against him. He might, perhaps, be fairly assumed bound to prepare himself to meet a charge of manslaughter by direct violence or assault. But which one was meant, out of the multitudinous forms of indirect and consequential homicide that might occur after a delay of any time not exceeding a year, from an original wrong or neglect, and of which he might or might not have been informed, he could not readily conjecture. Nothing could inform him of this statutory charge, except allegations conforming to the statute. These, we think, he was entitled to have spread out upon the accusation. Without them he was liable to be surprised at the trial, and could not be expected to prepare for it. We are not prepared to hold this information bad upon

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its face, for we are disposed to think, and it was practically admitted on the argument, that it may apply to the ordinary homicide by assault. It was not, therefore, until the evidence came in that it was made certain the case was different. The question of sufficiency does not arise directly upon the record, but on the bill of exceptions, and the error was in permitting a conviction on it."

In People v. Arnett, 126 Cal. 680, 59 Pac. 204, it was held that under an indictment charging assault to commit murder, but which does not charge that the defendant made the assault with a deadly weapon, the conviction of the lesser offense cannot be sustained. In Mapula v. Territory, 9 Ariz. 199, 80 Pac. 389, it was decided that a conviction of aggravated assault may be had under a murder indictment only after the facts constituting such assault are alleged in the indictment. Goldin v. State, 104 Ga. 549, 30 S. E. 749, laid down the principle that a verdict, finding a defendant guilty of assault and battery under an indictment charging assault with intent to commit rape, under which no battery is charged, cannot stand. Again, in Watson v. State, 116 Ga. 607, 43 S. E. 32, 21 L. R. A. (N. S.) 1, the court announced the doctrine that the crime charged in the indictment must necessarily include all the elements of the lesser crime, or the indictment must itself set them out by appropriate averments. State v. Desmond, 109 Iowa, 72, 80 N. W. 214, declares that to justify a conviction of assault and battery under an indictment charging assault with intent to commit rape, it must be averred in the indictment that the attempt was accompanied with actual violence. It is taught in People v. Adams, 52 Mich. 24, 17 N. W. 226, that in a trial for murder not charged to have been committed with assault, a conviction of assault is erroneous. It was held in Alyea v. State, 62 Neb. 143, 86 N. W. 1066, that a conviction of assault and battery is improper under an information, charging an assault with intent to inflict great bodily harm, where the averments do not include a battery.

In State v. Thomas, 65 N. J. Law, 598, 48 Atl. 1007, there was an indictment for manslaughter, which charged only that the defendant did "feloniously kill and slay" the deceased, and it was held that a conviction for assault and battery could not be supported. After reciting certain excerpts from previously decided cases the court says:

"These expressions are in harmony with our constitutional bill of rights that in all criminal prosecutions the accused shall have the right to be informed of the nature and cause of the accusation, a provision similar to that which the Supreme Court of Massachusetts declared to be only 'an affirmation of the ancient rule of the common law that no one shall be held to answer to an indictment or information unless the crime with which it is intended to charge him is set forth with precision and fullness.' * * * Hence the most that can be said of the present indictment on this point is that it charges an offense of which assault and battery may or may not be an ingredient. Such an accusation does not distinctly and precisely inform the accused that he is charged with this lower misdemeanor, as is required by the authorities cited. At best, the charge is equivocal and inferential only."

The Indiana statute on the requisites of an indictment as set out in State v. Lay, 93 Ind. 341, is almost precisely like the Oregon Code on that subject. The decision accords with the doctrine laid down by Mr. Justice Eakin in State v. Whitney, supra. Mr. Justice Hammond there said:

"Section 1908, supra, defines two offenses, namely, voluntary manslaughter and involuntary manslaughter. In the former the killing is done intentionally, but without malice, express or implied, and upon sudden heat. In involuntary manslaughter the killing, done in the commission of some unlawful act, is unintentional. An indictment for voluntary manslaughter will not support a conviction for involuntary manslaughter, and vice versa. Bruner v. State, 58 Ind. 159; Adams v. State, 65 Ind. 565. Though the penalty is the same in both, the crimes of voluntary and involuntary manslaughter are as separate and distinct as those of gross larceny and robbery. In determining the sufficiency of an indictment or information for manslaughter, all the sections of the statute above set out must be construed together. * * * In manslaughter the indictment or information must now, as heretofore, be sufficient to charge one or the other offense of voluntary or involuntary manslaughter. The indictment in the case before us is not sufficient to charge either offense, and under the fourth clause of section 1759 is bad for uncertainty."

In State v. McAvoy, 73 Iowa, 557, 35 N. W. 630, it was held that the crime of assault and battery is not necessarily included within the assault to commit rape and to justify a conviction of the lesser offense. Under such an indictment it must be averred that the attempt was accompanied with some actual violence to the person of the woman. The court there said:

"But the defendant can be convicted of an offense distinct from the one specifically charged in the indictment only when such offense is an essential element of that charge, or when it is shown by proper averment in the indictment that a minor offense was in fact included in the perpetration of the one charged."

In Scott v. State, 60 Miss. 268, it is stated that a statutory indictment for murder does not embrace a charge of assault and battery with intent to murder. The court said:

"A party can only be convicted of a lesser offense than the one charged where the lesser is specifically charged as constituting part of the higher, or by an added count, where the lower is necessarily included in the higher."

These precedents would seem to dispose of the theory that an assault is necessarily involved in the allegations of the indictment before us so as to justify the instruction of the court on the subject of abortion. Moreover, the court did not undertake to instruct on assault, even if we could torture the indictment into an inclusion of that element. The trial judge invited the jury to convict the defendant of a crime of which the indictment gave him no notice whatever, and in so doing violated a constitutional right established from the beginning of jurisprudence in this country. Our statute has un-

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dertaken to make certain groups of wrongful acts, and to apply to each one the term of manslaughter, although they are radically different from each other, containing only the common element of the death of a person. More than this, the Legislature has provided forms of indictment perpetuating the distinction between these different classes of specifications. All these things are for the protection of the liberty of the citizen. It is said in section 1439, L. O. L.:

"The manner of stating the act constituting the crime, as set forth in the appendix to this Code, is sufficient, in all cases where the averments there given are applicable, and in other cases forms may be used as nearly similar as the nature of the case will permit."

It thus imposes a duty upon the prosecuting officer in drawing his indictment to differentiate in allegation as required by the Code, and he cannot avoid this injunction by using an indefinite omnibus form, which does not notify the defendant of the particular circumstances of the crime charged. The contrary authorities are based on the doctrine that the common-law form of indictment for murder is sufficient for any charge involving homicide. These precedents are not applicable in this state, for it has been often held that there are no common-law crimes here. We must depend entirely upon our statute for the punishment of any offense. If the differences between the various kinds of murder in the second degree and of manslaughter were not to be observed, why did the Legislature put them upon the statute book and also prescribe forms indicating that the distinction should be carried into the indictment? The lawmaking power has provided these things for the protection of the liberty of the citizen, and his rights are materially abused unless the injunction is observed.

Undoubtedly, a most untimely death of a young woman has occurred under circumstances where vengeance, as distinguished from the orderly administration of the law, cries aloud for a victim. But the Constitution, supreme over all of us, and the statutes in pursuance thereof have provided certain guaranteed rights for the accused which have been disregarded. In brief, there are these errors clouding the proceedings in the circuit court: (1) The admission of hearsay, detailing a statement of Edna Morgan about her thought concerning the possible future movement of the defendant, thus letting in an utterance of hers which she would not have been permitted to narrate if she had lived and had been called as a witness, because it was not made in the presence or knowledge of the defendant or by his authority. (2) The faulty instruction of the court, wherein it was assumed that abortion alone was a crime, without stating the other elements of the offense defined by section 1900, L. O. L. (3) Charging the jury about forms of manslaughter of which no intimation was given to the defendant by the indictment upon which he was tried. The evidence was all circumstantial, and that on behalf of the defendant strongly controverts the contention of the prosecution. The danger of a wrong conviction on circumstantial evidence is very great. Under these conditions, as we did in State v. Rader, 62 Or. 37, 124 Pac. 195, we ought to reverse the conviction, and remand the case for the decision of a jury on a new trial.

(83 Or. 159)

SARGENT, State Superintendent of Banks, v. WATERBURY et al.

(Supreme Court of Oregon. Dec. 12, 1916.)

1. BANKS AND BANKING ⟸49(1)—SUPERINTENDENT OF BANKS—COLLECTION OF UNPAID SUBSCRIPTIONS.

The legal principles applicable to a suit by the superintendent of banks in his official capacity, in behalf of creditors of an insolvent bank, to recover from stockholders upon their liability for unpaid stock subscriptions, are not distinguishable from those applicable to any other case, where the individual liability of stockholders is sought to be enforced.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 71, 534; Dec. Dig. ⟸ 49(1).]

2. BANKS AND BANKING ⟸49(1)—SUPERINTENDENT OF BANKS—COLLECTION OF UNPAID SUBSCRIPTIONS.

The authority of the superintendent of banks to prosecute an action in behalf of creditors of insolvent bank to recover from stockholders upon their liability for unpaid stock subscriptions, being an action for the sole purpose of enforcing the individual liability of stockholders because of the lack of other assets to pay the debts, is derived from L. O. L. § 4586, as amended by Laws 1911, p. 244, which says that he may, "if necessary to pay the debts of such bank, enforce the individual liability, if any, of the stockholders."

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 71, 534; Dec. Dig. ⟸ 49(1).]

3. BANKS AND BANKING ⟸49(7)—COLLECTION OF UNPAID SUBSCRIPTIONS—COMPLAINT.

In such action, a complaint failing to allege defendants were stockholders at the time the suit was commenced is demurrable, even if it alleges that defendants were stockholders a few years prior to the commencement of the suit, since L. O. L. § 799, subd. 33, as to presumption of continuance of things once proven to exist, does not apply in such a case.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 77; Dec. Dig. ⟸ 49(7).]

4. BANKS AND BANKING ⟸91—STOCKHOLDERS—PURCHASE OF STOCK BY CORPORATION.

Notwithstanding L. O. L. § 4569, forbidding a bank to purchase its own capital stock, the surrender by bank stockholders of their stock to the bank was a valid transfer of their stock, where the bank did not permanently retire such stock upon its surrender, but subsequently reissued it and sold it to other persons.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 225; Dec. Dig. ⟸ 91.]

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5. BANKS AND BANKING ⟸49(1)—INSOLVENCY—COLLECTION OF UNPAID SUBSCRIPTIONS.

A suit by the superintendent of banks, in behalf of creditors of insolvent bank to recover from stockholders upon their liability for unpaid stock subscriptions, was a winding-up suit, and not simply a proceeding to collect a debt due to a corporation, where it appeared the corporation was hopelessly insolvent, and that it was necessary, in order to pay the debts of the bank, to enforce the individual liability of the stockholders.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 71, 534; Dec. Dig. ⟸ 49(1).]

6. BANKS AND BANKING ⟸47(2)—COLLECTION OF UNPAID SUBSCRIPTIONS.

To enforce unpaid subscriptions of stockholders of an insolvent bank, an accounting of the assets and debts, and of the amount of capital remaining unpaid upon the shares, and the amount unpaid by each stockholder, and an assessment of the amount due from each stockholder, is a condition precedent.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 66; Dec. Dig. ⟸ 47(2).]

Department 1. Appeal from Circuit Court, Multnomah County; R. G. Morrow, Judge.

Action by S. G. Sargent, as State Superintendent of Banks, against G. W. Waterbury and others. From a decree for plaintiff, certain defendants appeal. Suit dismissed without prejudice.

This is a suit by the superintendent of banks in his official capacity, in behalf of the creditors of the American Bank & Trust Company of Portland, to recover from certain stockholders upon their liability for unpaid stock subscriptions. The complaint, after some formal allegations, proceeds as follows:

"(4) That on or about the 18th day of December, 1911, plaintiff, upon examination of said American Bank & Trust Company, in his capacity as superintendent of banks of the state of Oregon, found the same to be insolvent, and thereupon, on said day, said bank placed its business and assets under the control of plaintiff to be liquidated, by posting a notice on its door as follows: 'This bank is in the hands of the superintendent of banks.' And the board of directors of said bank in writing requested said plaintiff to take charge of the same, and immediately an executive officer of said bank notified plaintiff of such action, personally and in person, and delivered to plaintiff the said written request of said board of directors; and upon said action of said bank, and the written request of its board of directors, plaintiff took possession of all of the assets, property, and affairs of said banking corporation, and ever since said day has been and now is in possession of said banking corporation and of all of its property and assets of every kind for the purpose of liquidating and settling up its business, and is proceeding with said liquidation and settlement, and in the collection of all money and of all credits due and to become due to the said corporation, and paying its liabilities so far as funds are realized therefor.

"(5) That said American Bank & Trust Company, was on said 18th day of December, 1911, and still is, indebted in a sum in excess of $97,000, and the liquidation and settlement of the business and affairs of said American Bank & Trust Company has and will entail a large expense, the total amount of which plaintiff cannot now state or determine, in addition to the liabilities of said corporation already existing; that the entire assets of said bank, exclusive of its demands against stockholders, do not exceed the probable value of $10,000; that it is necessary, in order to pay the debts of said American Bank & Trust Company, to enforce the individual liability of the stockholders thereof.

"(6) That on or about the 12th day of November, 1906, the defendant G. W. Waterbury, for himself and as agent and trustee for the other defendants, jointly and severally, subscribed for 850 shares of the stock of the Bank of America, now the American Bank & Trust Company, and for himself and as agent and trustee for the other defendants, jointly and severally, signed the following subscription agreement, to wit: 'Subscription to the capital stock of the Bank of America. 2,500 shares. Par value, $100 each. We, the undersigned, hereby subscribe for the number of shares of the capital stock of the Bank of America, a corporation of the state of Oregon, set opposite our names respectively, and do hereby agree to take and pay for the same at the times and in the manner required by the board of directors of said corporation.'

"(7) That thereafter said stock was issued to said defendants in accordance with the agreement therefor, made and entered into by and between the board of directors of the Bank of America, and the said defendants and stockholders of the Mortgage Guarantee & Trust Company, on or about the 31st day of December, 1906, in the following amounts:

James H. Alexander.....	30	shares	$ 3,000
W. A. Currie.....	10	"	1,000
John E. Davis.....	30	"	3,000
G. W. Waterbury.....	420	"	42,000
C. W. Miller.....	100	"	10,000
S. Logan Hays.....	100	"	10,000
E. C. Knoernschild.....	160	"	16,000

"That each of said defendants received the amount of said stock herein respectively stated, and thereafter participated in the business of the said banking corporation so issuing the same as stockholders of said corporation.

"(8) That said defendants turned over and delivered to said Bank of America, now American Bank & Trust Company, in payment for said 850 shares of stock, the entire assets, good will, and business of the said Mortgage Guarantee & Trust Company, which were not worth to exceed the sum of $3,000. That all the directors and officers of the said Bank of America, now American Bank & Trust Company, were at said time directors and officers of the Mortgage Guarantee & Trust Company, and had actual knowledge of the condition and affairs of said Mortgage Guarantee & Trust Company, and of the actual value of its assets, good will, and business, and knew that said assets, good will, and business were not worth the sum of $85,000, nor any other sum in excess of $3,000. That said board of directors of said Bank of America conspired among themselves and with the other defendants, and each and all of said directors were guilty of and practiced actual fraud upon all persons then and thereafter extending credit to and doing business with said Bank of America, in purchasing and pretending to purchase said assets, good will, and business of said Mortgage Guarantee & Trust Company, and in issuing therefor stock of the Bank of America to the par value of the sum of $85,000. That each of the defendants knew the condition and affairs of said Mortgage Guarantee & Trust Company, and knew that said assets, good will, and business of said company were not worth the sum of $85,000, nor any other sum in excess of $3,000, and conspired with the board of directors of said

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Bank of America in the transfer of said assets, good will, and business, and participated in the fraud of said directors of the Bank of America upon persons then and thereafter transacting business with and extending credit to said Bank of America, by means of the said fraudulent transfer of said assets, good will, and business of the Mortgage Guarantee & Trust Company, and the issuance of said stock of the Bank of America therefor. That said board of directors and said defendants made said transfer of assets, good will, and business of said Mortgage Guarantee & Trust Company, and issued said stock of the Bank of America therefor, with the design and intent and for the purpose of deceiving and misleading all persons doing business with and extending credit to said Bank of America, and causing all such persons to believe, and rely upon the belief, that said Bank of America had $85,000 par value of stock actually issued and fully paid for at par.

"(9) That said stock subscription has not been paid, nor any part thereof, except by the receipt of the assets, good will, and business of the Mortgage Guarantee & Trust Company as hereinabove alleged, the value of which was not more than $3,000. Wherefore plaintiff prays for a decree that plaintiff do have and recover from off the defendants, and each of them, on behalf of the creditors of the American Bank & Trust Company of Portland, Oregon, the sum of $82,000, together with the costs and disbursements incurred herein, and for such other and further relief as the court may deem best and in accordance with the principles of equity."

The defendants Waterbury, Miller, and Currie each filed a motion in this form:

"(1) That said complaint be made to show whether or not all of the stockholders or subscribers to the capital stock of the American Bank & Trust Company whose stock has not been fully paid for have been made parties to this suit; (2) that it shall be made to show the names of the creditors on whose behalf this suit is brought, the amount and nature of their claims, and when they became creditors of the American Bank & Trust Company; and (3) that it shall be made to show whether or not any of the creditors upon whose behalf this suit is brought were creditors on the 25th day of September, 1907."

Such motions being denied, the same defendants each filed a demurrer:

"Upon the ground that the same does not contain facts sufficient to constitute a cause of suit."

These demurrers being overruled, the defendants answered, and, replies thereto having been filed, a trial was had, resulting in a judgment and decree as follows:

"This cause coming on at this time to be heard upon motion of the attorneys for the plaintiff herein for a decree, and it appearing to the court at this time that this cause was heretofore duly tried and submitted, and the court having heretofore made its findings of fact and conclusions of law, which were filed herein, and the parties being present in court, plaintiff represented by his attorneys, C. M. Idleman and I. H. Van Winkle, and the defendants being present and represented by their attorneys, as shown by record, and the court being at this time fully advised: Now, therefore, upon the said motion and in accordance with the said findings herein, it is hereby ordered, adjudged, and decreed that the plaintiff herein have judgment against the defendants G. W. Waterbury, C. W. Miller, S. Logan Hays, John E. Davis, and E. C. Knoernschild, and each of them, in the sum of $75,314.04, and also for a decree against the defendant W. A. Currie in the sum of $535, and that the defendant Julius H. Alexander be dismissed from this cause, with his costs and disbursements, and that the plaintiff herein recover costs and disbursements against each and all of said defendants, excepting J. H. Alexander, and that execution may issue therefor."

From this decree, defendants Waterbury, Miller, Currie, and Hays appeal.

Martin L. Pipes, S. B. Huston, and J. P. Winter, all of Portland (John M. Pipes, Geo. A. Pipes, and Huston & Huston, all of Portland, on the brief), for appellants. C. M. Idleman, of Portland, and I. H. Van Winkle, of Salem, for respondents. Joseph & Haney, of Portland, for respondents Alexander and Davis.

BENSON, J. (after stating the facts as above). [1] At the outset it is observed that the only purpose of the allegation of fraud in the complaint is to meet the provision of section 6696, L. O. L., relating to the conclusiveness of the valuation by directors of property taken in payment of stock subscriptions, and therefore the legal principles applicable to the case are not in any manner to be distinguished from those applicable in any other case where the individual liability of stockholders is sought to be enforced. The question to be considered is the sufficiency of the complaint as against a general demurrer. Defendants contend that the demurrer should be sustained for three reasons: (1) That the complaint fails to allege that the defendants were stockholders at the time the suit was commenced; (2) that all stockholders having unpaid stock are indispensable parties; (3) that it is incumbent upon the plaintiff to allege facts showing an accounting of the debts of the insolvent corporation, and an assessment of the amount necessary to be collected upon such share of unpaid stock to pay such debts.

[2, 3] Considering these contentions in the order named, we first note the fact that while the complaint alleges that the defendants subscribed for stock, and that it was issued to them on December 31, 1906, and that they afterwards participated in the business of the corporation, it is not alleged that they were stockholders when the suit was commenced in August, 1911. Since it appears from the complaint that this proceeding is avowedly for the sole purpose of enforcing the individual liability of stockholders, because of the lack of other assets to pay the debts, the authority of the superintendent to prosecute it is derived from the statute, and is found in section 4586, L. O. L., as amended (Laws 1911, p. 244), which says:

"And may, if necessary to pay the debts of such bank, enforce the individual liability, if any, of the stockholders."

Thus it is seen that the plaintiff's right to sue in this instance is limited to stockholders. Plaintiff insists that the complaint is effectually aided by the legal assumption "that a

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thing once proved to exist continues as long as is usual with things of that nature" (section 799, subd. 33, L. O. L.), and cites a number of authorities to the effect that facts which the law presumes need not be pleaded. We have carefully examined all these authorities, and are unable to discover where they aid the complaint in the present case. Bliss on Code Pleading (3d Ed.) §§ 175, 175a, states the doctrine thus:

"'When the law presumes a fact, it should not be stated.' Thus, the law presumes every man innocent of crime or of fraud; that he is of good character; that he has capacity to contract; that he is free; that he is not indebted or a bankrupt; that he has not been negligent in the performance of a duty; that his business has been transacted legally. The plaintiff should not state the facts thus presumed; but, if to be put in issue, the contrary averment must come from the other side, although, in actions for injuries to character, some of the old common-law precedents violate the rule by unnecessarily alleging the good character of the plaintiff. The law also presumes the fact of consideration in contracts evidenced by sealed instruments, or by negotiable promissory notes or bills of exchange. Their execution and delivery import consideration; hence it need not be alleged. Some of the states have extended the scope of this presumption to most, or all, written promises; and, as to them, a want of consideration is but matter of defense." Section 175.

"These presumptions should not be confounded with inferences—presumptions, often called—arising from probative facts, the facts inferred, or presumed, and not those going to establish it. Thus the presumption that the stronger of two drowning persons will survive, if it exist at all, is, at common law, one of fact, and, in a given case, the pleader should allege that on, etc., A. B., the weaker person, died, leaving his only child, C. D., the stronger person, as his heir at law. Whether C. D. in fact survived, or whether both perished together, is matter of inference from all the facts. So the presumption of negligence which is sometimes drawn from the fact of the injury is an argumentative one, is an inference, and not a presumption proper, and the pleader should allege the negligence. Nor does the rule embrace conclusive presumptions." Section 175a.

Counsel for plaintiff are confounding the inference that, because the defendants were stockholders in December, 1906, they were stockholders in 1911, with a presumption of a fixed fact, such as those suggested by Mr. Bliss in section 175, supra. In 31 Cyc. 49, we read:

"But it is not sufficient that a fact may be inferable from the facts pleaded, where it is not necessarily implied. And it has indeed been said that under the Codes a fact must be pleaded, unless the law raises a conclusive presumption of its existence from the facts stated. In many cases, under a rule of liberal construction, courts have held pleadings sufficient which only inferentially and by reasonable presumption contained material averments; but such inference or presumption does not take the place of a positive averment for all purposes, and if objection to such pleadings is made seasonably and properly it will be sustained."

In Malone v. Craig, 22 Tex. 608, it is said that:

"A petition should state the plaintiff's cause of action by distinct averments, and not leave it to the court to deduce the existence of one fact, from the statement of another."

It cannot be overlooked that the relation of the defendants as stockholders is a vital element in plaintiff's right to maintain the suit; that it is just as important as the allegation in an action in replevin that plaintiff is entitled to the immediate possession of the property. In Afflerbach v. McGovern, 79 Cal. 268, 21 Pac. 837, it is said that:

"A complaint to be good must show a cause of action in favor of the plaintiff and against the defendant existing at the time the action is commenced. This complaint does not show this, but, if it states a cause of action at all, shows that it existed more than four years before the commencement of the suit, and for that reason the complaint is clearly bad."

The vice of such a pleading is strikingly apparent in the case at bar in the fact disclosed by the evidence that, of the eight defendants, only three were actually stockholders when this suit was commenced, and that at that time their combined holdings aggregated only 30 out of the 850 shares upon which the suit is based.

[4] Plaintiff insists that the surrender of their stock to the corporation was a violation of section 4569, L. O. L., and void, and that therefore they are still the owners of the stock so surrendered. There might be some merit in this contention if the bank had permanently retired such stock upon its surrender; but the record discloses that it was subsequently reissued, being sold to other persons, and that the very directors who turned the bank and its assets over to the superintendent of banks held their office and acted as stockholders by virtue of their subsequent holding of some of this very stock.

We come, then, to a discussion of the second and third points, which are so related as to be better considered together. The complaint does not plead the taking of an account and determination of the total unpaid debts of the bank, nor does it allege that there has been any computation or determination of the amount ratably necessary to be collected upon each share of unpaid stock to raise an amount sufficient to pay such debts. In Bush v. Cartwright, 7 Or. 329, we note the following:

"But, upon the other hand, we find that there are many cases in which it has been held that the remedy is in equity, where the rights of the corporation, the stockholders, and creditors can all be adjusted in one suit upon the principles of equality and justice. And as the views presented in these cases recommend themselves to our consideration as the most reasonable and appropriate, we have concluded to adopt them."

In Harris v. First Parish in Dorchester, 23 Pick. (Mass.) 112, which is cited with approval in Bush v. Cartwright, supra, is found the following language:

"If actions at law will lie, * * * suits may be multiplied to an indefinite extent. Each bill holder or other creditor must have his separate suit, and each stockholder must be sued separately. Again, suits between stockholders to adjust their contributions would be interminable. If a creditor's demand be larger than the amount of

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stock owned by any one, he must have several suits against several individuals on the same cause of action, or lose a part of his just demand. If any one stockholder owned more stock than was needed to meet any one claim made upon him, he would be liable to several suits."

In Hodges & Wilson v. Silver Hill Mining Co., 9 Or. 200, this court, speaking by Mr. Chief Justice Lord, says:

"To the extent of the stock subscribed and unpaid, each stockholder is liable for the indebtedness of the corporation. It is a several, distinct, and limited liability, as to which each stockholder stands alone, irrespective of the amount for which others are liable, except that, if he pays more than his proportion of such debts, he may, as in other cases, have contribution from his coshareholders. In the absence of any legislation providing for the enforcement of this liability, the implication of law is that the common law would supply a remedy. Our predecessors, however, conceived that the remedy in equity, where the rights of the corporation, the stockholders, and creditors could all be adjusted in one suit, upon principles of equality and justice, would be more appropriate, adopted the remedy in equity for the enforcement of such liabilities. Bush v. Cartwright, 7 Or. 329. * * * The amount of stock subscribed and unpaid of each stockholder is more than sufficient, many times, to liquidate the amount of the judgment against the corporation. That fact, however, would not make it less oppressive in principle to select some one of the number of defendant stockholders, and compel him to liquidate the judgment, because the amount of such judgment did not exceed the amount of his stock subscribed and not paid in, as claimed in the argument. It seems to us such a theory would frustrate some of the principal objects for which the remedy in equity was adopted, among which was that to enable the court to order such contribution amongst such stockholders as would be equitable to raise the money to pay such claim. This mode secures the payment of the indebtedness ratably, fixes according to the liability the burdens of such payment, and avoids the necessity of a multiplicity of suits."

In Brundage v. Mon. G. & S. M. Co., 12 Or. 322, 324, 7 Pac. 314, 315, the same eminent jurist says:

"The Constitution provides that 'the stockholders of all corporations and joint-stock companies shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more.' * * * By this section the liability of stockholders of a corporation is limited to the amount of their stock subscribed and unpaid; and the remedy to enforce this liability, it has been held, is in equity, where the rights of the corporation, the stockholders, and all the creditors can be adjusted in one suit. Ladd v. Cartwright, 7 Or. 329; Hodges v. Silver Hill M. Co., 9 Or. 200. * * * The liability, therefore, of the stockholders upon their unpaid subscription to the capital stock being a trust fund in equity for the payment of the debts of the corporation, all the creditors are entitled to share in it. As a result of this doctrine, the general proposition is well sustained by the authorities that a judgment creditor of the corporation, who has exhausted his remedy at law, may maintain a suit in equity in his own behalf, and in behalf of such other creditors of the corporation as may unite to become parties with him, against the corporation and its delinquent stockholders, and have a decree that an account of the assets and debts of the corporation be taken, and that the stockholders pay in and account for so much as may be due from them respectively to the corporation on account of their capital stock, as will be sufficient to pay the debts represented by the plaintiff and such other creditors as may join. * * * When the object of the bill is to settle or wind up the affairs of the corporation which is insolvent, and it becomes necessary to ascertain the whole amount of the indebtedness and to whom due, and also who are liable to contribute upon their unpaid stock subscriptions, the necessity of bringing the suit in the name and for the benefit of all the creditors of the corporation, and against all the stockholders found within the jurisdiction, is conceded."

[5] Referring to the opinion just quoted, plaintiff insists that this is not a winding-up suit, but simply a proceeding to collect a debt due to the corporation. We cannot agree with this position, for it appears from the allegations of the complaint that the debts of the bank are nearly $100,000, that its entire assets do not exceed $10,000, and that it is necessary, in order to pay the debts of the bank, to enforce the individual liability of the stockholders. In addition to these conditions, the allegations of paragraph 4 of the complaint are as follows:

"That on or about the 18th day of December, 1911, plaintiff, upon examination of said American Bank & Trust Company, in his capacity as superintendent of banks of the state of Oregon, found the same to be insolvent, and thereupon, on said day, said bank placed its business and assets under the control of plaintiff to be liquidated, by posting a notice on its door as follows: 'This bank is in the hands of the superintendent of banks.' And the board of directors of said bank in writing requested said plaintiff to take charge of the same, and immediately an executive officer of said bank notified plaintiff of such action, personally and in person, and delivered to plaintiff the said written request of said board of directors; and upon said action of said bank, and the written request of its board of directors, plaintiff took possession of all of the assets, property, and affairs of said banking corporation, and ever since said day has been and now is in possession of said banking corporation and of all of its property and assets of every kind for the purpose of liquidating and settling up its business, and is proceeding with said liquidation and settlement, and in the collection of all money and of all credits due and to become due to the said corporation, and paying its liabilities so far as funds are realized therefor."

It follows that this proceeding is merely a step in the process of winding up the affairs of the corporation, and does not bear any likeness to the case of a creditor seeking to recover his claim against a delinquent stockholder.

[6] In Lane's Appeal, 105 Pa. 49, 51 Am. Rep. 166, which appears to be a leading case upon this question, we find the doctrine expressed thus:

"Now it is manifest, upon the plainest principles, that in the case of an insolvent corporation, all of whose assets are exhausted, except its unpaid capital stock, there can be no recovery against a delinquent stockholder until a call or assessment has been made upon him fixing the amount he is required to pay. Prior to insolvency this might be done by the corporation, if it is not disabled by the special terms of the subscription contract. But, when insolvency and exhaustion of assets exist, the unpaid capital is not available to any one creditor in satisfaction of his debt, because then the whole amount of the unpaid capital is a trust fund, which does not belong to the corporation, but to the whole

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body of its creditors. Hence, whether the proceeding originates in the name of one, or of several, or of all, the creditors, the result is the same in each. The capital, when recovered, inures to the benefit of all, and must be distributed among all ratably. Before any recovery can be had in such proceedings, no matter of what particular form, there must be an assessment made by a competent authority. The necessity for an assessment arises from the consideration that only so much of the unpaid capital can be called in as is required for the payment of the unsatisfied debts. If the whole unpaid capital is not required, the whole cannot be called. In order to ascertain how much is required, there must be an account of debts, assets, and unpaid capital taken, and then a decree for an assessment of the amount due by each stockholder. Thus in Mann v. Pentz, 3 N. Y. 423, the court said: 'This liability [for unpaid capital] is only incurred when the capital paid in is not sufficient to satisfy the debts against the corporation, and then only to an amount sufficient to satisfy such debts. It is therefore necessary that an account of the assets and of the debts should be taken, of the amount of capital remaining unpaid upon the shares, and the amount unpaid by each stockholder, in order that they may be made equally liable.'"

In Myers v. Seeley, 10 Nat. Bankr. R. 411, Fed. Cas. No. 9,994, it is said:

"Bills by creditors who have judgments against a corporation have been sustained against the corporation and its stockholders; said bills being framed in the name of the judgment creditors and of all others who may choose to come in and be made parties thereto. In such cases the decree has been for an account to be taken of the debts and assets of the corporation, for the appointment of a receiver, to whom the stockholders and officers are ordered to pay and account, respectively, for so much of the assets and capital stock as are necessary to pay the debts due to the creditors; the assets thus collected and received to be applied by the receiver in discharge of the debts. The reason of that rule is that the unpaid subscriptions are assets applicable to the payment of corporate debts which the corporate authorities may call in for corporate purposes. If there are adequate assets other than said calls, then the creditor has no legal or equitable right to insist upon such calls. Primarily, the amount due on subscriptions is a debt to the corporation which it alone can enforce, and unless the corporation is without other assets to meet its obligations, and fails to make the needed calls, creditors cannot interpose. When the facts justify their interposition, an account of assets and debts should be taken, in order that it may be known what, if any, calls should be made. No further call should be made than what is sufficient, together with the other assets, to meet all debts; for the bill by creditors cannot reach beyond the satisfaction of their demands. They have no other equity."

These authorities not only represent the doctrine upheld, as we think, by the weight of authority, but are supported by sound reason and the fundamental principles of equity. The allegations of the complaint disclose a corporation in a condition of hopeless insolvency. For this reason it was voluntarily turned over to the superintendent of banks, and every proceeding which he institutes is a step in the process of winding up its affairs. He cannot proceed in the manner undertaken here. If he could, he might secure judgments far in excess of the demands of the creditors in whose behalf he sues, and to which no rules of equity or justice entitle him. Much was said in the argument as to the case of Sargent v. American Bank & Trust Co. et al., 154 Pac. 759, as having a controlling influence upon the conclusions to be reached in this case; but the history of the two is so widely different as to render the former of practically no value in the determination of the questions here considered.

The suit is therefore dismissed, without prejudice to any further proceeding not inconsistent with the views herein expressed.

MOORE, C. J., and BURNETT and HARRIS, JJ., concur.

(48 Utah, 633)

BROWN v. WRIGHT et al. (No. 2857.)

(Supreme Court of Utah. Nov. 23, 1916.)

1. CORPORATIONS ⇐149—TRANSFER OF STOCK CERTIFICATE—TITLE OF HOLDER.

Where shares of a corporation are offered for sale by the person named in the certificate, an intending purchaser is not required to look beyond the recitals of the certificate in regard to his title or the equities of the corporation, or to suspect fraud in the issuing of the shares where all seems fair and honest.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 539–546; Dec. Dig. ⇐ 149.]

2. CORPORATIONS ⇐129—TRANSFER OF STOCK CERTIFICATE—STATUTE.

In view of Comp. Laws 1907, § 330, providing that stock shall be deemed personal property, and the delivery of a stock certificate of a corporation, together with a written transfer of the same, signed by the owner, to a bona fide purchaser or pledgee for value, shall be deemed a sufficient transfer of the title as against any creditor of the transferor and all other persons whomsoever, a recital on a certificate of stock that it was "transferable only on the books of the company by indorsement hereon and surrender of this certificate," did not preclude or restrict the right to otherwise sell, transfer, or pledge the certificate by indorsement and delivery.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 479, 480, 482, 492; Dec. Dig. ⇐ 129.]

3. CORPORATIONS ⇐141—"OWNER"—TRANSFER OF STOCK CERTIFICATE — ESTOPPEL TO DENY.

In Comp. Laws 1907, § 330, the word "owner," meaning not only the actual and legal owner, but also the apparent owner named on the face of the certificate and the holder thereof in the regular course of business, the defendant corporation is estopped to deny the ownership of a stock certificate issued in name of other defendant as against plaintiff who took it as collateral security without notice of defect in title.[1]

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 477; Dec. Dig. ⇐ 141.

For other definitions, see Words and Phrases, First and Second Series, Owner.]

4. CORPORATIONS ⇐125—TRANSFER OF STOCK — CERTIFICATE — STATUTE — "WRITTEN TRANSFER."

Comp. Laws 1907, § 330, providing for a "written transfer" of stock, is satisfied by indorsement and delivery of the certificate of

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⇐ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] Mundt v. Bank, 35 Utah, 90, 99 Pac. 454.

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stock alone, and at least by a recital in a note of an assignment and transfer of the certificate as collateral security.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 470–473, 477; Dec. Dig. ⟸125.]

5. CORPORATIONS ⟸149—TRANSFER OF STOCK—CERTIFICATE—NOTICE.

Although that the assignor of a certificate of stock as collateral security objected to having the transfer to his assignee made on the books of the corporation as provided in the certificate may have been a suspicious circumstance, it alone was not sufficient cause of inquiry to overthrow other evidence, supporting a finding of bona fides on part of assignee.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 539–546; Dec. Dig. ⟸149.]

Appeal from District Court, Salt Lake County; F. C. Loofbourow, Judge.

Action by W. I. Brown against Thomas Wright, Jr., and others. Judgment for plaintiff, and defendant Nephi Irrigation Company appeals. Affirmed.

Thurman, Wedgwood & Irvine, of Salt Lake City, for appellant. W. H. Bramel, of Salt Lake City, for respondent.

STRAUP, C. J. For $1,500 loaned by the plaintiff to the defendants Thomas Wright, Jr., and Clara M. Wright, they, in April, 1912, executed and delivered to him their promissory note. To secure its payment Thomas Wright, Jr., at the same time, indorsed, transferred, and delivered to the plaintiff this certificate of stock:

"No. 428. 40¼ Shares.

"The Nephi Irrigation Company,
"Incorporated under the Laws of Utah Territory.

"Nephi, Utah, May 3d, 1889.

"This certifies that Thomas Wright, Jr., is entitled to forty and one-quarter shares in the capital stock of the Nephi Irrigation Company, transferable only on the books of the company by indorsement hereon and surrender of this certificate. Wm. H. Warner, President.
"Thomas Ord, Secretary."

The note also recites that the certificate, fully described, is given as security for its payment, and contains the usual provisions for sale on default of payment of the principal or interest. This action is brought to recover on the note and to foreclose on the certificate.

On allegations that the defendant the Nephi Irrigation Company asserts a groundless, but hostile, claim or interest in and to the certificate, it was made a party. It answered, alleging that it, in 1889, issued the certificate to Thomas Wright, Jr., which, in July of that year, was, on its books, surrendered and transferred; but that thereafter Thomas Wright, Jr., in some manner unknown to the company surreptitiously, wrongfully, and fraudulently, and without its knowledge or consent, obtained possession of it. In another paragraph the company alleged that upon a sale of the certificate by Thomas Wright, Jr., to one Joseph Wright the certificate was surrendered to the company, and that after a transfer of it on its books it was lost or stolen, but that the company had no knowledge or information as to how it thereafter came into the possession of Thomas Wright, Jr. It was thus averred that Thomas Wright, Jr., at the time of the indorsement and transfer of the certificate to the plaintiff, was not the legal owner or lawful holder thereof, of which the plaintiff had notice and knowledge, and hence was not an innocent purchaser or pledgee. These allegations were denied by the plaintiff, as well as by the defendants Thomas and Clara Wright, who did not contest, but confessed, plaintiff's cause.

The case was tried to the court, who found the issues in favor of the plaintiff. Among other things, the court found that in May, 1889, the irrigation company issued and delivered to Thomas Wright, Jr., the certificate pledged by him, and that the company, in July of that year, without the presentation, or surrender, or indorsement of the certificate, and without the knowledge or consent of Thomas Wright, Jr., made an entry on its stub books that the certificate had been surrendered, but that, until indorsed and delivered to the plaintiff in 1912, Thomas Wright, Jr., at no time had indorsed, transferred, or surrendered the certificate to any one, and had and maintained the exclusive possession and control over it. The court also found that Thomas Wright, Jr., from the summer of 1889 until he pledged the certificate in 1912, had not used any of the water represented by the certificate; that no notice was given him, nor any request made of him, to pay any charges or assessments, but that Joseph Wright paid all of the charges and assessments against the certificate issued to him in lieu of that of Thomas Wright's, and that Joseph Wright had and enjoyed the use of all of the water represented by it; that Thomas Wright, Jr., in the fall of 1889, learned that the company had issued a certificate to Joseph Wright for the identical stock represented by his certificate, and that Joseph Wright claimed to be the owner thereof, but that neither the company nor Thomas, nor Joseph Wright, took any steps to ascertain or determine the conflicting claims. The court, however, found that as to this the plaintiff had neither knowledge nor notice of any claim or right of any one, except that of Thomas Wright, Jr., in and to the certificate; that he relied on the certificate in the name and in the possession of Thomas Wright, Jr., and believed that it was what it on its face represented, and that Thomas Wright, Jr., was the lawful owner and holder thereof, and hence found that the plaintiff was an innocent purchaser or transferee for value in good faith, and without notice or knowledge of any defect or infirmity of title in Thomas Wright, Jr.

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Upon the issue that Thomas Wright, Jr., fraudulently or surreptitiously, or wrongfully, obtained possession of the certificate, or that he had sold it to Joseph Wright, the court found against the company and in favor of the plaintiff. Indeed, there was little, if any, evidence, to support such allegations.

Upon these findings the court reached the conclusion that the plaintiff had a valid lien on the certificate so indorsed and transferred to him by Thomas Wright, Jr., directed a sale thereof, and the proceeds to be applied on the note, and the surplus, if any, to be yielded over, not to Thomas Wright, Jr., but to the irrigation company. This, on the theory that as between the plaintiff, an innocent purchaser or transferee for value, and the irrigation company the latter was estopped from denying title and ownership in Thomas Wright, Jr., but that as between the irrigation company and Thomas Wright, Jr., the latter, by reason of laches and the statute of limitations, lost his right to assert against the irrigation company any claim or interest in or to the certificate. Judgment was entered accordingly, from which the irrigation company prosecutes this appeal.

[1] It is claimed that the plaintiff was neither an innocent nor rightful holder or purchaser of the certificate, for the reason that had he examined the books of the company, as it is urged he ought to have done, it would have been disclosed that Thomas Wright, Jr., was not the owner nor lawful holder of the certificate when he indorsed and transferred it to the plaintiff. But the plaintiff was not required to examine the books of the company to ascertain the validity of the transfer. Where shares of a corporation are offered for sale by the person named in the certificate, an intending purchaser is not required to look beyond the recitals of the certificate in regard to his title or the equities of the corporation, or to suspect fraud in the issuing of the shares where all seems fair and honest. 10 Cyc. 634.

[2] Because on the face of the certificate it was stated that it was "transferable only on the books of the company by indorsement hereon and surrender of this certificate," it is claimed that title thereto could not rightfully be transferred in any other manner; and as the certificate was not so transferred, it is urged that the plaintiff acquired no right therein. That such recitals do not preclude or restrict the right to otherwise sell, transfer, or pledge the certificate by indorsement and delivery has often been held. National Bank of the Pacific v. Western Pacific Ry. Co., 157 Cal. 573, 108 Pac. 676, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391; Morris v. Hussong Dyeing Mach. Co., 81 N. J. Eq. 256, 86 Atl. 1026; Nicollet National Bank v. City Bank, 38 Minn. 85, 35 N. W. 577, 8 Am. St. Rep. 643; O'Neil v. Wolcott Mining Co. et al., 174 Fed. 527, 98 C. C. A. 309, 27 L. R. A. (N. S.) 200; Gray v. Fankhauser, 58 Or. 423, 115 Pac. 146; Mapleton Bank v. Standrod, 8 Idaho, 740, 71 Pac. 119, 67 L. R. A. 656. And then we have a statute (Comp. Laws 1907, § 330), which provides:

"Stock shall be deemed personal property, and the delivery of a stock certificate of a corporation, together with a written transfer of the same, signed by the owner, to a bona fide purchaser or pledgee for value, shall be deemed a sufficient transfer of the title as against any creditor of the transferer and all other persons whosoever," etc.

This statute cannot be curtailed by a recital in the certificate. National Bank of the Pacific v. Western Pacific Ry. Co., supra.

[3] Because the statute says "signed by the owner" it is claimed that no one other than the actual and lawful owner of the certificate could legally or rightfully confer any title to another, and, as Thomas Wright, Jr., when he indorsed and transferred the certificate to the plaintiff, was not the real owner of the certificate, the plaintiff acquired no right therein. So construing the statute, a bona fide purchaser for value can acquire title only from the real or actual owner or his duly authorized agent. Such a construction renders the principle of caveat emptor to its full extent applicable to all sales and deliveries of stock certificates, the same as it is applicable to chattels. The authorities hold that stock certificates are a peculiar kind of property, and while, strictly speaking, not negotiable as commercial paper, yet are treated and dealt with similarly to such paper. National City Bank of Chicago v. Wagner, 216 Fed. 473, 132 C. C. A. 533; Union Trust Co. v. Oliver, 214 N. Y. 517, 108 N. E. 809; National Safe Deposit Co. v. Hibbs, 229 U. S. 391, 33 Sup. Ct. 818, 57 L. Ed. 1241; Russell v. American Bell Telephone Co., 180 Mass. 467, 62 N. E. 751; Litchfield v. Henson Oil Co. (Okl.) 157 Pac. 137. We do not think it was intended by the statute to destroy this doctrine. "Owner," as used in the statute, means not only the actual and legal owner, but also the apparent owner named and designated as such on the face of the certificate and the holder thereof in due and regular course of business. Any other view renders stock certificates mere chattels, and subject to the fullest extent to the principle of caveat emptor. Under the facts as found the appellant is estopped from disputing the ownership of the certificate in Thomas Wright, Jr. Mundt v. Bank, 35 Utah, 90, 99 Pac. 454, 136 Am. St. Rep. 1023; Telegraph Co. v. Davenport, 97 U. S. 369, 24 L. Ed. 1047, and other cases heretofore cited.

[4] It is also urged that under the statute to make a valid assignment and transfer requires a written transfer signed by the owner, and that a mere indorsement and delivery of the certificate is not such a written transfer within the meaning of the statute. We think this untenable. Bank of Culloden v. Bank of Forsyth, 120 Ga. 575, 48 S. E. 226, 102 Am. St. Rep. 115; Cook, Corp., §§ 375–

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380. Besides, the note signed by Thomas Wright, Jr., itself recites an assignment and transfer of the certificate for collateral security.

[5] Lastly, it is also urged that the plaintiff was not a bona fide purchaser, and was put upon inquiry as to the validity of Thomas Wright's title and given notice of some infirmity or defect in his title because the plaintiff did not have a transfer made on the books of the company, for the reason, as testified to by him, that Thomas Wright, Jr., objected to it, and stated to him that the certificate had not been out of his possession, and that he did not then care to have a transfer made of it. That may have been a suspicious circumstance of more or less weight, but, when considered in connection with the whole of the transaction, is not in itself of such controlling force as to overthrow the finding of bona fides, or to justify a contrary finding.

Let the judgment be affirmed, with costs. Such is the order.

FRICK and McCARTY, JJ., concur.

(48 Utah, 647)

STATE BOARD OF MEDICAL EXAMINERS v. TERRILL. (No. 2883.)

(Supreme Court of Utah. Nov. 24, 1916.)

1. PHYSICIANS AND SURGEONS ⟸6(1)—"PRACTICING MEDICINE" — WHAT CONSTITUTES — EVIDENCE.

Evidence *held* to show that defendant practiced medicine without a license, as he undertook to examine, diagnose, and prescribe for all ailments, as well as to do general massaging.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 6; Dec. Dig. ⟸ 6(1).]

2. INJUNCTION ⟸211—PRACTICING MEDICINE —EFFECT.

A decree, enjoining defendant from diagnosing, treating, operating on, prescribing, or advising for any person afflicted with any mental or physical ailment or condition, from which he expects to or does receive a pecuniary compensation, or from practicing medicine within the state until he shall have received a certificate permitting him to practice medicine, does not prevent him from doing the business of an ordinary masseur, since it is in the words of Laws 1911, c. 93, prohibiting practicing medicine without a license.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 434; Dec. Dig. ⟸211.]

3. PHYSICIANS AND SURGEONS ⟸6(1)—PRACTICING MEDICINE.

Laws 1911, c. 93, prohibiting practicing medicine without a license, does not concern systems of treatments, but merely prohibits any one from treating diseases who has not the requisite qualifications.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 6; Dec. Dig. ⟸ 6(1).]

Appeal from District Court, Davis County; N. J. Harris, Judge.

Injunction by the Board of Medical Examiners of State of Utah against G. W. Terrill. From a decree granting the writ, defendant appeals. Affirmed.

George Halverson, of Ogden, for appellant. A. R. Barnes, Atty. Gen., and E. V. Higgins and G. A. Iverson, Asst. Attys. Gen., for respondent.

STRAUP, C. J. The defendant is enjoined from practicing medicine without a license, and appeals.

He held himself out as a "scientific manipulator." He claims no knowledge of medicine, nor of anatomy, physiology, or hygiene, nor of any of the subjects enumerated in the statute (Laws Utah 1911, c. 93), knowledge of which one, to take an examination and obtain a license, must possess, and concerning which one must hold a degree or diploma from a legally chartered medical school requiring such subjects. The defendant, however, claims to be merely a masseur, and the right only to give massage treatments by rubbing and manipulating to relax the muscles of his patients and to accelerate the flow of blood, what popularly is known as ordinary massaging. If that were all the defendant did, it might well be conceded that he did not practice medicine within the meaning of the statute (Laws Utah 1911, c. 93), and hence needed no license, and ought not to have been restrained.

[1] But the record shows that he undertook to do, and did, much more. He advertised as a "scientific manipulator," maintained an office, and there received patients suffering from all kinds of ailments; and, in response to calls, visited and treated them at their homes. As testified to, he, for compensation, manipulated the muscles of the abdomen of one suffering from appendicitis, and similarly manipulated others suffering from ulcers or cancer of the stomach; the body of a girl, who, as testified to, "had every indication of typhoid fever," and by such manipulation claimed to have reduced the patient's temperature from 103 to 98 degrees, and told the parents that "if they wanted to, to give the girl a little castor oil and after that citrate of magnesia," and manipulated others for rheumatism. By the same process he treated a little boy suffering from tuberculosis, or other disease, of the hip. The boy's limb, by a regular physician, had been placed in a frame and cast to relieve the strain from the hip. This the defendant removed, and gave the boy treatment by manipulation, which, as testified to, so improved the boy that he was soon able to walk and to operate an automobile. By manipulation he also treated a baby, who, as testified to, "the doctor said," had leakage of the heart and bowel complications. He was called to visit, and treated, a woman who was sick and unconscious. He restored consciousness by rubbing and manipulating the woman's back, sides, and stomach. The wife of

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a dentist was treated by a regular physician for tonsilitis. She grew worse, so was the testimony. Then the attending physician diagnosed the case as tuberculosis of the throat, but later said that he was mistaken in that. She suffered severe pains back of the ear and in the spine. The attending physician advised consultation with a specialist. Without the knowledge or consent of the physician, and in his absence, the defendant was called in. As testified to, "he inquired as to her feelings and how long she had been sick and where she was suffering pain, and then pulled off his coat and began to manipulate in the region of her neck and spine for 15 or 20 minutes. She felt relieved. The next morning, when the attending physician arrived, he found her feeling and looking better. The morning after that she was so much better that the attending physician said that it was not necessary for him to call any more. The defendant told the husband that he had better give his wife some juniper root, which was done. Upon the defendant giving the woman several other treatments, her fever disappeared, and she was free from pain. When the defendant visited her, she was confined in bed for two weeks. Now she was able to get up and walk about. She continued her treatments at her house and at the defendant's office. The defendant, with his hands and fingers, simply manipulated the neck and back and the spine." Another patient, suffering from a sprained and swollen ankle, went to the defendant's office for treatment. Upon exhibiting the foot the defendant told him to remove his shoe and roll up his pant leg. After examining the foot, the defendant told him that he had a broken arch. He rubbed it, bathed it with some sort of oil or liniment out of a bottle, and then bandaged it. Other instances were testified to where persons suffering from ailments visited the defendant at his office, or he at their homes, and gave them treatments.

[2] The doing of these things clearly was practicing medicine within the meaning of the statute. Laws Utah 1911, c. 93, p. 135; State v. Yee Foo Lun, 45 Utah, 531, 147 Pac. 488; Board v. Freenor, 154 Pac. 941; State v. Erickson, 154 Pac. 948. There can be no doubt of that, and so the court found. But it is claimed the decree is too broad, in that it, as is urged, prohibits the defendant from doing merely ordinary massaging. The decree is that the defendant be—

"restrained, prohibited and enjoined from diagnosing, treating, operating upon, prescribing or advising for any person or persons within the state of Utah afflicted with any mental or physical ailment or afflicted with any abnormal, mental or physical condition, from which person or persons he expects to or has received or does thereafter receive a pecuniary compensation, or from practicing medicine within the state of Utah, until said defendant shall have received a certificate from the board of medical examiners of the state of Utah permitting him to practice medicine within said state."

Comparing the statute with the decree, it is seen that the decree but follows the language of the statute, and forbids the defendant from doing what the statute itself forbids. If the statute forbids mere massaging without a license, then also does the decree. If the statute does not, then the decree does not. As already indicated, we think mere "massaging," as that term popularly is understood, is not, within the meaning of the statute, "diagnosing, treating, operating upon or prescribing or advising for any physical or mental ailment or abnormal condition of another." People v. Hettiger, 150 Ill. App. 448; People v. Gordon, 194 Ill. 560, 62 N. E. 858, 88 Am. St. Rep. 165. Thus, ordinary massaging is not within the terms of the decree, and hence the defendant is not forbidden doing that. Mere massaging is no more forbidden than mere nursing. It is easy enough for a nurse, or a masseur, to keep within his sphere and not encroach upon the law by assuming or undertaking to diagnose, treat, operate upon, prescribe, or advise for ailments. But the trouble with the defendant is this: To the public he held himself out as "a scientific manipulator," and as willing and ready to receive and treat patients suffering from all sorts of ailments, but when summoned into court declares himself to be but a humble masseur, giving only massage treatments and nothing more. Let him be to the public what he claims to be in court, and let him refrain from diagnosing, treating, prescribing, and advising for ailments of others and confine himself to merely "massaging" as that term popularly is understood. Certainly one may employ a trained nurse, who, for compensation, and without a license, may accept such employment, and, without offending, may, in attendance upon a patient, render such service as ordinarily is rendered by a trained nurse; but she may not diagnose, treat, prescribe, or advise for ailments in the sense that one holding a certificate or license to practice medicine may do. That also is true of a masseur. But the defendant, though merely a masseur, claimed the right to do, without a license, all that one holding a license is permitted to do. Though a mere masseur, professing no knowledge of the human system, or of diseases to which it is subject, the defendant, nevertheless, undertook and claimed the right to treat about all kinds of diseases. Without any knowledge of anatomy, or surgery, he undertook to treat a broken or fractured bone of the foot; without any knowledge of pediatrics, he undertook to treat children for leakage of the heart and abdominal affections; without any knowledge of laryngology he undertook to treat tonsilitis, or throat affections; without any knowledge of anatomy, surgery, bacteriology, pathology, or histology, or of other scientific subjects, undertook to treat a boy for hip disease and patients for appendicitis and rheumatism. If a practice

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of that kind is to be permitted, then may we as well go back to the days when surgery was performed by the barber and the healing art administered by the Indian powwow.

[3] The object of the statute is to protect the sick and suffering and the community against the unlearned and incompetent who hold themselves out as being possessed of peculiar skill in the treatment of diseases, but who are ignorant of the human system and of the diseases to which it is subject. As we said in the Freenor Case we may well again say here, that the law is not concerned with the question whether one system of treatment is as good as or better than another, or what particular treatment should be administered, or what system employed. But "it is concerned with the question that, before any one shall undertake, no matter by what system, to diagnose, treat, operate upon, or prescribe or advise for, any physical or mental ailment or condition of another for a fee or other consideration, he shall possess the learning and skill required by the statute, and produce a degree or diploma from a college meeting the requirements enumerated in the statute, and successfully pass an examination before the board, showing his competency. When he does that, then he may practice whatever system he may consider the most efficacious, or do that in a given case which he thinks will produce the best result. Until he does that he cannot practice at all."

We are therefore of the opinion that the judgment should be affirmed, with costs. Such is the order.

FRICK and McCARTY, JJ., concur.

(48 Utah, 640)

CLEARY v. SHAND. (No. 2905.)

(Supreme Court of Utah. Nov. 23, 1916.)

1. DAMAGES ⟸108—INJURY TO REALTY.

If the thing destroyed, although a part of the realty, has a value ascertainable without reference to the value of the soil, the recovery must be for the value of the thing destroyed, and not for the difference in the value of the land before and after such destruction.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 273; Dec. Dig. ⟸108.]

2. DAMAGES ⟸112, 174(3) — EVIDENCE — INJURY TO CROPS.

In an action for destruction of growing crops, the measure of damages is their value at the time of their destruction, but in estimating them the probable yield and value of the crop, had it progressed to maturity, may be shown.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 281–283, 464, 467; Dec. Dig. ⟸112, 174(3).]

3. DAMAGES ⟸174(3)—EVIDENCE—INJURY TO CROPS.

Where grass or meadow has been eaten, injured, or destroyed, its value for hay or grazing purposes may be shown, and also, if the roots have been destroyed the cost of reseeding and restoring the field or meadow and the loss of the hay or pasture sustained in the meantime.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 464, 467; Dec. Dig. ⟸174(3).]

4. EVIDENCE ⟸497—DAMAGES—INJURY TO CROPS.

In action for injury to growing crops, it was error to allow witnesses, although experienced farmers, to testify directly to the amount of damage to the crop, since such testimony might have been based upon an element of damage not authorized by law.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2285–2288; Dec. Dig. ⟸497.]

5. APPEAL AND ERROR ⟸1050(1)—REVERSAL —NECESSITY OF NEW TRIAL.

In action for damage to crops, where inadmissible evidence as to plaintiff's damages is received, judgment for plaintiff will be reversed, and the case remanded, notwithstanding there is evidence which would support the verdict, since the Supreme Court will not try the case de novo on the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157; Dec. Dig. ⟸1050(1).]

Appeal from District Court, Utah County; A. B. Morgan, Judge.

Action by M. J. Cleary against John Shand. From judgment for plaintiff, defendant appeals. Reversed, and remanded for new trial.

Dilworth Woolley, of Manti, for appellant. Harvey Cluff, of Provo, for respondent.

STRAUP, C. J. This action was brought to recover damages for trespass on plaintiff's lands. The plaintiff testified that he was the owner of about 160 acres which he had taken up as a homestead and desert entry at Soldier's Summit, and that on the 24th of September, 1914, the defendant, without his consent, drove about 2,500 or 3,000 head of sheep thereon and pastured and kept them there for about four hours. He had about 3 acres in rye sown the 1st of August, which was up several inches, and about 1½ acres of clover up about 6 inches; 20 or 25 acres in rye and timothy up about an inch; a patch of about 5 acres in rye and timothy from which he had made hay for several years; a small patch in wheat and other patches cleared of sagebrush and in wild grass suitable for pasture; and a meadow of about 10 acres.

But little, if any, injury was done, as the plaintiff testified, to the wild grass or the meadow. The principal injury was done to the growing crops, the rye, timothy, clover, and wheat, which, as the plaintiff testified, were "cleaned off," leaving the roots unprotected for the next year's growth and crop, and by tramping up the ground. After so testifying to the condition of his land before and after the trespass, and that the verdure eaten and destroyed had no present value, either as pasture or hay, and was valuable only as a protection for the next year's crop, the plaintiff by his counsel was asked:

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"What in your judgment, were you damaged by those sheep crossing over your premises at that time?"

This was objected to by the defendant on the ground, among others, that the question called for a conclusion respecting the ultimate fact or issue which was within the province of the jury, and not the witness. The objection was overruled, and the witness answered:

"I would judge the damage would be $500. I wouldn't have had the damage done for $500. as I was proving up on the land at the time; I wanted it in the best condition possible for the special agent to examine."

Another witness for the plaintiff testified that he planted plaintiff's land to rye and timothy and some wheat, and knew the condition of his land before and after the trespass, with respect to which his testimony is similar to that of the plaintiff. Then he also was asked by plaintiff's counsel:

"Q. What, in your judgment, was the damage done to Mr. Cleary's farm there by those sheep?"

Over a similar objection as heretofore mentioned the witness was permitted to answer:

"Well, to the cultivated land and range I would judge in my estimation it would be about $350."

On cross-examination he testified:

"The damages that I placed at $350 would be covered by the clover and the rye that was eaten off and tramped out, and by the feed that was destroyed. I would judge there was about $150 damage done to the rye, about seven acres, about $100 to the clover, and about $100 to the grass. * * * I don't say that the rye as it stood on the 24th of September was worth $150 nor the clover $100, but only as a protection to the roots and the prospects for the next year's crop."

A verdict was rendered for the plaintiff assessing his damages at $150. The defendant appeals. The only question presented concerns the rulings permitting the witnesses to testify as to the amount of the damages. They were farmers, and were shown to have had experience in dry farming. No point is made respecting their qualifications. The point made is that, while the witnesses properly could have testified as to the conditions before and after the trespass, the extent and character of injury to the crops, grass, and land and as to loss and values, etc., nevertheless, they could not be permitted to fix or testify to the amount of damages without invading the province of the jury. The question is one concerning which much has been said by courts and text-writers, and a contrariety of opinions expressed and conclusions reached. There nevertheless is a common ground upon which they agree, which is that, as a general rule, to draw conclusions from the evidence as to the amount of damages is the province of the jury, and for such reason opinions directly fixing the amount of damages are usually inadmissible. 2 Elliott on Ev. § 1098; Jones, Blue Book on Ev. § 380; 5 Ency. of Ev. p. 686. But some courts have made exceptions to the general rule; and it is with reference to these that the disagreements arise. One of them is that, when the amount of damages is entirely dependent upon a question of value, many courts in different jurisdictions have permitted qualified witnesses to give their direct opinion as to the amount of damages. 5 Ency. of Evidence, 686. Instances of these are in cases of damages in condemnation proceedings where in some jurisdictions qualified witnesses, instead of expressing opinions as to the value of the property before and after the taking or condemnation, are permitted to give their opinion as to a direct or fixed amount of damage. Such a rule is favored and is stated to be the weight of authority by Lewis on Eminent Domain (2d Ed.) vol. 2, § 655, Rogers, Expert Testimony (2d Ed.) § 154, and Jones on Ev. (Blue Book), and is stated by them to prevail in about 20 jurisdictions, and opposed in about 13. Another exception as stated by some courts to the general rule, and where witnesses may give direct opinions as to the amount of damages, is in cases where the witness had the means of personal observation, but the facts and circumstances which lead his mind to the conclusion are incapable of being detailed and described so as to enable any one but the observer himself to form an intelligent conclusion from them. Bishop v. Readsboro Mfg. Chair Co., 85 Vt. 141, 81 Atl. 454, 36 L. R. A. (N. S.) 1171, Ann. Cas. 1914B, 1163; Kunst v. City of Grafton, 67 W. Va. 20, 67 S. E. 74, 26 L. R. A. (N. S.) 1201; 1 Elliott on Ev. § 675.

[1-3] Though we were inclined to follow the rule stated in the first exception, yet are we of the opinion that the case is not within it, for the question of damages here was not wholly dependent upon a question of value; that is, though value as to some things was an important factor, yet the amount of damages was not determinable by ascertaining what was the value of the land or of the crops before and after the trespass. Where the destruction is a permanent injury to the land, it may be that damages may be measured and ascertained by showing the value of the land before and after the destruction. But no claim is made that any permanent injury was done to the land. If the thing destroyed, although it is a part of the realty, has a value which can be measured and ascertained without reference to the value of the soil in which it stands, or out of which it grows, the recovery must be for the value of the thing destroyed, and not for the difference in the value of the land before and after such destruction. 13 Cyc. 155. So, in an action for growing crops, the measure of damages is their value at the time of their destruction. But in estimating them the probable yield and value of the crop, had it progressed to maturity, may be shown. And where grass or meadow has been eaten, injured or destroyed, its value for hay or grazing purposes may be shown,

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and, if the roots have been destroyed, the cost of reseeding and restoring the field or meadow, and the value of the loss of hay or pasture sustained in the meantime. 13 Cyc. 209.

Nor do we think the case falls within the other exception. Witnesses could, as they did, describe the conditions of the crops and grass before and after the trespass, the destruction or injury done, and the character and extent of it. Qualified witnesses could have expressed their opinions as to the effect sheep, partially or wholly eating off and tramping over growing wheat or rye or timothy an inch or more high, or clover six inches high, or pasturing and roaming on and over the wild grass or meadow, had on such growing crops, grass, and meadow, and what the probable yield would have been had the crops progressed to maturity, and the reasonable value thereof, and of the wild grass and meadow for hay and pasture. We thus see no difficulty in laying before the jury the primary facts and letting them, instead of the witnesses, fix the amount of damages. The case of Pacific Live Stock Co. v. Murray, 45 Or. 103, 76 Pac. 1079, is directly in point supporting such view. The case of Roseborough v. Whittington, 15 Idaho, 100, 96 Pac. 437, makes against it. But in the former the point was specifically noticed and discussed, while in the latter it was not. We see no real support to respondent's contentions from the cases noted in Baltimore Belt R. R. Co. v. Sattler, 100 Md. 306, 59 Atl. 654, 3 Ann. Cas. 667, for nearly all of them relate to damages in condemnation proceedings and are from jurisdictions where in such cases witnesses may directly testify to the amount of damages or where the question of damage was wholly dependent upon a question of value. And to that effect are most of the cases cited by the respondent.

[4] We thus are of the opinion that the court erred in the rulings. The vice of such questions is not only to permit the witness to invade the province of the jury, but also that he, in answering them, may adopt a rule, or consider an element of damage beyond the legal measure, just as did the plaintiff when he answered that he, in proving up his homestead, wanted his land in the best possible condition for the inspection and examination of the government agent; an element certainly not of general damage, and, if at all proper, required an allegation of special damage of which there was none. We do not take kindly to the views expressed by some courts that, if the witness, in fixing the amount of damage in such case, adopts or considers an element beyond the legal measure, the matter may be taken care of on cross-examination. The competency of direct testimony should not be made to depend upon the ability or skill of the cross-examiner to weed out the improper from the proper elements considered by the witness. It is weight, but not competency, of evidence which may thus be tested.

[5] It is also urged upon us that the jury, by the amount of verdict rendered, were not "overinfluenced" by the expressed opinions of the witnesses as to the amount of damages, and, since the verdict is well supported by evidence, the judgment should be affirmed. Such an argument but leads to this: A trial de novo by us on the record and our conclusion that on the evidence a verdict of $150 is about the right thing. Finding that a verdict is sufficiently or even well supported by evidence does not cure all the mischief wrought by a mistrial in which the verdict was rendered. Were that so, then all erroneous rulings and defects on a mistrial should be disregarded, if the verdict rendered is sufficiently or well supported by evidence. Then as to the amount of damages we have nothing except the expressed opinions of the witnesses, nothing as to the probable yield of the crops had they progressed to maturity, and nothing as to the value of them, nor as to the value of the pasture and meadow for hay or grazing purposes; if the roots of the clover, timothy, and grass were destroyed, nothing as to the cost of reseeding and restoring them; and, if the meadow or other lands were injured by the sheep roaming and tramping over them, nothing as to the cost of restoring those. In the rendition of their verdict the jury may have considered only these elements and others proper to be considered; and they might, as the witnesses in fixing the damages might, have considered elements wholly beyond the legal measure, and thus held the defendant liable for something which the law does not, or the verdict may be a compromise influenced by a wrong rule of value or measure of liability. Thus to affirm the judgment but means that we shall say, not that the amount of verdict rendered was the only reasonable and permissible verdict, but was the proper amount which in our judgment on the evidence ought to have been rendered. We are not such triers of fact.

Therefore let the judgment be reversed, and the case remanded for a new trial, with costs to the appellant.

FRICK and McCARTY, JJ., concur.

(48 Utah, 653)

WELSH, DRISCOLL & BUCK et al. v. BUCK et al. (No. 2914.)

(Supreme Court of Utah. Nov. 24, 1916.)

1. MORTGAGES ⇐36 — ABSOLUTE DEED AS MORTGAGE—DECLARATION OF TRUST—PAROL EVIDENCE.

While it may be shown by parol that an absolute conveyance was not intended to convey an indefeasible title, but that a mortgage was intended to secure an existing or contemplated indebtedness, where, long after deeds absolute in

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form were executed, the grantee made a written declaration of a naked trust for the benefit of the grantor and his heirs, it must be assumed that that was the real intention of the parties, and the grantee will hold title in trust to the use of the grantor or his heirs,[1] and it cannot be presumed that a mortgage was intended.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 95, 96; Dec. Dig. ⊂⊃36.]

2. TRUSTS ⊂⊃43(2) — PAROL EVIDENCE TO VARY.

If a declaration of trust in general terms in writing may be added to or varied by parol evidence, it should be permitted only upon the production of strong, clear, and convincing proof by the party who asserts that, although the declaration is couched in general terms, yet it was intended for a specific purpose, which is not mentioned.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 63, 64; Dec. Dig. ⊂⊃43(2).]

3. DISMISSAL AND NONSUIT ⊂⊃75—SCOPE OF RELIEF—CLAIMS AGAINST ESTATE OF DECEDENT—PROBATE COURT.

As claims against a decedent's estate may not be established in a court of equity, but must be presented in the probate court, when it was found that deeds were not given by a decedent to secure an indebtedness, and hence were not mortgages, the court properly dismissed the complaint without prejudice, without passing upon the claim asserted.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent.Dig. § 169; Dec.Dig. ⊂⊃75.]

4. MORTGAGES ⊂⊃608½ — ABSOLUTE DEED AS MORTGAGE — ACTION — ANSWER — AFFIRMATIVE RELIEF.

In an action to have deeds declared mortgages, while defendants did not set up the facts upon which they based their prayer for affirmative relief in the form of counterclaim or cross-demand, but stated the necessary facts in their answer and prayed that title be quieted in them, and the findings of fact are sufficient to authorize such relief, the court erred in not entering a conclusion of law that defendants were entitled to the affirmative relief, and in not entering a decree in accordance therewith.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1815; Dec. Dig. ⊂⊃608½.]

Appeal from District Court, Wasatch County; A. B. Morgan, Judge.

Suit by Welsh, Driscoll & Buck, a corporation, and another against William J. Buck, as executor of the last will of W. J. Wilson, deceased, and another to have certain deeds declared mortgages, in which defendants answered, praying affirmative relief quieting title. From a judgment dismissing the complaint and denying affirmative relief to defendants, plaintiffs appeal, and defendants cross-appeal. Judgment against plaintiffs, dismissing the complaint, affirmed, but case remanded, with directions to modify and enter a decree in accordance with defendants' prayer for affirmative relief.

W. I. Snyder, of Salt Lake City, for appellants. Evans, Evans & Folland and Walton & Walton, all of Salt Lake City, for respondents and cross-appellants.

FRICK, J. The plaintiffs, Welsh, Driscoll & Buck, a corporation, and Henry Welsh, brought this action in equity in the district court of Wasatch county against Wm. J. Buck, as executor of the last will of one W. J. Wilson, deceased, and against Medora Wilson Moline, who, at and prior to the death of said Wilson, was his wife. The plaintiffs sought to recover and prayed judgment for the sum of $8,983.90, which, it was alleged, said Wilson owed said corporation. They also prayed judgment that the court declare certain deeds executed by said deceased, during his lifetime, and one executed by both said deceased and his wife to the plaintiff, Henry Welsh, to be mortgages, notwithstanding that the same purported to be absolute deeds of conveyance of the interests of said Wilson in certain groups of mining claims, all of which are fully described in the complaint, and to foreclose said deeds as mortgages and to subject the interests so deeded by said Wilsons to the payment of the indebtedness alleged to be due to said corporation, and for general relief. The defendants, in their answer, admitted the ownership by the deceased of the alleged interests in said groups of mining claims, admitted the execution of the deeds set forth in the complaint, but averred that the same were not intended as mortgages, and that they were not intended nor given as security for the indebtedness set forth in the complaint, or for any indebtedness, and further averred that the title of the deceased to the interests in said mining claims were thereby conveyed to the plaintiff Henry Welsh in trust merely; that he, as the grantee in said deeds, held all of the interests conveyed by said deeds in trust for the use and benefit of the estate of said Wilson, deceased. The answer also admitted that said Wilson was indebted to said corporation in some amount, but denied that such indebtedness amounted to the sum claimed by plaintiffs, and averred that the amount thereof was unknown to the defendants. The defendants further averred that:

"They are the owners of the full equitable title in and to the undivided interests in the claims described in plaintiffs' complaint, * * * that the plaintiffs wrongfully and unjustly claim title and interests therein adverse to these defendants, which claims are wholly without right, and that as to all said interests, as hereinabove alleged, the said plaintiffs held the legal title thereto in trust for these defendants, and not otherwise, and said trusts have never been repudiated by said plaintiffs, or either of them, or disavowed by them, prior to the bringing of this action."

The defendants prayed judgment that the complaint be dismissed, and that the defendants have judgment, quieting the title to said interests in said mining claims, and that plaintiffs be required to convey the legal title thereto to the defendants, and for general relief. Upon substantially the foregoing issues the district court found that the deceased Wilson was the owner of the interests alleged in the several groups of mining claims; that the deeds conveying said interests were not intended as, and were

⊂⊃For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] Distinguishing Duerdon v. Solomon, 33 Utah, 468, 94 Pac. 978, 980.

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not, mortgages, and that the same were not given nor intended as security for the indebtedness alleged in the complaint, or for any indebtedness; that "said Henry Welsh in respect of all of said conveyances was and is a mere trustee, holding the legal title so conveyed as trustee of the said W. J. Wilson and his estate." As conclusions of law the court found that "there is no equity in plaintiffs' amended complaint:" that said deeds are not mortgages, and plaintiffs are not entitled to foreclose the same as mortgages; that "said Henry Welsh holds the title to the said real estate so conveyed to him in trust merely to the use of the defendant Medora Wilson Moline and the estate of W. J. Wilson;" that the defendants are entitled to a judgment, "dismissing this action upon the merits." Judgment dismissing the action was accordingly entered. The plaintiffs appeal from the judgment, and the defendants also prosecute a cross-appeal, and allege error upon the ground that the court did not give them the affirmative relief prayed for in the answer.

Plaintiffs' counsel, in his brief, states his contentions in the following words:

"The bone of contention in this case may therefore, be virtually resolved into the single proposition as to whether these deeds, taken as a whole, were intended by the parties to be a mortgage securing the indebtedness of and advancements to Wilson, or whether, as claimed by the respondents, there was a mere naked trust, and absolutely no security for these large sums of indebtedness charged to the deceased."

Counsel then proceeds to a very interesting and exhaustive discussion and review of the authorities upon the question of when a conveyance, although absolute in form, will, nevertheless, as between grantor and grantee, be declared to be a mortgage and treated as such. Among the numerous other cases cited and relied on by counsel the case of Duerden v. Solomon, 33 Utah, 468 and 477, 94 Pac. 978, 980, is cited. In that case (33 Utah, page 472, 94 Pac. page 979) the doctrine is stated in the following language:

"It is not contended that it was incompetent to show the real object of the deed by evidence aliunde the instrument. It is conceded that in cases such as this courts of equity will look beyond the terms of the instrument to the real transaction, and, when that is shown to be one of security and not of sale, they will give effect to the actual contract of the parties, and that the rule which excludes parol evidence to contradict or vary written instruments does not forbid an inquiry into the object of the parties in executing and receiving the instrument. The contention made is that a presumption arises that the instrument is what it purports on its face to be, an absolute conveyance of the land; that to overcome this presumption and to establish its character as a mortgage the evidence must be clear and convincing; and that the evidence was not sufficient to overcome this presumption, especially in that the evidence did not sufficiently show that any indebtedness existed between the plaintiff and the defendant. Whether the instrument should be treated as a deed or mortgage of course depends upon the facts and circumstances of the transaction, the object and purpose for which it was given and received, and whether it was given as security or for a bargain and sale of the land."

[1] Counsel concedes that the doctrine is there correctly stated and applied. The case at bar, for reasons presently to be stated, is, however, clearly distinguishable from the case of Duerdon v. Solomon, supra, and the numerous other cases cited by counsel to which it is not necessary to more specifically refer here. In the case at bar both parties, that is, both the grantee in the deeds and those who were in privity with the grantor therein, claim that although the conveyances are absolute in form, they nevertheless were not intended to, and did not, convey an absolute and indefeasible title. The grantee, however, claims that they were intended as mortgages, that is, as conveyances given to secure certain indebtedness, while the representative of the deceased and his heirs contend that they were given as mere naked trusts, and that the grantee, Mr. Welsh, merely held the title in trust for the deceased, the grantor, and, after his death, for his estate and his heirs. If there was no other evidence except the deeds themselves, there would be greater force to plaintiffs' contention that the indicia which are ordinarily held essential to constitute a deed absolute in form a mortgage are all present in this case. There is, however, also present other evidence, which, in our judgment, distinguishes and controls this case. The evidence is undisputed that after all of the deeds were given a declaration of trust in writing was made between the grantor and the grantee in the deeds, that is, between the deceased and Mr. Welsh. That was alone sufficient to prevent the plaintiff Welsh from claiming an indefeasible title to the interests conveyed in the deeds. It does not follow, however, that the declaration of trust constituted the deeds mortgages. Indeed, the language of the declaration of trust is general, and, giving it its natural, ordinarily, and generally accepted meaning, it would make the grantee a mere naked trustee for the grantor or his heirs. Plaintiffs contend, however, that although the declaration of trust is general, that is, that the language of the parties imports a mere naked trust, in view of the facts and circumstances, it was, nevertheless, intended by the parties thereto that the deeds are to be deemed mortgages, and that the interests conveyed should be held as security for certain debts or obligations of the deceased. No doubt as between a grantor and his grantee, in the absence of any written evidence to the contrary, the real transaction may always be shown by parol, and a deed absolute in form, in case of an existing or contemplated indebtedness, may, nevertheless, be shown to have been intended as a mortgage or security for the debt, and not as an absolute conveyance. In other words, it may be shown by parol that it was not intended to convey an indefeasible title, but

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that the title was held for security merely. In this case, however, the grantor and the grantee made a declaration of trust in writing long after the deeds in question were given. By that declaration the intention of the parties was clearly indicated, and at the same time swept away, or left no room for, a presumption that the conveyances were intended, either as mortgages or as absolute conveyances of the title. Had the parties then intended to have the deeds stand as security for the deceased's debts, it was quite as easy to have indicated that intention in a few words as it was to declare the same naked trusts, as was done. Having thus made an unconditional declaration of trust, it must be assumed that that was the real intention of the parties. Had the parties to the deeds remained silent after their execution, then there would be more force to plaintiff's contention; but, in view that they indicated in writing what the original purpose of the deeds was, the force of plaintiffs' contention is thereby destroyed.

[2] Assuming, without deciding, that in case of a written declaration of trust in which the purpose of the trust, if there be one other than the general terms of the declaration implies, was not stated, the grantee may, nevertheless, by parol evidence, show that the trust, although general in terms, was, nevertheless, intended for a specific purpose, yet the evidence produced by the plaintiffs in this case, in our judgment, is insufficient to establish such a purpose. To say the least, if a declaration of trust in writing, such as we have here, may be added to or varied by parol evidence (a question not presented, and hence not decided), it should be permitted only upon the production of strong, clear, and convincing proof by the party who asserts that, although the declaration is couched in general terms, yet it was intended for a specific purpose, which is not mentioned. Without pausing to set forth the evidence, or even to state it in substance, it must suffice to say that, in our judgment, the plaintiffs have failed to produce evidence of that character, and hence a finding in their favor, if the court had so found, would not be supported by the evidence.

[3] That disposes of plaintiffs' claims so far as a court of equity is concerned. Plaintiffs may not have recourse to a court of equity for the purpose of establishing their claims against the decedent's estate. To do that they must go into the probate court. Our probate courts are created for that purpose; and in view that we are forced to hold against plaintiffs' contention that the deeds in question were intended as mortgages, there remains nothing for us to do except to dismiss the complaint, without prejudice, however, to plaintiffs' right to establish their claim in a probate court, and, when so established, to subject the property of the estate to the payment of such claims. We express no opinion concerning the merits or demerits of plaintiffs' claims, nor upon their legal rights to establish the same according to law. All we now hold is that the district court did not err in finding that the deeds in question were not shown to be mortgages, as contended by plaintiffs, and that therefore it did not err in entering judgment against the plaintiffs, dismissing their complaint.

[4] This brings us to the defendants' cross-appeal. While the defendants did not set up the facts upon which they based their prayer for affirmative relief in the form of a counterclaim or cross-demand, yet they stated the necessary facts in their answer, and prayed that the title to the interests in the several groups of mining claims held by the deceased at the time of his death be quieted in the defendants. Moreover, the evidence and the court's findings of fact are sufficient to authorize such relief. Why then should the defendants be driven to another action? If they brought such an action, all they would be required to do would be to allege and prove the findings and conclusions entered in this case. Upon that evidence they would be entitled to a conclusion of law and decree quieting their title. Why then refuse them relief in this action? Nor does such a decree, if entered, in any way hamper or interfere with plaintiffs' rights in establishing and enforcing their just claims in the probate court. The title of the mining claims would not be quieted in the defendants so as to prevent recourse against such claims for the debts of the deceased, when such debts are once legally established in the proper probate court. We are of the opinion, therefore, that the district court erred in not entering a conclusion of law that the defendants are entitled to the affirmative relief prayed for by them, and in not entering a decree in accordance therewith.

For the reasons stated, the judgment against the plaintiffs, dismissing the complaint, is affirmed. The cause is, however, remanded to the district court of Wasatch county, with directions to modify its conclusions of law and to enter a conclusion of law that the defendants are entitled to the affirmative relief prayed for in their answer, and that the court enter a decree upon such a conclusion, quieting the title to the interests in the mining claims, described in the complaint and in the court's findings, in the defendants in accordance with the prayer of the answer; defendants to recover costs on this appeal.

STRAUP, C. J., and McCARTY, J., concur.

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(48 Utah, 528)

STEPHENS RANCH & LIVE STOCK CO. v. UNION PAC. R. CO. (No. 2849.)

(Supreme Court of Utah. Nov. 21, 1916.)

1. WATERS AND WATER COURSES ⟸152(10)—DIVERSION OF STREAMS—FLOODING LANDS.
Though defendant by erecting a dam and maintaining it for over 30 years may have acquired a prescriptive right to divert the flood waters of the stream, he is not entitled to a directed verdict in an action by lower owners for damages caused by the diversion, where there is evidence that the original dam was raised and diversion increased.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 156; Dec. Dig. ⟸152(10).]

2. WATERS AND WATER COURSES ⟸145—DIVERSION OF STREAMS—PROSPECTIVE RIGHTS.
After the dominant owner has acquired a prescriptive right to divert water of a stream by erection and maintenance of a dam, he cannot further injure the servient estate by increasing the height of the dam and the diversion of the water onto plaintiff's lands.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 20; Dec. Dig. ⟸145.]

3. APPEAL AND ERROR ⟸1002—SCOPE—CONFLICTING EVIDENCE.
The finding of the jury on a direct conflict in the evidence is conclusive on the court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. ⟸1002.]

4. APPEAL AND ERROR ⟸232(2) — SCOPE — PRESERVATION OF EXCEPTION—GENERAL EXCEPTIONS.
The objection that testimony is incompetent, irrelevant, and immaterial does not save the objection that the witnesses were not properly qualified to testify.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1430, 1431; Dec. Dig. ⟸232(2); Trial, Cent. Dig. § 213.]

5. DAMAGES ⟸130(1)—EXCESSIVE DAMAGES—EVIDENCE.
The mere fact that the jury allowed a verdict in excess of the amount warranted by the evidence does not alone warrant the inference that the verdict was based on passion and prejudice unless the amount is so grossly excessive that it shocks the ordinary man's sense of justice.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357, 363, 364, 366, 370; Dec. Dig. ⟸130(1).]

Appeal from District Court, Summit County; Geo. G. Armstrong, Judge.

Action by the Stephens Ranch & Live Stock Company against the Union Pacific Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

George H. Smith, J. V. Lyle, B. S. Crow, and A. B. Robertson, all of Salt Lake City, for appellant. Evans, Evans & Folland, of Salt Lake City, and P. H. Neeley, of Coalville, for respondent.

FRICK, J. The plaintiff, a corporation, brought this action against the defendant to recover damages to growing crops and to its lands which, it is alleged in the complaint, were caused by the defendant in constructing certain dams across a natural water course, and thereby causing the annual flood waters flowing therein to be diverted through an artificial ditch and cast upon plaintiff's lands.

The complaint originally contained three causes of action. The first one, however, was dismissed at the time of trial, and therefore is out of the case. In the second cause of action plaintiff, in substance, alleged that it was the owner and in possession of certain lands in Summit county, which were fully described, and which, it is alleged, are located along the Weber river and adjacent to the line of railroad owned and operated by the defendant; that Anderton creek is a natural water course having its source in the mountains lying north and east of the lands in question; that said Anderton creek, in its natural course, would carry the annual flood waters accumulating therein into the Weber river and away from plaintiff's lands; that in the year 1909 the defendant "wrongfully and in violation of plaintiff's rights constructed a dam across the channel of the said Anderton creek at a point above the plaintiff's premises, * * * by reason of which the said waters of the said creek were diverted from their natural channel"; that the defendant, immediately above said dam and connecting with said creek, had also constructed an artificial channel or ditch "in such a way as to cause all the waters of said Anderton creek to flow over and upon plaintiff's premises," and that said water carried and deposited large quantities of earth, gravel, sand, and débris upon plaintiff's lands; that in the year 1913 the defendant constructed another dam or dike across said creek which caused the natural flood waters thereof to flow through the artificial channel or ditch aforesaid upon and over plaintiff's lands and to deposit thereon large quantities of gravel, sand, and débris which obliterated and destroyed plaintiff's irrigating ditches and injured plaintiff's fences and caused permanent injury to its lands to its damage in the sum of $2,000. In the third cause of action the allegations respecting the natural water course, the construction of the dams and the artificial channel or ditch, and the casting of the water by means of said dams and ditch upon plaintiff's said lands, and that said waters damaged and destroyed plaintiff's growing crops in 1910, and in the subsequent years and obliterated its irrigating ditches, etc., were reiterated, and damages in the sum of $4,000 were claimed in said third cause of action. The complaint also contained allegations to the effect that the conditions and surroundings were such that the defendant well knew that the doing of the things complained of would result in injury and damage to the plaintiff's lands, growing crops, etc.

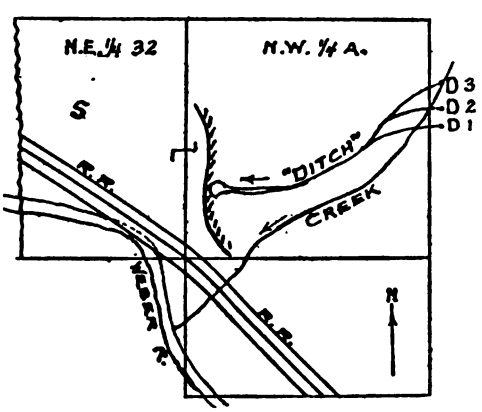
The defendant filed an answer in which it denied that it wrongfully did the things

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complained of; denied that plaintiff was damaged by reason of its acts, or at all; denied that it wrongfully diverted the waters from the Anderton creek, which it admitted was a natural water course as alleged in the complaint. The defendant, in substance, further averred that it had acquired a prescriptive right or easement to divert the waters from Anderton creek by means of the dams and the artificial channel or ditch mentioned in the complaint, and also averred that the dams and ditch were constructed upon lands originally owned by the defendant; that the lands of plaintiff lie below said ditch, and that the plaintiff acquired all of its lands long after the original dam was placed in the creek, which was placed therein in the year 1870; that the dams constructed in 1909 and 1913 were not new dams, but in fact constituted no more than a reconstruction of the old original dam which had been practically washed out and had become useless; that plaintiff's lands were servient and subject to defendant's easement or prescriptive right; that the injury and damage complained of were caused by unusual and unprecedented cloud-bursts over which the defendant had no control, and hence was an act of God.

At the trial the defendant admitted in open court that the plaintiff is, and during all of the times mentioned in the complaint was, the owner of the lands in question, except that portion thereof covered by its right of way.

The following rough sketch or plat will aid the reader to a better understanding of the situation:



The northwest quarter of section 33, marked "A" on the plat, in the year 1870, and for some time thereafter, was owned by the defendant, and is now owned by a Mrs. Anderton, except a small strip off the west end. The northeast quarter of section 32, lying to the west of section 33, is owned by the plaintiff, including the small strip off section 33 aforesaid. Anderton creek, marked "Creek" on the plat, is the natural water course mentioned in the pleadings. Its source is to the northeast in the mountains, and it flows southwesterly, and if its waters are not diverted it will empty them into the Weber river as indicated on the plat. Weber river flows in a westerly direction. The strip marked "R. R." constitutes the defendant's right of way. The channel marked "Ditch" on the plat is the artificial channel or ditch constructed by the defendant in 1870 when it constructed the railroad. The dam and ditch were constructed to divert the water from Anderton creek to the west. The heavy black lines marked "D1," "D2," "D3," represent the dams and dike before mentioned. In 1870, in order to divert the annual spring and summer floods which are caused by the melting snows in the spring and heavy rainstorms during the summer, the defendant constructed the artificial water course marked "Ditch" and the dam marked "D1." The dam, it appears, was at times partly washed out by the floods, but it nevertheless was replaced and kept in repair by the defendant until 1909, when it was completely washed out by a heavy storm, and was in that year replaced by what plaintiff's witnesses say was a larger dam, marked "D2" on the plat. The latter dam was again repaired, and, it seems, further enlarged, in 1913, at which time there was also constructed a dike, which is marked "D3" on the plat. The defendant diverted the flood waters of Anderton creek through the ditch by means of the dam marked "D1" continuously from 1870 until 1909 for the purpose of protecting the defendant's track and road at the point where the same crosses Anderton creek, at which point the track passes through a cut. At least a large portion of the flood waters of Anderton creek were thus discharged westerly through the ditch at a point some distance east of the west boundary line of section 33 since the year 1870. In that year, and for some years thereafter, all of section 33 was owned by the defendant, and it thus constructed the ditch and discharged the flood waters of Anderton creek upon its own lands. Many years before 1909—the exact time is not shown—plaintiff's predecessors in interest purchased the lands lying in section 32, which are marked S on the plat. Plaintiff obtained the title to the lands in section 32, including the small strip in section 33, some six or eight years prior to 1909, during all of which years the flood waters of Anderton creek, but, as plaintiff claims, without much injury or damage to its lands, were discharged at the point before stated by means of the dam and ditch constructed in 1870.

In view of the foregoing it was strenuously contended at the trial, and is now insisted, by the defendant that it had acquired a prescriptive right to divert and discharge the flood waters of Anderton creek at the point indicated on the plat, that the plaintiff had acquired the lands with full knowledge of defendant's rights and of the prevailing con-

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ditions respecting the diversion of said waters, and that for those reasons plaintiff's lands are burdened with its right or easement to divert and discharge the flood waters of Anderton creek as before stated. Upon the other hand, plaintiff contends that, while it may be true that it had acquired its lands subject to the right of the defendant to maintain the dam constructed in 1870, and by means of it and the ditch aforesaid to divert all of the flood waters of Anderton creek that would be diverted by means of that, or another one of the same dimensions, yet that, inasmuch as defendant, in 1909, and again in 1913, had constructed larger and higher dams across Anderton creek, and by such means had diverted larger quantities and practically all of the flood waters of Anderton creek to the artificial channel or ditch, and by reason thereof had caused such increased flood waters to carry and deposit large quantities of gravel, sand, and débris onto plaintiff's lands (all of which would not have occurred if a dam no larger than the one constructed in 1870 had been maintained), and by reason of which its irrigating ditches were filled up and obliterated, its growing crops damaged and destroyed, its fences injured and a portion of its lands permanently damaged, for those reasons defendant's contentions cannot prevail. Whether the defendant had, in 1909, and in 1913, enlarged and raised or elevated the dam of 1870, and by reason thereof had caused larger quantities of the annual flood waters of Anderton creek to be diverted through the ditch and discharged upon plaintiff's lands, causing the damages claimed by it, were the principal issues litigated at the trial. One of the principal stockholders of the plaintiff, in speaking of the old dam of 1870 and the one put in in 1909, and in 1913, said:

"We raised no objection to the old dam—if they had left the old dam as it was, and had not built new dams. We object to the new dams, not the old one."

There is much evidence to the effect that the dam of 1909 was placed farther up the stream and made three feet higher than the dam of 1870, that it was longer and larger, and that it caused much larger quantities of the annual flood waters of the creek to be diverted through the ditch and discharged upon plaintiff's lands.

When the evidence was all in, defendant's attorney moved the court to direct the jury to return a verdict for the defendant upon the ground that the evidence was undisputed that the defendant had acquired a prescriptive right or easement to divert the flood waters of Anderton creek through the artificial channel or ditch, and that when the plaintiff had acquired its lands it had full knowledge of the prevailing conditions, and therefore had acquired its lands subject to plaintiff's prescriptive right or easement aforesaid. The court denied the motion, and counsel now predicate error upon the ruling.

[1] We are unable to yield assent to counsel's contention. In our judgment, there is not only some substantial evidence, but there is ample evidence, in support of the contention that the dam of 1870 was in the year 1909, and again in 1913, enlarged and made higher, and that by reason thereof much larger quantities and practically all of the annual flood waters of Anderton creek were thereby diverted from said creek through the ditch and were cast upon the plaintiff's lands, and that by reason of the increased flow the damages complained of were caused. The court therefore did not err in refusing to direct a verdict in favor of the defendant for the reason stated.

[2] Nor can defendant's contention prevail upon the ground that it had acquired a prescriptive right or easement to divert and cast all of the annual flood waters of Anderton creek upon plaintiff's lands. If it be conceded that by the construction of the dam of 1870 the defendant had acquired a prescriptive right to burden plaintiff's lands by casting the annual flood waters of Anderton creek thereon to the extent that such waters would be diverted by the dam of 1870, or by some other dam of the same dimensions, yet it did not acquire any right to enlarge and elevate that dam, and by such enlargement and elevation increase the flow of flood waters onto and over plaintiff's lands. That a prescriptive right or easement to divert the flood waters of a natural water course by continuous user for a sufficient length of time (in this state 20 years) may be acquired by a dominant owner is now well settled. Holm v. Davis, 41 Utah, 202, 125 Pac. 403. But it is equally settled that after a prescriptive right or easement has been acquired by a dominant owner the means of diversion used by him may not be changed or enlarged so as to materially increased the flow of water to the detriment of the servient owner. The law is further well settled that when one acquires lands which are burdened with such an easement or prescriptive right he takes them subject to such right, but he is not also bound to submit to a material change or enlargement of the right by the dominant owner if thereby the servient estate is injured to a larger extent than it was under the right as it existed when the servient estate was acquired. It is not necessary to cite or review a large number of cases upon this point. See Greeley Irr. Co. v. Van Trotha, 48 Colo. 12, 108 Pac. 985; Manier v. Myers and Johns, 43 Ky. (4 B. Mon.) 514; s. c., 45 Ky. (6 B. Mon.) 132; Schumacher v. Brand, 72 Wash. 543, 130 Pac. 1145; 2 Farnham, Waters and Water Rights, § 542, and cases cited. Nor do the cases cited by defendant's counsel lay down a different rule. Indeed, in the case of Hagge v. Kansas C. S. R. R. Co. (C. C.) 104 Fed. 391, cited by them, the foregoing doctrine is clearly stated and maintained.

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[3] It is further contended, stating the contention in counsel's own words, that:

"Plaintiff's damage was the result of an extraordinary cloud-burst, which was an act of God, and for which defendant was not liable."

Upon that question the evidence is in conflict, and the court therefore was required to submit the matter to the jury; and their finding, being against defendant, is conclusive on this appeal.

[4] It is also insisted that the court erred in admitting certain evidence in plaintiff's favor. Counsel in their brief contend that the evidence was erroneously admitted because "the witnesses were not experts," but were, nevertheless, permitted to give their judgment or opinion respecting certain matters. Counsel for respondent insist that we are not authorized to review this assignment because the objections to the questions propounded to the witnesses were insufficient to cover the alleged error. The grounds of the objections as they appear from the bill of exceptions, are that the evidence is "irrelevant, immaterial, and incompetent." That is the objection the trial court was required to pass on, and none other. It is now well settled that such grounds of objection are not sufficient to authorize an appellate court to pass upon the competency of the witness or his qualifications to testify. In 5 Jones, Commentaries on Evidence, § 894, at page 375, the author, in discussing the subject now under consideration, says:

"An objection that evidence is incompetent, irrelevant, and immaterial does not cover the ground that the witness has not shown himself competent to testify as to the value as an expert."

For the reasons stated, therefore, this assignment cannot prevail. The evidence complained of was, however, hardly of that character which would authorize us to reverse the judgment.

It is further contended that the court erred in refusing to grant a new trial upon the ground that the verdict is the result of passion or prejudice, or both. This, in the judgment of the writer, is really the only serious question presented on this appeal. The question arises as follows: As we have seen, the plaintiff demanded judgment for $2,000 on the second cause of action and for $4,000 on the third. The court, apparently upon the defendant's request, instructed the jury to specify in their verdict the amount they allowed as damages for the growing crops, etc. The jury returned the following verdict:

"We, the jurors impaneled in the above case, find the issues of this action in favor of the plaintiff and assess its recovery at the sum of $1,000 for the damages resulting from permanent injury to the land, and $2,250 for the damages resulting to the personal property."

After the return of the verdict, and within the time allowed by our statute, defendant moved for a new trial upon the ground that the damages allowed were excessive and appeared to be the result of passion or prejudice. Counsel for the respective parties, apparently at the court's request, made a careful examination into the evidence, and it was agreed between them that the evidence was insufficient to sustain a verdict for the aggregate amount allowed by the jury, namely, $3,250, but that the evidence was sufficient to sustain a verdict for the amount of $1,882.50. The court accordingly required the plaintiff to either remit the difference between $3,250 and $1,882.50, or to submit to a new trial. The plaintiff thereupon agreed to remit the amount of the difference aforesaid, and the court ordered the remittitur entered, and then ordered judgment for $1,882.50, and denied the motion for a new trial.

It is strenuously insisted that, in view that the jury returned a verdict for so large an amount in excess of the evidence, it clearly indicates that the verdict was the result of passion or prejudice, or both, and therefore the verdict is tainted as a whole. It is quite true that, where it is made to appear that the verdict is excessive, and that such excess is the result of passion and prejudice, or either, the error cannot be cured by remitting the excess from the verdict. In the nature of things that must be so, because every other question of fact which is involved in the controversy, and which is included in the verdict, must therefore be tainted. But it does not necessarily follow that because the jury returns a verdict in which a greater sum is allowed than is authorized by the evidence for that reason alone the verdict is the result of passion or prejudice. If such were the rule, all cases in which excessive verdicts are returned would have to be retried. In Jensen v. Denver & R. G. R. Co., 44 Utah, 100, 138 Pac. 1192, 1193, this court has clearly indicated under what circumstances the amount of the verdict may be reduced and when a new trial because of an excessive verdict may be granted. Necessarily upon such a question appellate courts must, to a large extent, rely upon the judgment and discretion of the trial court. That court is in a much better position to observe and determine whether a jury was actuated by passion or prejudice, or by both, in returning a verdict for an amount larger than the evidence justifies, or whether the jury was merely mistaken with regard to the amount that should have been allowed. The jury may merely have misjudged the evidence, or may have erred in their judgment respecting the amount that should be allowed, and if such is the case the whole verdict is not tainted, and the error may be cured by requiring the plaintiff to remit the excess. To that effect are all of the modern authorities. In Gila Valley, G. & N. Ry. Co. v. Hall, 13 Ariz. 270, 112 Pac. 845, what we deem to be the correct rule is stated by the Supreme Court of Arizona in the fifth headnote, thus:

"Unless it clearly appears from the court record that an excessive verdict in a personal in-

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jury action resulted from prejudice or passion rather than an undue liberality exercised by the jury in awarding damages, the trial court's action in remitting a part of the verdict instead of granting a new trial will not be disturbed."

See, also, Dashiel v. Harshman, 113 Iowa, 283–296, 85 N. W. 85; Davis Iron Works v. White, 31 Colo. 82, 71 Pac. 384; Tunnel & M. L. Co. v. Cooper, 50 Colo. 390, 115 Pac. 901, Ann. Cas. 1912C, 504. In the latter case, in a footnote commencing on page 509, of Ann. Cas. 1912C, numerous instances are given where the appellate courts have approved the actions of the trial courts in requiring a remittitur of the excessive amount allowed by the jury. In many of the cases there collated the excess was much greater than in the case at bar, and notwithstanding that fact the order requiring a remittitur was nevertheless sustained, and the judgment was upheld.

[5] We can discover nothing in this case, except the amount allowed, which indicates passion or prejudice, and, as we have seen, passion or prejudice may not be inferred alone from the fact that an excessive amount is allowed by a jury unless the amount is so grossly excessive that it shocks the ordinary man's sense of justice. In this case the evidence upon the question of damages was, to say the least, somewhat scattered, and it is not to be greatly wondered at that a jury composed of laymen, who are required to rely entirely upon their memory respecting the amount that should be allowed, in view of the evidence, should arrive at a verdict which goes beyond the evidence. The case seems to have been well and fairly tried, and the court submitted the case to the jury according to the defendant's theory, and charged the jury as requested by it, except in one particular, and in that one the substance of defendant's request was given. While the writer, upon the last question discussed, entertained some doubt at the hearing, yet, after going into the authorities rather carefully, no reason is discovered why the judgment of the trial court upon this assignment should not prevail.

The further contention that a new trial should have been granted for the reason that the jury disregarded the court's instructions upon the question of defendant's prescriptive right or easement cannot prevail. As already stated, all the questions were fairly submitted to the jury, and the evidence fully justifies their findings, except upon the question of damages, and that question we have already disposed of.

The judgment therefore should be, and it accordingly is, affirmed, with costs to respondent.

STRAUP, C. J. (concurring). I concur in the result. I do not concur in what is said that a new trial must be granted in all cases where it appears that an excessive verdict was rendered under passion or prejudice, and that the court in no such case is justified in refusing a new trial on a remission of the excess. Because of the conclusion here reached that the verdict was not the result of passion or prejudice, what is said as to this is but dicta. I thus withhold my views respecting it until in a case the matter is involved and properly presented for consideration and decision.

McCARTY, J. In the main I agree with the reasoning of, and the conclusions reached by Mr. Justice FRICK, but I do not concur with him wherein he holds:

"That where it is made to appear that the verdict is excessive and that such excess is the result of passion or prejudice, or either, the error cannot be cured by remitting the excess from the verdict."

As stated by the CHIEF JUSTICE, this question is not necessarily involved in this case, and hence I refrain from expressing an opinion thereon.

(48 Utah, 540)

UNION PAC. R. CO. v. SUMMIT COUNTY et al. (No. 2834.)

(Supreme Court of Utah. Nov. 22, 1916.)

1. TAXATION ⟸299 — APPORTIONMENT BY STATE BOARD OF EQUALIZATION.

The determination of the state board of equalization in apportioning railroad property for taxation as to the boundary line between two counties is conclusive for the current year.[1]

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 472; Dec. Dig. ⟸299.]

2. TAXATION ⟸299 — APPORTIONMENT BY STATE — BOARD OF EQUALIZATION — CORRECTION.

The state board of equalization, after apportioning railroad property for taxation in one county in May, 1914, had the right and power to make a reapportionment of the property to another county on the 3d day of August, 1914.[1]

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 472; Dec. Dig. ⟸299.]

3. INTERPLEADER ⟸23—BILL—DEMURRER.

Where the state board of equalization had authority to reapportion railroad property for taxation to a certain county, a demurrer to the complaint alleging that both counties are attempting to collect tax, that plaintiff has refused to pay either county, and that the action is brought to interplead both counties to determine which is entitled to the tax, was properly sustained.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 47, 51; Dec. Dig. ⟸23.]

Appeal from District Court, Summit County; Geo. G. Armstrong, Judge.

Interpleader by the Union Pacific Railroad Company against Summit County and another. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Geo. H. Smith, J. V. Lyle, and Paul Williams, all of Salt Lake City, for appellant. P. H. Neeley, of Coalville, and Evans, Evans & Folland, of Salt Lake City, for respondent Summit County. Howat, Macmillan & Ne-

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⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] Rich County v. Bailey et al., State Board of Equalization, 154 Pac. 773.

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beker, of Salt Lake City, for respondent Rich County.

STRAUP, C. J. The case went off on demurrer to the complaint. In substance, it is alleged in the complaint that the plaintiff, in accordance with the statute relating to taxes, in February, 1914, furnished to the state board of equalization the mileage of its railroad to be 5.82 miles in Rich county and 41.72 miles in Summit county, together with the improvements and property necessarily incident thereto and the value thereof; that in accordance with such return the board, for the purpose of taxes, in May, 1914, apportioned the 5.82 miles to Rich county and the 41.72 miles to Summit county; but that thereafter, on the 3d of August, 1914, the board apportioned the whole of the mileage to Summit and none to Rich county. Then it is alleged that Rich county in May, 1914, proceeded to levy a tax on the 5.82 miles of railroad first apportioned to it, and that Summit county in August, 1914, also proceeded to levy a tax on the same 5.82 miles reapportioned to it, and that unless restrained both counties will proceed to collect the taxes on such mileage of 5.82 miles. The plaintiff further alleged that the 5.82 miles are "to the best of its information and knowledge" in Rich county, and not in Summit county; that it paid the taxes on the 41.72 miles properly assessed to Summit county, but, because both counties claim the tax on the 5.82 miles, the plaintiff, although at all times ready and willing to pay it to the proper authorities, refused to pay it to either county. Thus, as the plaintiff further avers, it brought this action to interplead both counties to determine in which county the 5.82 miles are and which county is entitled to the tax, and that both counties, in the meantime, be restrained from further proceeding to collect the tax. To this complaint general and special demurrers were sustained. The plaintiff stood on its complaint, whereon a judgment dismissing the action was entered, from which the plaintiff appeals.

[1-3] Passing the raised questions of whether an interpleader lies because of the stated reasons that (1) the plaintiff is an interested party and has a direct financial interest in the outcome of the suit, (2) is not ignorant of the facts and asserts the disputed mileage to be in Rich county as claimed by that county and there subject to taxation, and (3) has a plain, speedy, and adequate remedy at law, we think the disposition of the case turns on the question of whether the board of equalization had the right and power, on the 3d day of August, 1914, to apportion the 5.82 miles to Rich county and there to be subject to the tax. And, as in effect stated by the plaintiff, the disposition of the case is dependent upon the question of whether the 5.82 miles are in Rich or in Summit county. Such a question was before us in the case of Rich County v. Bailey et al., State Board of Equalization, 154 Pac. 773, where we held that the board's determination in apportioning railroad property for taxation as to the location of the boundary line between counties was conclusive for the current year. There, as it was here alleged, the board apportioned the 5.82 miles to Summit county. There we held that it was within the province of the board to determine whether the disputed railroad was within the one or the other county. Here it is alleged that the board, in August, 1914, apportioned the 5.82 miles to Summit county. It is not alleged that it did that wrongfully, erroneously, or without authority, or through mistake, or without a hearing or an investigation as to the boundary line, or even contrary to what the real fact is except the allegation "to the best information and knowledge of the plaintiff the 5.82 miles are in Rich county." The allegation as to that is:

"That thereafter, to wit, on or about the 3d day of August, 1914, the said State Board of Equalization changed the apportionment that it had theretofore made in accordance with the tax return aforesaid, and by said change allotted and apportioned that portion of the plaintiff's railroad line shown in the tax return by the state board of equalization as being located in Rich county, to wit, 5.82 miles, to Summit county in addition to the mileage theretofore allotted and apportioned by said state board of equalization to Summit county, and by said change did not apportion or allot to Rich county any of the mileage of this plaintiff's railroad."

In other words, for aught that appears, the apportionment made in May, 1914, apportioning the 5.82 miles to Rich county, may have been done inadvertently, or erroneously, or through mistake, and hence was corrected in August, 1914, when the 5.82 miles were apportioned as the board may have determined in accordance with the facts to Summit county. According to our prior holding, the board then had the right and power to do that. For this reason, we think the complaint insufficient, and that therefore the demurrer was properly sustained.

It thus follows that the judgment must be affirmed, with costs.

Such is the order.

FRICK, J., and MORSE, District Judge, concur. McCARTY, J., absent on account of illness.

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(93 Wash. 681)

SMITH v. HARRINGTON et al. (No. 13358.)

(Supreme Court of Washington. Dec. 15, 1916.)

TRIAL ⊂⊃260(1)—REQUEST FOR INSTRUCTIONS—INSTRUCTIONS ALREADY GIVEN.

Refusal to give requested instructions which are a specific elaboration of instructions already given in a more general way is not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. ⊂⊃260(1).]

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by R. N. Smith against P. A. Harrington and E. G. Peters, copartners doing business under the firm name and style of Harring-Peters Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Van Dyke & Thomas, of Seattle, for appellants. Victor M. Place, Benjamin M. Levine, and Philip Tindall, all of Seattle, for respondent.

PER CURIAM. Suit upon two causes of action growing out of a written contract for the furnishing of labor and material in the construction of a concrete warehouse. Verdict for plaintiff.

The case presents questions of fact only, properly triable before a jury. No suggestion is made of any improper admission or rejection of evidence, nor is complaint made as to the instructions given. Appellants content themselves with a claim of error in the refusal of the lower court to give certain requested instructions.

After examining the issues, the evidence, and the instructions given, we conclude that the case was properly submitted to the jury. The requested instructions are a specific elaboration of what the court said to the jury in a more general way in referring to the issues to be determined. We cannot say that the refusal to give them entitles the appellants to a new trial.

Upon the whole, we conclude that the case was fairly submitted to the jury, and the judgment should be affirmed.

(93 Wash. 667)

SUKSDORF v. SUKSDORF. (No. 13477.)

(Supreme Court of Washington. Dec. 12, 1916.)

1. ARBITRATION AND AWARD ⊂⊃6 — AGREEMENT TO ABIDE AWARD—STATUTE.

Rem. & Bal. Code, § 421, providing that an agreement to arbitrate shall be in writing, signed by the parties, and may be by bond "conditioned that the parties entering into said submission shall abide the award," applies solely to an arbitration "by bond," and not to the agreement to arbitrate.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 27; Dec. Dig. ⊂⊃6.]

2. ARBITRATION AND AWARD ⊂⊃6—REQUISITES.

A special agreement to abide an award is unnecessary in matters of arbitration, if the statute does not expressly require it, as the law implies an agreement to abide the result of an arbitration from the fact of submission.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 27; Dec. Dig. ⊂⊃6.]

3. ARBITRATION AND AWARD ⊂⊃2—COMMON-LAW AND STATUTORY ARBITRATION.

Common-law arbitrations have been entirely supplanted by the statutory regulations on the subject.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 7–10; Dec. Dig. ⊂⊃2.]

4. ARBITRATION AND AWARD ⊂⊃68—REQUISITES—OPERATION.

Mere defects in the proceedings for a statutory award will not avail after judgment on the award has been rendered, but there must have been some such radical departure from the prescribed proceedings as to show want of jurisdiction to render judgment.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 343–351; Dec. Dig. ⊂⊃68.]

5. ARBITRATION AND AWARD ⊂⊃82(6)—JUDGMENT ON AWARD—FINALITY.

Where the superior court properly acquired jurisdiction as to an award, its judgment confirming the award was final, and could be vacated only in the manner and on the grounds prescribed by law for the vacation of judgments.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 450; Dec. Dig. ⊂⊃82(6).]

Department 1. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Arbitration agreement between Henry F. Suksdorf and F. W. Suksdorf, with an award in favor of Henry F. Suksdorf. From an order of the superior court, vacating the judgment on the award, Henry F. Suksdorf appeals. Reversed, with directions to reinstate the judgment.

W. C. Jones and George W. Belt, both of Spokane, for appellant. Davis & Hell, of Spokane, for respondent.

FULLERTON, J. On March 23, 1915, Henry F. Suksdorf and F. W. Suksdorf, for the purpose of settling various controversies between them which extended over a number of years, entered into the following written arbitration agreement:

"This agreement, made and entered into between Henry F. Suksdorf, plaintiff herein, and F. W. Suksdorf, defendant herein, witnesseth: That whereas, a controversy has arisen and existed between plaintiff and defendant for many years, arising out of an accounting for 8,000 bushels of wheat received by defendant for plaintiff about 20 years ago, and out of the right to purchase certain land near Spokane Bridge and near Spangle, about 500 acres, which plaintiff claims to have procured for defendant, and out of a promissory note of defendant for $1,800.00 to plaintiff, on which plaintiff claims that but $1,450.00 and interest has been paid, and it being admitted that defendant claims various credits for payments made, also for the value of services rendered plaintiff; and whereas, defendant also claims other defenses; and whereas, said parties have been unable to agree as to the respective amounts for which each is entitled to credit, and also disagree as to the validity of several

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of the claims and counterclaims and credits aforesaid: Now, therefore, the said parties do hereby agree to submit their differences as aforesaid, and all others since 1884, to the award of Thomas Conlan, W. C. Gray, and Henry Rohwer, mutually selected by them for the purpose of arbitration. It is further agreed that the parties hereto waive the benefit or defense of the statute of limitations."

A majority of the arbitrators found that F. W. Suksdorf was indebted to H. F. Suksdorf in the sum of $2,500. The award was filed with the clerk of the superior court of Spokane county, and motion made before the court for its confirmation. Over the exception of F. W. Suksdorf, the award was confirmed, and judgment rendered in favor of H. F. Suksdorf for the amount found due by the award. Thereafter F. W. Suksdorf filed a motion to vacate the judgment and order affirming the award, which motion was granted by the court, "for the reason that the agreement to arbitrate contained no express stipulation that the parties thereto would abide by or perform the award." From the order vacating the judgment on the award, H. F. Suksdorf prosecutes this appeal.

[1] The court based its order vacating the confirmation of the award on the theory that, under Rem. & Bal. Code, §§ 420–430, providing a statutory method for arbitration and award, it was necessary for the parties to agree to "abide the award," in order to give the superior court jurisdiction to enter judgment upon an award without suit thereon. The only support for this position is found in section 421, which provides:

"Said agreement to arbitrate shall be in writing, signed by the parties, and may be by bond in any sum, conditioned that the parties entering into said submission shall abide the award."

To uphold the decision of the superior court it would be necessary to construe the foregoing section to mean that the arbitration agreement should be conditioned in terms that the parties should abide the award. We think the clause "conditioned that the parties entering into said submission shall abide the award" applies solely to an arbitration "by bond" mentioned in the statute, and relates to the conditions of the bond, not to the agreement to arbitrate.

[2] Moreover, a specific agreement to abide the award is unnecessary in matters of arbitration, if the statute does not expressly require it. "The law implies an agreement to abide the result of an arbitration from the fact of submission." Smith v. Morse, 9 Wall. 76, 19 L. Ed. 597; Kingsley v. Bill, 9 Mass. 198; Pierce v. Kirby, 21 Wis. 126; Valentine v. Valentine, 2 Barb. Ch. 430; Robinson v. Templar Lodge, 97 Cal. 62, 31 Pac. 609. It is true that, in the case of Zindorf Const. Co. v. Western American Co., 27 Wash. 31, 39, 67 Pac. 374, 376, we said:

"Section 5103 [Bal. Code, which is the same as section 421, Rem. & Bal. Code] provides that the agreement * * * shall be in writing, signed by the parties, and conditioned that the parties entering into the agreement shall abide the award."

But the question was not an issue in that case, and, while appropriate enough to the particular question, was not intended to lay down a general rule.

[3] The respondent further contends that, in the event this court construes section 421 as not imposing the necessity of a recital that the parties will abide the award, the arbitration agreement falls under the common-law rather than the statutory regulations for the submission of the controversy, since the agreement nowhere discloses that it is the intent of the parties to follow the statutory procedure. This contention is based on the assumption that both the common-law and statutory methods of arbitration and award are existent in this state. But this court has ruled in a recent case that common-law arbitrations have been entirely supplanted by our statutory regulations on the subject. See Dickie Mfg. Co. v. Sound Const. & Eng. Co., 159 Pac. 129. Possibly it might follow from this that, if the submission was insufficient under the statute, the entire proceedings would be a nullity; but, as we have indicated, we cannot conclude that this agreement was thus insufficient. According to the trial court's own view, it was deficient only because it did not contain an agreement to abide the award. This, as we say, is not enough on which to base a holding of insufficiency.

[4] Moreover, no claim of insufficiency was made when the appellant moved for judgment thereon; in fact, both parties to the agreement treated the matter throughout as a statutory arbitration until after judgment was rendered. Mere defects in the proceedings could not avail after that time. There must have been some such radical departure from the prescribed proceedings as to show want of jurisdiction in the court to render the judgment. There was no such departure here.

[5] The court having properly acquired jurisdiction, its judgment was a final one, which could be vacated only in the manner and on the grounds prescribed by law for the vacation of judgments.

Reversed, with directions to reinstate the judgment.

MORRIS, C. J., and MOUNT and CHADWICK, JJ., concur. ELLIS, J., concurs in result.

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(93 Wash. 614)

STATE v. FERRY LINE AUTO BUS CO. et al. (No. 13286.)

(Supreme Court of Washington. Dec. 12, 1916.)

1. CRIMINAL LAW ⟸58 — RESPONSIBILITY FOR CRIME—AGENT.
Agents of a jitney bus corporation who assisted and abetted its operation without a permit are criminally liable with it for violating Laws 1915, p. 227, regulating jitney bus traffic.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 40, 41; Dec. Dig. ⟸58.]

2. STATUTES ⟸114(1) — TITLE — EXPRESSING SUBJECT.
Laws 1915, p. 227, entitled "An act relating to and regulating common carriers of passengers upon public streets, roads and highways," and providing for bonding motor vehicles, does not violate Const. art. 2, § 19, because not expressing its subject in its title.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 145; Dec. Dig. ⟸114(1).]

3. CONSTITUTIONAL LAW ⟸205(5)—SPECIAL IMMUNITIES—PREFERENCE.
Laws 1915, p. 227, requiring bonds from motor vehicles, but not from street car companies, does not violate Const. art. 1, § 12, prohibiting class legislation, since the distinction is reasonable.
[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 616, 617; Dec. Dig. ⟸205(5).]

4. CARRIERS ⟸11—MOTOR VEHICLES—BOND.
Laws 1915, p. 227, is not invalid because requiring a surety company's bond from jitney busses without providing for bonds of other companies, since the requirement is presumably reasonable.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 2, 3; Dec. Dig. ⟸11.]

5. CONSTITUTIONAL LAW ⟸208(6) — CLASS LEGISLATION.
Laws 1915, p. 227, is not void because it exempts carriers of United States mail from its provisions.
[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 651, 653, 667; Dec. Dig. ⟸208(6).]

6. CONSTITUTIONAL LAW ⟸82—FOURTH AND FIFTH AMENDMENTS TO FEDERAL CONSTITUTION.
The fourth and fifth amendments to the federal Constitution are limitations upon powers of the federal government, and have no application to powers of the states.
[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 149; Dec. Dig. ⟸82.]

7. CONSTITUTIONAL LAW ⟸83(3)—CRIMINAL LAW ⟸393(1)—SELF-INCRIMINATION.
Laws 1915, p. 227, does not violate Const. art. 1, § 9, providing that no person shall be compelled in a criminal case to give evidence against himself, and that there shall be no imprisonment for debt except in cases of absconding debtors.
[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 151½; Dec. Dig. ⟸83(3); Criminal Law, Cent. Dig. § 871; Dec. Dig. ⟸393(1).]

8. CONSTITUTIONAL LAW ⟸297—DUE PROCESS.
Laws 1915, p. 227, does not unconstitutionally take property without due process of law.
[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 832–834; Dec. Dig. ⟸297.]

9. CARRIERS ⟸4 — REGULATION — WHO ARE COMMON CARRIERS.
A jitney line which contracted to carry passengers between a ferry landing and a designated locality is a common carrier, subject to Laws 1915, p. 227.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1, 462–478; Dec. Dig. ⟸4.
For other definitions, see Words and Phrases, First and Second Series, Common Carrier.]

10. CARRIERS ⟸5—REGULATION—COMPANIES AFFECTED.
Where a jitney bus line contracted with a municipal corporation to transport passengers between certain points, *held* that such transportation was not rendered on behalf of the municipal corporation so as to render the jitney line exempt from Laws 1915, p. 227.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 3, 4, 7; Dec. Dig. ⟸5.]

11. CRIMINAL LAW ⟸58 — RESPONSIBILITY FOR CRIME—AGENT.
A municipal corporation cannot itself, or by contract with others, transport passengers in violation of Laws 1915, p. 227, and those who do so under contract with it are criminally liable as independent contractors.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 40, 41; Dec. Dig. ⟸58.]

Department 1. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Prosecution by the State of Washington against the Ferry Line Auto Bus Company, a corporation, and A. G. Collins and George Collins, under Laws 1915, p. 227, regulating motor vehicle transportation for hire. The corporation appeals from the conviction and the state from a judgment of dismissal as to the individual defendants. Affirmed upon the corporation's appeal and reversed upon the State's appeal.

Alfred H. Lundin and W. F. Meier, both of Seattle, for the State. Jas. E. Bradford, Wm. B. Allison, C. J. France, and Shorett, McLaren & Shorett, all of Seattle, for respondents.

FULLERTON, J. The appellant Ferry Line Auto Bus Company, a corporation, together with A. G. Collins and George Collins, were jointly accused by an information filed by the prosecuting attorney of King county of engaging in the business of carrying passengers for hire in motor propelled vehicles along the public streets of the city of Seattle, without first having a permit so to do, as required by chapter 57 of the Laws of 1915, commonly known as the Jitney Bus Act. To the information each of the defendants filed demurrers. The demurrers of A. G. Collins and George Collins were sustained by the court, and on the election of the prosecution to stand on the information, a judgment of dismissal as to them was entered. The demurrer of the Ferry Line Auto Bus Company was overruled. The corporation then entered a plea of not guilty to the information, and on a trial, which was had before the court sitting without a jury, was found

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guilty and sentenced to pay a fine. The state appeals from the judgment of dismissal against the individual defendants, and the Ferry Line Auto Bus Company appeals from the judgment of conviction.

[1] The record does not disclose the ground upon which the learned trial judge rested his decision as to the individual defendants, but it can be gathered from the argument of their counsel it was thought that since the principal only was required to have a permit before engaging in the business of carrying passengers for hire in motor propelled vehicles at the place named, these defendants, being merely the servants and agents of the principal, could not be guilty of a violation of the statute, even though they aided and abetted the principal in the execution of the unlawful act. This is not the law. No person committing or aiding or abetting in the commission of an unlawful act can shield himself from punishment by showing that he acted under the direction of or as the agent or servant of another. As was said by the Supreme Court of Tennessee in Atkins v. State, 95 Tenn. 474, 32 S. W. 391, the relations of principal and agent, employer and employé, are not recognized in the criminal law. By that law every man must stand for himself. No man can authorize another to do what he may not lawfully do himself. If the attempt to confer such authority be made, and the unlawful act be done, both are guilty. So Mr. Bishop, in his work on Criminal Law, says that the command of a superior to an inferior, of a master to his servant, of a principal to his agent, will not justify a criminal act done in pursuance of it. Bishop's New Criminal Law, § 355. To the same effect are our own cases. In State v. Burnam, 71 Wash. 199, 128 Pac. 218, it was held that the manager of the active business of a corporation engaged in the business of selling milk was guilty of a violation of the statute prohibiting the selling of milk below a certain standard, although the milk was sold from one of the wagons of the corporation which left the dairy during the manager's absence. See, also, Spokane v. Patterson, 46 Wash. 93, 89 Pac. 402, 8 L. R. A. (N. S.) 1104, 123 Am. St. Rep. 921, 13 Ann. Cas. 706.

The defendants argue that if every person who is in any way engaged in the unlawful business is included within the penal provisions of the statute, then each individual agent or employé must comply with the statute, regardless of whether the principal has complied with the statute or not. Notwithstanding it is asserted that this conclusion is inevitable, we have not been able to accept it. The principal is guilty because it engaged in the business without a compliance with the statute. The agents and servants are guilty because they aided and abetted the principal in the commission of the unlawful act. The principal can make its business lawful by a compliance with the statute. When once it is made lawful, clearly it is no offense for one as its agent and servant to assist in the prosecution of the business. We conclude, therefore, that the court erred in sustaining the demurrer of the individual defendants.

[2-8] The principal question submitted on the appeal of the Ferry Line Auto Bus Company is the constitutionality of the statute upon which the prosecution is founded. This question was determined by us, contrary to the appellant's contentions, in the case of State v. Seattle Taxicab & Transfer Co., 90 Wash. 416, 156 Pac. 837, where we held the act constitutional. The reasons for our holding are fully stated in the opinion in that case, and it is unnecessary to repeat them here. On the authority of the case referred to we hold the act constitutional.

The appellant makes a further contention that the statute is not applicable to its situation: First, because the statute applies only to common carriers of passengers, and that it is not such a common carrier; and, second, because the auto service conducted by it is an integral part of a ferry system operated by the port of Seattle, a municipal corporation.

[9] As to the first objection, it may be conceded that the statute applies only to common carriers of passengers in motor-propelled vehicles, and we need notice the part of the objection only which denies that it is such a carrier. The record shows that the appellant was duly organized as a corporation under the laws of the state of Washington. Its articles of incorporation are not disclosed, but it is stipulated that it was organized "for the purpose of engaging in the performance of a certain contract with the port of Seattle, as set forth in Exhibit 2," as a part of the stipulation. The contract so set forth, after reciting that the port of Seattle maintains and operates a ferry service for carrying passengers between the business district of the city of Seattle to a portion of the city known as West Seattle, and that the appellant "for itself, its successors and assigns, is desirous of establishing an auto bus service so as to furnish a connecting service with said ferry for the inhabitants of the west side," provides that the appellant will maintain and operate for a period of 10 years an auto bus service for carrying passengers to and from the terminal of the ferry at West Seattle and certain other designated points in the city named. There is no agreement that the appellant will carry any or all persons who present themselves for carriage, but only an agreement to furnish transfer service for passengers going to and from the ferry. It is on this latter fact that the appellant founds its contention that it is not a common carrier of passengers. But we think it manifest that the appellant is a common carrier of passengers. It must carry all persons up to the limit of its capacity who present themselves for carriage at the ferry

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landing, and all those who present themselves for carriage at any convenient point in its route for carriage to the ferry landing, and this makes it a common carrier of passengers whether it carries passengers between other designated points or not.

[10] The second contention we think is equally without merit. In the first place the service conducted by the appellant is independent of the service conducted by the port of Seattle, and is not an integral or any part of that service. While the service doubtless operates to the mutual benefit of both, the parties treated with each other as independent corporations, the port of Seattle going so far as to exact a bond conditioned that the appellant would hold the port harmless from any judgment obtained against either party "by reason of any person being injured on or by" the vehicles used by the appellant.

[11] But more than this, it is not the rule that a municipal corporation can itself engage, or contract with another to engage, in the business of carrying passengers for hire in contravention of a public statute forbidding it. A municipal corporation, like every other corporation or person, must act within the law. Its acts otherwise are without authority, and subject its agents and servants, who assist in the unlawful acts, to liability as independent actors. Wharton, Criminal Law, § 377.

The judgment is reversed on the appeal of the state, and affirmed on the appeal of the Ferry Line Auto Bus Company.

MORRIS, C. J., and CHADWICK, MOUNT, and ELLIS, JJ., concur.

(93 Wash. 700)

In re TACHI'S ESTATE.
TACHI v. KENT.
(No. 13181.)

(Supreme Court of Washington. Dec. 8, 1916.)

On rehearing en banc. Former opinion (90 Wash. 621, 156 Pac. 833) adhered to.

PER CURIAM. Upon a rehearing en banc a majority of the court still adhere to the opinion heretofore filed herein as reported in 90 Wash. 621, 156 Pac. 833, and the judgment is accordingly modified.

(93 Wash. 671)

SCANDINAVIAN AMERICAN BANK OF TACOMA v. PIERCE COUNTY et al.
(No. 13552.)

(Supreme Court of Washington. Dec. 12, 1916.)

1. TAXATION ⟸386(2) — BANKS — REALTY —STATUTE.

Under Rem. & Bal. Code, § 9134, providing that the shares of stock in banks shall be assessed to the owners, on their full and fair value on March 1st, of each year, first deducting the proportionate part of the assessed value of the real estate belonging to the bank, and section 3330, making it unlawful for a bank to carry realty on its books as an asset for more than three years, where realty was acquired by the bank more than three years before March 1, 1913, the taxing date, the court properly refused to make any deduction therefor.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 644–647; Dec. Dig. ⟸386(2).]

2. TAXATION ⟸386(2)—BANKS—DEDUCTION —STATUTE.

A bank seeking by action to have the assessed value of its realty deducted from its assessment, as provided by Rem. & Bal. Code, § 9134, in view of section 3330, making it unlawful for a bank to hold realty for more than three years, must allege and prove the status of the realty was such that it should be deducted from its assessment.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 644–647; Dec. Dig. ⟸386(2).]

3. TAXATION ⟸386(2) — BANKS — REALTY — DEDUCTION—STATUTE.

Rem. & Bal. Code, § 9134, provides that bank stock shall be assessed to the owners at its fair value, first deducting the proportionate part of the assessed value of realty belonging to the bank. A bank building was subject to a mortgage of $150,000, and the bank, after acquiring it, spent $150,000 over and above the mortgage in improvements, which amount entered into the valuation of its capital stock, surplus, and profits. *Held*, that all the value of the realty which was considered in determining the value of the capital stock and surplus should be deducted, provided the deduction did not exceed the assessed value of the property, and that a deduction of $90,000 on a 60 per cent. basis of the improvement was proper.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 644–647; Dec. Dig. ⟸386(2).]

Department 2. Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

Action by the Scandinavian American Bank of Tacoma against Pierce County and Calvin J. Carr, treasurer of Pierce County. Judgment for plaintiff in part, and it appeals. Modified and affirmed.

Williamson, Williamson & Freeman, of Tacoma, for appellant. Fred G. Remann, Harry E. Phelps, and H. G. Fitch, all of Tacoma, for respondents.

HOLCOMB, J. Appellant, a domestic banking corporation, feeling itself aggrieved at the action of the assessor of Pierce county in failing to deduct the value of certain real estate owned by it from the value of its capital stock, surplus, and undivided profits for the purposes of taxation, in the assessment of March 1, 1913, brought this action against Pierce county and the treasurer thereof to restrain the enforcement of the tax, and to compel the treasurer to accept as full payment of the tax an amount which would be correct if the value of all the real estate were deducted in conformity with appellant's claim. The trial court ordered the assessed value of a portion of the tracts of real estate, amounting to $45,957, deducted, and entered its decree accordingly, from which decree appellant has appealed.

[1] Appellant first assigns as error the action of the trial court in refusing to deduct

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the value of certain of the tracts of real estate as provided for in Rem. & Bal. Code, § 9134, because it was shown by the pleadings that the date of acquisition was more than three years prior to March 1, 1913, it being unlawful for a bank to carry real estate on its books as an asset for a longer period than three years, under statute Rem. & Bal. Code, § 3330; and also the court's refusal to deduct the value of other parcels of real estate because the dates of acquisition thereof were neither pleaded nor proved, the court being of the opinion that the burden of proof was on appellant to establish such facts before it could prevail.

Appellant contends that, having alleged and proved that it owned this property on March 1, 1913, by virtue of Rem. & Bal. Code, § 9134, which provides that the proportionate part of the assessed value of the real estate belonging to the bank shall be deducted, it has established a prima facie case, and it is therefore incumbent on respondents to show as a matter of defense that the property has been held by appellant for a longer period than three years. In arriving at the foregoing conclusions the trial court construed certain dates indicated in an exhibit attached to and made part of appellant's complaint, preceding the description of each tract of real estate, as the dates of acquisition thereof by the bank, which construction is now complained of by appellant. Since there is nothing in the record to enlighten us on the exact office of these dates, and as the dates of acquisition would be material to the issues in this case, it seems improbable that they were placed there for any other purpose than to indicate the dates of acquisition of the various parcels, which leads us to the conclusion that the construction of the trial court is correct.

[2] Since, then, it was unlawful for banks to carry real estate on their books for a longer period than three years (Rem. & Bal. Code, § 3330), the value of such real estate could not be considered in determining the value of the capital stock, and hence could not be deducted from the value of the capital stock. Regardless of the status of the title to property held by a bank longer than three years, it is made unlawful by statute to do so, and appellant cannot reap the benefits of Rem. & Bal. Code, § 9134, by a continuing violation of the law. As appellant is seeking by this action to have the assessed value of this property deducted, it must allege and prove that the status of this property was such that it should be deducted by virtue of the statutes. As this was not done, we find no error in the trial court's ruling on the question.

[3] Included in this list of property the assessed value of which appellant claims should have been deducted was a tract of property which the bank used as its place of business, hereinafter called the bank property. The action of the trial court in allowing a deduction of only $30,000 by reason of the bank's ownership of this property is also assigned as error. This property was appraised at $200,000, and a 60-per cent. basis was then used in Pierce county to fix the assessed value for taxation, making the assessed value thereof $120,000, at which it was thereupon assessed separately as real estate according to law. As this property was incumbered by a mortgage of $150,000, the assessor, conceiving the idea that appellant was entitled only to a deduction of its equity in the property over and above the amount of the mortgage, instead of deducting the assessed value—$120,000—from the value of the capital stock, surplus, and undivided profits, first subtracted from the assessed value the sum of $90,000, which was 60 per cent. of the $150,000 mortgage, leaving a balance of $30,000, the deduction of which is complained of by appellant. After appellant had acquired this bank property it expended the sum of $150,000 over and above the mortgage in rendering the premises suitable for its business, and therefore asserts that 60 per cent. of this $150,000 invested in the premises, or $90,000, should have been deducted from the value of the capital stock, undivided profits, and surplus, instead of the $30,000 deduction as made by the assessor. It is interesting to note that appellant is not claiming a deduction of the assessed value of the property as real estate.

This court held, in Scandinavian American Bank v. Pierce County, 85 Wash. 348, 148 Pac. 18, that Rem. & Bal. Code, § 9134, contemplates that only that portion of the real estate which entered into the value of the capital stock should be deducted. The converse would also be true, that all the value of the real estate which was considered in determining the value of the capital stock and surplus should be deducted, provided that the value to be deducted does not exceed the assessed value of the property. As to what value this bank property was given in ascertaining the value of the capital stock, surplus, and undivided profits, at $229,977.28, the record is not clear, but Pringle, manager of appellant, testified that the $150,000 expended by appellant on this property entered into and became a part of the $229,977.28, which figures were turned in by appellant to the assessor. This testimony was corroborated by one Hayden, a former deputy state bank examiner. It is true that the assessor denied this testimony, but the fact remains that he accepted the exact figure of $229,977.28 as received by him from appellant, and offered no explanation as to how he ascertained that amount nor what value he placed upon the bank property in so ascertaining it. From these facts it seems apparent that the $150,000 expended by appellant on this property was taken as the value of the property in determining the value of the surplus, capital stock, and undivided profits.

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In determining the amount that should be deducted on account of appellant's ownership of this bank property, there are two tests that must be followed, viz.: (1) In no event can more than the assessed value of the property be deducted, which in this case was $120,000, as that is the limit authorized by Rem. & Bal. Code, § 9134; (2) nor can a greater amount be deducted by reason of a bank's ownership of property than the value that such property was considered to have in determining the value of the capital stock, surplus, and undivided profits. As $150,000 was considered the value of this property in ascertaining the value of the capital stock, surplus, and undivided profits no more than 60 per cent. of that amount, or $90,000, could be deducted or it would violate test No. 2 as stated above. It is apparent, therefore, that a deduction of $90,000 is proper as it violates neither of these tests, since it is a lesser amount than the assessed value of the property as real estate, and it is 60 per cent. of the value the land was given in determining the value of the capital stock, surplus, and undivided profits. Not to allow such deduction would amount to double taxation, for it would be taxed once as realty and once as personal property included in the capital stock, surplus, and undivided profits. We do not wish to be understood as holding that in all cases the true amount of deduction is measured by the amount invested by appellant in the property, but rather that the amount invested should be deducted where it is the amount used in determining the value of the capital stock, surplus, and undivided profits, and where such amount is either equal to or less than the assessed value of the property.

The decree of the trial court is therefore modified by deducting from the assessed valuation of the capital stock, surplus, and undivided profits $90,000 instead of $30,000, and in all other respects it is affirmed. Appellant will recover costs.

MORRIS, C. J., and MOUNT, FULLERTON, and PARKER, J., concur.

(93 Wash. 676)

STATE ex rel. HALL v. SAVIDGE, Public Lands Com'r. (No. 13649.)

(Supreme Court of Washington. Dec. 12, 1916.)

1. MINES AND MINERALS ⟸5—LEASE—RIGHT TO LEASE—POWERS OF COMMISSIONER.

Under Rem. Code 1915, § 6675, as to sales of public lands, and section 6791, providing that the commissioner of public lands may execute leases for extraction of petroleum from state lands, an applicant is entitled to a lease of lands for which he applies if they are subject to lease, and he has fully complied with the statutes relating thereto; the commissioner being without discretion.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 5; Dec. Dig. ⟸5.]

2. MINES AND MINERALS ⟸5—LEASE—RIGHT TO LEASE—POWERS OF COMMISSIONER—"LAND BELONGING TO STATE."

Under Rem. Code 1915, § 6675, providing for sales of public lands and for reservation of the right to extract petroleum and oils therefrom, but providing that no right shall be exercised under the reservation until provision has been made to pay the owner of the land on which the rights reserved are sought to be exercised full payment for all damages by reason of entering upon the land, and section 6791, providing that the Commissioner of Public Lands may lease for extraction of petroleum any land belonging to the state, the commissioner may execute leases even if the land has been sold by the state to individuals with a reservation of the right to extract oils.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 5; Dec. Dig. ⟸5.]

3. MINES AND MINERALS ⟸5—LEASE—RIGHT TO LEASE—POWERS OF COMMISSIONER.

Under such statutes it is prerequisite to right to lease that provision for payment of damages be made.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 5; Dec. Dig. ⟸5.]

4. MINES AND MINERALS ⟸5—LEASE—RIGHT TO LEASE—POWERS OF COMMISSIONER—"OWNER."

Under such statutes a contracting purchaser from the state is an owner.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 5; Dec. Dig. ⟸5.

For other definitions, see Words and Phrases, First and Second Series, Owner.]

Original application for mandamus by the State, on the relation of P. E. Hall, against C. V. Savidge, as Commissioner of Public Lands. Writ denied.

Lee C. Delle, of North Yakima, for plaintiff. W. V. Tanner, Atty. Gen., and R. E. Campbell, of Olympia, for respondent.

FULLERTON, J. This is an original application for a writ of mandamus. It is before us on the petition of the relator for the writ and the demurrer thereto by the respondent.

In substance, the petition recites the following facts: On April 2, 1910, the state, being then the owner of a certain section of land situated in Benton county, entered into a contract in the manner provided by statute for the sale of the same to one S. W. Macy, reserving to itself, its successors and assigns forever, all oils and gases in such land contained, together with the right to enter on the same or any part thereof for the purposes of exploring for oils and gases thereon and developing and working such mines as might be found, which contract has at all times since the same was entered into been kept in full force and effect. The land is situate in an arid region of the state, is unproductive in its natural state, is covered with a native growth of sagebrush, is incapable of raising any form of crop whatsoever without irrigation, is not irrigated, and is not situate under any irrigation canal or system from which it can be irrigated. Prior to July 12, 1916, the applicant discov-

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ered on a certain described quarter section of such land valuable petroleum oils and gases in paying quantities, and on the day named applied to the defendant, who is the duly elected and acting land commissioner of the state of Washington and the officer of the state who is vested with power to lease state lands for the purpose of mining for oils and gases, for a lease of the quarter section for that purpose, tendering to the defendant all of the costs and charges provided by statute as a condition precedent to procuring such a lease. The lease was refused by the defendant, and the prayer of the petition is for a peremptory writ commanding him to enter into it.

[1] The statute in force at the time the contract with Macy was entered into (Rem. Code, § 6675) contains the following provisions:

"All state lands shall be sold on the following terms: One-tenth to be paid on the date of sale and one-tenth to be paid one year from the date of issuance of the contract of sale, and one-tenth annually thereafter until the full purchase price has been paid: * * * Provided, further, that each and every contract for the sale of any state lands, or deeds or patents to such state lands except deeds or patents issued pursuant to contracts heretofore made shall contain the following saving clause: 'The party of the first part hereby expressly saves, excepts and reserves out of the grant hereby made, unto itself, its successors, and assigns forever, all oils, gases, coal, ores, minerals, and fossils of every name, kind or description, and which may be in or upon said lands above described, or any part thereof, and the right to explore the same for such oil, gases, coal, ores, minerals, and fossils; and it also hereby expressly saves and reserves out of the grant hereby made, unto itself, its successors and assigns forever, the right to enter by itself, its agents, attorneys and servants upon said lands or any part or parts thereof, at any and all times, for the purpose of opening, developing and working mines thereon, and taking out and removing therefrom all such oils, gases, coal, ores, minerals and fossils, and to that end it further expressly reserves out of the grant hereby made, unto itself, its successors and assigns forever, the right by its or their agents, servants and attorneys at any and all times to erect, construct, maintain and use all such buildings, machinery, roads and railroads, sink such shafts, remove such soil, and to remain on said lands or any part thereof for the business of mining and to occupy as much of said lands as may be necessary or convenient for the successful prosecution of such mining business hereby expressly reserving to itself, its successors and assigns, as aforesaid, generally, all rights and powers in, to, and over said land, whether herein expressed or not, reasonably necessary or convenient to render beneficial and efficient the complete enjoyment of the property and rights hereby expressly reserved': Provided, further, that no rights shall be exercised under this reservation by the state, its successors or assigns, until provision has been made by the state, its successors or assigns to pay to the owner of the land upon which the rights herein reserved to the state, its successors or assigns are sought to be exercised, full payment for all damages sustained by said owner, by reason of entering upon said land."

The section of the statute relating to leases of land containing petroleum and natural gases (Rem. Code, § 6791) reads as follows:

"The commissioner of public lands of the state of Washington is hereby authorized to execute leases and contracts for the mining and extraction of petroleum and natural gas from any land belonging to the state or from any lands in which the state may hereafter acquire title, subject to the conditions hereinafter provided."

In State ex rel. Pindall v. Ross, 55 Wash. 242, 104 Pac. 216, we held, when construing the statute with reference to the leasing of state lands for mining purposes, that the land commissioner was without discretion with regard thereto, but that he must lease on application of a person qualified to take who fully complies with the provisions of the statute. The same rule applies to the present statute, and the applicant is entitled to a lease of the lands here in question if they are the subject of lease and the applicant has fully complied with the statutes relating thereto.

It is the contention of the Attorney General representing the land commissioner that the lands are not subject to lease for the purposes for which they are sought, for two reasons: First, because the statutes relating to leases for mining purposes apply only to unincumbered lands of the state, and that these lands are not unincumbered; and, second, because there has been no compliance with the last proviso of the section first quoted, in that no provision has been made to pay to the owner of the land upon which the rights are sought to be exercised the damages that will be sustained by the owner by reason of entering upon the land.

[2] The first of these objections cannot, in our opinion, be sustained. It is true that the statute authorizing the lease of lands for mining and for the extraction of petroleum and natural gases uses the expression "land belonging to the state" in describing the lands subject to the lease; yet we think it includes lands the title to which stands in the condition of the lands here in question. The language employed is general. The statute was intended to be operative. The Legislature has not authorized the state itself to engage in the business of mining, and, if it may not lease these reserved rights, it must follow that no means exists by which such rights may be made available to the state. While the language is perhaps not the most happy that could be employed to express the idea, we are constrained to conclude that these reserved rights are subject to lease.

[3] We are clear, however, that the application was properly denied on the second ground stated. It will be observed that it is expressly provided in the second of the provisos in the first section quoted that no rights shall be exercised under the reservation, either by the state or its successors or assigns, until provision has been made for the payment to the owner of the land of all damages which he will sustain by reason of entering upon such land. This is a condition precedent to any action in the premises and includes the entering into of the lease as well as the act of entering upon the property for

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exploring or mining purposes. Since it is conceded that these damages have not been ascertained or paid, the land commissioner acted within his authority in refusing to enter into the lease.

[4] We have not overlooked the argument to the effect that a person holding a contract to purchase is not an owner, and that in this particular instance the purchaser will not be damaged because of the valueless character of the land for the purposes for which he is permitted to use it. But we have no hesitancy in saying that the contracting purchaser is an owner within the meaning of the statute, and whether or not the land is valuable for his purposes is a question on which he has a right to be heard in a court of competent jurisdiction; he is not obligated to appear and contest the question before the land commissioner.

The application for the writ is denied.

MORRIS, C. J., and MOUNT and PARKER, JJ., concur.

(93 Wash. 635)

NORTHWESTERN NAT. BANK OF BELLINGHAM v. GUARDIAN CASUALTY & GUARANTY CO. (No. 13349.)

(Supreme Court of Washington. Dec. 12, 1916.)

1. MUNICIPAL CORPORATIONS ⟸347(2)—CONSTRUCTION CONTRACT — INSTALLMENTS DUE —ASSIGNMENT.

Assignment to a bank of all moneys to become due to contractors as security for notes taken and filed with the city comptroller prior to any notice that labor and material claims had not been or would not be paid, the contract containing no provision for an absolute reserve for labor and material claims, but only permitting the city to withhold payment until satisfied that all such claims had been paid, and nothing having been held up by the city at the time the assignments were made, must be treated as a valid appropriation to the bank's notes of the fund afterward paid into court by the city, superior to any right of laborers or materialmen, and hence superior to any right of subrogation in the surety, as the bank had a superior equity.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 877; Dec. Dig. ⟸ 347(2).]

2. MUNICIPAL CORPORATIONS ⟸347(2)—CONSTRUCTION CONTRACT — LABOR AND MATERIAL CLAIMS—ASSIGNMENT.

Assignments of labor and material claims were not, because of the agreement between the contractor and bank to advance money for this purpose, extinguished, so far as the bond is concerned, upon their payment by the bank; but the bank had the same right to purchase and take assignment of the claim as any one else.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 877; Dec. Dig. ⟸ 347(2).]

3. ASSIGNMENTS ⟸78 — EQUITABLE ASSIGNMENTS—MECHANICS' LIENS.

Where a bank paid and took assignments of labor and material claims, as the materialman or laborer's claim against the contractor's bond is ancillary to and dependent upon his right against the contractor, an assignment of the right against the contractor operates as an equitable assignment of the right against the bond.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 145; Dec. Dig. ⟸78.]

4. MUNICIPAL CORPORATIONS ⟸347(2) — CONSTRUCTION CONTRACT—RIGHTS OF SURETY—PRIOR ASSIGNMENTS.

Where a bank paid and took assignments of the claims for labor and material under an agreement with the contractor, the surety could not claim that because it was not surety for claims for money advanced by the bank to the contractor, but only for labor and material claims, as between the bank and the surety, a fund paid into court by the city should be first applied to the assigned claims and not the contractor's prior claim.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 877; Dec. Dig. ⟸ 347(2).]

5. MUNICIPAL CORPORATIONS ⟸347(2)—CONSTRUCTION CONTRACTS — NONLIENABLE CLAIMS—ASSIGNMENT.

The claims of two subcontractors and their bookkeeper, not being lienable claims, were not assertable against either the fund paid into court by the city or against the contractor's bond to the exclusion of the surety's right of subrogation, and the assignment of their claims carried no rights except rights of action against the contractors personally.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 877; Dec. Dig. ⟸ 347(2).]

Department 1. Appeal from Superior Court, Whatcom County; W. H. Pemberton, Judge.

Action by the Northwestern National Bank of Bellingham against the Guardian Casualty & Guaranty Company and others. Judgment for plaintiff, motion for new trial denied, and named defendant appeals. Remanded for modification of judgment as indicated.

Reeves Aylmore, Jr., and S. H. Kelleran, both of Seattle, for appellant. Black & Black, of Bellingham, for respondent.

ELLIS, J. The facts of this case are in part stipulated and are not disputed. On August 25, 1913, defendant city entered into a contract with defendants Brooks & Olsen for the construction of a certain trunk water main, and at the same time took from Brooks & Olsen a bond signed by them as principals and by defendant Guardian Casualty & Guaranty Company as surety, conditioned as follows:

"The conditions of this obligation are such, that if the said principal shall perform said contract which is hereby expressly referred to and made a part hereof, according to its terms, conditions and stipulations, and shall pay as they become due, all just claims for all work and labor so performed, and all skill, or labor and all laborers, mechanics, subcontractors and materialmen and all persons who shall supply such person or persons or subcontractors with provisions and supplies for the carrying on of said work, all just debts, dues and demands incurred in the performance of said contract, and shall comply with all the requirements of the charter and ordinances of the city of Bellingham and the statutes of the state of Washington, then this obligation to be void, otherwise to remain in full force and effect."

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The penalty in the bond was $25,125.50. The contractor entered upon the performance of the work, and soon after went to plaintiff bank and arranged for loans of money with which to carry on the work. The bank as a condition to the making of the loans required the contractor to execute to it an assignment of all warrants to be issued by the city under the contract, which assignment was to be collateral security for the payment of the loans. The contractor accordingly did execute, on or about the dates they bear, assignments as follows:

"Sept. 8, 1913. City Comptroller, Bellingham, Wash.—Dear Sir: Will you kindly deliver to the Northwestern National Bank, all warrants or amounts due us on account of the new concrete water ditch, which contract was recently awarded to us. Yours truly, Brooks & Olsen, C. M. Olsen."

"Sept. 24, 1913. Mr. H. J. Korthaur, City Comptroller, Bellingham, Wash., City—Dear Sir: Please pay to the order of the Northwestern National Bank all the water fund warrants for construction of trunk water main from Lake Whatcom to Larsons Station under ordinance No. 2019. Yours truly, Brooks & Olsen, per Brooks & Olsen, by Wesley Brooks."

These assignments were at once filed with the city comptroller. Thereafter from time to time as the work progressed plaintiff advanced to the contractor various sums upon their 8 per cent. demand notes aggregating $21,700. From time to time, also, as warrants became due for the work they were paid by the city in the sums received by the bank which were applied on these notes in such amount that there now remains due upon the notes the sum of $2,300 with interest. All of the moneys advanced by the bank and evidenced by these notes was used by the contractor in the prosecution of work under the contract. In March, 1914, the bank ceased to make advances upon the notes to the contractors, but from that time on cashed time checks and vouchers issued by the contractors for labor and material entering into the work. Each of these checks bears the indorsement:

"For value received I hereby assign to the Northwestern National Bank all my right, title and interest to the within time check."

None of the moneys received from the city were credited by the bank to any of these checks. The time checks for labor, exclusive of three, total $5,864.91. The three time checks excluded were issued, one to the contractor Olsen in the sum of $245, another to the contractor Brooks in the sum of $205, and the third to Cora E. Nyman, the contractors' bookkeeper and stenographer, in the sum of $130—total $580. The checks for material total $1,211.96. The contract provided that:

"The said contractor agrees to pay the wages of all persons and for assistance of every kind employed upon or about said work, and for all materials purchased therefor, and the said city of Bellingham may withhold any and all payments under this contract until satisfied that such wages, assistance and materials have been fully paid for."

It did not contain the usual provision for the payment of a certain percentage of the estimated value of work as it progressed and for a retention of a certain percentage by the city until the work was completed to meet any unpaid labor and material claims, nor did it contain any provision for the holding up of any sum by the city, except that above quoted. This action was brought by the bank to recover the $2,300 balance due upon the notes and the amount of the time checks cashed by the bank. The city answered that, in addition to the payments made to the bank under its assignments, it had paid labor and material claims and still had on hand the sum of $3,383.95, but was unable to determine to whom this sum rightfully belonged, and that it therefore brought the money into court "for distribution by the court according to the various rights of the claimants therefor." Defendant guaranty company answered, alleging that it had paid certain claims properly filed against the bond and claimed subrogation to the rights of the contractors. Upon the trial it was stipulated that defendant guaranty company was the assignee of material claimants whose claims aggregate the sum of $2,323.26. The contractors defaulted. The bank first claims the right to have paid from the funds in court the $2,300 and interest still due upon the notes by reason of the assignments of money to become due under the contract. It then claims that the balance of the fund in court should be applied upon its labor and material claims, and finally that it is entitled to judgment against the guaranty company on its bond for the remaining amount. The bank filed no claims against the bond for the $2,300 advanced to the contractors upon the notes. It did, however, file its claim with the city within 30 days after acceptance of the work for the labor and material claims which it had paid and of which it had taken an assignment. Upon these facts the trial court sustained the claims of the bank in full. Motion for a new trial was made and denied. Defendant guaranty company appeals.

As pointed out in the statement of the case, the bank is asserting three classes of claims: (1) The $2,300 and interest due upon the notes for which no claim has been filed against the bond. This it claims solely from the money in court by virtue of its assign ments from the contractors. (2) The labor and material claims which the bank has discounted and of which it took assignments, other than the Brooks, Olsen, and Nyman claims. (3) The Brooks, Olsen, and Nyman claims. We shall notice these in their order.

1. Appellant contends that the first item of $2,300 and interest cannot be paid from the money in court because it is inferior to all of the labor and material claims, both those held by the bank and those held by appellant. Respondent bank contends that, as to the $2,300 advanced on the assignments

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made to it by the contractors and of which the city was notified, it has a right to the fund held up by the city superior to any right of the surety company for moneys which that company was compelled to pay for labor and material.

This claim is based upon the case of Dowling v. Seattle, 22 Wash. 592, 61 Pac. 709. The contract and supplemental agreement in that case contained a provision the same as that above set out as found in the contract here involved, that the city "may withhold any and all payments under this contract until satisfied that such wages, assistance and materials have been fully paid for." But the contract in that case contained a provision also to the effect that bonds and warrants were to be issued on about the 20th of each month during the progress of the work for 70 per cent. of the contract price upon estimates of the city engineer covering the work done during the preceding month; the other 30 per cent. to be retained to secure laborers and materialmen who shall have performed work or furnished materials therefor. The bond in the Dowling Case was conditioned for the faithful performance of the work and for the payment of labor and material furnished upon and for the work in accordance with the contract and supplemental agreement. Prior to his default in the work, the contractor borrowed money from various persons, representing to them that he needed the money to pay for labor and materials consumed in the work. To these persons he gave assignments or orders on the city comptroller for money then due or to become due on estimates for work done under the contract. These assignments and orders were filed with the comptroller. The contractor after having earned $1,895.70 on the contract abandoned the work, leaving laborers and materialmen unpaid. Prior to this he had received from the city a bond of $500 in part payment of work done under the contract. So far as the opinion shows, this was the only bond or warrant issued prior to completion of the work. After the contractor defaulted, the bondsmen completed the improvement in accordance with the contract. On the completion of the contract, bonds and warrants were issued in the name of the contractor for $3,459.10 in payment for the work. The bondsmen brought action to compel all of these bonds and warrants to be turned over and paid to the laborers and materialmen to the exclusion of the contractor's several assignees. The city deposited the bonds and warrants so issued in court to abide its judgment. The court held that, because the assignments and orders were made and accepted by the city prior to the contractor's default, they operated as an equitable assignment of so much of the fund in the city's hands as was necessary to pay them, and that they were not invalidated by the subsequent default of the contractor. The court said:

"It is true that the city, by virtue of a provision of the agreement which we have hereinbefore noted, might have withheld all payments from the contractor until it was satisfied that all just claims for labor and materials had been fully paid; but it does not follow from that fact, as contended by the learned counsel for appellants, that it was obliged to do so, and that, having done otherwise, it should now be held to be a trustee of the laborers and materialmen, and, as such, liable to them directly for the amount of the fund assigned and of the bond delivered to the contractor. If these appellants had had a lien upon this fund, as they had upon the 30 per cent. of the amount of the monthly estimates which was withheld by the city, there would be at least some ground for the claim that the city is their trustee. But, in the absence of such lien, this contention cannot be sustained."

Touching the claim of the bondsmen of a right of subrogation to the fund in court as against the contractor's assignees, this court said:

"The city, as we have seen, claimed no right in or to the fund earned and assigned by Forest [the contractor]; and therefore, so far as that fund is concerned, there is no right to which the appellants could be subrogated. Certainly Forest could not justly claim that his assignments were invalid, and his bondsmen, having assumed and performed his contract, cannot claim anything which he could not."

If the last-mentioned provision of the contract, permitting the city to withhold any and all payments until satisfied that wages, assistance, and materials had been fully paid for, had no force as to assignments made without notice of the contractor's intention to default and accepted by the city without such notice, as held in the Dowling Case, we can see no reason why the same provision should be held to have any force as against the assignments in this case, which were made by the contractors and accepted by the city under exactly the same circumstances.

But appellant here contends that the Dowling Case was either overruled or modified in this particular by our decision in the case of First National Bank v. Seattle, 71 Wash. 122, 127 Pac. 837. In that case it does not appear just when the assignment was made by the contractor, Steenstrup, to the bank; but in the opinion it was intimated that it was not made until after the city had notice of the contractor's default. The money in controversy there, it was admitted, was a balance in the city's hands of the contractor's 70 per cent. fund provided for in the contract. The entire 30 per cent. authorized to be held up by the city had been paid out by the city to laborers and materialmen and was not involved. The bank claimed that its right to this balance of the 70 per cent. under its assignment was free from all claims of laborers and materialmen. The contract contained both of the provisions found in the Dowling Case, namely (1) that 70 per cent. on estimates should be paid to the contractor as the work progressed and 30 per cent. should be held as security for laborers and material-

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lien; and (2) that the city might withhold all payments until satisfied that all claims for laborers, materials, and assistance had been paid in full. The assignment to the bank, however, contained an express stipulation that it should not be valid against any claims for labor, materials, provisions, and goods supplied and furnished in the prosecution of the work. There was no such stipulation in any of the orders or assignments in the Dowling Case or in the assignments in the case now before us. On these facts we held, in First National Bank v. Seattle, supra, that the assignment to the bank was subject to the claims for labor and materials as to this seventy per cent. fund. We did not overrule or modify the Dowling decision, but distinguished it, in that the stipulation in the assignment that it was not valid as against labor and material claims, which was not found in the Dowling assignments, made the assignments subject to such claims. This distinction is obviously sound and sufficient.

The other distinctions attempted in the First National Bank Case we are now satisfied are not sound. It is true that we said that the payments in the Dowling Case were made when due under the contract and without notice of adverse claims. This is not strictly accurate, for in the Dowling Case the actual payments were not made until after the work had been completed by the bondsmen and all funds brought into court, and then only on an order of the court. When we said, in the case of the First National Bank v. Seattle, supra, that in the Dowling Case the 70 per cent. had been paid when due and without notice, we were evidently speaking loosely of the assignments without notice as equivalent to payment, which, under the holding in the Dowling Case, they were as between the contractor and the assignee. Hence they bound the bondsmen. A re-examination of the record in the case of First National Bank v. Seattle, supra, shows that the contract there involved was let in June, 1909. The assignment was made to the bank by Steenstrup, the contractor, on January 4, 1910, and notice of the assignment was filed by the bank with the city comptroller on January 6, 1910. The record and the briefs show that this must have been before any notice of failure on the contractor's part to pay the laborers and materialmen. This was the precise situation, also, in the Dowling Case. It follows that the only just distinction between the First National Bank Case and the Dowling Case must be found in the fact that in the former case the assignment to the bank itself provided that it should be invalid as against claims for labor and material, while in the Dowling Case the assignments contained no such stipulation. In other respects, the facts in the two cases were parallel. The other distinctions made in the First National Bank Case therefore do not seem to be justified by the record. That the Dowling Case is still the law of this state as applied to the same state of facts as there found is manifest from the very recent decision in Maryland Casualty Company v. Washington National Bank, 159 Pac. 689. In that case, as in the Dowling Case, the contract provided for payment to the contractor as the work progressed of a certain percentage of the money earned (in that case 80 per cent. instead of 70 per cent.), and for a retention of the balance (in that case 20 per cent. instead of 30 per cent.) as security for labor and material claims and hence available to the surety who had to pay such claims. At the close of the work, the contractor had received his 80 per cent. in full, and, after notice of claims for labor and materials had been filed with the highway board and the money had been ordered held up by that board, the bank, with the culpable connivance of the county auditor, procured and cashed warrants for the remaining 20 per cent. under assignment to it previously made by the contractor. We held, in substance, that this 20 per cent. was a trust fund for labor and material claimants and was not subject to assignment either as against them or as against a surety who paid such claims, but that the 80 per cent. would have been subject to the assignment had it not already been paid to the contractors. In this connection we said:

"In the Liebes Case, and in First Nat. Bank v. Seattle, 71 Wash. 122, 127 Pac. 837, we announced a trust to creditors *in a contractor's reserved balance.* Here, holding the surety liable for the contractor's debts by a contract supplementing statutory obligations we have a surety's right of subrogation *to that balance* should he be compelled to pay the principal's creditors, and of his right to prevent the dissipation of the fund. In this portion justice must rigorously protect the surety. His expectation when he goes on the bond is plain; *the principal may squander 80 per cent.*, leaving the surety at the mercy of the creditors, but there is at least 20 that will be applied to the creditors in spite of him. *This amount*, originally reserved to protect merely the creditors, is a collateral security of the principal available to the paying surety."

We have italicized the controlling language for emphasis. This is a distinct holding that it is only where there is a clear and express reservation in the contract of a fund to be held up for the benefit of laborers and materialmen that there is any fund the contractor may not effectually assign by an assignment made prior to his default and notice of such default to the board or, as in this case, to the city, and that it is only as to such reserve fund that the labor and material claims have any priority over such assignments, hence only as to such reserve fund that there is any right of subrogation in favor of the bondsmen. It is true that in the Maryland Casualty Company Case we cited Prairie State Bank v. United States, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412; and Henningsen v. United States Fidelity & Guaranty Co., 208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547, in which cases it was held

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that under the United States statutes and decisions the whole contract price for public works is a trust fund for the payment of labor and material claims to which the bondsmen are subrogated as of the date of their bond; but it is manifest from what we have quoted above that we cited these cases only on the question of the surety's right of subrogation to the 20 per cent. reserved, not as adopting the view that the whole of the contract price was a reserve fund under the contract which we were then considering.

[1] In the case before us the bank had taken assignments of all moneys to become due to the contractors as security for the notes on which there remains a balance due of $2,300. These assignments were taken and filed with the city comptroller prior to any notice to any one that the labor and material claims had not been paid or would not be paid. The contract itself contained no provision for an absolute reserve of any percentage as security for labor and material claims. It contained nothing but a provision permitting the city to withhold payment until satisfied that all labor and material claims had been paid. Nothing, however, had been held up by the city at the time the assignments were made. It follows that, under the rule in the Dowling Case, the contractors' assignments to the bank must be treated as a valid appropriation of the fund which was afterwards paid into court to the payment of the bank's notes, including this balance of $2,300, prior and superior to any right of laborers or materialmen, hence superior to any right of subrogation in the surety. As said in the Dowling Case, "these assignments, being valid when made and assented to by the city, were not invalidated by the subsequent default" of the contractor. Any other view would make it impossible for the ordinary contractor to finance a large contract by obtaining credit with a bank on the strength of its performance.

We find no merit in the claim that the bonding company has a superior equity in this fund over that of the bank. It has no equity in the fund as against the bank which paid its money on the strength of assignments of the fund at a time when the contractors had full right to collect and dispose of the fund as they saw fit. Moreover, it is an admitted fact in this case that the money advanced by the bank was actually used by the contractors in the execution of the contract, thus diminishing the bonding company's liability by just the amount advanced. The equities are obviously with the bank.

[2] 2. We now come to the labor and material claims (other than the Olsen, Brooks, and Nyman claims) assigned to the bank. Appellant first contends that, inasmuch as the bank had agreed with the contractor to advance money for the performance of the contract, it had no right to do anything but pay these claims; that therefore these claims must be treated as paid and extinguished so far as the bond is concerned. This position is untenable. The claims were assignable and were assigned to the bank. The contractors are not asserting any breach by the bank of any contract with them. The bank had never undertaken to indemnify the surety company against these or any other claims. It had the same right to purchase and take an assignment of these claims that any one else would have had.

[3] It is next urged that the assignment of these labor and material claims in any event carried no right to assert them against the bond. It is argued that the right of the laborer or materialman is merely a right to receive his pay under the express or implied contract with the contractors, and that this is all the right he has by virtue of his contract; that therefore the assignment of the time checks was only an assignment of a right of action against the contractors. This view is too narrow. It is only by virtue of his right to receive his pay from the contractor that the laborer or materialman has any right assertable against the bond as a contract made for his benefit. His right against the bond is ancillary to and dependent upon his right against the contractors. The first right is dependent upon the second. An assignment of the second, therefore, operates as an equitable assignment of the first. Gilmore v. Westerman, 13 Wash. 390, 43 Pac. 345.

[4] Nor do we find merit in the further claim made under the rule announced in the case of Sturtevant Company v. Fidelity & Deposit Company of Maryland, 159 Pac. 689, that as between the bank and the surety company the moneys which were applied in payment of the first sums advanced to the contractor by the bank should be applied on the labor and material claims now held by the bank, because the surety company is surety for the labor claims, and not surety for the claims upon which the application was made. The fund having been assigned as collateral to the bank's notes before any default of the contractors or notice of their intention to default, the assignment was valid and binding as against the city and the contractors, and, as held in the Dowling Case, valid as against laborers and materialmen, hence valid as against any future claim of the bonding company. The bank's knowledge of whence the money came was therefore immaterial. The question here involved was neither discussed nor decided in the Sturtevant Case.

We are constrained to hold that the respondent bank is entitled to have the moneys in court applied first to the payment of this $2,300 and interest and to have the balance applied in payment pro tanto of its claims for labor and materials, and that it is entitled to judgment against the appellant surety company on its bond for the balance of these claims with interest.

[5] 3. As to the Olsen, Brooks, and Nyman claims a different case is presented. Neither

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of these parties had any claim assertable either against the fund in court or against the bond to the exclusion of the appellant's right of subrogation. Olsen and Brooks were the contractors. Miss Nyman was their bookkeeper and stenographer. None of them had a lienable claim. The assignments of their claims carried no rights except rights of action against the contractors personally.

The cause is remanded for modification of the judgment in accordance with this opinion.

MORRIS, C. J., and MOUNT, CHADWICK, and FULLERTON, JJ., concur.

(93 Wash. 593)

STATE ex rel. PETERSON v. CITY OF SEATTLE. (No. 13240.)

(Supreme Court of Washington. Dec. 9, 1916.)

MUNICIPAL CORPORATIONS ⇐358(3)—CONSTRUCTION CONTRACT — DETERMINATION BY ENGINEER.

Determination by the city engineer of the quantities of work done under a construction contract with the city will be disregarded, though the contract provides that it shall be final; it being so manifestly erroneous as to evidence arbitrary and capricious action.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 890; Dec. Dig. ⇐358(3).]

En Banc. Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by the State, on the relation of Andrew Peterson, against the City of Seattle. Judgment for plaintiff, and defendant appeals. Affirmed.

Jas. E. Bradford and Howard A. Hanson, both of Seattle, for appellant. John W. Roberts and George L. Spirk, both of Seattle, for respondent.

PARKER, J. This action, while in form a mandamus proceeding, is in substance an action to recover a balance claimed by the relator, Peterson, to be due him upon his contract with the city of Seattle for the construction of a local street improvement. Trial in the superior court without a jury resulted in findings and judgment in favor of the relator in the sum of $2,041.93 and mandamus against the officers of the city requiring them in satisfaction of the judgment to issue and deliver to the relator warrants or bonds payable by special assessment against the local improvement district. From this disposition of the case the city has appealed to this court.

By the terms of the contract Peterson was upon completion of the improvement to be paid therefor in local improvement warrants or bonds in a total sum determinable by the quantities of the various items of construction and the unit price therefor agreed upon; for instance, earthwork 28 cents per cubic yard; clearing and grubbing $100 per acre; wood walks $20 per 1,000 feet, board measure, etc. The controversy here is over the quantities of earthwork and three or four other small items for which Peterson claims compensation under the contract, claiming that the city engineer arbitrarily and capriciously refused to allow in his estimate of quantities the full amount of work actually performed in the construction of the improvement. So far as the merits of Peterson's claims are concerned, they present only questions of fact, and counsel for the city contend that the decision of the city engineer on these questions of fact in the making of his estimates became final and conclusive upon Peterson because of the following provision of the contract:

"To prevent all disputes and litigation it is further agreed by the contractor that the city engineer shall in all cases determine the amount of work to be paid for under the contract for this improvement, and his estimates and decisions shall be final and conclusive, subject to the approval of the board of public works."

This contention, of course, would have to be sustained unless it can be said from the evidence that the decision of the city engineer was so manifestly wrong as to call for the conclusion that it was arbitrary and capricious on his part, to the prejudice of Peterson, which evidently is the theory upon which the trial court rendered its decision in favor of Peterson. We have read all the evidence with care as presented in the abstracts prepared by counsel, and conclude therefrom that we cannot see our way clear to disturb the conclusion reached by the trial court, notwithstanding the provision of the contract in terms making the engineer's decision in determining the several quantities of the different classes of work final. The conclusion that the engineer's determination of the quantities was so manifestly erroneous as to evidence arbitrary and capricious action on his part, we think, finds support in the evidence, and that the trial judge did not err in so regarding it. The evidence is very lengthy, and involves many details which we think it unnecessary to review here. That a decision of a supervising architect or engineer, arbitrarily or capriciously made to the prejudice of a contractor, though such architect or engineer be made an arbiter by the terms of the construction contract, will be disregarded by the courts, is well settled. Taft v. Whitney Co., 85 Wash. 389, 148 Pac. 43.

The judgment is affirmed.

MOUNT, MAIN, CHADWICK, HOLCOMB, ELLIS, and FULLERTON, JJ., concur.

(93 Wash. 655)

BALLARD et ux. v. ALASKA THEATER CO. (No. 13424.)

(Supreme Court of Washington. Dec. 12, 1916.)

1. FIXTURES ⇐15—LANDLORD AND TENANT —TRADE FIXTURES.

Trade fixtures of a moving picture theater business annexed to the realty by the tenant

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held removable by the tenant on the termination of his tenancy, notwithstanding that the lease required him to erect a theater on the premises, and clearly contemplated the use of such premises solely for theater purposes.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 23–29; Dec. Dig. ⊂⊃15.]

2. FIXTURES ⊂⊃4—TRADE FIXTURES—INTENT.
In determining whether a chattel which has been annexed to the freehold is a trade fixture or a part of the realty, the intent of the party making the annexation is controlling.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 3, 6; Dec. Dig. ⊂⊃4.]

3. FIXTURES ⊂⊃4—ACTIONS—EVIDENCE.
In determining whether a chattel which has been annexed to the freehold is a trade fixture or a part of the realty, the intent of the person making the annexation is not to be gathered from testimony of his actual state of mind, but is to be inferred, when not determined by express agreement, from the nature of the articles affixed, the relation and situation to the freehold of the party making the annexation, the manner of the annexation, and the purpose for which it is made.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 3, 6; Dec. Dig. ⊂⊃4.]

4. FIXTURES ⊂⊃1—ANNEXATION—REMOVAL.
A chattel annexed to the freehold is a fixture, and as such a part of the realty when it cannot be removed without a material injury thereto, as where it is essential to the support of some part of a permanent structure, but the fact that the removal will result in inconsequential injuries or injuries that can be made whole does not determine that the property annexed is a fixture.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 1, 6; Dec. Dig. ⊂⊃1.]

5. FIXTURES ⊂⊃35(2) — ACTIONS — PLEADING AND EVIDENCE.
When chattels are annexed to realty by a tenant or licensee, the presumption is that he did not intend to enrich the freehold, but intended to reserve title in himself to the chattel annexed; while, where the annexation is made by the owner of the property, the presumption is that the property annexed becomes a part of the freehold.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 73, 74; Dec. Dig. ⊂⊃35(2).]

6. FIXTURES ⊂⊃15—LANDLORD AND TENANT.
Opera chairs, vacuum cleaner, electric fixtures, pipe organ, and other paraphernalia of a moving picture theater installed by tenant *held* to be trade fixtures, and as such removable by the tenant upon the termination of his tenancy, notwithstanding that such removal would require an opening in walls of building where the installation had been made by opening such walls, and the removal would work no material injury to building.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 23–29; Dec. Dig. ⊂⊃15.]

Department 1. Appeal from Superior Court, King County; John Kelleher, Judge pro tem.

Action by W. R. Ballard and wife against the Alaska Theater Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Bogle, Graves, Merritt & Bogle, of Seattle, for appellants. J. W. Albright and Peters & Powell, all of Seattle, for respondent.

FULLERTON, J. The respondent, as the lessee of the appellants, erected a theater building upon a certain lot situated in the city of Seattle of which the appellants are the owners. The building was erected pursuant to the terms of a written lease which provided that the building should be of certain standard construction, should cost not less than $75,000, and should be wholly the property of the owners of the realty. The lease also provided that the premises should be quietly yielded up at the expiration of the lease in a good and tenantable condition in all respects, reasonable wear, damage by fire or unavoidable casualty, excepted. The lease was for a term of 15 years from and after February 1, 1914, with a renewal privilege of 5 years additional. The rent reserved was $2,000 per month.

The respondent completed the building in accordance with its agreement, fitted it up, and operated as a moving picture theater until November 1, 1915, a period of some 22 months, when it found itself unable to continue the business longer. At that time it notified the appellants that it would quit and surrender the premises, and was proceeding to remove from the building certain furnishings which it conceived to be trade fixtures and no part of the freehold when the present action was begun to restrain it from so doing.

Of the articles over which the contest was waged in the court below, the court found to be trade fixtures, and awarded to the respondent, the pipe organ, the opera and opera box chairs, the electric sign and frames, certain of the electric fixtures used for lighting the building, the carpets, curtains, and draperies, the sign frames, the umbrella lockers, the picture screen, the picture machines, the portable switchboard, the vacuum cleaner, the piano, and the draperies, and furniture of the ladies' dressing room.

In the plans for the building a space was allotted for the pipe organ by the architect in charge, and bids were invited for an instrument that could be accommodated in the space allotted. A bid of a manufacturer was accepted, but the instrument itself did not arrive until after the building had been completed and in use for some time. It came in a knocked-down condition, but it was found that to get some of the larger pieces into the space provided certain structural portions of the partition walls of the building had to be removed. There were two such removals, one to admit a portion of the organ proper, and another to admit the organ blower. The parts of the walls removed were replaced after the organ had been put together, and to remove it would again require the removal and replacing of these same parts of the wall.

The opera chairs were not manufactured specially for the building. After the completion of the building the floors of the main seating room and balcony were marked off into aisles necessary to be established and main-

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tained in virtue of the municipal ordinances, and the remaining spaces measured for the placement of the chairs. These spaces were of varying dimensions, and to properly fit chairs in them different width of chairs were required. The chairs were selected with reference to spaces and with reference to the color scheme of the building, and the aisle standards were cast according to a selected design. The municipal ordinances also require that all such chairs be securely fastened to the floor, and these were fastened by inserting expansion bolts into the concrete floor at proper places to fit into holes in the feet of the chairs; the chairs being fitted over the bolts and fastened with nuts in the usual manner. They can be removed by unscrewing the nuts and lifting the chairs from the bolts. New chairs of the same design from the same manufacturer can be fitted onto the bolts, but perhaps not those of any other manufacturer, as the particulars of the designs are not the same. To remove the chairs would leave the bolts protruding above the floors, but the evidence discloses that these can be removed without injury to the floor; the simplest way being to clip them off even with the concrete floor.

The opera box chairs are not fastened in any way to the building. They were selected, however, with reference to the size of the boxes, and were specially selected so as to comport with the general color scheme of the theater. No difficulty would be experienced in replacing them.

The electric sign and frame is on the front of the building, and contains lights so arranged as to spell the words, "The Alaska Theater." It was specially designed for the building, and is supplied with electricity by wires leading from the source of supply through conduits passing through the building. The sign frame can be detached by releasing the wires and removing the screws by which the frame is attached to the building.

The electric light fixtures in question are those used for lighting the inside of the theater building. There are 47 of these in all, 10 of which are curved to fit the columns on which they are placed, and were specially shaped for that purpose. They are not such fixtures as are usually found in stock. The other 37, as we understand the record, are the usual stock fixtures. None of them are built into the frame of the building, and all can be removed without injury thereto, by merely loosening the fastenings by which they are held in place.

The carpets are tacked down to wooden strips embedded in the concrete floor, and were especially cut to fit the curves and sides of the aisles and floors. The draperies are hung on rings which slide on poles, the poles being fastened to the building with sockets and brackets screwed onto plugs inserted in the walls. The stage curtain does not roll up, but parts in the center, and is operated by a motor which sets upon a cushion to which it is made fast with bolts. All are capable of being removed without injury to the building.

The sign frames are brass and copper frames placed in panels on the outside of the building, intended to hold advertising signs. They are held by ordinary fastenings, and are capable of being removed without injury to the building. The umbrella lockers are racks which stand on the floor without fastenings.

The picture screen consists of a canvas stretched on a wooden frame which is hung at the back of the stage on the wall. It is hung on hinges screwed to wooden ledges built into the wall. It is a stock article, and all that is necessary to remove it is to unscrew the hinges from the ledges.

The picture machines are of the Simplex design, and rest upon tripods. The tripods were placed in position before the floor of the picture room was completed, and the feet thereof, together with the electric wires which lead to the machine, are imbedded in the floor. The machines are ordinarily portable, and these could be removed with only such damage to the floor as could be easily repaired.

The portable switchboard is in the orchestra pit, and is movable for a distance of probably six feet, so made as to be available for either the organist or the pianist, and is for use in controlling the lights and the curtain motor. It can be detached by disconnecting the wires.

The vacuum cleaner is a stock machine placed in the basement of the building. A concrete foundation was put in on which was bolted a ten-plate for holding bolts, and the machine was bolted to the ten-plate. Connections were made with the suction pipes leading to the various rooms, and with a discharge pipe leading to a sewer. To remove it requires disconnecting the pipes and releasing it from the ten-plate to which it is bolted. It was not specially designed for the building, although its manufacturer was the only one out of a number of different manufacturers of vacuum cleaners who would install a sewer connection and guarantee its successful operation.

The piano is a standard instrument, and the office furniture and the furniture for the ladies' dressing room, with the other furnishings thereon, are articles in common use, such as are found among dealers therein generally.

The appellants, while admitting that between landlord and tenant, as that relation is ordinarily understood, many of the articles enumerated would be property of the tenant and removable by him at the termination of the tenancy, make the contention that the ordinary rules are not applicable to the situation as here disclosed. It points out that the defendant corporation was organized

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for the sole and only purpose of taking over the lease to the real property, erecting a building thereon, and conducting a theater therein for a fixed period of time; that it was not a case of a theater company doing business first in one building and then in another and removing its trade fixtures from place to place, but was a case of a company organizing for a particular purpose at a particular place, and procuring fixtures in some instances specially and in all instances generally designed for the particular building, which was in itself planned in its inception to receive fixtures of this character and none other. It is further pointed out also that the tenant is insolvent and does not intend to engage in the theater business elsewhere, and that the controversy is in reality a contest between the appellants and the creditors of the tenant. From this it is argued that it was the intention of the parties to complete and equip a theater building suitable for the purpose for which it was intended to be used, and that the claim made now that the articles of furniture placed therein are chattels or trade fixtures subject to be taken by the outgoing tenant is directly antagonistic to this manifest intention.

[1] But we cannot think the tenancy differs in this regard from an ordinary tenancy. The lessee, it will be remembered, contracted to erect on the leased premises a theater building to cost not less than a certain fixed sum of money and to pay another fixed sum as rental for the property for a fixed period of time. There was no agreement that it should be furnished in any particular manner. Indeed, while it was undoubtedly contemplated by the parties to the lease that the building was to be furnished as a moving picture theater, and that such a business would be conducted therein, the terms of the lease would have been complied with by the construction of the building and the payment of the rent, without furnishing it in any manner or putting it to any particular use. Again, many of the enumerated articles are from their very nature fragile and shortlived. It would be strange indeed, if the electric sign, the electric fixtures, the opera chairs, the picture machine, the picture screen, the carpets, or the furnishings for the ladies' dressing room would have been in a usable condition after 15 years of service. Clearly these articles were so far personal property that they could be removed and replaced by the tenant as the necessities of the case or the demands of the business required without the consent, let, or hindrance of the landlord. The clause in the lease requiring the tenant to quietly yield up the premises at the termination of the lease or sooner termination of the tenancy in a "good and tenantable condition" did not contemplate that the building should then be furnished for any particular purpose. This is a customary clause in all leases, and contemplates the return of the land with its appurtenants that pertain to the realty, not the personal property or trade fixtures which the tenant introduces for his own special purpose.

Stress is laid on the fact that this building was constructed for a particular purpose, that it was constructed specially to receive the very fixtures the tenant installed in it, and that these were suitable only for this particular building or type of building. But this is true of many buildings other than those built specially for a moving picture business. For example, the lessee of a dwelling house for a term of years would want the furniture and fixtures he placed therein to correspond with the general contour and color scheme of the building; so the lessee of a building to be used as place for the sale of goods, wares, and merchandise; and the lessee of a building to be used for manufacturing purposes would doubtless be controlled to some extent by the form and style of the building when selecting machinery for his purposes; yet it would not be contended in any of such instances that the fact would be a controlling element in determining whether the furnishings or fixtures become a part of the realty. We cannot conclude, therefore, that the rules governing the determination of the question are different in this case from those ordinarily pertaining to landlord and tenant.

It remains, then, to inquire whether the property in question are fixtures in the sense that they form a part of the realty or are trade fixtures capable of being removed by the tenant, considering the question in the light of the ordinary rules applicable to landlord and tenant.

[2-4] In determining whether a chattel which has been annexed to the freehold is a trade fixture or a part of the realty, the cardinal inquiry is into the intent of party making the annexation. Often there is difficulty in determining the intent, but, whatever may be the legal relation of the parties between whom the controversy is waged, when the intent is discovered it is generally controlling. The intent is not to be gathered from testimony of the actual state of the mind of the party making the annexation (Washington National Bank v. Smith, 15 Wash. 160, 45 Pac. 736); but is to be inferred, when not determined by an express agreement, from the nature of the article affixed, the relation and situation to the freehold of the party making the annexation, the manner of the annexation, and the purpose for which it is made. It is conclusive, of course, that the chattel annexed is a fixture when it cannot be removed without a material injury to the freehold, as, for example, where it is essential to the support of some part of a permanent structure. Lawton Pressed Brick & T. Co. v. Ross-Kellar T. P. B. M. Co., 33 Okl. 59, 124 Pac. 43, 49 L. R. A. (N.

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S.) 395. But before this rule will be allowed to govern it must be shown that the removal will result in a material injury, injuries that are inconsequential, or injuries that can be made whole do not affect the principle.

[5] Again, a different rule obtains for determining the intent when the question arises between landlord and tenant or licensor and licensee than obtains when it arises between grantor and grantee, mortgagor and mortgagee, or heir and executor. When the annexation is made by a tenant or licensee, the presumption is that he did not intend to enrich the freehold, but intended to reserve title to the chattel annexed in himself, while from an annexation by the owner of the property the presumption is the other way. Chase v. Tacoma Box Co., 11 Wash. 377, 39 Pac. 639; Dunsmuir v. Port Angeles, etc., Power Co., 30 Wash. 586, 71 Pac. 9; Lynn v. Waldron, 38 Wash. 82, 80 Pac. 292; Welsh v. McDonald, 64 Wash. 108, 116 Pac. 589; Cutler v. Keller, 88 Wash. 334, 153 Pac. 15.

It therefore often happens that the same character of article annexed to the realty in the same way will be held to be a trade fixture and removable when annexed by a tenant, but real property and not removable when annexed by the owner of the property. A good illustration is found among our own cases. In Welsh v. McDonald, supra, the controversy was between landlord and tenant. It was held that mill buildings, camp buildings, barns, and outhouses erected by a tenant on leased land for the purpose of conducting a sawmill business were removable at the will of the tenant at any time before the expiration of the lease. In the course of the opinion the court said:

"The testimony shows that all these buildings were erected exclusively for the benefit of the milling business which was carried on by the lessors. Many of the small houses were built by the laborers employed by the mill owners, and the laborers were charged by the mill owners for the lumber which was used in the construction of said small houses.

" 'That articles which are annexed by the tenant for purposes of trade, known as "trade fixtures," are removable by him as against the landlord, has been recognized from an early period in the development of the law of fixtures; the theory being that it is public utility that the tenant should be enabled to improve the property for the purpose of carrying on trade, without thereby forfeiting his improvements.' 1 Tiffany, Modern Law of Real Property, § 240.

" 'The strict rule of the early common law under which chattels which had been physically annexed to the freehold became the absolute property of the landlord has been gradually and greatly relaxed in favor of tenants. The first exception to this rule was made in the case of trade fixtures so called such as were placed upon the premises by the tenant during the term for the purpose of carrying on trade, commerce, or manufacture. It is now a general rule that whatsoever is affixed as a trade fixture to the land or to any building which is on the land during the term, whether made of wood, stone, iron, or other material, is removable by the tenant at the end of the term. And it is difficult to conceive of any so-called fixture, however solid, permanent, and closely attached to the realty, which is placed there for the sole purpose of trade, which may not be removed by the tenant at the end of his term.' 2 Underhill, Landlord & Tenant, § 736.

"Under this modern rule it has been uniformly held that a building erected upon leased land for the purpose of carrying on the business of the lessee was removable at the will of the lessee, provided it was removed during the term of the lease."

In the case of Cutler v. Keller the controversy was between lien claimants on the one side and mortgagees on the other. The owner had erected a building on the property to which the several liens attached, intending to use the building as a moving picture studio. The building was set upon posts, and was capable of being removed without injury to the freehold. It was held that the building was a part of the realty, the court saying:

"As a general rule, structures of a permanent character erected on land by the owner in fee simple are presumed to be built for the purpose of improving the land and to become a part of the realty, in the absence of evidence of a contemporaneous contrary intention. * * *

"When buildings are placed by the absolute owner of land on which they rest, their quality of removability without injury to the freehold is not usually a factor of controlling importance as between mortgagor and mortgagee (Rowland v. Sworts, 17 N. Y. Supp. 399[1]), though it may be as between landlord and tenant or licensor and licensee.

" 'Fully as much importance is attached to the relation of the party making the annexation to the land and the permanency and habitual character of the annexation as is paid to the manner or form of the fastening. When the absolute owner of land, for the better use of his land, erects property upon, or attaches it to the freehold, it will go to his heir, or pass by deed to his grantee, and the same general rule applies between mortgagor and mortgagee, but as between landlord and tenant and licensor and licensee this rule is relaxed, with a view to the encouragement of mechanical and agricultural pursuits.' Tiedeman, Real Property (3d Ed.) p. 23, § 17."

In the light of these principles we are clear that the trial court did not err in its judgment. Much of the property would be regarded as personalty no matter by whom installed, since it is in no way attached in such a manner as to hold it in place while in use, but which must be constantly removed for renovation or repair. In this jurisdiction the opera chairs certainly, and the vacuum cleaner probably would under our earlier decisions be regarded as realty, and would pass by a deed from the owner to his grantee, but, since they were purchased and put in place by the tenant, most of them under conditional sales contracts, we cannot conclude, under the presumption that prevails in such cases, that they became a part of the realty. All can be removed without material injury to the structure or to themselves.

[6] The pipe organ is not in any way a part of the building. It was manufactured and installed, as we have said, after the

[1] Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 63 Hun, 625.

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building was completed. The right to remove it is denied because to do so requires tearing away certain parts of the partition walls. But all of the evidence is to the effect that these parts were taken out on the installation of the organ and subsequently repaired, and that the organ can be removed by reopening the walls at the same places. The fact that they were once opened and replaced would not, perhaps, justify a second opening if the building should be materially injured by the act. But the evidence discloses that no material injury of the building will ensue from such an opening, and the fact that it was once made without objection by the owners of the fee is forceful evidence of the immateriality of the injury. The removal of the other articles which are attached to the building will not as is shown from our review of their nature and the manner in which they are attached, work material injury to the building. Their removal will require some repairing to make the building again a completed whole. The trial court met this by requiring that the tenant give a bond in the penal sum of $1,000, conditioned that it will repair and make good any and all damage which shall be caused the building by the removal of the property. It is not questioned that this sum is sufficient to meet the incidental damage the removal of the property will cause.

The judgment is affirmed.

MORRIS, C. J., and MOUNT, CHADWICK, and ELLIS, JJ., concur.

(93 Wash. 603)

ELSOM v. GADD. (No. 13256.)*

(Supreme Court of Washington. Dec. 12, 1916.)

EXEMPTIONS ⇐50(1)—LIFE INSURANCE—RIGHT TO PROCEEDS.

Proceeds of a life insurance policy payable to the estate of the insured are not exempt from the payment of debts of the estate.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 75; Dec. Dig. ⇐50(1).]

Fullerton, J., dissenting.

Department 1. Appeal from Superior Court, King County; John S. Jurey, Judge.

Action by Rosa Elsom against Ella Gadd. Judgment for plaintiff, and defendant appeals. Affirmed.

Tucker & Hyland, of Seattle, for appellant. Charles H. Miller, of Seattle, for respondent.

CHADWICK, J. This appeal raises the question whether a life insurance policy payable to the estate of a deceased person is exempt from the payment of the debts of the estate. At the time the case was decided in the court below, the case of German-American State Bank of Ritzville et al. v. Godman, 83 Wash. 231, 145 Pac. 221, was the final expression of this court. The trial judge, however, found that the statute under which appellant claims (Rem. & Bal. Code, § 569) was an exemption statute, and could not be invoked in aid of one who did not come within the usual definitions of exempt persons, following the principles set forth in 18 Cyc. 1374, 1397, 1436.

An appeal was taken. Pending a hearing, we announced our decision in the case of Blattner v. Abel, 89 Wash. 412, 154 Pac. 796. A rehearing was granted in the latter case. The final decision of the court, sitting en banc, was rested upon the doctrine of preferred claim, a majority of the judges saying:

"This view of the record renders is unnecessary to consider the question determined in our former opinion, and we leave it open for future consideration." S. C. 158 Pac. 1015.

While the opinion of the court might be rested upon the grounds indicated by the trial judge we shall not—because of the importance of the main issue, and the fact that it must inevitably recur unless finally determined—inquire into the soundness of the holding that the statute is not available to one who is not named as a privileged person in the general exemption laws.

We have had the benefit of two able oral arguments in the Blattner Case, with exhaustive briefs, and a more exhaustive petition for a rehearing. We have also had the benefit of able argument and briefs in this case, and conclude that the decision in the Blattner Case, 89 Wash. 412, 154 Pac. 796, is the true interpretation of the law, and controls the case at bar.

It was explained in the Blattner Case that the issue now determined was not called directly to the attention of the court in the case of Northwestern, etc., Co. v. Chehalis County Bank, 65 Wash. 374, 118 Pac. 326, and in the case of German-American State Bank v. Godman, supra, but counsel insist that the issue was in fact involved, and that under those decisions, money payable to an estate is exempt from all debts of the estate. Granting, but without holding, this to be so, a majority of the judges are now content to subscribe to the first opinion in the Blattner Case and, that no confusion may follow, it will be understood that the cases last referred to, in so far as they affect the main issue, are now overruled.

Affirmed.

MORRIS, C. J., and MOUNT and ELLIS, JJ., concur.

FULLERTON, J. (dissenting). An examination of the opinion in the case of In re Blattner's Estate, 89 Wash. 412, 154 Pac. 796, will show that the decision was rested entirely on a particular clause of section 36 of the act of March 17, 1909 (Laws 1909, p. 538). Our attention was not then directed to the

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For opinion on rehearing, see 162 Pac. 867.

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later act on the subject of life insurance, found in the Session Laws of 1911 at page 161. In the argument on the rehearing of the cause, however, this statute was brought to our attention, and it was strenuously contended that it repealed the statute of 1909, leaving the general statute (Rem. & Bal. Code, § 569), which exempts the proceeds or avails of all life and accident insurance from all liability for any debt, in full force with respect to life insurance payable to the estate of a decedent. This question is not noticed in the majority opinion, although it seems to me to be worthy of consideration.

The act of 1911 purports to be a complete Insurance Code. It is entitled:

"An act to provide an Insurance Code for the state of Washington, to regulate the organization and government of insurance companies and insurance business, to provide penalties for the violation of the provisions of this act, to provide for an insurance commissioner and define his duties, and to repeal all existing laws in relation thereto."

The last section of the act contains a repealing clause. It reads:

"This act may be referred to and shall be known as 'the Insurance Code,' and shall supersede all prior acts on the subject of the organization and government of insurance companies and insurance business, and all such prior acts are hereby repealed."

The language of this section, it is true, is somewhat restrictive, but I think it broad enough in its terms to include the particular clause on which the case of In re Blattner's Estate was rested. It expressly repeals all prior acts on the subject of insurance business, and this particular clause to my mind clearly relates to insurance business. If it does not it has no standing under any circumstances or on any theory, since it was enacted under the title, "An act to regulate the business of life insurance, * * *" a title too restrictive to permit the enactment of any provision not relating to such business.

But if it be said that this particular section does not relate to insurance business, was properly enacted, and that the repealing clause in the later act is so far restrictive as to refer to nothing that would not have been superseded by the act itself had it contained no repealing clause, I think the same result must follow. The new law covers the whole subject-matter of the old one and, if any part of the latter remains, it is only the particular provision now under consideration. In the early case of Mansfield v. First National Bank, 5 Wash. 665, 32 Pac. 789, 999, we held that, where a new law covers the whole subject-matter of an old one, the earlier law is repealed by the later one notwithstanding there may be some matters in the earlier law which are not necessarily obnoxious to any provision of the new one. The rule rests not strictly on the ground of repeal by implication, but upon the principle that where the Legislature makes a recision of a particular statute and frames a new statute on the subject-matter, it is a legislative declaration that whatever is embraced in the new law shall constitute the existing law, and that whatever is excluded therefrom is discarded. The principle of the case cited has been followed in numerous other cases decided by us, the latest of which is perhaps the case of Whitfield v. Davies, 78 Wash. 256, 138 Pac. 883.

The principle is controlling here. I am convinced, therefore, that the cases of Northwestern, etc., Co. v. Chehalis County Bank, 65 Wash. 374, 118 Pac. 326, and German-American State Bank v. Godman, 83 Wash. 231, 145 Pac. 221, were correctly decided, and that we were in error in the case of In re Blattner's Estate, and that the majority are in error in the opinion in the case before us.

(93 Wash. 648)

CRADDICK v. EMERY et al. (No. 13418.)

(Supreme Court of Washington. Dec. 12, 1916.)

1. PATENTS ⟸196—SALE OF INVENTION—CONSIDERATION—FAILURE.

Where a note was given for an interest in a device represented by the payee to be patentable and a practical invention, and the device was valueless and unpatentable, the note was without consideration.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 275, 280; Dec. Dig. ⟸196.]

2. PATENTS ⟸196 — SALE OF INVENTION — CONSIDERATION—ESTOPPEL TO QUESTION.

One who was not a mechanic, who gave his notes for a device represented by the payee to be valuable and patentable, when in fact it was neither, was not estopped to assert failure of consideration on the ground that he relied on his own opinion, and not on the representations, though advised by casual observers that the device was valueless.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 275, 280; Dec. Dig. ⟸196.]

Department 1. Appeal from Superior Court, King County; John S. Jurey, Judge.

Action by W. F. Craddick against H. A. Emery and C. E. Lawson and Adelbert Fournier, wherein Emery answered and filed a cross-complaint against Fournier, and Fournier answered and filed a cross-complaint against Emery and Lawson. From a judgment that plaintiff take nothing, and that defendant Fournier take nothing on his cross-complaint, Fournier alone appeals. Affirmed.

Walter B. Allen, of Seattle, for appellant. C. H. Winders, of Seattle, for respondents.

FULLERTON, J. W. F. Craddick, claiming as indorsee of a promissory note, instituted this action to recover thereon. In his complaint he set forth a note for $1,000, purported to have been executed by H. A. Emery and C. E. Lawson to Adelbert Fournier, and by Fournier indorsed in blank and delivered to him. Judgment was demanded against the indorsee as well as the purported makers. To the complaint Fournier answered, setting up want of notice of nonpay-

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ment at the time of the maturity of the note. Emery filed an answer in which he admitted the execution of the note, and by way of an affirmative defense set up that the note was one of three of equal amounts given to Fournier for an undivided half interest in a mechanical contrivance for power transmission, which the payee of the note falsely and fraudulently represented to be of value and capable of being patented, further alleging that the contrivance afterward proved to be of no value and nonpatentable, and that the notes were thus without consideration, further alleging also that Craddick was not a purchaser for value of the note sued upon, but took the same with notice of its want of consideration. He set forth also certain payments made to Fournier on account of the dealings between them in making a working model of the mechanical contrivance aggregating $1,967.70, for which sum he demanded judgment against Fournier.

Lawson answered, denying all of the material allegations of the complaint, and set up two affirmative defenses. In the first of these he alleged that he was an indorser of the note for Emery, and that notice of nonpayment of the note at maturity was not given him. In the second affirmative defense he set up want of consideration for the note, substantially in the language of the affirmative defense interposed by Emery. Whether Craddick replied to the affirmative matter in the answers of Emery and Lawson is not disclosed by the transcript. Fournier replied, putting in issue the affirmative matter in both answers. He also filed a cross-complaint against both Emery and Lawson. Against Emery he alleged that he had evolved a device for a power transmission and clutch for an automobile, that he showed this to Emery, who became interested therein, and that in consideration of the assignment of a half interest to Emery they then entered into a contract whereby Emery agreed to employ him at $15 per week during such time as it would take him to make a working model of the device, pay all costs for patenting the same, manufacture the same for the market, and divide the profits derived from the sale of the manufactured product with him, further alleging that he completed the working model, whereupon Emery broke the contract, and that thereupon he demanded a cancellation of the same and a redelivery of Emery's interest to him, that Emery refused his demand, and that the same was worth $3,000, and for this sum he demanded judgment against Emery. Against Lawson he set up a breach of a contract to procure him bankable notes for an interest in his invention, whereby he was damaged in the sum of $1,000. The cross-complaint against Emery was put in issue by a reply, and a demurrer was interposed and sustained to the cross-complaint against Lawson, and no amendment of the pleading was sought or allowed.

At the trial the evidence was mainly directed to the issues as framed between Craddick and the defendants Emery and Lawson, but little, if any, evidence being on the issues between Emery and Fournier. The court held the note in suit to have been given without consideration, that Craddick took the same with notice, and entered a judgment to the effect that he take nothing by his action. The court also denied recovery to Fournier on his cross-complaint against Emery, adjudging that his cause of action be dismissed. Fournier alone appeals.

The assignments of error are all directed against the findings of the court in so far as they affect the controversy between Craddick and the respondents Emery and Lawson; the contention being that the findings are against the preponderance of the evidence. Since Fournier in his pleadings claimed no interest in a recovery by Craddick, but, on the contrary, treated his indorsement of the note as passing his title and interest therein to Craddick, it is difficult to see what appealable interest he has in the controversy between them. But, conceding that he has such an interest, and that his pleadings are capable of amendment in that respect, we find no error in the findings of the court on the evidence. Without reviewing the evidence in detail, and setting forth only its salient features, it tended to show that Fournier had conceived a transmission device and clutch for use on automobiles. This he showed to Emery, who owned and conducted a machine shop, representing to him that he had had the patent office searched, and that the device was patentable and would infringe upon no other patent, except, perhaps, a clutch which he (Fournier) had theretofore patented. Emery was impressed with the device, and the parties entered into a contract by the terms of which Emery, in consideration of a half interest in the device, agreed to furnish the necessary materials, give him the use of his machine shop and tools for the purpose of making a working model, and pay him $15 per week during such time as would be required for that purpose, further agreeing to pay the expense of procuring a patent for the device. After the model had been completed, but before it had been tested out, and before it was found not to be patentable, Fournier attempted to sell his remaining half interest to Lawson. Emery, hearing of this, and still believing in the feasibility of the device, claimed a preference right in himself to purchase the interest. An agreement was thereupon entered into between them by which Emery agreed to buy Fournier's interest for a consideration of $3,000. The sale was consummated by an assignment of the half interest and the delivery by Emery to Fournier of notes of the face value of $3,000. These proved not to be bankable; whereupon they were returned to Emery, who gave new notes in lieu thereof indorsed by Lawson, one of such notes being the note in suit. The device thereafter

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proved not to be very efficient or of any value from a commercial standpoint, and not to be patentable; the device infringing upon the patents of others. The evidence also disclosed that while the device was in the process of construction it was examined by a number of persons purporting to have mechanical knowledge, and by many of them pronounced impracticable and of no value, and that Emery was informed of the fact, but nevertheless afterwards consummated the purchase.

The evidence makes it clear that Emery received nothing of value for his notes. Not only did the device itself prove inefficient, but, what is more to the point, the device proved an infringement upon other patents, thus rendering it commercially valueless even had it been what its inventor claimed for it and what Emery was led to believe it to be.

In Arnold v. Wilt, 86 Ind. 367, notes were given for certificates in a marriage benefit association, which ceased to do business within a few days after the notes were given, rendering the certificates wholly worthless. In an action upon the notes the maker set up want of consideration. The court said:

"This evidence fully establishes the defence of want of consideration, because it proves that the thing given the appellee for his note was utterly worthless. The case is not that of one receiving some consideration and judging for himself of its adequacy, but that of one receiving a thing utterly destitute of value. In short, there is a total absence of consideration."

In Smith v. Hightower, 76 Ga. 629, the action was upon a promissory note. The defendant set up that the note was given in consideration of the exclusive right to sell two patents, one for "patent grazers," and the other for "patent buggy attachments," in two named counties within the state of Georgia, and that the devices were utterly worthless and unsuitable for the purposes for which they were made. The jury found for the defendant, the court denied a new trial, and the plaintiff appealed. The court on the appeal held:

"There was no error in overruling a demurrer to the plea. It rested on the ground that defendant did have the right to sell in those counties, and therefore the consideration did not fail; but it is hard to understand of what value is the exclusive right to sell a worthless thing, totally unfitted for the use for which it was manufactured; and, if valueless, we do not see where the consideration to sell it can be found. Its adaptation to the use for which the machine is made is always warranted."

In Comings v. Leedy, 114 Mo. 454, 21 S. W. 804, the facts and the conclusion of the court were stated in the following language:

"The original note was given for the sole right to make, use, and vend in the state of Colorado a patent right improvement in what is called a 'sad iron,' of which Smallstig, one of the payees, claimed to be the patentee. The consideration expressed in the bill of sale is $5,500. The sale was made after several visits by Smallstig and wife, and Smallstig and Onstott, and various and divers statements and misrepresentations as to the usefulness and salableness of the iron; that one pint of alcohol only would be required to run it per day, when in fact Mrs. Leedy testified that it would take $2, $3, or $4 worth per day; that she never could get it hot enough to do good work, and that it was the greatest fraud ever invented; that before they purchased the right she asked Smallstig to leave one of the irons with her for a few days so that she could try it before trading, but that he declined to do so, giving, as a reason that he did not have a spare one. The original note being void because of the inability of the payor, Mrs. Leedy, to make a contract of this kind on account of her coverture, it was void in the hands of plaintiff as indorsee even without notice of the fact that it was obtained by fraud, and was without consideration; and, although the last note was given in renewal of the first, there was no consideration therefor, and it was subject to the same defenses as was the original note. And, not only this, but the evidence shows conclusively that it too was obtained by fraud and deceit on the part of Milner, who was plaintiff's agent. The only consideration for either of the notes was the right to the state of Colorado in the patented iron, which the evidence shows is worthless and unsuited to the purpose for which it was made. The adaptation of a machine to the uses for which it is made is always warranted. Smith v. Hightower, 76 Ga. 630; Daniel on Negotiable Instruments, § 203, p. 226. So generally, if the thing purchased was entirely worthless when purchased, there is a total failure of consideration. Arnold v. Wilt, 86 Ind. 367; Brown v. Weldon, 27 Mo. App. 251. There is a total absence of consideration for either of the notes."

So Daniel on Negotiable Instruments, at section 203, states the rule as follows:

"Where the patented machine is worthless and unsuited to the purpose for which it was made, the consideration of a note given for the right to sell it totally fails. The adaptation of a machine to the uses for which it was made is always warranted."

[1] These principles apply to the facts before us. The note having been given for a valueless unpatentable device, represented to be valuable and patentable, there was no consideration for it.

[2] The appellant, however, seeks to invoke a rule of estoppel, contending that the purchaser, when making the purchase, relied upon his own investigations and inquiries, not upon the representations of the seller or upon the implied warranties arising from the character of the device sold. But if this principle would permit of a recovery under the facts assumed, the evidence does not justify the conclusion drawn. While the evidence shows that the purchaser was convinced of the feasibility of the device, so much so, indeed, that he expended some $2,000 in trying to perfect and patent it, it also shows that he was not a mechanician, and relied upon the seller's statements and representations rather than upon the opinions of those who examined it only casually and expressed belief in its impracticability.

The judgment is affirmed.

MORRIS, C. J., and MOUNT, ELLIS, and CHADWICK, JJ., concur.

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(96 Wash. 585)

BOGITCH v. POTLATCH LUMBER CO.

(No. 13117.)

(Supreme Court of Washington. Dec. 8, 1916.)

1. MASTER AND SERVANT ⟸86 — INJURY — WHAT LAW GOVERNS.

Injury to a servant having occurred in another state, its law being pleaded, when ascertained, controls as to liability.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 137; Dec. Dig. ⟸86.]

2. STIPULATIONS ⟸14(7)—CONSTRUCTION—INSTRUCTIONS.

Stipulation that without any testimony the court may consider the laws of another state in evidence, and may instruct as it conceives the law to be under the decisions of the court of that state, is not one to be bound by its conclusion as expressed in the instructions.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 31; Dec. Dig. ⟸14(7).]

3. COURTS ⟸95(2) — FOREIGN DECISIONS — CONCLUSIVENESS.

Construction by the court of another state of its decision is to be followed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 432; Dec. Dig. ⟸95(2).]

Supplementary Opinion.

4. APPEAL AND ERROR ⟸842(1) — REVIEW — QUESTION OF LAW—FOREIGN LAW.

What is the law of another state as proved by decision of its court is a question of law, so that determination thereof may be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316–3318, 3323; Dec. Dig. ⟸842(1).]

Department 1. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Petition by Michael Bogitch against the Potlatch Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions.

Cannon & Ferris, of Spokane, for appellant. Corkery & Corkery and Robertson & Miller, all of Spokane, for respondent.

CHADWICK, J. This is an action to recover for injuries which respondent alleges he sustained while in the employ of the Potlatch Lumber Company in the state of Idaho, in November, 1914. Appellant, at that time, was cutting and hauling timber to a point of loading by means of a donkey engine and cable. The evidence is somewhat conflicting, but the methods of operation would seem to have been about as follows: The sawyer gang would fell the tree; swampers would trim the branches; the slinger rigger would attach the cable to the tree; the hooktender, who was in charge of all the operations, would call out a warning to the swampers and all the others, and then signal a man called the whistlepunk who was stationed some 300 feet away; the whistlepunk would pull a wire, which extended to the donkey engine, and which would signal the engineer to go ahead or stop, etc. The donkey engine was located about 1,000 feet from where the timber was being secured. Respondent alleges that he was working as a swamper, and was trimming a tree when, without warning, the tree was put in motion by means of the cable; that he was thrown under the tree and sustained injury. Respondent recovered in the court below.

A number of assignments of error going to the sufficiency of the evidence and to the instructions of the court have been made by appellant. The proximate cause of the injury, as found by the jury, was the failure of the hooktender to warn respondent that he was about to give the "go ahead" signal to the whistlepunk. Appellant pleaded:

"That if plaintiff was in any manner injured at the time and place set forth in plaintiff's complaint, the said injuries occurred in the state of Idaho, and that under the common law of the state of Idaho, as construed by the courts of said state, plaintiff's injury, if caused by and through the negligence of any one other than himself, was caused and brought about by and through fellow servants of the plaintiff, and that under the common law of the state of Idaho, as construed by its courts, the defendant is in no way responsible for the negligence, if any, of said fellow servants, and that the negligence of said fellow servants of the plaintiff is under the decisions of the courts of the state of Idaho, construing the common law, one of the risks which the plaintiff assumes, and which plaintiff did assume as a matter of law."

[1] The accident occurred in the state of Idaho, and the law of that state, being pleaded, is, when ascertained, controlling. At the time the case was tried, the case of Lucey v. Stack-Gibbs Lumber Co., 23 Idaho, 628, 131 Pac. 897, 46 L. R. A. (N. S.) 86, was the last expression of the Supreme Court of that state. That case seemed to hold to the rule that obtains in this state, that is, that the duty of the master who is engaged in hazardous work, where the safety of the workmen depends upon a system or code of warning signals to warn the workmen, is a nondelegable duty, and that the foreman or the one upon the duty of giving the signal or warning is put is a vice principal and not a fellow servant. This rule is peculiar to the state of Washington. The great majority of the states, if not all of them, as well as the Supreme Court of the United States, has held in such cases that the master has performed his full duty when he has adopted a sufficient system or code of signals, and put it into the hands of competent men for execution. Labatt's Master & Servant, vol. 4 (2d Ed.) § 1537. We find that the Supreme Court of the state of Idaho has recently rejected the doctrine of the case mentioned, and has put itself in line with the great weight of American authority, although, as we have said, it is contrary to the rule that obtains in this state. That court held, in Wiesner v. Bonners Ferry Lumber Co., 160 Pac. 647, that that part of the opinion in the Lucey Case upon which respondent relied, and which, no doubt, moved the court

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below to sustain the judgment that was entered, was obiter.

"And so far as it may be considered as supporting the doctrine that 'authority to a servant to give a signal [to a coservant] is nondelegable,' it is expressly overruled."

"* * * The theory of respondent is that, by reason of the fact that the warning was not given upon the occasion of the accident, the appellant is liable in damages, irrespective of the fact that it exercised ordinary care, having regard to the hazard of the service, in providing a reasonably safe place and reasonably safe appliance for the performance of the work, in the selection of a competent servant to perform the duty of giving the warning, and had adopted a proper system of rules and regulations, with positive instructions that every precaution be taken in order to avoid accident; in short, if the servant failed to give the warning, the appellant company, under no circumstances, could escape liability. This, we think, is carrying the rule a step too far, the enforcement of such a principle, in view of the rapid development of this state and the great number of men employed, would be detrimental to the employé as well as the employer. There must be some reasonable limitation placed upon both the employer and the employé, in the matter of fixing the liability of the former for negligence and the assumption of risk by the latter."

The court then proceeds to cite and elaborate upon many decisions, concluding, as follows:

"By the great weight of authority, the master may intrust to a competent servant the work of giving signals where it is necessary for the safety of the workmen in the operation of the work, and it is not the master's fault if such competent servant fails to give the proper signal. Nor is respondent's contention that the master is an insurer of the sufficiency of the means which he selects for giving signals supported by the preponderance of authority."

[2] Counsel for respondent contend that we cannot consider the more recent decision of the Idaho court because the law of Idaho was a fact to be proven, and counsel has waived his right to assert that the law is otherwise than as declared by the trial judge, having stipulated that the court might make up his own instruction as to the law of Idaho without formal proof. We have re-read that part of the record which is relied on by counsel as a stipulation. We think counsel went no further than to stipulate that the court could instruct as it conceived the law to be under the decisions of the Supreme Court of Idaho, counsel contending meanwhile that the fellow-servant rule in Idaho was not the same as in this state.

The agreement was that both sides should waive "any testimony, and agreeing that the court may consider the laws of Idaho in evidence." The laws of Idaho, that is, the statutes and decisions, are to be proven as facts. The legal conclusion or the construction of the written or declared law becomes the law of the case. It follows then, if the law of a foreign state is to be ascertained by a reference to its statutes, and the practice and adjudged cases, the decisions of its courts are no more than evidence of the law. If a trial judge draws a wrong legal conclusion from the written evidences of the law, this court may, upon proper exceptions, correct the error, as it would any other error of law. In doing so, it is in duty bound to follow the courts of the foreign state. There is nothing to indicate that counsel stipulated to be bound by the conclusion of the trial judge as expressed in his instructions. On the contrary, counsel excepted to all of the instructions, charging the hooktender as a vice principal, arguing then, as we must presume, and in their brief on appeal, that the hooktender was a fellow servant under the authority of Knauf v. Dover Lumber Co., 20 Idaho, 773, 120 Pac. 157.

[3] The courts of Idaho have an undoubted right to construe their own decisions, and, having said, in the Wiesner Case, that the Lucey Case did not hold to the rule relied on, or, if seemingly so, that it was obiter, we have no recourse other than to follow the rule as it is, and as the Supreme Court of Idaho says it was, at the time this case was tried.

Counsel maintain that this case is to be distinguished upon the facts. We find no ground of distinction. The place where respondent was working was not unsafe if the warning had been given. Under the law of Idaho, the fault or omission was that of a fellow servant.

There being no issue raised as to the sufficiency of the signal system, or the competency of the hooktender to give the signals, or the ability of the respondent to understand a warning if given, and this case being controlled by the law of the state of Idaho as expounded by its court of last resort, the judgment will be reversed, and the case remanded, with instructions to dismiss.

In justice to the trial judge, it is only fair to say that if this case were to be decided under our own decisions, or under the law of Idaho, as we would have read the Lucey Case, we would hold the case for affirmance upon this question of law. We have not inquired into the other assignments of error.

MORRIS, C. J., and ELLIS and MOUNT, JJ., concur.

Supplementary Opinion.

PER CURIAM. This case was heard at the January, 1916, term. As stated in the opinion, the trial judge rested his opinion as to the law of Idaho upon the case of Lucey v. Stack-Gibbs Lumber Co., 23 Idaho, 628, 131 Pac. 897, 46 L. R. A. (N. S.) 86. We noted a later decision of the Supreme Court of Idaho, Wiesner v. Bonners Ferry Lumber Company, since reported in 160 Pac. 647, in which it was held, in the opinion of the judges of the Supreme Court of Idaho, that such construction was not well founded, and that in so far as the Lucey Case might be considered as supporting the doctrine that authority to a servant to give a signal is nondelegable, it was expressly overruled.

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Subsequent to the writing of the foregoing opinion, and about the time it would otherwise have been filed, counsel for respondent called our attention to the fact that a rehearing had been granted in the Wiesner Case. Accordingly we withheld the filing of our opinion pending a ruling upon the petition for rehearing. The Supreme Court of Idaho upon such rehearing has adhered to its original holding in the Wiesner Case.

[4] Counsel for respondent has filed a supplemental brief, again urging that respondent had pleaded the law of Idaho as a fact, and that, by stipulation, the trial judge had given it to the jury as a matter of fact and not of law, and that the ruling of the trial judge thus became a fact conclusive even though he did err, or even though the Supreme Court of Idaho did subsequently change its decision. Counsel cite the case of Spies v. National City Bank, 174 N. Y. 222, 66 N. E. 736, 61 L. R. A. 193, and Genet v. Del. & Hud. Canal Co., 163 N. Y. 173, 57 N. E. 297. But these cases merely hold, quoting from the Spies Case:

"What may be the foreign law upon a given subject presents a question of fact, not a question of law, * * * and must be both proved and found like any other question of fact."

While there is some conflict as to this being the true rule, for the purpose of this case it may be admitted to have the sanction of the greater number of courts, but there is a well-recognized exception, upon which practically all courts that have considered it seem to agree. This exception is well stated in 10 R. C. L. pp. 1112, 1113, as follows:

"There is some controversy whether the proof of foreign laws should be addressed to the court or the jury. It involves, however, no serious conflict, and depends entirely upon the form in which the foreign law is presented. Although what the foreign law is, is usually denominated a question of fact, yet, when it merely involves the construction of a written statute, or the interpretation of judicial opinions, it becomes a question of law."

Bank of China, etc., v. Morse, 168 N. Y. 458, 61 N. E. 774, 56 L. R. A. 139, 85 Am. St. Rep. 676, and Hancock National Bank v. Ellis, 172 Mass. 39, 51 N. E. 207, 42 L. R. A. 396, 70 Am. St. Rep. 232, also recognize this exception. See, also, Ely v. James, 123 Mass. 36; Kline v. Baker, 99 Mass. 253; Thomson-Houston Elec. Co. v. Palmer, 52 Minn. 174, 53 N. W. 1137, 38 Am. St. Rep. 536, and Lockwood v. Crawford, 18 Conn. 360.

In Hite v. Keene, 149 Wis. 207, 134 N. W. 383, 135 N. W. 354, Ann. Cas. 1913D, 251, it was held that on appeal the court will not accept the testimony of what the law of a sister state is, where it is contrary to its own conclusions from statutes in evidence and reported cases. But, regardless of what may be the rule in other jurisdictions, this court, in Ongaro v. Twohy, 57 Wash. 668, 107 Pac. 834, has held that where the law of a sister state is involved and is based upon the decisions of that state, the question of what the law is, is for the court, and not the jury. It was there said:

"The appellant further argues that the court erred in determining for itself, from the proofs offered in evidence, what the law of Idaho was at the time the injury in question occurred, but contending that the question should have been submitted to the jury. The authorities seem not to be in harmony on this question, but we are clear that, in any view, there was no error committed here. There was no disputed questions of fact to be determined; on the contrary, there was no dispute in the evidence at all. The sole question was what were the proper legal inferences to be drawn from the facts proven, and this clearly was for this court."

This court having held that what the law of a sister state is, is a question of law when proven by undisputed facts, surely, then, what the foreign law is, is also a question of law when proven by a decision of the foreign state court. It being a question of law, it is therefore for this court to say whether the lower court erred in construing the decision of the Idaho Supreme Court.

(93 Wash. 595)

HEERMANS v. BLAKESLEE. (No. 13452.)

(Supreme Court of Washington. Dec. 9, 1916.)

1. CHATTEL MORTGAGES ⇐5—WHAT CONSTITUTES ASSIGNMENT OF FUTURE EARNINGS.
Assignments of a company's future income as security for a debt were chattel mortgages within Rem. & Bal. Code, § 3660, declaring such instruments void unless recorded, especially as section 3659 provides that all kinds of personal property may be mortgaged.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 4–13, 16; Dec. Dig. ⇐5.]

2. CHATTEL MORTGAGES ⇐138(1)—RIGHTS OF CREDITORS—FAILURE TO RECORD.
Under Rem. & Bal. Code, § 3660, declaring unrecorded chattel mortgages void against subsequent creditors, garnishment liens on funds due a judgment debtor are superior to prior unrecorded assignments by said debtor of its future income.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 228, 229, 231–236; Dec. Dig. ⇐138(1).]

3. CHATTEL MORTGAGES ⇐138(1)—RIGHTS OF CREDITORS—FAILURE TO RECORD.
Under said section a creditor's valid lien, whether acquired by judicial process or otherwise, is superior to an unrecorded chattel mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 228, 229, 231–236; Dec. Dig. ⇐138(1).]

4. CHATTEL MORTGAGES ⇐18 — CONSTRUCTION—DOCTRINE OF EJUSDEM GENERIS.
Rem. & Bal. Code, § 3659, providing "all kinds of personal property" may be mortgaged, is not limited by the later enumeration of certain kinds of property under the doctrine of ejusdem generis so as to exclude mortgages of future earnings.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 61–66; Dec. Dig. ⇐18.]

En Banc. Appeal from Superior Court, Thurston County; John R. Mitchell, Judge.

Action by Harry C. Heermans against F.

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G. Blakeslee. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

Frank C. Owings and Thos. L. O'Leary, both of Olympia, for appellant. Chas. D. King, of Olympia, for respondent.

PARKER, J. The plaintiff, Harry C. Heermans, seeks an accounting from the defendant, F. G. Blakeslee, for moneys received by him through writs of garnishment issued upon a judgment rendered in his favor against the Washington Public Service Company, and also seeks to have the defendant enjoined from causing to be issued additional writs of garnishment against the debtors of that company. The moneys so acquired and sought to be acquired by the defendant are claimed by the plaintiff as assignee of that company. The defendant demurred to the plaintiff's complaint upon the ground that it does not state facts constituting a cause of action. The demurrer being sustained by the superior court, and the plaintiff electing to stand upon his complaint and not plead further, judgment of dismissal was rendered against him, from which he has appealed to this court.

The controlling facts appearing in appellant's complaint may be summarized as follows: The Washington Public Service Company is a waterworks corporation engaged in furnishing water to the city of Olympia and its inhabitants. On the 28th day of December, 1914, appellant became a creditor of the Washington Public Service Company on account of money advanced by him to pay certain of its accruing indebtedness. On that day a writing was signed by the Washington Public Service Company and appellant, which writing is claimed by him to be one of the assignments entitling him to the moneys acquired and sought to be acquired by respondent through writs of garnishment. This writing, following recitals therein of the advancements made by appellant, reads, so far as we need here notice its provisions, as follows:

"Now, therefore, in consideration of the premises the debtor [Washington Public Service Company] hereby agrees to pay to the creditor [appellant], in the manner hereinafter set forth, all sums heretofore advanced by the creditor, as hereinbefore recited, * * * with interest on all such sums advanced at the rate of 8 per cent. per year. * * *

"As security for such payments and advances the debtor hereby assigns to the creditor all such present and future earnings and income from sales of water and from service performed as a water company in Olympia, Wash., as shall become due and payable from consumers to it on or after January 1, 1915. * * *

"The creditor hereby constitutes the debtor his agent to collect for him and receipt for in the name of the debtor all earnings and income hereby assigned, and agrees that if on each day on which any such collections are made, until the debtor's obligation hereunder is fully paid, the debtor shall pay one-half of the income and earnings collected on that day to the creditor at the Capital National Bank in Olympia—and deposits made therein by the debtor to the credit of the creditor shall conclusively be deemed payment to the creditor of all sums so deposited, and the receipt of said bank shall be conclusive evidence of each such deposit—and if the debtor shall perform and observe those agreements on its part hereinafter contained, the debtor may retain the remaining one-half of each such days collections for its own use, freed from all liens hereby created, and freed from all liability to account to the creditor therefor as his agent.

"And further, in consideration of the premises, the debtor agrees with the creditor that the remaining half of its collections reserved to the debtor by any of the provisions of this agreement shall be by it promptly applied to the expense of operating and maintaining its water plant in Olympia (with such minor additional service connections and other additions as may be necessary to keep the plant in proper condition for service), including in such expense of operation and maintenance a monthly salary list not exceeding $515, and that no other manner of expenditures shall be made therefrom except with the written assent of the creditor."

On the 30th day of January, 1915, another writing of substantially the same import was signed by the Washington Public Service Company and appellant to secure repayment to him of additional sums then about to be advanced by him for the benefit of that company. Neither of these writings was accompanied by an affidavit of good faith, acknowledged or recorded as required by section 3660, Rem. & Bal. Code, relating to the execution of chattel mortgages. Thereafter the Washington Public Service Company became indebted to respondent for goods, wares, and merchandise by him sold to it, and thereafter respondent was awarded a judgment by the superior court of Thurston county against the Washington Public Service Company for the goods, wares, and merchandise so sold in the sum of $1,300.29. In that action respondent caused to be issued sundry writs of garnishment against persons indebted to the Washington Public Service Company, being its customers as water consumers, resulting in some of such persons paying into court the sums owing by them to the company, which were thereafter paid to respondent, and in others answering acknowledging their indebtedness to the company. Respondent threatens to cause to be issued additional writs of garnishment against customers of the company. Appellant alleges that the writs of garnishment already caused to be issued by respondent "are impairing plaintiff's contracts of assignment heretofore set forth and constitute an irreparable damage to plaintiff and are impairing his security," and that respondent's causing the issuance of additional writs of garnishment will further impair his security. Upon these facts respondent prays for an accounting and injunction, as we have already stated.

In view of the fact that these writings signed by the Washington Public Service Company and appellant, which are claimed by appellant to be assignments effectually transferring the title to "present and future earnings and income" of that company, do

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not purport to assign the proceeds of any specified existing contract or contracts of that company, nor any specified amount due or to become due from any present or prospective debtor of the Washington Public Service Company, it may well be doubted that the thing so attempted to be assigned has sufficient potential existence to become the subject of assignment.

[1-4] See 5 C. J. 866, 871, and authorities there cited. We leave that question undecided, however, since, as we view these writings, they are in no event anything more than attempted executions of chattel mortgages creating liens upon the "earnings and income" of the Washington Public Service Company, which, if properly executed and timely recorded, we assume for present purposes, might create such liens, as against the rights of respondent. The particular provisions and recitals of these writings leading us to conclude that they could in no event be more efficacious than chattel mortgages are the relation therein recited of appellant to the Washington Public Service Company as creditor, which relation manifestly is by the terms of the writings contemplated as continuing until the debts attempted to be so secured are paid with interest; the recital therein that the debtor assigns its "earnings and income" to appellant "as security for such payments and advances"; and the reference therein to the rights of appellant as "liens hereby created." Plainly this is an assignment as security for the payment of a debt, which debt is to continue to exist until paid with interest.

We have noticed that neither of these writings is accompanied by an affidavit of good faith, acknowledged or recorded as required by section 3660, Rem. & Bal. Code, which reads:

"A mortgage of personal property is void as against creditors of the mortgagor or subsequent purchaser, and incumbrancers of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay, or defraud creditors, and it is acknowledged and recorded in the same manner as is required by law in conveyance of real property."

In the meantime the liens of respondent's writs of garnishment have attached to the moneys and credits of the Washington Public Service Company claimed by appellant, and we see no reason why the right of respondent to acquire additional liens by additional writs of garnishment should not continue as long as these writings remain unaccompanied by affidavits of good faith, unacknowledged and unrecorded, as required by section 3660, above quoted. That a valid lien of a creditor, whether acquired by judicial process or otherwise, is superior to a chattel mortgage executed by his debtor unaccompanied by an affidavit of good faith, unacknowledged and unrecorded, is thoroughly settled by the decisions of this court. Blumauer v. Clock, 24 Wash. 596, 64 Pac. 844, 85 Am. St. Rep. 966; Smith v. Allen, 78 Wash. 135, 138 Pac. 683, Ann. Cas. 1915D, 300; Spokane Merchants' Ass'n v. First Nat. Bank, 86 Wash. 367, 150 Pac. 434.

We assume that the rights of appellant and respondent merely as creditors of the Washington Public Service Company are equal. The question here is: Who acquired the first valid lien upon the funds, not merely as against the public service company, but as between appellant and respondent? Respondent having acquired such liens upon moneys due from the debtors of the public service company, by writs of garnishment, and having the right to acquire additional liens upon moneys due from the debtors of that company, by writs of garnishment, so far as the present rights of appellant are concerned, we conclude that the learned trial court did not err in sustaining respondent's demurrer and rendering judgment of dismissal in his favor upon the election of appellant to not plead further.

Counsel for appellant in support of their contention that the assignments made to him by the public service company of its earnings and income are not chattel mortgages within the meaning of section 3660 of Rem. & Bal. Code, above quoted, cite the recent decision of the Supreme Court of Kansas in Hall v. Kansas City Terra Cotta Co., 97 Kan. 103, 154 Pac. 210, L. R. A. 1916D, 361. That decision, when read without reference to the difference between the Kansas statute and our own, does seem to be at variance with the conclusion we here reach; but we think it is not so when that difference is taken into consideration. The Kansas statute is silent upon the question of what kind of personal property may be mortgaged, while ours, in section 3659, Rem. & Bal. Code, reads:

"Mortgages may be made upon all kinds of personal property, and upon the rolling stock of a railroad company, and upon all kinds of machinery, and upon boats and vessels, and upon portable mills, and such like property, and upon growing crops and upon crops before the seed thereof shall have been sown or planted. * * *"

It can hardly be seriously contended that the earnings and income of the public service company assigned to appellant as security are not personal property as described by the words "all kinds of personal property," found in section 3659 above quoted. It may be suggested, however, that these words are to be read in the light of the particular enumeration of different kinds of property which follow them; but we think the enumeration of such kinds of property does not limit the meaning of the words "all kinds of personal property," but expand rather than limit the meaning of those words. This is not a case of general words in a statute following the enumeration of particular classes of persons or things, but the opposite of that, and where at least some of the enumerated

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things would not be included in the general words "all kinds of personal property" but for the particular enumeration. This at least seems true as to the enumeration of "growing crops." We think the rule of ejusdem generis does not call for our holding that the words "all kinds of personal property," as used in this statute, are limited by the particular enumeration of the kinds of property following those words in the statute to similar property to that particularly enumerated. 36 Cyc. 1119–1122.

Now, the Kansas statute touching the recording of chattel mortgages (section 5224, General Statutes of Kansas 1909) in force when the assignment involved in Hall v. Kansas City Terra Cotta Co. was made reads:

"Every mortgage or conveyance intended to operate as a mortgage of personal property, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof shall be forthwith deposited in the office of the register of deeds in the county where the property shall then be situated * * *"

—thus evidencing a legislative intent to have the recording requirement of the statute refer only to the mortgaging of physical personal property capable of manual delivery; while our statute expressly authorizes the making of mortgages upon "all kinds of personal property," and declares all such mortgages void as against creditors, etc., unless accompanied by the affidavit of good faith, acknowledged and recorded. Whether or not a chose in action such as is here involved may be mortgaged or pledged is ordinarily a different question from the question of whether or not such mortgaging or pledging falls within the recording statute, though under our statute "all kinds of personal property" may be mortgaged and all such mortgages must be accompanied by the affidavit of good faith, acknowledged and recorded, or be held void as to creditors, etc. Those decisions holding that it is only mortgages of physical personal property capable of manual delivery which fall within the recording statute by reason of the particular provisions of the recording statute involved in the given case also recognize the law to be that a chose in action, though not capable of manual delivery because of the fact that it is not physical personal property, can become the subject of chattel mortgage or pledge for the security of a debt. Among numerous decisions so holding we note the following: Lawrence v. McKenzie, 88 Iowa, 432, 55 N. W. 505; Dunn v. Michigan Club, 115 Mich. 409, 73 N. W. 386; Livermore Falls Trust & Banking Co. v. Richmond Mfg. Co., 108 Me. 206, 79 Atl. 844. We conclude that the decision of the Supreme Court of Kansas above noticed is not controlling here, in view of the provisions of our statute.

The judgment is affirmed.

MOUNT, MAIN, HOLCOMB, and ELLIS, JJ., concur.

(93 Wash. 629)

KRANZUSCH v. TRUSTEE CO. (No. 13327.)

(Supreme Court of Washington. Dec. 12, 1916.)

1. APPEAL AND ERROR ⟸639(1)—MOTION TO DISMISS APPEAL—STATUTE.

Under Laws 1915, p. 302, § 6 (Rem. Code 1915, § 1730–6), providing "when the appellant's abstract of record is found to be insufficient and defective under the terms of this act or the rules of the Supreme Court, the appeal shall not be dismissed by reason thereof, but the appellant may be allowed to file an amended or supplementary abstract * * * upon such terms as may be fixed by the order of the Supreme Court," the insufficiency of an abstract is not ground for dismissing an appeal, and will not be considered on such motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2829; Dec. Dig. ⟸639(1).]

2. APPEAL AND ERROR ⟸609—RECORD—SUPPLEMENTAL TRANSCRIPT.

Where a supplemental transcript filed by respondent contains the motion for new trial, order of court, and verdict of jury in a prior trial of the same cause, which matter was not introduced in evidence, and is not material to appeal from judgment on second trial, a motion to strike it will be granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2685–2687; Dec. Dig. ⟸609.]

3. APPEAL AND ERROR ⟸590—RECORD—MOTION TO STRIKE—MOTION TO CORRECT.

Where a respondent's supplemental abstract goes over the same ground as the original and is more full than the necessities of the case require, it being respondent's privilege to file such an abstract where he deems the abstract presented by appellant inadequate or incorrect, the remedy is to move to correct it, and not a motion to strike.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2611–2615; Dec. Dig. ⟸590.]

4. CARRIERS ⟸318(3) — CARRIAGE OF PASSENGERS—EVIDENCE—SUFFICIENCY.

In an action for death of plaintiff's minor child while a passenger in an elevator operated in an office building belonging to defendant, evidence *held* to warrant a finding that the elevator was negligently constructed, inherently dangerous, and that this was the cause of the death of the child.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1307, 1308; Dec. Dig. ⟸318(3).]

5. CARRIERS ⟸293 — CARRIAGE OF PASSENGERS—ELEVATORS—NEGLIGENCE.

To leave projecting floors in an elevator well, construct indicators so that they project into the well, and operate an elevator cage with an open door under such conditions is negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1188; Dec. Dig. ⟸293.]

6. CARRIERS ⟸280(4)—CARRIAGE OF PASSENGERS—ELEVATORS—CARE REQUIRED.

Proprietors of elevators are held to the same high degree of care as other carriers of passengers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1092, 1117; Dec. Dig. ⟸280(4).]

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7. EVIDENCE ⟸474(17) — OPINION EVIDENCE —ADMISSIBILITY.

In an action for death of plaintiff's minor child, evidence as to the earning power of a boy during his minority was admissible, although the fact that the witness' experience related to a particular calling might detract from its weight.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2216; Dec. Dig. ⟸474(17).]

8. APPEAL AND ERROR ⟸971(2)—EVIDENCE ⟸546 — EXPERTS — QUALIFICATIONS—DISCRETION OF COURT—REVIEW.

The qualification of a witness to testify as an expert on a subject requiring peculiar or special knowledge is largely a matter of discretion with the trial court, and its ruling thereon will not be reversed, unless there has been a manifest abuse of that discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3852; Dec. Dig. ⟸971(2); Evidence, Cent. Dig. § 2363; Dec. Dig. ⟸546.]

9. DEATH ⟸95(4)—DAMAGES—INFANT.

In an action for death of plaintiff's minor child, the jury were entitled to return substantial damages.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 115; Dec. Dig. ⟸95(4).]

10. DEATH ⟸99(3)—MEASURE OF DAMAGES.

In an action for death of a minor, permitted by direct terms of Rem. Code 1915, § 184, as the amount of damages cannot be specifically proven, the verdict should not be interfered with, unless it appears affirmatively that it was the result of passion or prejudice, or so grossly exceeds a just award that this result must be presumed.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125, 126, 128; Dec. Dig. ⟸99(3).]

11. DEATH ⟸99(3)—EXCESSIVE DAMAGES.

In an action for death of plaintiff's minor child while a passenger in an elevator operated in an office building belonging to defendant, a verdict for $3,576 was not so grossly in excess of a just award that it must be presumed to be the result of passion or prejudice.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125, 126, 128; Dec. Dig. ⟸99(3).]

Department 1. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by E. H. Kranzusch against the Trustee Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Smith & Mack, of Spokane, for appellant. A. E. Gallagher, of Spokane, for respondent.

FULLERTON, J. Plaintiff's minor child, four years of age, was accidentally killed while a passenger in an elevator operated in an office building belonging to defendant. In an action for damages for such death, judgment was rendered in favor of plaintiff upon a verdict awarding $3,576. The defendant appeals.

[1] The respondent presents a motion to dismiss the appeal based on the grounds: (1) That appellant's abstract of record does not contain sufficient of the evidence and records to enable the court to pass upon the merits of the appeal, and that the evidence given is misstated; and (2) that the abstract is not indexed as required by statute and rules of court, in that the testimony of the witnesses is merely indexed under the head "Evidence, pages 4 to 30," without specially indexing the names of the individual witnesses. In respect to the motion it suffices to say that the insufficiency of the abstract is not ground for dismissing the appeal, under Laws 1915, p. 302, § 6 (Rem. 1915, Code, § 1730—6). By that section it is provided that when the appellant's abstract of record is found to be "insufficient and defective under the terms of this act or the rules of the Supreme Court, the appeal shall not be dismissed by reason thereof, but the appellant may be allowed to file an amended or supplementary abstract * * * upon such terms as may be fixed by the order of the Supreme Court." The motion is not to require the abstract to be amended; hence its defects need not be considered.

[2] The appellant moves to strike the supplemental transcript filed by respondent. This sets out the motion for new trial, order of court, and verdict of the jury in a prior trial of this same cause. The matter was not introduced in evidence, and we find it in no way material to the present appeal from the judgment on a second trial. The motion is granted.

[3] The appellant also moves to strike respondent's supplemental abstract for the reason that it is a repetition of the original abstract, set out in ampler form and largely by questions and answers. This motion is denied. The supplemental abstract, perhaps, does go over the same ground as the original, but it is the respondent's privilege to file such an abstract where he deems the abstract presented by appellant inadequate or incorrect. Seemingly the abstract is more full than the necessities of the case required, but the same rule applies to a supplemental abstract that applies to an original one; the remedy is to move to correct it, not to strike.

The principal ground urged as error is the insufficiency of the evidence to sustain the verdict. The assignments suggesting the question are grouped and argued by the appellant under the one head, namely, Did the plaintiff make a case for the jury on any grounds of negligence alleged or proven?

The mother of the child and the child entered the elevator of the defendant's building on the second floor landing for the purpose of going to one of the floors above. The elevator was entered through a sliding door placed in the grillwork, which inclosed the elevator shaft or well. This grillwork was set back 3½ inches from the well, and extended upward to within 4 inches of the ceiling above. Across the gap of 3½ inches between the grillwork and the well in which the cage moved up and down, the third floor

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projected horizontally into the well some 3 inches, forming, in connection with the grillwork, a sort of cavity. The indicator, which showed passengers at what floor the moving cage was located, was placed above the sliding door in the grillwork. This indicator was operated by a shaft, on which were a wheel and setscrew; this mechanism of shaft, wheel, and screw extending into the open space on the inside of the grillwork about 2½ inches. The movement of the elevator cage up and down would bring this well and setscrew directly opposite the door of the cage. The cage had no inside door, and the door space was always open as the cage passed by the indicator mechanism thus extending toward the well, and as it passed the floor projecting into the well.

[4, 5] Respecting the manner of the child's death there is no dispute in the evidence. In some way the child was thrown down at about the time the elevator started, so that his body protruded beyond the open door of the elevator cage, permitting it to be caught between the elevator floor and projecting floor of the building, drawn from the elevator cage and dropped to the bottom of the well as the elevator passed on. The evidence as to how the boy got into his precarious position is not so satisfactory. There were but two witnesses, the mother of the child and the elevator operator. Their testimony was conflicting. The mother testified, and it was the privilege of the jury to believe her, that she entered the elevator ahead of the child, holding him by the hand; that the elevator started quickly with a sudden movement before the child had fairly entered the elevator cage; that he was jerked from her hand, and fell to the floor of the cage; that he fell towards the door so that his body partially protruded through the door from the floor of the cage, and was caught on the projecting upper floor of the building as the elevator passed it. From this we think the jury were warranted in drawing the inference that the boy was thrown down, either by the too sudden starting of the elevator, or that he was caught and thrown down by the projecting mechanism of the indicator, before he had fairly entered the elevator. Either finding would justify a finding of negligence.

We think also that the jury were warranted in finding that the elevator was negligently constructed and inherently dangerous, and that this was the cause of the death of the child. It may not be negligence in itself to leave projecting floors in the elevator well, or to construct indicators so that they project into the well. Nor, perhaps, is it negligence in itself to operate an elevator cage with an open door. But to operate an elevator where there is a combination of these conditions is negligence. We need not go beyond our own reports to discover that similar combinations have been the cause of a number of accidents even to grown persons, and that at least one other child has lost its life by reason of it.

[6] Proprietors of elevators are held to that same high degree of care other carriers of passengers are held, and it would be too much to say that the law forbids a recovery for an accident shown to have been caused by such conditions as were shown here. Atkeson v. Jackson Estate, 72 Wash. 233, 130 Pac. 102; Hendrickson v. Grays Harbor R. & L. Co., 88 Wash. 145, 152 Pac. 992; Sweeten v. Pacific Power & Light Co., 88 Wash. 679, 153 Pac. 1054; Davis v. Burke, 90 Wash. 495, 156 Pac. 525; Frescoln v. Puget Sound Traction, L. & P. Co., 90 Wash. 59, 155 Pac. 395.

[7, 8] The appellant further contends that the court erred in its rulings, both in the admission and exclusion of evidence. The evidence admitted which was objected to concerned the earning power of a boy during his minority. This evidence was plainly admissible. True the witness' experience related to only one particular calling, but this did not render his testimony inadmissible, however much it might detract from the weight which should be given to it. On the other branch of the objection, the appellant complains that the court refused to permit it to show the cost of rearing the child, particularly in view of the fact that it was expected to give him the benefit of the common schools and a college education. But this is hardly a fair statement of the court's ruling. The court did not deny to the appellant the right to offer evidence upon the fact, but denied him the right to offer the evidence of a particular witness, holding that the witness had not qualified himself to testify thereon. The qualification of a witness to testify as an expert on a subject requiring peculiar or special knowledge is largely a matter of discretion with the trial court, and its ruling thereon will not be reversed, unless there has been a manifest abuse of that discretion. Traver v. Spokane Street Railway Co., 25 Wash. 225, 65 Pac. 284; Halverson v. Seattle Electric Co., 35 Wash. 600, 77 Pac. 1058; Czarecki v. Seattle & S. F. R. & N. Co., 30 Wash. 288, 70 Pac. 750. The ruling here shows no such manifest abuse as to require a reversal.

[9-11] Finally, it is urged that the verdict is not justified by the evidence, being too large. But the jury were entitled to return substantial damages. Sweeten v. Pacific Power & Light Co., 88 Wash. 679, 153 Pac. 1054. From the nature of the case the amount of the damages could not be specifically proven. All the jury could do was to take into consideration the age, health, and capacity of the child, the situation of the parents, and award such damages as to them should seem just. Actions of this kind are specially permitted by statute (Remington's Code, § 184), and the verdict should not be interfered with unless it appears affirmatively that it was the result of passion or prejudice, or so grossly exceeds a just

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award that this result must be presumed. No such condition appears here.

The judgment is affirmed.

MOUNT, CHADWICK, and ELLIS, JJ., concur.

(173 Cal. 725)

SMITH et al. v. SMITH. (S. F. 6883.)

(Supreme Court of California. Nov. 29, 1916.)

1. DEEDS ⊂⊃61—DELIVERY—ESCROW.
Where deeds to his sons were delivered by an aged father to his attorney with directions to hold them in escrow until his death, and then to deliver them to the sons, there was a valid delivery thereof, where previously thereto the attorney explained to the grantor that he would have no power thereafter to withdraw the deeds if he once delivered them.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 140, 141; Dec. Dig. ⊂⊃61.]

2. APPEAL AND ERROR ⊂⊃1011(1)—CONFLICTING EVIDENCE.
Where a finding of the trial court is based on sufficient although conflicting testimony, it will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⊂⊃1011(1).]

3. DEEDS ⊂⊃61—DELIVERY—ESCROW.
Whether, in any case of deposit of deeds in escrow, delivery is sufficient, depends upon the intention of the grantor at the time of giving the deed to the third person.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 140, 141; Dec. Dig. ⊂⊃61.]

4. DEEDS ⊂⊃61—DELIVERY—DIRECTION—"DELIVER"—"THEN TAKE EFFECT."
Where deeds were deposited with third person, a direction to the depositary to deliver them "upon my death," "so that they may then take effect," did not prevent the present passing of title, where the direction also used the technical language, "I herewith deliver to you two deeds," and where, in view of all the evidence, the court was justified in deciding that the word "deliver" used in the expression, "upon my death deliver them," was employed in its general sense, meaning "transmit," and that the expression "then take effect," referred not to vesting of title, but to the time of enjoyment.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 140, 141; Dec. Dig. ⊂⊃61.

For other definitions, see Words and Phrases, First and Second Series, Deliver.]

5. EVIDENCE ⊂⊃417(17)—PAROL EVIDENCE—CONSTRUCTION OF WRITING—STATUTE.
Where it was claimed that a deed was delivered in escrow with written instructions which did not purport to be all the directions given, and oral testimony of the depositary as to the circumstances was necessary to a full understanding and interpretation of his written instructions, such oral testimony was admissible under Code Civ. Proc. § 1860, as to construing written instruments in the light of surrounding circumstances.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1898; Dec. Dig. ⊂⊃417(17).]

6. DEEDS ⊂⊃61—DELIVERY—ESCROW—ATTORNEY OF GRANTOR.
An attorney of the grantor is not disqualified from assuming the duty of holding a deed in escrow for another grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 140, 141; Dec. Dig. ⊂⊃61.]

7. VENDOR AND PURCHASER ⊂⊃244—NOTICE OF OTHER DEEDS—EVIDENCE.
A finding that a subsequent grantee had knowledge of prior deeds of the property by her grantor was supported by evidence that the attorney drawing the subsequent deeds questioned her grantor in her presence, as to whether he had straightened out the former deeds, and the grantor replied they had never been annulled.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 609–611; Dec. Dig. ⊂⊃244.]

8. WITNESSES ⊂⊃199(2)—PRIVILEGES—ATTORNEY AND CLIENT.
Where two sons claimed title under earlier deeds by their father to them, which had been placed in escrow until the father's death, statements of an attorney employed by their father to draw a subsequent deed conveying the same land to the father's second wife, as to conversation had at the time which gave actual notice of the prior deed to the second wife, were not privileged so far as the sons were concerned.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 750; Dec. Dig. ⊂⊃199(2).]

9. APPEAL AND ERROR ⊂⊃1027—HARMLESS ERROR—FAILURE TO MAKE FINDINGS.
The Supreme Court will not reverse a judgment because of failure to make findings which would not necessitate a different judgment, even if they were made and entered in appellant's favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4083; Dec. Dig. ⊂⊃1027.]

In Bank. Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by N. De Forest Smith and another against Ella R. Dooley Smith. From a judgment for plaintiffs and an order denying new trial, defendant appeals. Affirmed.

G. W. Waldorf and R. M. Wright, both of San Jose, for appellant. Chas. M. Cassin and James L. Atteridge, both of San Jose, for respondents.

MELVIN, J. Defendant appeals from a judgment against her and from an order denying her motion for a new trial.

The action had reference to a certain tract of land in the county of Santa Clara. On the 19th of October, 1907, Uriah Smith owned this property in fee simple. On that day he made two deeds purporting to convey the title to his two sons, N. De Forest Smith and Grove C. Smith. These deeds were delivered to B. Grant Taylor, Esq., his attorney, with written instructions as follows:

"Saratoga, California, Oct. 19, 1907.

"Mr. B. Grant Taylor, Attorney at Law, Saratoga, California—Dear Sir: I herewith deliver to you two deeds, one to each of my sons, N. D. Smith and G. C. Smith, and direct that you keep and hold the same in escrow during my lifetime, and upon my death deliver them to N. D. Smith and G. C. Smith so that they may then take effect. Uriah Smith."

Mr. Taylor accepted the deeds and held them in his custody until after the death of Uriah Smith, which took place on the 31st day of July, 1911. Shortly thereafter he delivered the deeds to the grantees named therein and by cross-conveyances they have fixed their ownership each of an undivided

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half interest in such title as passed by the original deeds.

Meanwhile the grantor, Uriah Smith, who was 85 years of age, had met and had proposed marriage to the defendant, then Mrs. Dooley, a woman many years his junior. On July 25, 1910, Uriah Smith deeded to Mrs. Dooley the greater part of the property described in the deeds which had been executed previously and delivered to Mr. Taylor. The old man and Mrs. Dooley were married on August 2, 1910, and on March 22, 1911, they separated.

The complaint states three causes of action. In the first are pleaded Uriah Smith's ownership of the property on October 19, 1907; the making and delivery in escrow of the two deeds to his sons; their ownership as tenants in common of the property; Uriah's unsoundness of mind at the time when he made the deed to Mrs. Dooley on July 25, 1910; and that by pretending great affection for him she took an unfair advantage and fraudulently induced him to make the deed to her. The court did not find upon the allegations of unsoundness of mind and undue influence. It was also set forth in the pleading of the first cause of action that prior to and at the time of the execution of the deed of July 25, 1910, from Uriah Smith to the defendant, she well knew of the execution and delivery in escrow of the conveyances to his sons.

The second cause of action was based upon a supposed conspiracy on the part of the defendant to marry the old man, Uriah Smith, and to quarrel with and annoy him for the purpose of securing a division of his property, and it is averred that in pursuance of this design she caused her husband to join in an instrument conveying this land to one Wright, who then executed two deeds, one purporting to convey the greater portion of it to Mrs. Smith, and the other being in form a conveyance of the rest of the land to her husband. The court made no findings upon the issues raised under the second cause of action.

The third cause of action was one to quiet title, pleaded in the usual form, and the court found the allegations therein contained to be true.

By her answer defendant put in issue the material averments of the complaint, and she filed a cross-complaint by which she sought to quiet title to the land.

Judgment was in favor of plaintiffs quieting their title and decreeing that they have and recover possession of the property.

Appellant's counsel insist that their demurrer to the complaint on the ground that several incompatible causes of action were joined therein should have been sustained, but, as their argument is based almost entirely upon matters regarding which the court made no findings and pronounced no judgment, we need not consider it. Their argument relative to the alleged ambiguity and unintelligibility of the complaint may be similarly disposed of.

[1-3] The most important attacks made upon the judgment of the superior court depend upon the contentions that the deeds from Uriah Smith to his sons are invalid: (1) As attempted testamentary disposition of the land; and (2) as wanting valid delivery during the lifetime of the grantor. We are of the opinion that the finding of the court supporting as valid the delivery of the deeds to Mr. Taylor is amply sustained by the evidence. Mr. Taylor testified, in substance, that on the 19th of October, 1907, Mr. Smith consulted him, stating a wish that N. De Forest Smith and Grove C. Smith should have in equal portions the old man's property at Saratoga but that he might live there during the rest of his lifetime. Under his instructions Mr. Taylor prepared deeds making what seemed to the grantor a just division of the land, and these, together with the written directions copied above in this opinion, were thereafter retained by the attorney. Before the manual tradition of these instruments from Mr. Smith to Mr. Taylor the latter explained to the grantor what was necessary to constitute a good delivery in escrow in the full legal sense, telling him that he must surrender all control over the documents, and that he would have no power thereafter to withdraw them or otherwise to command their disposal. We believe that this testimony and the letter of instruction are amply sufficient to establish the transaction as one falling within the rule announced in such cases as Moore v. Trott, 156 Cal. 353, 104 Pac. 578, 134 Am. St. Rep. 131; Bury v. Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186; Follmer v. Rohrer, 158 Cal. 755, 112 Pac. 544; Moore v. Trott, 162 Cal. 268, 122 Pac. 462; Husheon v. Kelley, 162 Cal. 656, 124 Pac. 231; and Bias v. Reed, 169 Cal. 33–44, 145 Pac. 516. It is true that some of the actions of Uriah Smith after the deposit of the deeds with Mr. Taylor might indicate either that he did not intend to deliver them and place them beyond his power of recall, or that the old man had forgotten the transaction with his attorney; but the finding of the court based upon conflicting testimony will not be disturbed if there is sufficient to support the conclusion that a delivery has taken place. The solution of the question of delivery or nondelivery in each case is based upon the intention of the grantor at the time of passing the deed to a third person. Williams v. Kidd, 170 Cal. 631–639, 151 Pac. 1; Donahue v. Sweeney, 171 Cal. 388–391, 153 Pac. 708; Follmer v. Rohrer, supra; Cox v. Schnerr, 156 Pac. 509–514.

[4] Appellant places great stress upon the words contained in the written directions to Mr. Taylor: "Upon my death deliver them" (the deeds) and "so that they may then take

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effect." There is nothing in this language to prevent the present passing of title at the time of the giving of the deeds to Mr. Taylor, if the intention of the grantor was that it should then pass. Earlier in the letter of instruction Mr. Smith had used the technical language, "I herewith deliver to you two deeds." In view of all of the evidence the court was justified in deciding that the word "deliver," used in the latter part of the writing, was employed in its general sense meaning "transmit," and that the expression "then take effect" referred not to the vesting of title, but to the time of enjoyment. Haug v. Schumacher, 50 App. Div. 562, 64 N. Y. Supp. 310–313; Middleton's Heirs v. Middleton's Devisees (Ky.) 43 S. W. 677; Newberry v. Hinman, 49 Conn. 130–132; Chambers v. Chambers, 139 Ind. 111–119, 38 N. E. 334; Dove v. Torr, 128 Mass. 38–40.

[5] Appellant takes the position that the court erred in permitting oral testimony of the occurrences and circumstances surrounding the preparation of the deeds and the passing of them by Uriah Smith to Mr. Taylor. The course pursued was entirely proper. The written instructions did not purport to be all of the directions given, and the letter does not come under the rule that a written contract may not be varied by oral testimony. Mr. Taylor's testimony was necessary to a full understanding and interpretation of the writing. It was properly admitted therefore. Section 1860, Code Civ. Proc.; Clarke v. Eureka County Bank (C. C.) 123 Fed. 922–927. This court has recently declared the rule that, where the very question is whether or not the alleged grantor has parted with his title by making an efficient delivery of his deed, his acts and statements material to the question of delivery during the entire period of the escrow may be proven. Williams v. Kidd, 170 Cal. 631–648, 151 Pac. 1.

[6] There is no force in the suggestion that because of his status as Mr. Smith's attorney Mr. Taylor might not occupy the position of the "third person" to whom a deed might be delivered in escrow for another grantee. In nearly all of the cases cited above, notably in Bury v. Young, the holder of the deeds was the attorney for the grantor, and we are aware of no rule of law disqualifying an attorney from assuming such a duty.

[7] Appellant attacks as without real or material support the findings that at the time of the execution of the deed to her on July 25, 1910, she had knowledge of the deeds held in escrow by Mr. Taylor. It is true that she vigorously denied such knowledge, but the court's finding is supported by the testimony of Mr. J. H. Russell, an attorney at law having an office in San Jose. Mr. Russell testified that Mr. Uriah Smith called upon him on July 24, 1910, and requested him to draw a deed in favor of Mrs. Dooley for the conveyance of the property here in dispute. On the following day he called again, accompanied by Mrs. Dooley. According to Mr. Russell's testimony, before the deed was executed he said to Mr. Smith:

"You have already conveyed this property in escrow, have you not, and has that matter been straightened out so that you have the entire title?"

Mr. Smith replied that the situation was just as it had been; that he had executed a deed in favor of his sons covering these properties; that these deeds were still in existence; and that they had never been annulled. Mrs. Dooley was present when this conversation between Uriah Smith and Mr. Russell took place. Later, when Mr. Smith and Mrs. Dooley returned for the documents, the former told Mr. Russell that his sons would not, he believed, claim any right under the escrow deeds if Mrs. Dooley would carry out her contract to marry him and to care for him in his old age. The sons were not present at that time, but the conversation about the deeds, as we have said, occurred in Mrs. Dooley's presence. It is suggested that this notice was not sufficiently precise to put appellant upon her guard. We cannot see how it could have been more definite unless the deeds themselves had been exhibited to defendant. Here was information by her intended grantor that he had previously dispossessed himself of the title to the land which he was about to give to her.

There is a further suggestion that it does not affirmatively appear that Mrs. Dooley heard these conversations. She was quite deaf, but Mr. Russell testified that both he and the aged Uriah Smith were hard of hearing, that the conversations took place within a few feet of Mrs. Dooley, and that they were conducted in very loud tones. Whether or not the alleged conversations occurred and whether they were heard by defendant or not were matters to be decided by the superior court, and we will not disturb the adjudication of that tribunal based upon the conflicting testimony.

[8] It is asserted also that Mr. Russell was attorney and common agent for both grantor and grantee named in the deed which he prepared, and that therefore the communications made to him when they were present were privileged so far as plaintiffs were concerned. There was no proof that Mr. Russell was acting for Mrs. Dooley. He was employed by Mr. Smith and acted under his orders. Nevertheless appellant contends that the statements of Mr. Russell come within the rule of privilege applying where, for example, an attorney acts for a husband and wife in preparing a declaration of homestead. In re Bauer, 79 Cal. 304–312, 21 Pac. 759. But that rule only operates against strangers. The sons claiming title under the deeds which had been placed in escrow were not within that category.

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"It is generally considered that the rule of privilege does not apply in litigation, after the client's death, between parties, all of whom claim under the client." 40 Cyc. p. 2380.

Among the citations supporting this text are Kern v. Kern, 154 Ind. 29, 55 N. E. 1004, Phillips v. Chase, 201 Mass. 444–448, 87 N. E. 755, 131 Am. St. Rep. 406, and Glover v. Patten, 165 U. S. 394–406, 17 Sup. Ct. 411, 41 L. Ed. 760.

It will be remembered that in the Bauer Case the contest was between a son asserting title to property as an heir and his mother claiming under a homestead, and it was held that the statements of his father and mother, made to the attorney who prepared the declaration of homestead, were not privileged. In Murphy v. Waterhouse, 113 Cal. 467–470, 45 Pac. 866, 54 Am. St. Rep. 365, Mr. Justice McFarland, after citing the rule announced in the Bauer Case, used the following language:

"The rule, however, is the same where the witness is attorney for only one of the contracting parties. Where two persons are negotiating with each other in the presence of the attorney of one of the parties, the very nature of the transaction and the circumstances surrounding it are inconsistent with the notion of a confidential communication between one of the parties and his attorney who happens to be present."

In Harris v. Harris, 136 Cal. 384, 69 Pac. 23, the same rule was announced, and it was also followed in Gerety v. O'Sheehan, 9 Cal. App. 447–450, 99 Pac. 545. The testimony of Mr. Russell was admissible and was a sufficient basis for the finding that Mrs. Dooley took the deed from Uriah Smith with knowledge of the existence of the deeds to his sons.

[9] The court failed to find upon certain issues, namely upon Uriah Smith's mental condition in July, 1910; upon the matter of the alleged unfair advantage over the old man taken by defendant; upon the question of consideration for the deed to defendant; upon the motives of defendant in marrying Uriah Smith; and upon the subject of the alleged plan to obtain the property by evil designs. Findings upon these aspects of the litigation were not necessary in view of the judgment that there had been a valid delivery of the deeds to the plaintiffs in escrow, and that defendant then had full knowledge of that transaction. The determination of the last-named issues controlled the judgment. This court will not reverse a judgment because of failure to make findings which would not necessitate a different judgment, even if they were made and entered in the appellant's favor. Windhaus v. Bootz, 92 Cal. 617–622, 28 Pac. 557; Southern Pacific Railroad Co. v. Dufour, 95 Cal. 615–619, 30 Pac. 783, 19 L. R. A. 92; Merrill v. Merrill, 102 Cal. 317–319, 36 Pac. 675; Morrison v. Stone, 103 Cal. 94–97, 37 Pac. 142; Gould v. Adams, 108 Cal. 365–368, 41 Pac. 408; Sewell v. Price, 164 Cal. 265–271, 128 Pac. 407.

The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; SLOSS, J.; LAWLOR, J.; SHAW, J.

(173 Cal. 734)

WESTERN STATES LIFE INS. CO. v. LOCKWOOD. (S. F. 7346.)

(Supreme Court of California. Nov. 29, 1916.)

1. CORPORATIONS ⟸314(2)—OFFICERS—INDIVIDUAL PROFITS FROM CORPORATE BUSINESS.
The liability of the president of a corporation to account to the company for compensation paid him under a secret contract with a firm for assisting it in selling the corporation's stock is not affected by the fact that his services were reasonably worth the sum paid him.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1396; Dec. Dig. ⟸314(2).]

2. CORPORATIONS ⟸314(2)—OFFICERS—INDIVIDUAL PROFITS FROM CORPORATE BUSINESS.
Nor is such liability affected by the fact that the president gave up another position the better to assist the firm, or that it was to the best interests of the corporation that the firm should sell the stock, which they could not have done without the president's aid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1396; Dec. Dig. ⟸314(2).]

3. CORPORATIONS ⟸314(5)—OFFICERS—INDIVIDUAL PROFITS FROM CORPORATE BUSINESS.
Nor is such liability affected by the fact that the corporation knew the president was actively engaged in selling the stock, giving his entire time thereto, where the fact that he had a contract with the firm was not known.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1400; Dec. Dig. ⟸314(5).]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Western States Life Insurance Company against Arthur D. Lockwood, as executor. From a judgment for plaintiff, defendant appeals. Affirmed.

Frank H. Short, of Fresno, and Titus, Creed & Dall and A. E. Bolton, all of San Francisco, for appellant. Otto Irving Wise, of San Francisco, for respondent.

ANGELLOTTI, C. J. This is an appeal by defendant on the judgment roll from a judgment in favor of plaintiff. It is the second appeal in the case, a former judgment given on the pleadings in favor of the estate of Mr. Briggs on the theory that the complaint did not state facts sufficient to constitute a cause of action, having been reversed by this court. 166 Cal. 185, 135 Pac. 496. As stated in the opinion then filed, the case made by the complaint was as follows:

"Plaintiff is a corporation incorporated on October 11, 1909, under the law of this state, to do a life insurance business therein. Its articles of incorporation provided for a capital stock of $1,000,000, divided into 100,000 shares, of the par value of $10 each. On October 16, 1909, it entered into a written agreement with the partnership firm of Pratt & Grigsby, by which said

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firm agreed to sell all the capital stock of plaintiff within one year from the date of its incorporation, and to pay plaintiff therefor $13 per share for the first 50,000 shares sold and issued, and $15 per share for the remaining 50,000 shares, making in all $1,400,000, said sale to be without expense of any kind to the plaintiff. On October 19, 1909, said Arthur R. Briggs, defendants' testator, was elected president of plaintiff corporation, and from that day to and including October 11, 1910, was a director and the president of said corporation. In January, 1910, 'he demanded of said Pratt & Grigsby a sum equal to 22½ per cent. of the net profits earned, or that would be earned by said Pratt & Grigsby from the sale of the capital stock of plaintiff corporation under and by virtue of the agreement between said Pratt & Grigsby and plaintiff,' and 'threatened to resign as president of plaintiff, and that he would not render further service as such president in aiding said Pratt & Grigsby in the sale of the capital stock of plaintiff' if Pratt & Grigsby refused to pay him said amount. Pratt & Grigsby, 'well knowing that, without the aid, assistance, and co-operation of said Arthur R. Briggs, they would be unable to sell the entire capital stock of plaintiff within one year from the date of the incorporation of plaintiff as provided in their agreement and by law,' thereupon agreed to pay him the percentage demanded. They did sell all the stock as provided in the agreement between them and plaintiff, and prior to October 11, 1910, paid to plaintiff therefor the sum of $1,400,000. They sold the same at such price that they 'earned a net profit of $180,000,' and in pursuance of their agreement with defendants' testator paid to him at various dates between March 7, 1910, and September 22, 1910, amounts aggregating $40,500, being 22½ per cent. of their net profits of $180,000. Plaintiff and its board of directors never knew anything about the transaction between Mr. Briggs and Pratt & Grigsby until after the death of the former, which occurred October 24, 1910, and never authorized, consented to, or acquiesced therein."

The action was subsequently tried, and the findings of the trial court were in complete accord with the allegations of the complaint, except that it was substantially found that the amount received by defendant's testator from Pratt & Grigsby on account of the matters referred to in the complaint was $38,100, instead of $40,500. This was because, as found by the trial court, Mr. Briggs, in accord with his agreement with Pratt & Grigsby, paid the latter 60 per cent. of his salary of $1,000 per month as president, paid him by plaintiff for June, July, August, and September, 1910. Judgment was given in favor of plaintiff against appellant, as the surviving executor of the will of deceased, for $38,100, with interest from June 13, 1911. The appeal being on the judgment roll alone, the findings of fact are necessarily conclusive on this appeal, and, in view of the ruling on the former appeal, it must be held that such findings support the judgment. The alleged errors assigned on this appeal are that the trial court erred in sustaining a demurrer to the first, second, and third separate answers and defenses of the defendant, and in granting in so far as one part of the answer was concerned, a motion to strike out. An examination of the matter stricken from the answer and the matters set forth in the separate answers and defenses, discloses no good ground for holding, in view of what was said on the former appeal, and has become the law of this case, that the trial court erred in any of these rulings.

In the opinion on the former appeal it was shown that the situation was that, the contract of Pratt & Grigsby with plaintiff corporation being unexecuted, the same being a contract of employment to secure subscriptions to the full amount of the fixed capital within one year, paying $13 per share on the first 50,000 shares and $15 per share on the remaining 50,000 shares, and receiving as their compensation all sums they could obtain in excess of said amounts, Mr. Briggs, being a director and the president of plaintiff corporation, secretly became a partner of Pratt & Grigsby in the net profits received and to be received by them under said contract, the consideration therefor being such aid, assistance, and co-operation as he might be able to give them in completing their undertaking, and under this arrangement, while still director and president of plaintiff, received the profits sued for to his own use, all without notice to or knowledge of the plaintiff or any of its directors. It was held for reasons stated in the opinion that in acquiring this interest in the contract of Pratt & Grigsby, Mr. Briggs acquired an interest that was possibly adverse to his fiduciary duty, and that, in so far as pecuniary interest was concerned, he secretly placed himself in a position that was hostile to the interests he was bound to protect as an officer of the corporation, and in a position where conflict might arise between his trust duty and his personal interest. The court said:

"The rules we have referred to do not allow the president of a corporation to occupy such a position. For him to do so is a violation or disregard of the obligations incident to the fiduciary or quasi trust relation that he occupies. It matters not that the officer is entirely free from any intent to injure the corporation in the slightest degree, acting in fact in the highest good faith throughout, or that his actions really advantage the corporation. No inquiry may be made into such matters. The inquiry in this regard is stopped when the relation is disclosed."

It was further said that by acquiring this interest in the net profits of Pratt & Grigsby, Mr. Briggs clearly placed himself in a position antagonistic, so far as pecuniary interest was concerned, to the interests of those who were to subscribe for the stock, for it immediately became to his pecuniary interest to assist in obtaining from them as high a price as possible for the stock over and above the net amount that was to go to plaintiff corporation. It was held that the duty of securing subscriptions to the full amount of the fixed capital was one enjoined by the law upon the directors, that no director could lawfully make any secret profits for himself in the matter of such subscriptions, and that in the discharge of this trust they were practically "promoters of the

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corporation forbidden to make any secret profit." It was said:

"Whatever work any of them actually did in that behalf they must be held to have done as directors, in execution of the trust confided to them."

It was squarely held, for reasons stated in the opinion, that Mr. Briggs being the president and director of a corporation actually engaged in obtaining the subscriptions to its capital stock necessary under the law to enable it to commence and continue its business, stood in such a relation to those who subscribed and thereby became stockholders, that he was absolutely precluded from assuming any such position without a full and fair disclosure. It was substantially held that any secret profits obtained by Mr. Briggs under his arrangement with Pratt & Grigsby could be recovered by plaintiff corporation, and that it was entirely immaterial that the corporation may not have been damaged by the transaction, such secret profits belonging to the corporation for the benefit of its stockholders.

[1] Of course, as stated in the opinion, the ruling on the former appeal was upon the assumption that the complaint stated the facts correctly. That the allegations of the complaint were in all respects true is now established by the findings of the trial court. That the "work, labor, services, and assistance" of Mr. Briggs in connection with the carrying out of the Pratt & Grigsby agreement "were fairly and reasonably worth the said sum of $40,500," which was alleged in the portion of the answer stricken out by the trial court, is clearly immaterial, in view of the opinion on the former appeal. It remains only to determine whether there is anything material alleged in the separate answers and defenses to change the situation. Substantially the matters alleged are as follows:

Mr. Briggs was president of the California Development Board, and while also president and a director of plaintiff "was not required or expected to render any services as such, * * * except such mere formal services as were required of him to be performed by law as such, until said Pratt & Grigsby should have sold said stock so as to enable said corporation to do the business for which it was incorporated." Prior to the agreement between him and Pratt & Grigsby it had become apparent to them (Briggs and Pratt & Grigsby) that the latter could not perform their part of the contract "without the active aid, time, assistance, and co-operation" of Briggs. For this reason the agreement was entered into between them, Briggs to devote "his time, energies, services, and abilities" to the work. Briggs thereupon resigned his position as president of the California Development Board, giving up "the salary connected with said position," and performed his part of his contract with Pratt & Grigsby, giving his entire time thereto, and expending "large and considerable sums of money for his expenses in so doing and in necessary travel * * * on said business." The fact that he was doing all this was known to plaintiff, its officers, directors, and members, and they made no objection thereto, and his services and the benefit thereof were desired, and knowingly accepted and received, by plaintiff and its officers. His services and efforts were indispensably necessary to the carrying out of this contract by Pratt & Grigsby. The services of Briggs were reasonably worth $40,500, and were worth that amount to plaintiff corporation. Plaintiff corporation has not in any way paid or compensated Briggs for such "work, labor, and expenditure." Plaintiff corporation settled with Pratt & Grigsby upon the completion of their contract, with full knowledge of these facts, affirming and ratifying said contract between it and Pratt & Grigsby, and allowing them to receive the full amount of the compensation expressed therein. Plaintiff never offered to pay the executors of the will of Mr. Briggs any sum of money for his services. Because of the payment to him by Pratt & Grigsby, Briggs never made any claim against plaintiff corporation for compensation.

[2, 3] To our minds, in view of what was said on the former decision, there is nothing in all this to affect the case made by the complaint in so far as profits received by Mr. Briggs by reason of his arrangement with Pratt & Grigsby are concerned. It clearly enough appears from the opinion that it was in view of the duties and obligations held to be imposed on the directors *by the law*, and existing solely because of the fact that they were directors, duties and obligations in no degree lessened by their agreement employing Pratt & Grigsby to assist them in obtaining subscriptions, that it was held that in the matter of obtaining these subscriptions, they were practically promoters of the corporation, forbidden to make any secret profit, and that, whatever work any of them did in that behalf, he must be held to have done in execution of his trust as such director. In the face of this ruling, we cannot see any force in the attempted allegation that Mr. Briggs "was not required or expected to render any services," etc., in connection with the obtaining of subscriptions. It is a mere conclusion of the pleader, opposed to what was said in the former opinion as to the law applicable in such matters. It was held that in view of the law a director of the corporation could not make any secret profit in the matter of obtaining such subscriptions, and especially that Mr. Briggs, who was both president and a director, by reason of his consequent relation to those who were to subscribe for the stock, was by the law absolutely precluded from the enjoyment of secret profits as the result of

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what was practically a partnership agreement with Pratt & Grigsby in the matter of their contract with plaintiff corporation. That he gave up another position the better to enable him to carry out his undertaking with Pratt & Grigsby, that Pratt & Grigsby could not have completed their contract with plaintiff corporation without his aid, that it was to the best interests of plaintiff corporation that Pratt & Grigsby should fully perform their contract, that the services, etc., of Mr. Briggs were reasonably worth $40,500, appears to us to be absolutely immaterial, in view of what is declared in the former opinion to be the law applicable to such a situation as is here presented. The mere fact that it was known that he was actively co-operating in the effort to obtain the necessary subscriptions, giving his entire time thereto, and even expending sums of money for traveling and other expenses, is likewise immaterial. The important thing is that nobody knew that there was an agreement of partnership between him and Pratt & Grigsby, under which he, the president and a director of the plaintiff corporation, was to share, and did share, in the profits of the contract between them and the corporation. There was never any disclosure as to this, and the circumstances were such, in view of what was said in the former appeal, that in the absence of a full and fair disclosure he could not participate in the profits made by Pratt & Grigsby under their contract, and that, to the extent to which he did participate by reason of his secret agreement with them, he was receiving "secret profits" which must be held to belong to the corporation.

It is to be noted that we have not in this case any basis for the application of authorities to the effect that even if there be a violation of the obligation resting on an officer of a corporation, nevertheless the corporation must pay for the value of the thing which it receives. As was said in the former opinion, these cases have no application here, the case being one in which "the plaintiff corporation is simply seeking to recover such secret profits as were made by one of its officers in a transaction wherein he was forbidden to make any such secret profits, and which profits, in view of the rules we have discussed, belong to the corporation."

We cannot regard as material in this inquiry the value to Pratt & Grigsby, in the carrying out of their contract, of the cooperation of Mr. Briggs, the reasonable value of his time and service in performing his part of his agreement with them, or even the amounts of money expended by him for traveling and other expenses in so performing. As to expenditures there is only the most general sort of allegation without any statement of amount, and learned counsel for appellant do not strongly contend for any real distinction between moneys advanced and services rendered. The real contention is that there is no "secret profit" within the meaning of the rule applicable here where the services given for the money received were reasonably worth the amount received and the amount was honestly and fairly earned. We think there can be no question but that any moneys received by Mr. Briggs by virtue of his agreement with Pratt & Grigsby for a definite percentage of the net profits of their contract with the corporation, in consideration of his proposed active personal co-operation in the matter of carrying out such contract, were "secret profits" within the meaning of the rule, regardless of the value of his services, etc., given in carrying out his agreement with them.

As substantially already said, we think that the claims of learned counsel for appellant were substantially disposed of by what was said on the former appeal.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.; LAWLOR, J.

(31 Cal. App. 723)

WILLS v. SOUTHERN PAC. CO.

(Civ. 1829.)

(District Court of Appeal, Second District, California. Oct. 20, 1916.)

1. RAILROADS ⇐411(10)—INJURIES TO ANIMALS ON TRACKS—FENCE LAWS.

Civ. Code, § 485, prior to amendment of 1915, requiring fences and making railroads liable for animals killed from absence of such fences, was not intended to be for the benefit of owners of stock running at large, but the right of action given existed only in favor of one having some interest in land adjoining the right of way.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1426; Dec. Dig. ⇐411(10).]

2. RAILROADS ⇐441(6) — INJURIES TO ANIMALS—FENCES—STATUTE—INTEREST OF LESSOR.

Under such statute a lessee of premises adjoining and separated by a fence from a railroad right of way could not recover because horses kept on such premises were killed by escaping to the right of way through a gate in the fence carelessly permitted by the railroad company to remain open, without showing that the lessor had title to the premises, or owned an interest therein or was in possession of it, and that such lessee obtained possession through his lessor.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1583–1587; Dec. Dig. ⇐441(6).]

3. RAILROADS ⇐413(4)—INJURIES TO ANIMALS—FENCE—GATES.

Under such statute a railroad company maintaining a sufficient gate was required to use only reasonable diligence in keeping the gate closed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1465; Dec. Dig. ⇐413(4).]

4. RAILROADS ⇐446(9)—INJURIES TO ANIMALS — FENCE — GATES — ACTION — QUESTION FOR JURY.

Under such statute, in action for killing animals on railroad right of way because they

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escaped through gate in railroad fence, whether the railroad company used reasonable diligence in keeping the gate closed was for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1636; Dec. Dig. ⟸446(9).]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Mary Wills against the Southern Pacific Company. From judgment for plaintiff and order denying new trial, defendant appeals. Reversed.

Power & McFadzean, of Visalia, for appellant. Edwards & Smith, of Dinuba, for respondent.

CONREY, P. J. Pursuant to the verdict of a jury, judgment was entered in favor of the plaintiff for the sum of $600 damages on account of the loss of certain horses of the plaintiff which were killed on the defendant's railroad track. The defendant appeals from the judgment and from an order denying its motion for a new trial.

[1] There is in the complaint an allegation of negligence by the defendant in running and managing its train whereby the horses were killed. The evidence shows that they were killed by a collision with one of defendant's trains. But there is no evidence of carelessness or negligence in the running of the train, and the judgment cannot be sustained unless a cause of action has been established upon another theory of the case arising from the provisions of section 485 of the Civil Code. We refer to that section as it existed prior to the amendment of 1915. It is therein enacted that:

"Railroad corporations must make and maintain a good and sufficient fence on either or both sides of their track and property. In case they do not make and maintain such fence, if their engine or cars shall kill or maim any cattle or other domestic animals upon their line of road which passes through or along the property of the owner thereof, they must pay to the owner of such cattle or other domestic animals a fair market price for the same, unless it occurred through the neglect or fault of the owner of the animal so killed or maimed. * * *"

The provisions of the foregoing section are not intended to be for the benefit of the owners of stock running at large, but the right of action there given exists only in favor of one having some interest in land adjoining the right of way of a railroad. It has been held that the interest of a lessee in the land constitutes a sufficient ownership under the statute. Walther v. Sierra Ry. Co., 141 Cal. 288, 74 Pac. 840. And there are intimations that a licensee in possession of land under a license from the owner is included in the benefit of the statute. McCoy v. Southern Pacific Co., 94 Cal. 568, 29 Pac. 1110, where it was said that such license (in that case derived from lessees) did not confer upon the licensee any rights as against the railroad company which the licensors themselves did not possess; that he stood in the place of the lessees and possessed only such rights as they could have enforced.

In the present action it is alleged in the complaint that on the 26th day of January, 1914, the plaintiff was the owner and possessed of certain horses, and that said horses were lawfully upon certain described land, from which land the horses strayed in and upon the track and ground occupied by the railroad. It is alleged that the defendant so carelessly and negligently permitted its gates in its fences to remain open that it permitted said horses to go from the pasture of the plaintiff upon the said railroad track. These are the only facts alleged which in any way connect the plaintiff with any ownership or right of occupancy of land adjacent to the railroad. Unless such allegations can be construed as declaring that the plaintiff owned the land or was in occupancy thereof as tenant or licensee, it must follow that the complaint does not state a cause of action. Without deciding that the complaint is sufficient in this respect, we will assume its sufficiency for the purpose of considering the evidence bearing upon the supposed issue. And we will here note that the complaint was unverified, and that all of its allegations are denied.

[2] It was shown that there was a fence separating the railroad right of way from the land described in the complaint, that there was a gate in the fence, and that on and before the date of the killing of the horses they were kept by the plaintiff in the field upon which that gate opened. The plaintiff testified that she leased the premises described in the complaint from one P. T. Clark, and the court received in evidence a document identified by the plaintiff, which was in terms a lease of those premises by Clark to her. All of the foregoing evidence was received over objections duly made by defendant's counsel. No effort was made by the plaintiff to show that Clark owned the land or owned any interest therein, or that he was in possession of it, or that plaintiff obtained possession through him. So far as the record shows, Clark may have been in every respect an absolute stranger to said premises both as to title and possession.

There is evidence sufficient to establish the facts that the defendant negligently permitted the gate to remain open, and that the horses strayed from the field to the railroad tracks and were killed without any fault of the plaintiff. We have stated the evidence merely for the purpose of considering whether it is sufficient to establish any right of the plaintiff in or to the land on which she was keeping her horses. We are of the opinion that it is wholly insufficient for that purpose. As the record does not show who was the owner of the land or where he was at any time, it may be that the plaintiff's occupancy there was entirely without his knowledge or consent, and that she was a mere trespasser. If so, the statute upon which she must rely in this case gives her no cause of action against the defendant.

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[3, 4] With regard to the errors claimed in the refusal of instructions and in the giving of instructions by the court to the jury, it seems necessary to refer here to instruction No. 1 given by the court, as follows:

"You are instructed that the laws of this state require railroads to maintain fences beside their tracks, and if they make a gate in the fence, it is a part of the fence, and when there is a road across their track with a gate in the fence across it, they are under the same duty to keep it in repair when erected as it is regarding any other part of the fence, and also it is their duty to keep such gate closed at all proper occasions to prevent stock from adjoining lands from passing upon the right of way of said roadbed."

The objection urged is that the instruction imposes upon the defendant the absolute duty to keep the gate closed, whereas in fact its only duty was to use reasonable care to keep it closed. In Johnson v. Southern Pacific Co., 11 Cal. App. 278, 285, 104 Pac. 713, 716, the court said:

"Had the defendant erected and maintained a good and sufficient gate, it would have been required only to exercise reasonable diligence in keeping the gate closed"—citing and quoting from Thompson on Negligence, § 2059.

In the case at bar no claim has been made that the gate was insufficient or out of repair. On the contrary, the testimony of the plaintiff's own witnesses proves that the fence was sufficient to turn stock and that the gate was better than the fence. It seems that the horses strayed out of the field because some person whose identity was not ascertained left the gate open on the afternoon preceding the night when these horses were killed. Therefore clearly the question for the jury to determine was as to whether the defendant had used reasonable diligence in the matter of keeping its gate closed. Therefore the instruction as given was not only erroneous, but also it was seriously prejudicial to the defense.

The judgment and order are reversed.

I concur: JAMES, J.

I concur in the judgment: SHAW, J.

(31 Cal. App. 716)

TRACY v. SUMIDA. (Civ. 1904.)

(District Court of Appeal, Second District, California. Oct. 19, 1916.)

1. JUSTICES OF THE PEACE ⇐174(10)—APPEAL—JURISDICTION—AMENDMENT.

Where, upon appeal by plaintiff to the superior court from judgment in action brought in justice court upon a contract to recover $171, an amended complaint was filed wherein the cause of action based on the contract was stated in the sum of $990, upon which judgment was asked, the superior court had no jurisdiction, since, the action being originally upon a contract for recovery of less than $300, it had no jurisdiction except on appeal, and the effect of the amendment was to convert the action into one over which the justice court had no jurisdiction, thereby depriving the superior court of its jurisdiction by appeal.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 672; Dec. Dig. ⇐174(10).]

2. APPEAL AND ERROR ⇐20—APPELLATE JURISDICTION—COURT OF APPEAL—JUSTICE COURT CASES.

Erroneous assumption of appellate jurisdiction by the superior court over a justice court case for recovery of less than $300 on a contract cannot be reviewed by appeal to the Court of Appeal, since it has no appellate jurisdiction over such justice court cases.

[Ed. Note.—For other cases see Appeal and Error, Cent. Dig. §§ 81–87; Dec. Dig. ⇐20.]

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Marvin G. Tracy against K. Sumida. From judgment for plaintiff in superior court upon appeal by plaintiff from justice court, defendant appeals. Dismissed.

Earl A. Bagby and Farnsworth & McClure, all of Visalia, for appellant. Bradley & Bradley, of Visalia, for respondent.

SHAW, J. This action was commenced in the justice's court to recover a balance of $171.80 alleged to be due plaintiff from defendant for wood furnished by plaintiff to defendant under a contract so to do. Defendant answered, denying all the allegations of the complaint, and also filed a cross-complaint wherein he asked judgment against plaintiff. The case was tried by the justice, who gave defendant a judgment for $6.85 and costs, from which the plaintiff appealed to the superior court. After perfecting the appeal plaintiff, by leave of court, filed an amended complaint in said action wherein the cause of action based upon the contract was stated in the sum of $990.40, for which he asked judgment. Defendant demurred to this amended complaint upon the ground, among others, that the court had no jurisdiction of the action set out in said amended complaint. The demurrer was overruled; whereupon defendant filed his answer, consisting of a general denial, and a cross-complaint upon which he asked for judgment against plaintiff in the sum of $842.45. Trial was had by a jury which rendered a verdict in favor of plaintiff for $150, and from the judgment entered thereon defendant prosecutes this appeal.

[1] Clearly the action as brought, since it was upon a contract to recover a sum of money less than $300 (section 112, Code of Civ. Proc.), was one over which the superior court had no jurisdiction, except upon appeal. The effect of the amendment made in the superior court was to convert the action into one over which the justice's court had no jurisdiction; hence the case was one over which the superior court could not, by virtue of its appellate powers, derive jurisdiction by the procedure of an appeal. In Heath v. Robinson, 75 Vt. 133, 53 Atl. 995, it is said:

"An amendment which, had it been made before the justice, would have ousted that court of its jurisdiction, * * * must consequently oust the county court of its appellate jurisdiction upon the same condition."

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To the effect that, where jurisdiction of an action is derived from a justice's court on appeal from a judgment rendered therein, the superior court may not, by permitting an amendment of the complaint, acquire jurisdiction in excess of that of the justice's court from which the appeal is taken, see Pecos & N. T. Ry. Co. v. Canyon Coal Co., 102 Tex. 478, 119 S. W. 294; M., K. & T. Ry. Co. v. Hughes, 44 Tex. Civ. App. 436, 98 S. W. 415; Rose v. Christinet, 77 Ark. 582, 92 S. W. 866; Flanagan v. Reitemier, 26 Ind. App. 243, 59 N. E. 389. In our opinion, since the jurisdiction of a justice of the peace in an action to recover money upon contract is limited to an amount not in excess of $300, the jurisdiction of the superior court on appeal from a judgment rendered therein is likewise limited to such an amount. In other words, the superior court by virtue of the appeal acquires only such jurisdiction as the justice of the peace had.

[2] Conceding, however, as claimed by appellant, that the superior court erred in its rulings and erroneously assumed jurisdiction to try and render judgment upon the cause of action over which it had no jurisdiction, nevertheless such rulings cannot be reviewed by this court on appeal from the judgment rendered. Cases of this character originating in justice's courts cannot be brought by appeal to this court. Williams v. Mecartney, 69 Cal. 556, 11 Pac. 186; Pool v. Superior Court, 2 Cal. App. 533, 84 Pac. 53; Cox v. Southern Pacific Co., 2 Cal. App. 248, 83 Pac. 290.

We agree with respondent's contention that the appeal should be dismissed; and it is so ordered.

We concur: CONREY, P. J.; JAMES, J.

(31 Cal. App. 705)

NATIONAL BANK OF BAKERSFIELD v. WILLIAMS, State Superintendent of Banks. (Civ. 2042.)

(District Court of Appeal, Second District, California. Oct 19, 1916.)

1. BANKS AND BANKING ⟸77(5)—SALE BY SUPERINTENDENT OF BANKS—DEED—IMPLIED COVENANT.

The superintendent of banks in making sale of lands of a bank in his charge having, under Banking Act (St. 1909, p. 115) § 136, only such power as was given the order of court, which was to execute a deed conveying "all the right, title and interest" of the bank in the property, the covenant ordinarily implied from the word "grant" in the deed must be deemed limited by the subject-matter of the conveyance, and so not one against the incumbrance of the taxes for the year, which were at the time a lien on the property; but the deed is to be construed as a conveyance of such interest as the bank had, subject to defects in title, liens, or incumbrances of whatever nature.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 175; Dec. Dig. ⟸77(5).]

2. BANKS AND BANKING ⟸77(5)—SALE BY SUPERINTENDENT—"JUDICIAL SALE."

Sale by the superintendent of banks, under Banking Act, § 136, of property of a bank, is a judicial sale, so that the doctrine of caveat emptor applies, it being on order of the court on his petition, and the provision thereof that he execute a deed to the party who had made the only offer being a sufficient confirmation of the sale.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 175; Dec. Dig. ⟸77(5).

For other definitions, see Words and Phrases, First and Second Series, Judicial Sale.]

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by the National Bank of Bakersfield against W. R. Williams, Superintendent of Banks of the State of California. Judgment for defendant, and plaintiff appeals. Affirmed.

C. L. Claflin, of Bakersfield, for appellant. Hiram W. Johnson, Jr., of San Francisco, and A. A. De Ligne, of Sacramento, for respondent.

SHAW, J. This is an appeal by plaintiff from a judgment entered in favor of defendant upon the court sustaining a general demurrer to the former's amended complaint, without leave to amend.

Briefly stated, the facts so far as pertinent are as follows: At the times in question the business and assets of the Kern Valley Bank, a corporation organized for the purpose of conducting a banking business, were in charge of defendant as superintendent of banks, and in process of liquidation.

In accordance with section 136 of the banking act of 1909 (Stats. 1909, p. 115), which provides that "the superintendent of banks shall collect all debts due and claims belonging to it, and upon the order of the superior court may sell or compound all bad or doubtful debts, and on like order may sell all real and personal property of such bank on such terms as the court shall direct," defendant filed a petition in the superior court praying for an order of court empowering and directing him to sell certain real estate therein described to plaintiff for the sum of $31,000. After due notice, the petition was heard, at which time the court called for other bids, and, none being received, the court "ordered, adjudged, and decreed that the said W. R. Williams, superintendent of banks of the state of California, and trustee of the Kern Valley Bank, a corporation in liquidation, be and he is hereby authorized, empowered, and directed to accept the offer of said the National Bank of Bakersfield to sell the property hereinafter described for the sum of $31,000, and he is hereby authorized, empowered and directed to execute unto said the National Bank of Bakersfield a deed conveying to said the National Bank of Bakersfield all the right, title, and interest in said Kern Valley Bank, a corporation in liquida-

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tion, to all that certain real property commonly known as the banking premises of said Kern Valley Bank [followed by description of property], upon the payment to said W. R. Williams for and in behalf of said Kern Valley Bank, a corporation in liquidation, the sum of $31,000." Pursuant to this order directing him so to do, defendant sold and conveyed to the plaintiff all the right, title, and interest of the Kern Valley Bank to said real estate, which property at the time was subject to state, county, and municipal taxes (not then due) for the then current year, the lien for which had attached in March preceding. No reference to taxes was made in the deed or in the order pursuant to which it was made, and, defendant refusing to pay them, plaintiff, in order to protect the property from sale on account of delinquency, paid the same and brought this action to recover upon implied covenants contained in the deed.

[1] It is conceded the superintendent of banks, in the absence of such order, had no power to make the sale and conveyance. Hence, since he was acting as an instrument of the court, the duty of which was to direct the sale upon such terms as it might specify, the power of such agent must be measured by the terms of the order under which he acted. Looking to the order, it appears that he was directed to accept the offer of plaintiff and authorized "to execute unto said the National Bank of Bakersfield a deed conveying * * * all the right, title, and interest in said Kern Valley Bank * * * to all that certain real property," etc. The deed followed the language of the order; the words of transfer used, however, being "grant, bargain, and sell all the right, title, and interest" of the Kern Valley Bank. While the use of the word "grant" in a conveyance implies a covenant against incumbrances made or suffered by the grantor (section 1113, Civ. Code), and while taxes for the fiscal year, which were at the date of the grant a lien upon the property, are embraced therein (McPike v. Heaton, 131 Cal. 109, 63 Pac. 179, 82 Am. St. Rep. 335), nevertheless the covenant implied from the use of the term "grant" must be deemed limited by the subject-matter of the conveyance. The order of court, which is the measure of defendant's power, directed a conveyance only of such right, title, and interest as the grantor had in the property, and the deed transferring such interest must be construed as a conveyance of such interest subject to defects in title, liens, or incumbrances of whatsoever nature. Sweet v. Brown, 12 Metc. (Mass.) 175, 45 Am. Dec. 243.

"Where a deed purports to convey only the right, title, and interest of the grantor, the scope of the covenant of warranty may be limited by the subject-matter of the conveyance." 2 Devlin on Deeds, § 931.

[2] Moreover, we are of the opinion that the transaction possesses every element of a judicial sale, to which, if true, the doctrine of caveat emptor applies. Webster v. Haworth, 8 Cal. 21, 68 Am. Dec. 287; Freeman on Executions, vol. 3, § 335; 17 Am. & Eng. Ency. of Law, p. 1010.

Appellant claims that, conceding the sale and conveyance were required to be made upon an order of the superior court, no provision is made in the law for an order confirming the same, and hence it is lacking in one of the essential elements of a judicial sale. In our opinion, there is no merit in this contention. It is conceded that the sale could not have been made in the absence of an order of court. As appears from the record, respondent presented a petition showing that he had received an offer for the property; whereupon notice was given of the hearing of the petition, and at the hearing thereof the court itself called for bids thereon, and, none being received, directed that the sale be made to plaintiff, and directed defendant, upon the payment of the purchase price, to execute a deed conveying the grantor's right, title, and interest therein to plaintiff. The order itself constituted a confirmation of the sale thus directed to be made, and there remained nothing to confirm. In Freeman on Void Judicial Sales, § 1, it is said:

"The true test is that it [the sale] must be one which is, in contemplation of law, made by the court, and there may be circumstances when such is the case, though there is no pre-existing order directing or authorizing the sale, as where the property is in the hands of a receiver appointed by the court and given power by law to make sales thereof, or of an executor upon whom a power of sale is conferred by the will, if the sale must be reported to, and confirmed by the court."

A "judicial sale" is defined in the American & English Encyclopedia of Law, vol. 17, p. 953, as follows:

"A judicial sale is a sale made under the process of a court having competent authority to order it, by an officer duly appointed and commissioned to sell, which sale, as a general rule, becomes absolute only upon confirmation by the court."

Here the sale was made by the court through an officer by law designated in such cases to make the conveyance of the property when so ordered by the court and upon the terms specified therein. It was made under a procedure authorized by law, and in substance is the same as that adopted in effecting sales of property by receivers of national banks as provided by section 5234, Revised Statutes of the United States (U. S. Comp. St. 1913, § 9821) which transactions are held to constitute judicial sales. Thus in Schaberg's Estate v. McDonald, 60 Neb. 493, 83 N. W. 737, it is said:

"A sale made by a receiver of a national bank under an order of a court of competent jurisdiction is a judicial sale."

And in Re Third National Bank (D. C.) 4 Fed. 775, it is said:

"A sale by a receiver of the property of a national bank, under an order of court, in ac-

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cordance with the provisions of section 5234 of the Revised Statutes, constitutes a judicial sale."

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(31 Cal. App. 727)

PEASE v. FITZGERALD et al. (Civ. 1921.)

(District Court of Appeal, First District, California. Oct. 25, 1916. Rehearing Denied by Supreme Court Dec. 21, 1916.)

1. PLEDGES ⇐38—ASSIGNMENT.

A pledgee of commercial paper may assign it, and the assignee holds it in the same capacity as the original pledgee, and may sue to collect it when due.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 97–102; Dec. Dig. ⇐38.]

2. PRINCIPAL AND AGENT ⇐156—REPRESENTATIONS OF AGENT—WRITTEN CONTRACT.

One making a purchase may not rely on the oral statements of the seller's agent; the contract providing it was based on the seller's printed statements, and that no representations of agents not in accord therewith should bind it.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 583–587; Dec. Dig. ⇐156.]

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Charles J. Pease against J. F. Fitzgerald and others. From an adverse judgment, the named defendant appeals. Affirmed.

Brittan & Raish and W. E. Davies, all of Marysville, for appellant. Robert R. Moody and Edwin L. Forster, both of San Francisco, for respondent Pease. Franklin T. Poore, of San Francisco, for respondent Withoft.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff in an action brought to recover the sum of $1,000 and interest alleged to be due upon the promissory note of the defendant J. F. Fitzgerald, and from an order denying said defendant's motion for a new trial.

The facts out of which the action arose were these: On the 8th day of February, 1912, the defendant J. F. Fitzgerald executed and delivered to the California Mail Order House, a corporation, a promissory note for the sum of $1,000 as the purchase price of 1,000 shares of its capital stock, for which he subscribed on that day. The transaction was conducted on behalf of the corporation by one Hugh Wyncoop as its agent, who is alleged by the said defendant Fitzgerald to have made to him certain false and fraudulent representations as to the assets and solvency of the corporation. The said defendant, however, at the time of making his said subscription, signed a memorandum attached thereto to the effect that his subscription was based upon the printed literature and printed statements of the corporation, and that no representations made by its agents not in accordance therewith should be binding upon the corporation. On April 20, 1912, the California Mail Order House executed and delivered to the American National Bank of San Francisco its promissory note for the sum of $2,500, and at the same time assigned and delivered to the said bank as security for the same the promissory note of the defendant Fitzgerald. On April 30, 1912, the California Mail Order House paid to the bank $1,435.82 on account of its note, but no further sum, and on May 11, 1912, the bank indorsed and delivered to the plaintiff and respondent in this action the Fitzgerald note. On May 24, 1912, the California Mail Order House was adjudged a bankrupt, and one T. W. Withoft was appointed trustee. On October 30, 1912, the present suit was brought.

In his answer the defendant Fitzgerald set forth several defenses, chiefly relying, however, both in his pleading and at the trial, upon the defense that the note had been procured through the false and fraudulent representations made by said Wyncoop at the time of his stock subscription, upon the discovery of which he had taken steps to rescind the transaction. Upon the trial he was permitted to testify fully as to these matters. The court gave judgment in plaintiff's favor, and from such judgment, and the order denying a new trial, the defendant Fitzgerald prosecutes this appeal.

[1] The first point urged by the appellant is that the assignment and transfer of his promissory note by its pledgee, American National Bank, to the plaintiff, was illegal and void, for the alleged reason that a pledgee of commercial paper has no right to sell the same, but must collect the amount due thereon at maturity, and apply the proceeds to the payment of the principal debt. Whatever may be the rule in other jurisdictions from which the appellant draws for authority supporting his contention, the rule is well settled in this state that a pledgee of commercial paper may assign and deliver the same, and in the event of such transfer the assignee holds the same in the same capacity as the original pledgee, and may bring suit to collect the collateral note when due. Cushing v. Building Ass'n, 165 Cal. 731, 134 Pac. 324; Brittan v. Oakland Bank of Savings, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58; Williams v. Ashe, 111 Cal. 180, 43 Pac. 595; Dewey v. Bowman, 8 Cal. 145.

The appellant in his closing brief herein practically admits that this is the settled rule in this state, but urges that in the event of such transfer the assignee takes the note subject to all of the defenses which the maker might have urged against the original payee. It is not necessary, however, to discuss or decide this point, for the record discloses that the appellant was permitted upon

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the trial of the cause to fully present his defenses to the note, and that the court found that neither of the two chief defenses to the payment of the obligation was sufficiently made out. We think the evidence sufficiently sustains the finding of the court in that regard.

[2] The defendant was not entitled to rely on the oral statements of the agent, Wyncoop, in the face of his own express written agreement that only the printed statements of the corporation were to be regarded in making subscriptions to its stock. The effort of the appellant to rescind his agreement after his discovery that Wyncoop's statements were false was clearly not sufficiently carried into effect to work a rescission of his agreement or furnish a defense to the payment of his note.

We discover no error in the record before us.

Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(31 Cal. App. 709)

VRAGNIZAN v. SAVINGS UNION BANK & TRUST CO. (Civ. 1924.)

(District Court of Appeal, First District, California. Oct. 19, 1916. Rehearing Denied by Supreme Court Dec. 18, 1916.)

1. ABATEMENT AND REVIVAL ⇐52 — CHARACTER OF ACTION—TORT AND CONTRACT.

Though, if an action arises out of tort alone, it abates with the death of the wrongdoer, yet, if virtually founded upon contract, though nominally in tort, it survives against the tortfeasor's legal representatives.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 248–254; Dec. Dig. ⇐52.]

2. ABATEMENT AND REVIVAL ⇐55(8)—CHARACTER OF ACTION—TORT AND CONTRACT.

Where a wife sued for divorce, alleging good cause, and was therefore entitled under Civ. Code, § 146, subsec. 2, to one-half of the community property at least, but settled with the husband for less than that amount on his false and fraudulent representations that he had a lesser amount of property than he did have, her action for the fraud did not abate on his death, but she could recover from the executor.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 257, 258, 274–276; Dec. Dig. ⇐55(3).]

3. DIVORCE ⇐171—JUDGMENT—CONCLUSIVENESS—RES JUDICATA—MATTERS CONCLUDED.

In such case, the division of property in the divorce case having been reached by stipulation, the decree of divorce was not res judicata of the wife's rights in the property.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 554–558; Dec. Dig. ⇐171.]

4. EXECUTORS AND ADMINISTRATORS ⇐443(3)—ACTIONS—PLEADING—SUFFICIENCY.

An allegation in an action against an executor that letters testamentary were duly issued to the executor, who then duly qualified and acted as such, is not objectionable as a mere conclusion of law, in the absence of special demurrer, especially where admitted in the answer, thus rendering allegation of more specific facts unnecessary.

[Ed. Note.—For other cases, see Executors and Adminstrators, Cent. Dig. §§ 1800, 1842–1845; Dec. Dig. ⇐443(3).]

5. FRAUD ⇐9—FALSE REPRESENTATIONS—NECESSITY OF COMMUNICATION.

Where, in an action for divorce, a husband took false oath that he had only a certain amount of property, and further urged his wife through his son to make a settlement, the representations as to the amount of property, though not actually made and addressed to the wife, were yet sufficient basis for an action for deceit.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 8; Dec. Dig. ⇐9.]

Appeal from Superior Court, City and County of San Francisco; Marcel E. Cerf, Judge.

Suit by Augusta Vragnizan against the Savings Union Bank & Trust Company, as executor of one Vragnizan, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

Pillsbury, Madison & Sutro and Felix T. Smith, all of San Francisco, for appellant. Arthur H. Barendt, of San Francisco, for respondent.

KERRIGAN, J. This is an action based on a claim presented against the estate of the decedent for approximately $6,000, of which sum the plaintiff alleges she was defrauded in a settlement of property rights had between herself and the decedent during the pendency of a suit for divorce in which they were the parties. Plaintiff obtained judgment, and the defendant appeals.

After the plaintiff and the decedent had been married and living together as husband and wife for a period of about 30 years the decedent on September 11, 1908, culminated a long course of cruel treatment of the plaintiff by threatening to kill her and by driving her and their children from home. The next day, in anticipation of a divorce proceeding being brought against him by his wife, he withdrew from two savings banks, where he had on deposit community funds to the amount of $10,100, the sum of $6,000, and placed the same in a safe deposit box which he rented that day. A few days thereafter the plaintiff commenced an action against decedent for divorce on the ground of extreme cruelty. In a counter affidavit upon a motion for counsel fees, costs, and alimony, as well as in his verified answer to the plaintiff's complaint and by testimony in open court, the decedent represented that the only money he had was the $4,100 remaining on deposit in the said savings banks. He also represented in his affidavit, answer, and oral testimony that a partnership in which he had been theretofore interested had been dissolved, and that he was no longer interested in that business, whereas it was admitted at the trial of the present ac-

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tion that such representations were untrue, and that in fact his partnership in such business continued to the time of his death, and it was also stipulated by the parties to this action that during all the time between the commencement of said proceeding in divorce and his decease he was in receipt from the partnership of a net income of $40 per month. On the 12th day of April, 1909, the plaintiff, believing these representations of the decedent, entered into an agreement of settlement of their property rights with him, under the terms of which they divided equally all the money which he had on deposit at the time in the savings banks above mentioned, viz. $4,100. At about three months after the making of this contract the decedent redeposited the $6,000 with an additional $900 in the banks from which the $6,000 had been withdrawn. The decedent by the terms of his will left $5 to each of his two children. He was of a secretive nature, and consequently the plaintiff knew little concerning his business affairs. Plaintiff herself is unable to read or write the English language, and for years has suffered from an incurable deafness. In her complaint, among other things, she alleges that she was induced to enter into the agreement of settlement by the fraudulent misrepresentations of the decedent; that she did not learn the falsity of his representations until shortly after his death; that if she had known the facts with reference to the property owned by the decedent at the time of the agreement she would not have accepted the property delivered to her in settlement of her property rights. In her prayer she asks judgment for one-half of the value of the property concealed from her by decedent.

[1] In support of the appeal the defendant claims that this is an action based on fraud and deceit, and that therefore it abated with the death of the decedent. It is sometimes said that at common law all causes of action ex contractu survive, whereas all those based on tort die with the person. But neither of these statements is strictly accurate. As to the former, for example, a breach of promise of marriage is an action arising ex contractu; yet it does not survive. Nor do all actions in tort die with the person. The true test is not so much the form of the action as the nature of the cause of action. When the action arises out of a tort, unconnected with contract, and which affects the person only, and not the estate—such as assault and battery, false imprisonment, malicious prosecution, personal injuries—the action is purely personal, and abates with the death of the wrongdoer. But when the action is virtually founded upon contract, though nominally in tort, it survives against the tort-feasor's legal representatives. 1 Cyc. 60; 1 C. J. 340, 362; 1 R. C. L. 22; Lee v. Hill, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666; Payne's Appeal, etc., 65 Conn. 397, 32 Atl. 943, 33 L. R. A. 418, 48 Am. St. Rep. 215. And in the case of a tort resulting in the wrongful acquisition of personal property, the law imposing on the wrongdoer the duty of returning that property to the owner, the obligation at common law might be treated as quasi contractual, and the neglect to perform it a breach of such contract, in which case the damage resulting from the tort is substantially the value of the property, and the damage resulting from the breach of contract is measured substantially in the same way. Similarly, in determining the question of survival at common law the substantial cause of action might properly be treated as founded in contract. 1 R. C. L. 24.

[2] In the present case, it appearing from the allegations of the complaint that the plaintiff was entitled to a divorce from the decedent on the ground of extreme cruelty, she was entitled at the very least to one-half the community property (Civil Code, § 146; Gorman v. Gorman, 134 Cal. 378, 66 Pac. 313); and she settled with her husband apparently on the theory that she was receiving one-half of the community personal property, and that the agreement of settlement recognized this right. Later, and after his death, on discovering that she had been deceived as to the amount of money decedent had on hand at the time of the settlement, she promptly commenced this action to recover one-half of the property which decedent had thus concealed from her. Such an action is not purely a personal action for tort. It may be treated under the authorities as founded upon contract; and certainly it is in the nature of an action for the recovery of an interest in property. If one believes a false statement of another, and such false statement is the direct means of obtaining the property of such person, there is a legal injury to the rights of property, and the owner has an action for the property or its value based on the fraud, and also in some jurisdictions on the implied contract to return the property or the proceeds thereof, which legally or equitably belong to the original owner. In the case at bar the plaintiff at the time of settlement was entitled to at least one-half of the community property, and if the divorce proceeding had included an adjudication of property rights the court could not have awarded her less (Gorman v. Gorman, supra,) but, believing a false statement of the decedent as to how much community property there was, and receiving by agreement with her husband one-half thereof, she took less than she would have been entitled to receive under an adjudication by the court. Accordingly it would appear that she has been injured in a right of property, and has an action to recover the amount of which she was defrauded.

In Henderson v. Henshall, 54 Fed. 320, 4 C. C. A. 357, the facts constituted an action for damages for false representations concerning

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real property, and to the contention that the cause of action did not survive the death of the plaintiff the court said:

"There may be some question as to the survival of a thing in action arising out of a personal injury, but the thing in action in this case arises out of the violation of a right of property, which, by the express language of section 954 of the Civil Code [of California], passes to the personal representatives of the deceased," for that section provides that "a thing in action, arising out of a violation of a right of property, or out of an obligation," and "may be transferred by the owner." Upon his death it "passes to his personal representatives."

And it necessarily follows that, if the thing in action would pass to the legal representatives of plaintiff on her death, it would survive the death of the defendant. The court further said:

"The wrong which is the subject of the action was not merely a personal injury inflicted upon the decedent, and the damages claimed the measure of her bodily or mental suffering, but the wrong was to the estate of the original plaintiff, whereby it became diminished in value."

Here the court quotes from Pomeroy's Remedies and Remedial Rights, § 147, as follows:

"It is now the general American doctrine that all causes of action arising from torts to property, real or personal—injuries to the estate by which its value is diminished—do survive and go to the administrator or executor as assets in his hands."

In the case of Fox v. Hale & Norcross S. M. Co., 108 Cal. 478, 41 Pac. 328, the defendants were charged with a conspiracy to defraud a mining company in which the plaintiff was a stockholder, and one of the defendants died after judgment against him, but before the entry thereof; and on the subject of the abatement of the action with the death of that defendant the court said:

"The right of the plaintiff to 'maintain' the action against the executors of Hobart is fully recognized by section 1584 of the Code of Civil Procedure. See, also, Coleman v. Woodworth, 28 Cal. 567. It falls within the rule given by Lord Mansfield in Hambly v. Troutt, Cowp. 371: 'Where the property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor.'"

See, also, Shiels v. Nathan, 12 Cal. App. 604, 108 Pac. 34, which is a case very similar in its facts to this case, except that there the contract of settlement itself expressly provided that the plaintiff should receive one-half of the community property, which provision of the contract having been broken, it was held that an action for damages for the breach would lie.

[3] Passing to the next question, it must be held, we think, that the decree in the suit for divorce of Vragnizan v. Vragnizan is not a bar to this action. The pleadings in that case placed in issue the question of the property rights of the parties, but thereafter the plaintiff and defendant, as the Code permitted them, withdrew that question from the consideration of the court, and prior to the entry of the decree made the agreement upon which this action is founded. The plaintiff therefore is not estopped by the decree in the divorce proceeding from maintaining this action. That decree is final, it is true, as to every point which either expressly or by implication was in issue and the decision of which is essential to support the judgment; but the decree in this instance dealt only with the status of the parties; and certainly no decision with respect to their property rights was essential to sustain such a decree. 1 Freeman on Judgments, 465, 468; Senter v. Senter, 70 Cal. 619, 625, 11 Pac. 782; Coats v. Coats, 160 Cal. 671, 679, 118 Pac. 441, 36 L. R. A. (N. S.) 844; Tabler v. Peverill, 4 Cal. App. 671, 679, 88 Pac. 994; In re Burdick, 112 Cal. 387, 397, 44 Pac. 734.

[4] Defendant complains that the allegation in the complaint that on the 5th day of June, 1913, letters testamentary were duly and regularly issued to the defendant executor, who has ever since and now is the duly qualified and acting executor of the will in the estate of said Vragnizan, deceased, is a mere conclusion of law, and that the complaint therefore must be held insufficient. We think this allegation of the official capacity of the defendant sufficient in the absence of a special demurrer. Moreover, the allegation is admitted in the answer, which is in effect a stipulation of the fact; and this rendered the allegation of more specific facts unnecessary. Collins v. O'Laverty, 136 Cal. 31, 68 Pac. 327. See, also, S. F., etc., Land Co. v. Hartung, 138 Cal. 223, 71 Pac. 337.

[5] Defendant also contends that the complaint fails to show that the representations upon which the plaintiff relies were addressed to her, and therefore it is argued that they cannot be the basis of an action for deceit. In the main the complaint depends upon statements made by the decedent, as before stated, in his oral testimony and in his affidavit and verified answer, and therefore were not made directly to her; but it is reasonable to assume that they were made with the intention of deceiving her, and she, believing these representations, was induced thereby to make a settlement with the decedent for less than she otherwise would have accepted, and certainly for less than she was entitled to; the property being community property, and the decedent having treated her with extreme cruelty. Under these circumstances how can it be successfully asserted that the representations upon which she acted were not addressed to her? However this may be, it is alleged in the complaint in so many words:

"That said decedent repeatedly communicated with plaintiff through their son, and urged her to make a settlement of their property rights, and stated that he had no other money save and except the sum of $4,100 in the two savings banks, and that, if plaintiff would agree to make a settlement of their property rights, he would give her one-half of said money," etc.

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It is further argued that, so far as the plaintiff depends upon affidavits and statements made by the decedent in court, they are privileged, and cannot be made the foundation of an action of deceit, and that it is not alleged in the complaint that decedent, by his representations in the former action, intended to induce any action on the part of the plaintiff. It is further contended that nowhere is it alleged in the complaint that the testator had any reason to believe that the representations made by him were false. We think these and other points made by the defendant cannot be seriously urged, and it is not necessary to specifically discuss them.

For the reasons heretofore stated, the judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

(40 Nev. 163)

STATE ex rel. FREYESLEBEN, Austro-Hungarian Consul, v. NINTH JUDICIAL DIST. COURT OF NEVADA IN AND FOR WHITE PINE COUNTY et al. (No. 2241.)

(Supreme Court of Nevada. Dec. 15, 1916.)

1. MANDAMUS ⟸4(4)—REMEDY BY APPEAL—REFUSING REMOVAL OF ADMINISTRATOR.
Where a petition was presented in the district court for removal of an administrator, setting up his alleged wrongful acts, and, after hearing both petitioner and respondent, decision was rendered dismissing the petition, such action was not reviewable by mandamus, since the court exercised jurisdiction and discretion in hearing and deciding the case and petitioner had a plain, speedy, and adequate remedy at law by appeal from such decision under Rev. Laws, § 6112, providing for appeal from decisions in probate matters.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 11, 16; Dec. Dig. ⟸4(4).]

2. MANDAMUS ⟸28—FUNCTION OF WRIT.
Mandamus will lie to compel a certain prescribed duty to be assumed by a tribunal, board, or officer, but will not operate beyond a point where that tribunal, board, or officer has the right to exercise discretion.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 64; Dec. Dig. ⟸28.]

3. MANDAMUS ⟸4(1), 26—SCOPE — REMEDY BY WRIT OF ERROR.
Writ of mandamus will not assume the function of a writ of error, nor will it serve to require an inferior tribunal to act in any particular manner or to enter any particular judgment or order.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 9, 11, 17–19, 62; Dec. Dig. ⟸4(1), 26.]

Original proceeding in mandamus by the State, on the relation of F. Freyesleben, Austro-Hungarian Consul, against the Ninth Judicial District Court in and for the county of White Pine and another. Writ denied.

Albert Gallatin Breeland, of Reno, for relator. G. F. Boreman and Anthony Jurich, both of Ely, for respondent.

McCARRAN, J. This is an original proceeding in mandamus.

On November 22, 1911, one A. B. Witcher, of Ely, White Pine county, Nev., was appointed administrator of the estate of Thomas Odolovich, deceased. Subsequently, proceedings were instituted in the lower court, by and through the representatives of the Austro-Hungarian consul, for the removal of the administrator theretofore appointed, and for the appointment of J. B. Dixon, Esq.

The petition presented in the lower court for the removal of the administrator sets up, among other things, the assumption of control by A. B. Witcher as administrator of the estate of Thomas Odolovich, deceased; the filing by the administrator of an inventory and appraisement of the property and effects belonging to the estate; and certain other acts on the part of the administrator, such as a compromise settlement with the Giroux Consolidated Mining Company for the death of the deceased, the sale and disposition of certain property by the administrator, alleging in this respect failure on the part of the administrator to properly or legally conduct such sale and failure to make proper accounting for the proceeds thereof. The petition further relates failure on the part of the administrator to properly save and preserve property and effects of the estate.

The administrator, being cited to appear and show cause why his letters should not be revoked, responded by answer. On the hearing by the lower court, evidence was offered pro and con the several matters raised by the petition; and after the submission of the matter, an order was made, which we find in the following words:

"In view of the authorities cited and the showing made at the hearing, the petition for a dismissal of the administrator, A. B. Witcher, will be denied, and the petition dismissed, with costs against petitioners, and it is so ordered."

Petitioner in the lower court comes here by original proceedings in mandamus, praying that the writ issue commanding the district court:

"(1) To vacate the order of said court denying and dismissing the relator's petition for the removal of the administrator, to restore the petition on the calendar in said court for further proceedings, and to allow the appearance of the said Austro-Hungarian consul on behalf of said alleged heirs, and to decide said matter upon its merits.

"(2) To vacate the order of said court refusing and disallowing the application of said consul for a continuance of the hearing upon the account of the administrator and refusing counsel additional time in which to file exceptions to the account.

"(3) To vacate the order of said district court approving the amount of the account of the administrator and to declare that said account be declared open for filing objections, and that the consul be allowed to appear therein and be allowed a reasonable time to prepare and file objections to said account."

The right of petitioner to a writ of mandamus is challenged by respondent, upon the

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ground that the matter was regularly heard and determined by the lower court, and therefore mandamus will not lie to review the proceedings; further, that petitioner here has a plain, speedy, and adequate remedy in the ordinary course of law.

In the case of Floyd v. District Court, 36 Nev. 352, 135 Pac. 923, we said:

"In a case where the district court takes jurisdiction and acts, its acts will not be subject to review by a writ of mandate, but where such tribunal refuses to take jurisdiction at all, when by law it ought to do so, or where having obtained jurisdiction it refuses to proceed in its exercise, mandamus is the proper remedy. Errors committed in the exercise of judicial discretion cannot be made the subject of review, nor can they be corrected by a writ of mandamus, but where a district court erroneously decides that it has no jurisdiction, the writ of mandamus is the proper remedy to compel that tribunal to do that which the law prescribes it should do—assume jurisdiction and proceed with the cause."

In the light of this rule, we review the record as it is before us in the petition. We find an application to revoke letters of administration. Under this application, evidence parole and documentary was introduced, entertained, and considered by the lower court. Both petitioner, as representative of the foreign consul, and the administrator theretofore appointed in the matter of the estate offered and had introduced evidence in support of their respective contentions. At the conclusion of the proceedings the matter was submitted to the lower court and was by the judge of that court taken under consideration and advisement. Later a decision was arrived at and rendered by the judge of the lower court, which decision is concluded in the language heretofore quoted.

Cases such as the one at bar are to be distinguished from those presenting a record which clearly shows that the lower court refused to act judicially in the determination of a question of fact duly presented, or erroneously divested itself of jurisdiction. The line that divides these two classes of cases is, we think, well expressed by the words of Mr. Justice Christiancy, speaking for the Supreme Court of Michigan in the case of People ex rel. Wiley v. Judge of Allegan Circuit, wherein he said:

"I think the true principle upon which a majority of the cases may be reconciled is that if the inferior court has acted judicially in the determination of a question of fact, or a question of law, at least if the latter be one properly arising upon the case itself, and not some collateral motion or matter—that is, if the case or proceeding before it, upon the facts raised the particular question in such a shape as to give the power judicially thus to determine it—then such determination, however erroneous, cannot be reviewed, nor can any order the court may have made, or action it may have taken in consequence of it, be disturbed or reversed or reviewed by mandamus, if the action or order be such as would be justified by the same decision or determination when correctly made." People ex rel. Wiley v. Judge of Allegan Circuit, 29 Mich. 487.

[1, 2] In the case at bar, the district court assumed jurisdiction, entertained the proceedings, heard the evidence in support of petitioner's contention, and rendered a determinative judgment based upon the showing made, and either a correct or incorrect interpretation of the law applicable to the specific question in furtherance of which the showing was made. What more could the lower court do if the writ were to issue now? Would it reverse its judgment entered upon the showing made? Would it take a different view of the law arising upon the case? Is it the function of the writ of mandate to review errors of discretion or judgment and reverse decisions based thereon? An answer to such query is found in the established principles of law applicable to the function of this extraordinary writ, which may be stated thus: The acts or duties, the performance or nonperformance of which rests in whole or in part on the discretion or judgment of the inferior tribunal, board, or officer, will not be required by the writ of mandamus. On the other hand, duties which are in their nature purely ministerial, or which are by law clearly and specifically required to be performed, and in the performance of which no element of discretion may be exercised by the tribunal, officer, or board required so to do, will be compelled by the writ. The rule may be otherwise stated that the writ will lie to set in motion the machinery of the law, so to speak, whereby a certain specifically prescribed duty must be assumed by a given tribunal, board, or officer, but will not operate beyond the point where that tribunal, board, or officer has the right to exercise any degree of discretion and judgment. High's Extraordinary Legal Remedies, § 24.

[3] It needs no citation of authority to support the well-established rule that the writ of mandamus will not assume the function of a writ of error, nor will it serve to require the inferior tribunal to act in a particular manner or to enter any particular judgment or order. On the contrary, it serves only to compel the doing of some act which it is the clear, legal duty of the lower court in some way to do.

The Supreme Court of the state of Colorado, in the case of People ex rel. Denison v. Butler, 24 Colo. 401, 51 Pac. 510, ably reviewed the question here under consideration, and the decision of that court goes a long ways to support the position we take here. As we view the question here presented, petitioner might have availed himself of that plain, speedy, and adequate remedy laid down by our Code of Civil Procedure (Civil Practice Act, § 255; Rev. Laws, § 6112), wherein it is prescribed:

"Any person interested in, affected by, and aggrieved at the decision and decree of the district court appointing an executor or administrator, revoking letters, allowing a final ac-

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count, or disallowing it, decreeing a distribution or partition, order or decree, confirming or setting aside a report of commissioners, admitting or refusing a will for probate, and any other decision wherein the amount in controversy equals or exceeds, exclusive of costs, one thousand dollars, may appeal to the Supreme Court of the state, to be governed in all respects as an appeal from a final decision and judgment in action at law."

This court, in passing upon the question of appeal in matters of this kind, in the case In re Bailey's Estate, 31 Nev. 377, 103 Pac. 232, Ann. Cas. 1912A, 743, referred to this statute and said:

"From a mere reading of this section, and the circumstances disclosed by the record in this case, it is clearly manifest to us that an appeal will lie from the order refusing to revoke letters of administration."

It has been repeatedly held by this court that under the provisions of our statute mandamus will not lie where there is a plain, speedy, and adequate remedy at law. State v. Guerrero, 12 Nev. 105; Mayberry v. Bowker, 14 Nev. 336; State v. Boerlin, 30 Nev. 473, 98 Pac. 402.

For the reasons herein set forth, the writ as prayed for should be denied. It is so ordered.

NORCROSS, C. J., and COLEMAN, J., concur.

(40 Nev. 139)

In re BAILEY. (No. 2197.)

(Supreme Court of Nevada. Dec. 15, 1916.)

1. ATTORNEY AND CLIENT ⇐53(2) — DISBARMENT PROCEEDINGS — EVIDENCE — SUFFICIENCY.

In a proceeding for disbarment of an attorney, evidence, consisting in part of an affidavit, *held* to support a charge that respondent by falsely and willfully representing to an officer that affiant was defendant in a divorce action in which respondent was attorney for plaintiff, procured the service of summons on affiant and a false affidavit of service.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 75; Dec. Dig. ⇐53(2).]

2. ATTORNEY AND CLIENT ⇐42—DISBARMENT —GROUNDS.

An attorney's action in knowingly and fraudulently procuring the service of summons in a divorce action in which he was counsel for plaintiff, upon another than the defendant, and by falsely representing to the officer that the person served upon was said defendant, procured him to make a return of service showing falsely that the summons had been duly served upon said defendant, was misconduct sufficient for disbarment.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 54; Dec. Dig. ⇐42.]

In the matter of the application for the disbarment of Gordon W. Bailey as an attorney at law. Respondent disbarred.

A. Grant Miller, L. N. French, and E. F. Lunsford, all of Reno, for the Nevada Bar Ass'n.

McCARRAN, J. Application for disbarment in this instance is made by and through a committee duly appointed by the Nevada Bar Association.

Pursuant to the petition, citation was issued to the said Gordon W. Bailey, requiring him to appear on Thursday, the 30th day of December, 1915, and show cause, if any he might have, why he should not be disbarred. An order was duly made, upon application and statutory affidavit, directing service of said citation by posting and publication. The citation was duly published, proof thereof having been submitted to this court in the form of an affidavit of the publisher of the Nevada State Journal, showing that citation was published as directed for a period of six consecutive weeks commencing on the 12th day of October, 1915, and ending with the issue of date the 25th day of November, 1915. Proof of posting in the manner prescribed by law was made by the affidavit of A. Grant Miller, Esq. No appearance was made in this court for or in behalf of the said Gordon W. Bailey; and on November 21, 1916, the default of the said Bailey was entered.

Gordon W. Bailey, whose license is sought to be revoked, was an attorney at law, duly licensed by this court to practice law in all the courts of the state of Nevada. The application for disbarment in this instance is based upon the ground that the said Gordon W. Bailey, in violation of his duties as an attorney at law and of the duties imposed upon him by his oath of office as such attorney at law, has been guilty of misconduct in office.

Several charges of misconduct, and indeed some evidence bearing out most of them, were presented to this court by the testimony under oath of A. Grant Miller, Esq., a witness called in behalf of the Bar Association committee.

One specific charge of misconduct made in the complaint, and which the court deems sufficient for disbarment, is as follows:

"That the said Gordon W. Bailey, while acting as one of the attorneys for the plaintiff in the divorce action of Francisca Redondo v. Demetrio Redondo, then pending in the Second judicial district court of the state of Nevada, in and for the county of Washoe, and numbered 10,966, fraudulently and willfully procured the service of the summons in the said action to be made upon one Pierre Couste, on or about the 28th day of July, 1915, the said Gordon W. Bailey then and there well knowing that the said Pierre Couste was not the defendant in the action and so procured the said service to be made by falsely representing to one William O'Brien, as server of the said summons, that the said Pierre Couste was the defendant in said action, and by so falsely representing to the said William O'Brien that the said Pierre Couste was Demetrio Redondo, procured the said William O'Brien to make a return of service of the said summons showing falsely that the said summons had been duly served upon the said Demetrio Redondo, and that upon said false affidavit of service the said Second judicial district court proceeded to the trial of said action and ordered and decreed a divorce of the parties thereto."

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Supporting the charge was evidence presented to this court by the testimony of A. Grant Miller, Esq., and William O'Brien, and the affidavit of Pierre Couste. The affidavit of Pierre Couste, offered in support of the charge, is as follows:

"Pierre Couste, being first duly sworn, deposes and says: I did on or about the 15th day of July, 1915, I went to the office of Gordon W. Bailey, an attorney, offices in the Journal Building in the city of Reno, Nevada; I said I knew a lady who wanted to get a divorce and I would send her to him; he asked me where the husband was, but I did not say anything about it; the lady's name is Francisca Redondo; I told him I didn't know where her husband was; I brought Mrs. Redondo to Bailey because Bailey could talk Spanish and she could talk Spanish and not English; I afterward went with Mrs. Redondo to Bailey's office; at this time Mr. Bailey asked Mrs. Redondo where Mr. Redondo was and Mrs. Redondo said to Mr. Bailey that she did not know; that she had not seen him for two years. I never saw Mr. Redondo in my life; I don't know him; I told Mr. Bailey my name was Pierre Couste; I asked Mr. Bailey how long it would take to get her a divorce; he said maybe a week or two; afterward Mr. O'Brien came to my house and asked me to come to Bailey's office; I went; Mr. O'Brien gave me some papers, and said something to me, and I said, 'Yes, I think so;' I laid the papers on Mr. Bailey's table; Mr. Bailey asked me if those papers were all right, and I said, 'I think so;' I did not take the papers away; I cannot read much English; I have been in Reno about seven months; I never saw Redondo in my life or in Reno; I heard Mr. Bailey ask Mrs. Redondo where Redondo was when I visited Bailey's office before, and Mrs. Redondo told Bailey she didn't know, but thought he was in Spain, in Madrid; I did not know that Mr. Bailey was pointing me out as Redondo; I gave Mr. Bailey $60 for Mrs. Redondo to pay for her divorce; I know nothing about these law matters, but Mr. Bailey told me he would fix it up all right."

[1] The charge is amply supported—so much so that the court made the order of disbarment from the bench at the time of submission and before preparing this opinion.

[2] Records such as that found in the career of Gordon W. Bailey present a chapter in human conduct difficult to understand. Youth, energy, ability, genial and pleasing personality, all combined in one individual, would indicate something better than a climax painted in the dark colors of studied, consummated, fraud and deception. Condemnation is the first blush that comes to the cheek of shocked propriety. But propriety should be an exacting, but a charitable, mistress. Condemnation neither explains nor rectifies; and while it may scourge, it teaches no lesson. We may enforce the laws of man; we may interpret his constitutions and his codes, but we can offer no solution for the varying and conflicting laws that, emanating from an unseen power, seem to govern the idiosyncrasies we find in mankind. The potter's thumb that moulds the bowl of human nature leaves many a dent, and the symmetry we seek may, when found, in our ideal, serve only to cover up the greater flaw. At the close of a chapter in the life of a young man in which were written the elements of fraud, cunning and deceit, however hesitatingly we may approach it, there remains for us but to write the word—the climax to which such elements lead—disbarred.

It is so ordered.

NORCROSS, C. J., and COLEMAN, J., concur.

(40 Nev. 143)

LEACH v. MASON VALLEY MINES CO.

(No. 2251.)

(Supreme Court of Nevada. Dec. 15, 1916.)

MASTER AND SERVANT ⇐382—PERSONAL INJURIES—WORKMEN'S COMPENSATION LAW—RELEASE—VALIDITY.

Under Workmen's Compensation Act (Act March 24, 1911 [St. 1911, c. 183]) § 11, allowing workmen to elect any other remedy at law, where a servant, a citizen and resident of California, executed in California a full and fair release of his master from liability for injuries received in his employment in Nevada, which was valid in California, it was a valid defense to action by him in Nevada for such injuries, notwithstanding Rev. Laws, § 5652, providing that no acceptance of any insurance, relief, benefit, or indemnity by the person entitled thereto shall constitute any bar to any personal injury action, for, the cause of action being transitory, and being completely barred in California, it was completely extinguished everywhere.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⇐382.]

Appeal from District Court, Washoe County; R. C. Stoddard, Judge.

Action by William O. Leach against Mason Valley Mines Company. From judgment for defendant, plaintiff appeals. Affirmed.

Dixon & Miller, of Reno, for appellant. Brown & Belford, of Reno, and W. H. King and P. T. Farnsworth, both of Salt Lake City, Utah, for respondent.

NORCROSS, C. J. This is an action for damages for personal injuries sustained by appellant while employed in respondent's mine, commonly known and called the "Mason Valley Mine," in the county of Lyon, state of Nevada.

As a defense to appellant's alleged cause of action, respondent in its answer alleged that a compromise and settlement of any claim of appellant against respondent, on account of said injuries, was made between appellant and respondent in the city of San Francisco, state of California, on the 11th day of December, 1912, and that respondent then and there paid to appellant the sum of $2,175 in full settlement of said claim; that appellant, in consideration of such payment and for other valuable consideration, made and delivered to the defendant a release of all liability by reason or on account of the said injuries and that said release was duly acknowledged by said plaintiff before a notary public in and for the city and county

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of San Francisco, and was and is in words and figures as follows, to wit:

"San Francisco, December 11, 1912.

"Received of Mason Valley Mines Company the sum of two thousand one hundred seventy-five dollars ($2,175) in consideration whereof I hereby release and forever discharge the said Mason Valley Mines Company, its successors and assigns, from any or all claims and demands, actions and causes of action, and liability of every kind and nature whatsoever for, upon or on account of or by reason of any loss, damage, injury or liability sustained or which may be sustained by me in consequence of injuries received by me, the undersigned William O. Leach, on or about the 3d day of March, 1912, in the Mason Valley Company's mines in the state of Nevada, resulting in loss of limb, and eyesight and other injuries. W. O. Leach."

Upon the conclusion of the taking of testimony at the trial, the court instructed the jury to return a verdict in favor of the defendant. This instruction constitutes one of the 101 assignments of error in this case.

The only question necessary to consider in this case, we think, is whether appellant is bound by the compromise and settlement of his claim for damages made by him with respondent in the state of California. There is no substantial conflict in the evidence relative to the making of the settlement in question. It was a result of negotiations covering a considerable period of time, including correspondence in which the precise terms of the final agreement were discussed. There is no contention or room for contention of any fraud upon the part of respondent in the procurement of the settlement with and the obtaining of the written release from appellant. The amount paid by respondent to appellant was approximately and possibly more than he could have received, had he elected to have settled with respondent under the provisions of an act of the Legislature of this state, approved March 24, 1911 (Stats. 1911, p. 362), entitled:

"An act determining certain employments and industries to be especially dangerous, establishing a system of compensation for accidents to workmen engaged therein, requiring employers or contractors carrying on such industries to pay compensation, entitling injured workmen or their legal representatives to receive such compensation, fixing the amount of same and the manner of payment, fixing the time within which claims for compensation must be made, prescribing the manner and method of giving notice to such owner or contractor of such accident, providing for the manner of settling disputed claims by arbitration, providing for their final determination by courts of justice, and granting to courts of justice certain additional powers in proceedings under this act, determining what persons shall be liable under this act."

Section 11 of said act provides:

"Nothing in this act contained shall be held or deemed to require any workman or his personal representatives to proceed under its terms and provisions for the recovery of compensation of damages for death or accidental injury. But if the workman or his personal representatives shall so elect, he or they may disregard the provisions of this act and may pursue any other remedy at law for the recovery of such compensation of damages for or on account of such death or injury. The right of election or choice of remedies shall be exercised solely by such workman or his representatives."

It is the contention of appellant that the settlement made by him with respondent in the state of California cannot be interposed as a complete defense to his action by reason of Rev. Laws, § 5652, which provides:

"That no contract of employment, insurance, relief benefit, or indemnity for injury or death, entered into by or on behalf of any employé, nor the acceptance of any insurance, relief benefit or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to, or death of such employé: Provided, however, that upon the trial of such action the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the person entitled thereto."

This provision of our statutes was sustained in Lawson v. Halifax-Tonopah M. Co., 36 Nev. 591, 135 Pac. 611, 138 Pac. 261.

We concur, however, in the contention of respondent that this provision of our statute can have no application in this case, for the reason that appellant's cause of action was transitory. Christensen v. Floriston Pulp & Paper Co., 29 Nev. 552, 92 Pac. 210; Dennick v. Railway Co., 103 U. S. 18, 26 L. Ed. 439. Such a cause of action follows its owner and may be sued upon in any state where jurisdiction of the defendant can be secured.

As appears from the record in this case, appellant was at all times a citizen of the state of California. At the time the contract and settlement was made, he was a resident and citizen of that state. Such settlement was in accordance with the laws of the state of California and was a complete bar to any action which might be instituted in that state to recover damages for such injuries. Such settlement in the state of his residence was a complete extinguishment of his chose in action. When he came to the state of Nevada, after such settlement, he brought nothing with him that could form the basis of an action because he had finally settled his cause of action in the state of his residence. Oglesby v. Attrill, 105 U. S. 611, 26 L. Ed. 1186; Ogden v. Saunders, 12 Wheat. (U. S.) 369, 6 L. Ed. 606; 8 Cyc. 516; 36 Cyc. 829.

It is unnecessary to consider other assignments of error.

The judgment is affirmed.

McCARRAN and COLEMAN, JJ., concur.

(40 Nev. 157)

LOOSE v. LARSEN. (No. 2203.)

(Supreme Court of Nevada. Dec. 15, 1916.)

1. SALES ⇐⇒48—ILLEGAL CONSIDERATION.

Generally where goods are sold for the express purpose of enabling the buyer to accomplish an unlawful or immoral purpose, there can be no recovery for their price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 101-107; Dec. Dig. ⇐⇒48.]

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2. SALES ⊂⊃48—ILLEGAL CONSIDERATION.
Generally where the vendor of goods merely has knowledge that the purchaser intends to use them for an immoral or illegal purpose, and does nothing to aid in carrying out such purpose, he is entitled to recover therefor.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 101–107; Dec. Dig. ⊂⊃48.]

3. INTOXICATING LIQUORS ⊂⊃327(3) — CONTRACTS—VALIDITY—NOTE FOR PRICE.
A note for balance of indebtedness for liquors sold and delivered to the maker, engaged in conducting a house of ill fame within the restricted distance from a church, was not invalid, though the seller knew the liquors would be resold upon the premises; there being nothing unlawful in the sale nor any law prohibiting sale of liquors at such house, since the buyer had a license to sell liquor there.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 471; Dec. Dig. ⊂⊃327(3).]

Appeal from District Court, Humboldt County; Edward A. Ducker, Judge.

Action by H. Loose against Lillian Larsen. Judgment for plaintiff. From order denying motion for new trial, defendant appeals. Affirmed.

Salter & Robins, of Winnemucca, for appellant. R. M. Hardy, of Lovelock, for respondent.

COLEMAN, J. This is an appeal from an order denying a motion for a new trial.

The judgment in this case is in favor of respondent, who was the plaintiff in the trial court, and is based upon an action to recover judgment upon a certain promissory note executed by appellant. For defense to the cause of action mentioned, the answer alleged that the note described in the complaint was given to cover a balance of an indebtedness due plaintiff for liquors sold and delivered by him to defendant, who was engaged in conducting a house of ill fame within the restricted distance from a church edifice which was used for religious worship, knowing that said liquors would be resold by the defendant upon said premises to the inmates of said house of ill fame and the visitors thereto in order to encourage patronage of said house, that the same might be made more profitable.

Appellant contends that, since a contract which is founded upon an immoral or illegal consideration is void, and since it is against the law of Nevada to conduct a house of ill fame within a certain distance of a church edifice which is used for religious worship, as did appellant, and since the sale of the liquors mentioned encouraged such violation of the law by appellant, there is no valid consideration for the note sued upon, and hence the order refusing to grant defendant a new trial was error.

[1, 2] It is the general rule of law that where goods are sold for the express purpose of enabling the buyer to accomplish an unlawful or immoral purpose, there can be no recovery for the price of the goods sold; but where the vendor merely has knowledge that the purchaser intends to use the goods for an immoral or illegal purpose, and does nothing to aid in carrying out the immoral or illegal purpose, the vendor is entitled to recover. We quote from Cyc. as follows:

"It is held in England that, where the agreement is innocent in itself, but the intention is unlawful, as where goods are bought or money borrowed to be used for an unlawful purpose, the mere fact that the other party knows of such purpose renders the agreement illegal and void. * * * In the United States, while some courts have followed the English rule, most of the courts have taken a different view, and have held that mere knowledge of the seller of goods or services that the buyer intends an illegal use of them is no defense to an action for the price or for rent." 9 Cyc. 571, 572.

Ruling Case Law says:

"A question which is apparently involved in some obscurity is whether a contract is rendered illegal by the fact that one party knows of the other's intention to further an illegal purpose by means of the contract, as, for instance, to use the subject-matter thereof for an unlawful purpose. That there is some difference of opinion on the subject there would seem to be no doubt. From some decisions the rule is deducible that knowledge of the other party's illegal object may, at least under some circumstances, indicate an intention to aid the unlawful object or constitute participation in an unlawful act. However, in a majority of the decisions dealing with particular contracts, mere knowledge by one of the parties of the other's intention to use the subject-matter for an unlawful purpose has been held not to render the contract illegal." 6 R. C. L. pp. 696, 697.

The Supreme Court of South Carolina, in Wallace v. Lark, 12 S. C. 576, 32 Am. Rep. 516, uses the following language:

"We are not disposed, however, to rest the case here, but are rather inclined to adopt the rule laid down by Lord Mansfield in Hodgson v. Temple, 5 Taunt, 181, that mere knowledge of the vendor that the purchaser intends to make an illegal or immoral use of the article purchased is not sufficient to defeat an action for the purchase money. There must be something more; something to show that the vendor was to participate in the illegal transaction, or that his intention in making the sale was not the ordinary purpose to dispose of his goods to the best advantage, but to aid or promote the illegal or immoral purpose for which article was bought."

Again we quote:

"One who has received the benefits of the complete performance by the plaintiff of a contract which was neither malum in se nor malum prohibitum cannot successfully defend an action for the payment of his indebtedness which has accrued therefrom on the ground that either he or another intended to do some unlawful act which was no part of the consideration nor of the performance of the agreement." Hanover Nat. Bank v. First Nat. Bank, 109 Fed. 422, 48 C. C. A. 483.

The Supreme Court of New Hampshire in Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205, after reviewing all of the decisions which had been rendered at the time that case was before the court, reached the conclusion that mere knowledge that goods sold are intended by the purchaser to be used unlawfully was not sufficient to prevent recovery for the purchase price of the goods.

It would serve no useful purpose to here

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review the cases at length which sustain this view, and we content ourselves by calling attention to the authorities which appear in the notes to the citations to Cyc. and Ruling Case Law, supra.

The Supreme Court of the United States, in Hanauer v. Doane, 12 Wall. 342, 20 L. Ed. 439, said:

"Where to draw the precise line between the cases in which the vendor's knowledge of the purchaser's intent to make an unlawful use of the goods will vitiate the contract and those in which it will not may be difficult. Perhaps it cannot be done by exact definition."

[3] While no doubt it is difficult in many cases to know just where to draw the line where the purchaser intends to make an unlawful use of the goods bought, we do not think this is such a case, because appellant intended to make a lawful use of the goods. There was certainly nothing unlawful or immoral in the sale by respondent to appellant of the liquors, nor is there anything in the laws of this state which prohibited the sale of liquors at the house which was occupied by appellant. In fact, she had a license from the duly constituted authorities to sell liquor upon the premises in question. The use to which appellant intended to put the liquors, and to which in fact they were put, being perfectly legal, we are unable to see that the doing by respondent's grantee, with the goods purchased, that which she had a legal right to do, though done with a bad motive, as was known by respondent, could in any way affect respondent's right of recovery. No authority has been called to our attention, nor have we been able to find one, which holds that a person who sells goods to another who intends to resell them in a legitimate manner, though such legitimate resales may incidentally encourage an illegal or immoral business, and all with the knowledge of the vendor, cannot recover. Yet that is what we are asked to hold in this case. While we are anxious to maintain every rule of law which tends to promote civic decency, we are of the opinion that to sustain appellant's contention would be to take a step which neither the law nor sound business principles will justify.

It is ordered that the order denying appellant's motion for a new trial be affirmed.

NORCROSS, C. J., and McCARRAN, J., concur.

(40 Nev. 220)

STATE ex rel. BROWN v. NEVADA INDUSTRIAL COMMISSION. (No. 2252.)

(Supreme Court of Nevada. Dec. 15, 1916.)

1. MANDAMUS ⟸3(4) — WORKMEN'S COMPENSATION—AWARD.

Mandamus is not the proper remedy to compel the Industrial Commission to award an injured workman compensation, under St. 1913, c. 111, as amended by St. 1915, c. 190, since such workman has a speedy and adequate remedy at law in an action at law against the Commission.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 20; Dec. Dig. ⟸3(4).]

2. MANDAMUS ⟸111 — WORKMEN'S COMPENSATION—PAYMENT OF JUDGMENT.

Mandamus is an appropriate remedy to compel the Industrial Commission to pay a final judgment of compensation obtained by an injured workman in an action at law against the Commission, where it refuses to pay such final judgment.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 231, 232, 234; Dec. Dig. ⟸111.]

Original proceedings in mandamus by the State, on the relation of Ernest E. Brown, against the Nevada Industrial Commission. Demurrer to the petition sustained.

William Forman, of Tonopah, for petitioner. W. W. Griffin, of Carson City, for respondent.

NORCROSS, C. J. This is an original proceeding in mandamus. Paragraph 1 of the petition alleges the creation of respondent, Nevada Industrial Commission, under and by virtue of the provisions of section 8 of that certain act of the Legislature, entitled "An act relating to the compensation of injured workmen in the industries of this state and the compensation to their dependents where such injuries result in death, creating an Industrial Insurance Commission, providing for the creation and disbursement of funds for the compensation and care of workmen injured in the course of employment, and defining and regulating the liability of employers to their employés, and repealing all acts and parts of acts in conflict with this act," approved March 15, 1913 (Stats. 1913, p. 137), as amended March 22, 1915 (Stats. 1915, pp. 279, 282).

Paragraph 2 of said petition alleges that from the 6th day of July to the 24th day of September, 1915, inclusive, petitioner was employed by one M. E. McGhan as an engineer and millman in the operation of a quartz mill near the town of Round Mountain, in Nye county, and that during that time the relation of employer and employé existed between petitioner and said McGhan.

Paragraph 3 of said petition alleges that on the 24th day of September, 1915, while petitioner was so employed, he was accidentally injured in the machinery of said mill, resulting in the loss of the first, second, and third fingers of his right hand.

Paragraph 4 of said petition alleges that as a result of said injury petitioner was totally disabled from performing any labor or service whatever for the period of $3^{7}/_{30}$ months, and suffered permanent partial disability as above mentioned; that, under and by virtue of the provisions of the aforesaid act, petitioner is entitled to compensation from respondent in the sum of $1,454.

Paragraph 5 of said petition alleges that

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petitioner has complied with all the provisions of said act; that neither he nor his said employer have ever rejected the provisions of said act; that prior to said injury of petitioner, petitioner's said employer had never paid to respondent any amount whatever, as is required under the provisions of said act from employers not rejecting the terms of said act, nor had any demand ever been made of such employer for such payment by respondent; that respondent refused, and will continue to refuse, to pay petitioner said claim solely because petitioner's employer had not contributed to the state insurance fund provided for in said act.

Paragraph 6 of the petition alleges that it was and is the duty of respondent under and by virtue of said act to award and pay petitioner the amount of said claim.

Paragraph 7 of the petition alleges that petitioner has no plain, speedy, or adequate remedy at law.

To the petition a demurrer was filed, alleging:

"That said petition does not state a cause of action in favor of petitioner and against respondent, nor does it state facts sufficient to entitle the petitioner to the relief prayed for therein."

This proceeding was submitted upon the briefs filed. It was assumed by the briefs, both upon the part of petitioner and respondent, that mandamus was the proper remedy in this case. Upon reading the petition, the court was of the opinion that a serious question was presented as to what was petitioner's remedy upon the facts alleged, and an order was made vacating the submission and directing counsel to present the question as to whether mandamus was an appropriate remedy. Counsel for the respective parties have filed a joint brief, in which it is contended that this court should entertain the writ.

Section 38 of the act in question provides:

"The Nevada Industrial Commission is hereby authorized and empowered to prosecute, defend and maintain actions in the name of the Commission for the enforcement of the provisions of this act. * * *"

From the briefs filed upon the merits it would appear that the main, and possibly the only, controversy relative to the claim of petitioner, grows out of a difference of opinion as to the construction of section 37 of the act, which reads as follows:

"If any employer shall default in any payment to the accident fund hereinbefore in this act required, the sum due shall be collected by action at law in the name of the Nevada Industrial Commission as plaintiff, and such right of action shall be in addition to any other right of action or remedy. In respect to any injury happening to any of his workmen during the period of any default in the payment of any premium under section 6, the defaulting employer shall not, if such default be after demand for payment, be entitled to the benefits of this act, but shall be liable to suit by the injured workman (or the husband, wife, child or dependent of such workman in case death result from the accident) as he would have been prior to the passage of this act. In case the recovery actually collected in such suit shall equal or exceed the compensation to which the plaintiff therein would be entitled under this act, the plaintiff shall not be paid anything out of the accident fund; if the said amount shall be less than such compensation under this act, the accident fund shall contribute the amount of the deficiency. The person so entitled under the provisions of this section to sue shall have the choice (to be exercised before suit) of proceeding by suit or taking under this act. If such person shall take under this act, the cause of action against the employer shall be assigned to the Nevada Industrial Commission for the benefit of the accident fund. In any suit brought upon such cause of action the measure of liability shall be as provided in section 1, subdivision c (1, 2, 3 and 4) of this act. Any such cause of action assigned to the Nevada Industrial Commission may be prosecuted or compromised by the department in its discretion. Any compromise by the workmen of any such suit, which would leave a deficiency to be made good out of the accident fund, may be made only with the written approval of the department."

[1] We are of the opinion that, notwithstanding counsel contends that this proceeding only presents a question of law as to the proper construction of section 37, supra, the extraordinary proceeding in mandamus is not the proper remedy. It has been repeatedly decided by this court that mandamus will not lie if there is a plain, speedy, and adequate remedy at law. That there is a remedy at law against respondent upon a rejected claim of an employé, we think, permits of no question. Suppose, for example, a claim is rejected by the Commission upon the ground that the relation of employer and employé did not exist at the time of the accident, it would not, we think, be contended that this court, upon an original proceeding in mandamus, could hear evidence and determine such controverted question of fact. Again, if the Commission should determine that the extent of the claimant's injuries are not as great as that asserted by the claimant, and the claimant is unwilling to accept the compensation which the Commission determines he is entitled to, the claimant is entitled to have the question of the extent of his injuries determined as a fact by a court of law. Suppose that, instead of filing a demurrer to the petition in this proceeding, respondent had filed an answer and denied all the allegations of the petition, we think counsel would not contend that this court could assume to act as a court of original jurisdiction and try the issues of fact thus raised.

There has been filed in this proceeding for the information of the court a transcript of all of the proceedings before respondent in the matter of the claim of petitioner. From this transcript it appears that petitioner's claim was at one time allowed conditionally by a vote of a majority of the members of the respondent Commission. Subsequently the Commission reconsidered the resolution by which the claim was conditionally allowed, and the claim was rejected. It appears from this transcript that, at one time, the

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question was raised whether the relation of employer and employé existed at the time of the accident. It nowhere appears from the transcript, excepting inferentially, that the respondent Commission ever found the facts as alleged in the petition. While this transcript of the proceedings before the respondent Commission may have no proper place in determining the questions raised upon the demurrer to the petition, it is proper, we think, to refer to the same as illustrating the reason why mandamus is not an appropriate remedy to enforce a rejected claim presented to such Commission. Necessarily, the claim of an employé, rejected in whole or in part by the Industrial Commission upon any question of fact going to the extent of his injuries or as to the existence of the relationship of employer and employé at the time of the accident, must be determined in an action at law against the Commission. If the remedy by an action at law is ample, and the only remedy in the case of a rejected claim, based upon a disagreement between the claimant and the Commission as to such matters of fact, we can see no good argument why the same remedy is not as plain, speedy, and adequate where the rejection of the claim is based upon a difference of opinion as to a mere matter of law. Many cases arise in which disputes between litigants are based simply upon a difference of contention as to a matter of law. Our statutes provide for a simple method of submission of such controversies to the district courts. Rev. Laws, §§ 5252-5254.

[2] In the administration of the important duties imposed upon the Nevada Industrial Commission, that Commission will doubtless often be required, as it interprets its duty, to reject claims in whole or in part, and both upon questions of fact and law. If a claim is finally rejected in toto, that is the end of it so far as the Commission is concerned, unless a judgment is obtained against the Commission in a court of competent jurisdiction, in which event the judgment will have the force of an allowed claim. Should the Commission refuse to pay such final judgment, mandamus would be an appropriate remedy.

It was never intended that this court, through the agency of some extraordinary writ, should be made the instrument for furnishing legal advice to boards, commissions, and officers. Petitioner has or has not a legal claim against the respondent Commission. A district court is the proper forum to determine the legality of his claim, and, if a legal claim, the amount he is entitled to recover under the statute. If, after a judgment in the district court, either party is dissatisfied with such judgment, the remedy of appeal to this court is available.

If the Legislature had not adopted the statute under which petitioner claims compensation, he would, if he sought to enforce compensation from his employer, be compelled to institute his suit in the district court. It cannot, in reason, we think, be contended that a person entitled to compensation for personal injury has, by virtue of the statute, been granted any different remedy to establish his right to such compensation than that which before existed.

Petitioner having an adequate remedy at law, proceeding in mandamus is not available. State ex rel. Mighels v. Eggers, 36 Nev. 364, 136 Pac. 104; State ex rel. Abel v. Eggers, 36 Nev. 372, 136 Pac. 100, 104; State ex rel. Kendall v. Cole, 39 Nev. ——, 148 Pac. 551.

The demurrer to the petition is sustained.

McCARRAN and COLEMAN, JJ., concur.

(53 Mont. 81)

WALL v. NORTHERN PAC. RY. CO.
(No. 3439.)

(Supreme Court of Montana. Dec. 1, 1916.)

1. CARRIERS ⟸32(2) — CARRIAGE OF LIVE STOCK — LIMITATIONS OF LIABILITY — REQUIREMENTS OF NOTICE OF LOSS—WAIVER.
A stipulation, in a bill of lading for an interstate shipment of cattle, that the shipper, as a condition to his right to recover damages for loss or injury to any of the stock, must give notice of his claim in writing to some officer or station agent of the company before the stock should be removed from the place of destination or mingled with other stock, cannot be waived by the carrier, under the provisions of the Interstate Commerce Act, forbidding discriminations.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 84; Dec. Dig. ⟸32(2).]

2. COURTS ⟸97(1) — THEORY OF CASE BELOW.
An action by a shipper of live stock against a railroad for injuries to stock in transit was tried on the theory that compliance with the bill of lading stipulation for notice of claim could be waived by the railroad. On appeal to the state Supreme Court the question of waiver was not considered, the stipulation being regarded as unreasonable and invalid in any event. On appeal to the United States Supreme Court, the stipulation was held valid and enforceable, and the case remanded. *Held*, the railroad company was not precluded, by the theory on which the case had been tried below, from urging that such stipulation could not be waived by the carrier under the uniformity requirements of the Interstate Commerce Act, since whether such stipulation could be waived was a federal question, and the rule of the theory of the case below, being merely a rule of practice, must give way to the holding of the Supreme Court of the United States on the federal question.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 329; Dec. Dig. ⟸97(1).]

3. APPEAL AND ERROR ⟸1175(1)—DISPOSITION OF CASE—RENDERING JUDGMENT.
Where action was brought to recover as a lump sum damages for several items, on some of which it was decided on appeal no recovery could be had, and a general verdict was returned for a less amount than their aggregate, but it did not appear what particular items were considered in making up the amount of the verdict, judgment could not be rendered in the Supreme Court for the items on which plaintiff

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might have recovered, since this would substitute the judgment of the Supreme Court for that of the jury in making findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573, 4575, 4576, 4583–4587; Dec. Dig. ⊂=1175(1).]

Appeal from District Court, Gallatin County; Ben. B. Law, Judge.

Action by R. P. Wall, as administrator of the estate of R. J. Wall, deceased, against the Northern Pacific Railway Company. On remand from Supreme Court of United States. Reversed and remanded.

For previous opinions, see 241 U. S. 87, 36 Sup. Ct. 493, 60 L. Ed. 905; also 50 Mont. 122, 145 Pac. 291.

Hartman & Hartman, of Bozeman, and Gunn, Rasch & Hall, of Helena, for appellant. Walter Aitken, of Bozeman, for respondent.

HOLLOWAY, J. When this cause came before this court on appeal from the district court of Gallatin county, we reached the conclusion that the provision in the bill of lading which required the shipper, as a condition precedent to his right to recover damages for any injury to the cattle while in transit, to give notice in writing of his claim before the cattle were removed from the place of destination or mingled with other stock, was unreasonable and void, and affirmed the judgment in favor of the plaintiff. Wall v. Northern Pac. Ry. Co., 50 Mont. 122, 145 Pac. 291. The question whether the carrier had waived compliance with that provision was submitted to the jury in the trial court, and the verdict was apparently based upon a finding that such compliance had been waived. In this court we deemed the question of waiver immaterial and gave it no consideration. When the cause was removed by writ of error to the Supreme Court of the United States, that court reversed our judgment and held, in effect, that the provision in the bill of lading to which reference has been made was reasonable and valid, and remanded the cause for further proceedings. Northern Pac. Ry. Co. v. Wall, 241 U. S. 87, 36 Sup. Ct. 493, 60 L. Ed. 905. Reference is made in the opinion to the fact that the question of waiver was litigated in the trial court, but not considered in this court. Counsel for plaintiff now insists that this court review the evidence touching the question of waiver, and, if we find it sufficient to justify the verdict, that we again affirm the judgment, and argues that this was the intention of the Supreme Court of the United States in remanding the cause, with the directions contained in the mandate. We are met with the contention by counsel for the carrier that such could not have been the intention of the Supreme Court, for the reason that compliance with the provision of the bill of lading in question could not be waived by the carrier, and that the Supreme Court had theretofore and has since held that compliance with like terms of contracts of interstate shipments cannot be waived.

In many instances the Supreme Court has had occasion to consider the Commerce Act and its amendments, generally with reference to deviations from the established rates, and to indicate the broad purpose to be served by that legislation. In New York, New Haven & H. R. Co. v. Interstate Com. Commission, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. Ed. 515, that court said:

"It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. * * * If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier as a public agent to give equal treatment to all."

In Armour Packing Co. v. United States, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681, the court said:

"The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published."

In Chicago & Alton R. R. Co. v. Kirby, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501, where the shipper was relying upon a special oral contract that his stock should be taken by a particular fast train, the court quoted with approval the excerpt from the opinion in the Armour Case above, as justification for its conclusion that such a special contract was invalid, and further said:

"The broad purpose of the Commerce Act was to compel the establishment of reasonable rates and their uniform application. That purpose would be defeated if sanction be given to a special contract by which any such advantage is given to a particular shipper as that contracted for by the defendant in error. To guarantee a particular connection and transportation by a particular train was to give an advantage or preference not open to all and not provided for in the published tariffs."

In a somewhat similar case, Kansas So. Ry. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683, the court said:

"Nor can a carrier legally contract with a particular shipper for an unusual service, unless he make and publish a rate for such service equally open to all."

Another case, very similar in its facts to the Kirby Case above, is Atchison, T. & S. F. Ry. Co. v. Robinson, 233 U. S. 173, 34 Sup. Ct. 556, 58 L. Ed. 901.

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There the court said:

"If oral agreements of this character can be sustained, then the door is open to all manner of special contracts, departing from the schedules and rates filed with the commission. Kansas City Southern Ry. Co. v. Carl, supra, 227 U. S. 652 [33 Sup. Ct. 391, 57 L. Ed. 683]. To maintain the supremacy of such oral agreements would defeat the primary purposes of the Interstate Commerce Act, so often affirmed in the decisions of this court, which are to require equal treatment of all shippers and the charging of but one rate to all, and that the one filed as required by the act."

In Phillips v. Grand Trunk Ry., 236 U. S. 662, 35 Sup. Ct. 444, 59 L. Ed. 774, there was presented the question whether, in an action by a shipper to recover for freight overcharges, where it appeared from the face of the complaint that the action had not been commenced within the time limited by the Hepburn Amendment, the objection could be raised by general demurrer. The court held that under the statute the lapse of time, not only bars the remedy, but destroys the liability, and said:

"This will more distinctly appear by considering the requirements of uniformity, which, in this as in so many other instances, must be borne in mind in construing the Commerce Act. The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law and to treat all shippers alike, would have made it illegal for the carriers, either *by silence or by express waiver*, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission and the varying periods of limitation of the different states, where a suit was brought in a court of competent jurisdiction, or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others, would be to prefer some and discriminate against others in violation of the terms of the Commerce Act, which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate, not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier. The railroad company, therefore, was bound to claim the benefit of the statute here, and could do so here by general demurrer."

In Georgia, F. & A. Ry. Co. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948, there was presented the question whether by its wrongful act the carrier could abandon the contract of shipment and render itself liable in the event the shipper had failed to make claim within the time limited for such purpose by the bill of lading. The court said:

"It is urged, however, that the carrier, in making the misdelivery, converted the flour and thus abandoned the contract. But the parties could not waive the terms of the contract under which the shipment was made pursuant to the federal act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed."

In Banaka v. Missouri Pac. Ry. Co., 193 Mo. App. 345, 186 S. W. 7, the Court of Appeals of Missouri had under consideration the question whether an interstate carrier can waive the requirement in the bill of lading that notice of claim for damages must be presented within a certain specified time, and said:

"But plaintiff relies upon a waiver of the notice by conduct. That is to say, defendant by its acts and conduct waived its privileges with respect to notice in this: That it accepted and received plaintiff's claim without protest or complaint, after the limitation of four months had expired, and that it treated with plaintiff since four months after a reasonable time for delivery had expired, and declined to pay on other grounds than want of notice. The federal Commerce Act is designed to prevent discrimination between shippers, and its object is to nullify any device whereby the carrier may practice favoritism between them."

The court refers to the language employed in the Phillips Case above, and concludes:

"Under this rule of equality we think a carrier cannot say to one shipper, 'I will enforce the burdensome terms of our contract requiring notice in a specified time,' and to another, 'I will release you from the same provisions in the same character of contact.' We do not say that a situation might not exist whereby a shipper would be relieved of the necessity of giving notice of loss, but we do say that a carrier may not, by his voluntary act, release one and hold the other."

The same conclusion was reached by the same court in Kemper Mill Co. v. Missouri Pac. Ry. Co., 193 Mo. App. 466, 186 S. W. 8. There reference is made to the decision in the Blish Milling Co. Case above, and it is said that the Supreme Court of the United States there held that the giving of the notice by the shipper cannot be waived by the carrier. Again, in Donoho v. Missouri Ry. Co., 193 Mo. App. 610, 187 S. W. 141, the same court held:

"Under the decisions of the Supreme Court of the United States, the contractual provision as to notice is valid, and it cannot be waived."

[1] When we realize that the ultimate object of the Commerce Act is to guarantee to interstate shippers absolute equality in rates and treatment, and to prevent unjust discriminations, by whatever means employed, the conclusion is forced that the carrier cannot waive a provision of the bill of lading of the character of the one under consideration. To permit the carrier to say to one of two competing shippers, "If you do not present a notice of your claim for damages within the time limited by the bill of lading, your right to sue shall be forfeited," and to another shipper, under similar circumstances, "Notwithstanding your failure to give the required notice, your right to press the claim by negotiations, or in court, will not be disputed, and no question will be raised upon your failure to give notice," would result in substituting for the written contract of shipment what is in effect a special agreement, not filed with nor sanctioned by the Interstate

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Commerce Commission, and one whereby the latter shipper would secure a decided preference and advantage over his less fortunate competitor. It was plainly the intention of Congress that the shipping contracts shall be such only as meet the approval of the Commission; that they shall be published for the benefit of all intending shippers alike; that they shall be rigidly adhered to by both shipper and carrier, and all the terms and provisions carried into effect in good faith. If the carrier cannot waive the defense that the action against it was not commenced within the time limited by statute, as held in the Phillips Case above, neither can it waive the defense that the required notice was not presented in time.

[2] It is suggested by counsel for the plaintiff that this cause was tried and determined in the court below upon the theory that compliance with the provision of the shipping contract requiring notice could be waived, and that the railway company ought not to be permitted to change its theory at this late day. But whether such compliance can be waived is a federal question, and in our opinion our rule of practice to which reference is made must give way in this instance to the holding of the Supreme Court of the United States. Since the required notice was not given in this instance, and the failure to give it could not be waived by the carrier, but must be invoked, there is, under the decision of the Supreme Court of the United States, no question open for further consideration.

[3] Plaintiff urges that he may recover for the three animals which died en route, even if he is denied relief for the injuries to the others. The action was brought to recover $1,504.83 as the aggregate damages for the loss of these three, for the injuries and depreciation to the others, and for the extra feed and care. The jury returned a general verdict in favor of plaintiff for $879.60, and we are unable to say from the record what particular elements were considered in making up that amount. Whether the jury found that these three animals died from exposure to the extreme cold, from being trampled by the others, or that the deaths resulted proximately from defendant's negligence in unreasonably delaying the shipment, cannot be determined. We cannot substitute this court for the jury and make findings upon those subjects.

The judgment heretofore rendered by this court is vacated and set aside, and it is now ordered that the judgment of the district court of Gallatin county in favor of the plaintiff, and the order denying defendant's motion for a new trial, be reversed, and the cause is remanded, with directions to the lower court to enter judgment in favor of the defendant for its costs, including the costs incurred in the Supreme Court of the United States.

Reversed and remanded.

BRANTLY, C. J., and SANNER, J., concur.

(53 Mont. 71)

ALBERS v. BOARD OF COUNTY COM'RS OF BEAVERHEAD COUNTY et al.

(No. 3708.)

(Supreme Court of Montana. Nov. 24, 1916.)

1. COUNTIES ⇐205(5)—CLAIMS—APPEAL TO DISTRICT COURT FROM ACTION OF BOARD OF COUNTY COMMISSIONERS—STATUTE.

Under Rev. Codes § 2948, providing that an appeal to the district court from an order of a county board of commissioners allowing or disallowing a claim must be entered, tried, and determined the same as appeals from justices' courts, on appeal to the district court from an order of the board of commissioners of a county allowing a claim, the district court is limited to the determination of only the matter that was before the board of commissioners.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 332, 333; Dec. Dig. ⇐205(5).]

2. COUNTIES ⇐204(4)—CLAIMS—ACTION OF BOARD OF COUNTY COMMISSIONERS—STATUTE—"COURT"—"JUDGMENT."

A board of county commissioners is not a "court," and its action in allowing or disallowing a claim against the county is not tantamount to a "judgment," its refusal to allow a claim not being conclusive, even though the claimant does not appeal, in view of Rev. Codes, § 6450a, subd. 2, providing that actions for claims against a county, rejected by the commissioners, must be commenced within six months after the first rejection.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 317; Dec. Dig. ⇐204(4).

For other definitions, see Words and Phrases, First and Second Series, Court; Judgment.]

8. COUNTIES ⇐205(5)—CLAIMS—APPEAL TO DISTRICT COURT—STATUTES.

Under Rev. Codes, §§ 2947, 2948, concerning appeals to the district court from an order of the board of county commissioners allowing or disallowing a claim against the county in whole or in part, the action of the district court should not terminate in a formal judgment for the amount of the claim, though judgment for costs is proper, but only in an order affirming or reversing the action of the board, since the language of section 2948 means only that the court may try de novo the question whether the action of the board was correct, and so declare.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 332, 333; Dec. Dig. ⇐205(5).]

4. COUNTIES ⇐205(5) — CLAIMS — APPEAL — JUDGMENT—STATUTE.

Under Rev. Codes, §§ 2947, 2948, relative to appeals to the district court from the decision of a board of county commissioners allowing or disallowing a claim against the county, the court cannot give judgment against the claimant for the amount of a claim already paid to him, as the statute is the limit of the court's power, and does not authorize such judgment.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 332, 333; Dec. Dig. ⇐205(5).]

Appeal from District Court, Beaverhead County; Wm. A. Clark, Judge.

Proceedings before the Board of Commissioners of Beaverhead County by C. C. Barnett for allowance of a claim. From an or-

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der of the board allowing the claim, John G. Albers, as a taxpayer, appealed to the district court. There was judgment that the claim had been allowed and warrant issued without authority of law, and that the county was entitled to recover from Barnett and others the amount specified in the warrant, and from an order denying the motion of Barnett and others for new trial, they appeal. Order reversed, and district court directed to grant appellants new trial.

Rodgers & Gilbert, of Dillon, for appellants. Norris, Hurd & Smith and Roy S. Stephenson, all of Dillon, for respondent.

BRANTLY, C. J. On December 6, 1910, C. C. Barnett, one of the appellants, submitted to the board of commissioners of Beaverhead county his bid for a contract for the care of the indigent sick, poor, and infirm of the county. This was in response to a notice published by an order of the board in pursuance of section 2054 of the Revised Codes, as amended by the Laws of 1909 (Laws 1909, c. 29). On December 10th he was awarded a contract. Under its terms he assumed the obligation to care for and support the indigents whose maintenance was chargeable to the county as provided in the statute, except that he did not assume to furnish medical attendance and medical supplies, to pay the salaries of the nurses for the sick or the expense of the necessary laundry work. It was expressly agreed that he was relieved from any obligation in this behalf. The contract covered a term of three years from December 12, 1910. Barnett was to be paid by the county, at the quarterly meetings of the board, 80 cents per day for each person who became a county charge; he was to have the use of the county poor farm, and, as a consideration for its use, was to pay to the county in installments on specified dates, for the first year, $1,900, for the second, $2,000, and for the third, $2,100, or a total of $6,000 for the three years. The contract recited with great particularity the obligations mutually assumed by the county and Barnett. For present purposes, the foregoing general statement of its nature and object will suffice. Appellants Eliel and Best became the sureties of Barnett for the faithful performance of the contract, and the latter proceeded to execute it on his part, receiving his compensation and paying the rent for the farm as therein provided. On August 29, 1913, the respondent brought his action in the district court against the board, alleging that the contract was void because the board had failed in several particulars to observe the requirements of the statute in the letting of it, and demanding that the board be enjoined from making further allowance or payment to Barnett for his services under it. It was alleged that the contract was void because: (1) The notice was not published for the time required by law before the contract was let; (2) because of the exceptions made therein, relieving Barnett from the necessity of furnishing medical attendance, medical supplies, etc.; (3) because it fixed the compensation at a rate per day instead of a rate per week, as required by the statute; and (4) because it covered a term not contemplated by the statute. On application to the court, it issued an injunction pending final decree. None of the appellants were parties to this action. The board suffered a default to be entered, and on February 2, 1914, after final hearing, the contract was adjudged void, and the board was peremptorily enjoined from proceeding under it, and specifically from paying any further compensation to Barnett. On December 1, 1913, Barnett presented to the board a verified account for allowance for the care of indigents during the months of June, July, and August, at the rate per capita specified in the contract, amounting to $1,518.30. On March 6, 1914, the board having allowed the account to the amount of $1,430, directed the issuance to Barnett of a warrant for this amount, and this was at once done. Barnett immediately assigned the warrant to Eliel and Best, who thereupon assigned and delivered it to the board for the county in part payment of the rent due from Barnett for use of the poor farm under the terms of the contract. Thereupon the respondent, as a taxpayer of the county, appealed to the district court from the order of allowance. On June 22, 1914, the controversy was submitted to the court upon an agreed statement of facts, to which the county, represented by the county attorney, the appellants, and the respondent were all parties. It was agreed, among other things, in addition to the foregoing recitals, that the persons cared for and maintained by Barnett were properly charges of the county; that it was the duty of the county to care for and maintain them; that Barnett performed the services rendered to the county in this behalf in good faith, in the belief that the contract was valid and binding upon him as well as the county; that the county received the benefit of his services and the supplies furnished by him in good faith; that the county had paid no consideration for the services and the supplies so furnished; and that the sum allowed by the board was the reasonable value thereof. Upon the facts submitted, the court held that the claim had been allowed and the warrant issued without authority of law, and that the county was entitled to recover from the appellants the amounts specified in the warrant. Judgment was rendered accordingly. The appeal is from an order denying appellants' motion for a new trial.

Whether the Barnett contract was void upon any of the grounds alleged in the action brought by the respondent, and whether Barnett was concluded by the decree therein, are questions which do not arise on this appeal. When the action was brought and a

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temporary injunction was issued, Barnett abandoned further performance of the contract, assuming, apparently, that he could not lawfully proceed under it. In any event, in presenting this case, counsel for appellants have assumed that the decree in that case was proper and binding upon the county, and also concluded Barnett for all purposes. They assail the integrity of the judgment in this case on several grounds. One of them is that, though the contract was void, yet since under the provisions of the Code on the subject it was the absolute duty of the county to provide for the care and maintenance of indigents in the county, and Barnett, at the instance of the board, performed services and incurred expense in that behalf, he is entitled to reasonable compensation for his services and to be reimbursed for his expenses. It is also contended that, upon the broad principle of equity and good conscience, the county, having received the benefit of Barnett's services and outlay, ought to reimburse him. It is further contended that, whether Barnett is entitled to be reimbursed by the county or not, the court was without jurisdiction in this proceeding to render judgment against the appellants for the amount of the warrant issued in payment of Barnett's claim.

It may be remarked here that the result of the transaction between the board and the appellants was not a withdrawal of funds from the treasury of the county, but merely a discharge pro tanto by the board of the rent assumed to be due the county for Barnett's use of the poor farm up to the time respondent brought his action to annul the contract. From this point of view Barnett had not received money from the county for which recovery could be had upon any theory. Counsel and the court, however, both seem to have assumed that the transaction was the equivalent of a payment to Barnett and to have tried the issue whether or not the payment was legal; the court having plenary jurisdiction for all purposes. However this may have been, and without regard to the merits of the other contentions of counsel, we think the court was wholly without jurisdiction to render the judgment it did.

[1-3] The proceeding was before the court on appeal from the order of allowance by the board, in pursuance of these provisions of the Revised Codes:

"Sec. 2947. Whenever a claim against a county is disallowed in whole or in part, or when any taxpayer of the county is not satisfied with any allowance made by the board, the claimant or such taxpayer may appeal from the decision of the board to the district court for the county, by causing a written notice of appeal to be served on the clerk of the board, within thirty days after the making of the decision or allowance, and executing a bond to the county, with surety to be approved by the clerk of the board, conditional to prosecute such appeal to effect, and to pay all costs that may be adjudged against the appellant.

"Sec. 2948. The clerk of the board, upon an appeal being taken, must immediately give notice thereof to the county attorney, and must make out a return of the proceedings in the matter before the board, with its decision thereon, and file the same, together with the bond and all the papers therein in his possession, with the clerk of the district court; and such appeal must be entered, tried and determined, the same as appeals from justices' courts, and costs are awarded in like manner."

These provisions contemplate that the parties to the controversy in the district court in such cases are the county and the claimant or the taxpayer. Clearly this is so when the claimant is the appellant, for the controversy is between him and the county upon the question of allowance or disallowance, or, in other words, upon the question whether he has a legal claim against the county. The same situation is presented when a taxpayer is the appellant because there is no provision for notice to the claimant; the only provision on the subject being the requirement that the clerk shall give notice to the county attorney, the representative of the county. It will be noted, too, that the appeal bond required of the taxpayer runs, not to the claimant, but to the county, and there is no provision that if the taxpayer is overruled, the claimant may recover his costs against the taxpayer of the county; nor, if the taxpayer is successful in reversing the order, that the county may have judgment against the claimant for its costs.

The scope and meaning of these sections have never been defined by this court, nor has any decision construing them been called to our attention. They were considered somewhat in State ex rel. Cope v. Minar, 13 Mont. 1, 31 Pac. 723, but the justices were not in harmony, except upon the point that the judgment which had been rendered by the district court on appeal by a taxpayer from an order of allowance by the board of commissioners was void for want of jurisdiction. In a concurring opinion in that case Mr. Justice Harwood expressed the view that when a taxpayer appeals, the real adversary party is the claimant, and that the clear implication is that he must be made a party under the general provision of the statute (Rev. Codes, § 6498), authorizing the court, whenever the presence of other parties than those before it is necessary to a complete determination of the controversy in hand, to order them to be brought in. This proceeding, however, is a special statutory proceeding, and in conducting and determining it, the court must look to the statute for its authority. As in cases of appeals from justices' courts, the district court is limited to a determination of only such matters as the justice might have determined (Duane v. Molinak, 31 Mont. 343, 78 Pac. 588, and cases cited) so here the court is limited in its authority to the determination of only the matter that was before the board of commissioners. The language of the last clause of section 2948 can mean no more than that the court may try de novo the

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question whether the action of the board in its allowance or disallowance was correct, and so declare. The board is not a court, and its action is not tantamount to a judgment. Its refusal to allow a claim is not conclusive even though the claimant does not appeal. Rev. Codes § 6450a; Greeley v. Cascade County, 22 Mont. 580, 57 Pac. 274. So the action of the district court does not terminate in a formal judgment for the amount of the claim, but only in an order affirming or reversing the action of the board. In other words, for the time it sits in place of the board and performs the functions of the board, being authorized to render no judgment other than one for costs. This is apparently the limit of its power. This was the view entertained by Mr. Chief Justice Blake in State ex rel. Cope v. Minar, supra. We think it clearly correct.

[4] But let it be conceded that the adversary parties are the claimant and the taxpayer, the county being only the pawnholder, and that the determination of the district court is conclusive upon the question of allowance or disallowance. The statute does not authorize the court to grant any other relief. It does not directly or by implication authorize judgment against the claimant for the amount of a claim already paid to him. Since the statute is the limit of the court's power, the judgment in this case cannot be upheld.

The order is therefore reversed, and the district court is directed to grant the appellants a new trial.

Reversed and remanded.

SANNER and HOLLOWAY, JJ., concur.

(53 Mont. 33)

In re DOLENTY'S ESTATE.

MANNIX et al. v. DOLENTY. (No. 3757.)

(Supreme Court of Montana. Nov. 17, 1916. On Motion for Rehearing, Dec. 19, 1916.)

1. EXECUTORS AND ADMINISTRATORS ⟸277—PROMPT ADMINISTRATION.

It is the policy of the law that proceedings for the settlement of a decedent's estate be conducted with dispatch, that the estate may not be wasted by needless expense incident to delay and the continuation of allowances made to the widow, and creditors are entitled to prompt satisfaction of their claims, and those entitled to the residue to have distribution made.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1074, 1075, 1124; Dec. Dig. ⟸277.]

2. EXECUTORS AND ADMINISTRATORS ⟸506(3)—UNAUTHORIZED DISPOSITION OF PROPERTY OF ESTATE—SUFFICIENCY OF EVIDENCE.

In proceedings for settlement of an executrix's annual account, evidence *held* to show that her disposition of certain mixed cattle and work horses had been made without authority, so that the items of her account should have been disapproved and she charged with the property as part of the assets of the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2177; Dec. Dig. ⟸506(3).]

3. EXECUTORS AND ADMINISTRATORS ⟸323—SUBMISSION TO COURT OF LIABILITY FOR SERVICES—DUTY TO PAY AS DIRECTED.

Where the nephew of an executrix rendered her services in keeping the accounts of the estate, it was her duty nevertheless to submit the liability incurred for services to the court for allowance, and to pay it as directed by the court by sale of the property of the estate for cash.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1334–1336; Dec. Dig. ⟸323.]

4. EXECUTORS AND ADMINISTRATORS ⟸86(1)—DUTY TO TAKE POSSESSION OF ESTATE—STATUTE.

Under Rev. Codes, § 7603, an executor or administrator must take into his possession all the estate of his decedent, real and personal, and collect all debts due it.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 323; Dec. Dig. ⟸86(1).]

5. EXECUTORS AND ADMINISTRATORS ⟸89—PROPERTY WITH WHICH CHARGEABLE—STATUTE.

Under Rev. Codes, § 7628, providing that an executor or administrator is chargeable in his account with all the estate which may come into his possession, except as provided in following sections, and with all interest, profit, and income, the executor or administrator is chargeable not only with the assets which actually come into his hands, but also with those which by reason of his negligence he has failed to get into his hands.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 393, 394–396; Dec. Dig. ⟸89.]

6. EXECUTORS AND ADMINISTRATORS ⟸131—PROPERTY WITH WHICH CHARGEABLE—RENTS—STATUTE.

As an executor or administrator, under Rev. Codes, § 7603, is entitled to the possession of decedent's realty for the purposes of administration, he is chargeable with the rents and profits thereof, which, in the exercise of ordinary care and diligence, should have been received from it, so that, if he has occupied the realty himself, or lost rents and profits by negligence, he must be charged therewith.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 541–544; Dec. Dig. ⟸131.]

7. EXECUTORS AND ADMINISTRATORS ⟸506(1)—LIABILITY FOR LOSS OF RENTS AND PROFITS—BURDEN OF HEIR OR CREDITOR.

The burden is upon decedent's heir or creditor, seeking to charge the executor or administrator with loss of rents and profits of the realty of the estate due to his negligence, because, though the estate has apparently suffered loss, there is no presumption that the representative has been guilty of fault causing it.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2169–2175; Dec. Dig. ⟸506(1).]

8. EXECUTORS AND ADMINISTRATORS ⟸506(3)—NEGLIGENCE IN LOSS OF RENTS AND PROFITS—PRIMA FACIE CASE—SUFFICIENCY OF EVIDENCE.

In proceedings on an annual account of an executrix, evidence that the executrix lost rents and profits of certain realty of the estate through her negligence *held* to make a

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prima facie case, which, in the absence of explanation, justified a charge against her for the crops for a certain year and the reasonable rental value of the ranch thereafter.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2177; Dec. Dig. ⊂⊃506(3).]

9. EXECUTORS AND ADMINISTRATORS ⊂⊃502—ORDER DIRECTING FULL DISCLOSURE OF CONDITION OF ESTATE — COMPLIANCE WITH AS TO SECURITIES.

Where the court directed an executrix to make full disclosure of the condition of the estate, specifically with reference to the securities mentioned in her inventory, her report, which merely stated that a debt to a bank had been fully paid, and "the said collaterals returned to the executrix, who holds them as assets of the estate," was not a compliance with the requirements of the order, since full disclosure should have been made as to the condition of the securities and whether they were substantial assets to which creditors could look.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2149–2152; Dec. Dig. ⊂⊃502.]

10. EXECUTORS AND ADMINISTRATORS ⊂⊃118 — PROPERTY WITH WHICH CHARGEABLE — STATUTE.

Under Rev. Codes, § 7628, providing that every executor or administrator is chargeable in his account with the whole of decedent's estate which may come into his possession, where certain farm implements were admittedly assets of the estate, and were included in the inventory, the executrix should have been charged with their value.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 472–482; Dec. Dig. ⊂⊃118.]

11. COURTS ⊂⊃200½—PROBATE COURT—ADMINISTRATION ON DECEDENT'S ESTATE—POWER TO DETERMINE QUESTIONS OF TITLE.

Under Rev. Codes, §§ 7383, 7384, relative to probate proceedings, a district court, sitting in probate to approve an executrix's report has only the special and limited powers conferred by statute, and is without power to hear and determine any matters other than those which come within the purview of the statute, or which are implied as necessary to a complete exercise of those powers expressly conferred, and has no power to determine questions of title between the estate and persons claiming adversely to it, which must be determined in proper proceedings for that purpose.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 479; Dec. Dig. ⊂⊃200½.]

12. EXECUTORS AND ADMINISTRATORS ⊂⊃22(2)—SPECIAL ADMINISTRATOR TO LITIGATE TITLE.

Since a decedent's estate is an entirety, and there can be but a single administration of its affairs, a special administrator cannot be appointed to litigate a question of title with the executrix, who has put herself into a position in which she cannot represent the estate and at the same time assert title in herself adversely to it.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 117–122; Dec. Dig. ⊂⊃22(2).]

13. EXECUTORS AND ADMINISTRATORS ⊂⊃122(1)—POWERS OF SPECIAL ADMINISTRATOR — STATUTE.

Under Rev. Codes, § 7474, prescribing the duties of special administrator, the powers of a special administrator are limited to the preservation and protection of the estate temporarily until a general administrator or executor has been appointed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 494, 495½; Dec. Dig. ⊂⊃122(1).]

14. EXECUTORS AND ADMINISTRATORS ⊂⊃35(2)—REMOVAL TO MAKE POSSIBLE DETERMINATION OF TITLE.

The only remedy, where an executrix has put herself in a position in which she cannot litigate a question of title between herself and the estate, is to remove her, and substitute a successor who may bring such action as may be necessary to determine title.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 236; Dec. Dig. ⊂⊃35(2).]

15. EXECUTORS AND ADMINISTRATORS ⊂⊃35(2)—APPOINTMENT OF SUCCESSOR TO EXECUTRIX TO LITIGATE QUESTION OF TITLE — NECESSITY.

Where the executrix is sole beneficiary under the will, her removal, to make way for a successor who can litigate a question of title between the executrix and the estate, is unnecessary, unless it appears the estate has become insolvent, in which event only the creditors have an interest in it.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 236; Dec. Dig. ⊂⊃35(2).]

16. EXECUTORS AND ADMINISTRATORS ⊂⊃508(1)—APPROVAL OF EXECUTRIX'S ACCOUNT—VOID SALES OF PROPERTY.

Where the district court, in approving an executrix's account, treated as valid sales of realty made by the executrix under an order of court, but which were void, and allowed the executrix to charge herself only with the proceeds of the sales, there was error.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2192–2196; Dec. Dig. ⊂⊃508(1).]

On Motion for Rehearing.

17. EXECUTORS AND ADMINISTRATORS ⊂⊃35(12)—SUSPENSION OR REMOVAL—POWER OF DISTRICT COURT—STATUTES.

By direct provision of Rev. Codes, §§ 7488, 7489, which make no distinction between the surviving spouse, acting as representative, and any other person, the district court is authorized to suspend the powers of an executor, and, if necessary, to remove an executor who has been guilty of delinquencies mentioned therein.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 249; Dec. Dig. ⊂⊃35(12).]

18. EXECUTORS AND ADMINISTRATORS ⊂⊃11, 17(3), 35(7)—RIGHT OF SURVIVING SPOUSE—INSOLVENCY—APPOINTMENT AND REMOVAL.

Insolvency of the estate is not a ground for refusal of appointment as executor or administrator to the surviving spouse, nor is the fact that it has become insolvent subsequently to the appointment ground for his or her removal.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 25, 45–47, 244; Dec. Dig. ⊂⊃11, 17(3), 35(7).]

19. EXECUTORS AND ADMINISTRATORS ⊂⊃15, 35(2)—CLAIM TO PROPERTY OF ESTATE BY EXECUTRIX—REMOVAL AND APPOINTMENT OF SUCCESSOR.

An executrix was not rendered incompetent to receive her appointment in limine because she asserted claim to property ostensibly belonging to the estate, but, when subsequent exigencies have put her in a position so antagonistic to the creditors that she cannot do justice to them and the estate, and also establish her personal right, she should be relieved from

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her position and some fit person put in her place.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 32–35, 236; Dec. Dig. ⊂⊃15, 35(2).]

20. EXECUTORS AND ADMINISTRATORS ⊂⊃17(7) —WIDOW'S RIGHT TO NOMINATE—WAIVER BY ACCEPTING APPOINTMENT.

Where a widow chose to take the appointment as executrix, her right in limine to nominate some one to serve in her stead was waived, so that on removal for cause she could not nominate her successor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 57–59; Dec. Dig. ⊂⊃17(7).]

Appeal from District Court, Broadwater County; Geo. W. Pierson, Judge.

In the matter of the estate of W. B. Dolenty, deceased. Petition by Con Mannix and others asking that Isabel Dolenty, executrix, be required to present an account and report under oath. From an order of the district court overruling objections and approving the account filed by the executrix, petitioners appeal. Order reversed, and proceedings remanded.

Walsh, Nolan & Scallon, of Helena, for appellants. H. G. McIntire, of Helena, for respondent.

BRANTLY, C. J. This is an appeal from an order made by the district court of Broadwater county, Hon. Geo. W. Pierson presiding, approving the fourth annual account of Isabel Dolenty, the surviving widow of W. B. Dolenty, deceased, and executrix of his will. Dolenty died on September 15, 1910. His estate consisted of lands and a large amount of personal property. Under the terms of the will the widow is entitled to take substantially the entire estate, subject to the payment of decedent's debts. She qualified as executrix on November 26, 1910, and has since been acting as such. On February 16, 1915, the executrix being in default in presenting her annual account, several of the creditors of the estate, having established claims aggregating about $20,000, presented to the court their petition asking that she be required to present an account and report under oath, disclosing the amount of money received and expended, the amount of claims presented and allowed, with the names of the claimants, and all other matters necessary to show in detail the condition of the estate. The petition charged, in substance, that the executrix had been guilty of mismanagement of her trust in several particulars; that she had failed to account for some of its assets; that she had been guilty of waste; that in certain instances she had turned over property to some of the creditors in discharge of claims due to them, to the detriment of the petitioners and other creditors, the estate being insolvent; and that, except as to such claims, none of the debts due the creditors had been paid. On February 19, 1915, the court made an order directing the executrix to file on or before March 15th a full and complete report and account of all her acts and transactions since the filing of her last account, and to make full disclosure of the condition of the estate. The account having been filed in response to the order, the petitioners interposed objections to the approval thereof. Some of these question the right of the executrix to be credited with certain items paid by her as expenses of administration. Most of them challenge the conduct of the executrix as a whole, specifying particular instances of neglect and mismanagement resulting in loss of assets, or a misapplication of them to her own use, or for the benefit of certain creditors. After a hearing had on June 4, 1915, the court overruled the objections and approved the account. From this order, the petitioners have appealed.

[1] Before taking up the various contentions made by counsel, we remark generally that the administration of this estate has not been conducted with that degree of dispatch and attention to the rights of the petitioners which the law contemplates. The respondent has been somewhat hampered and delayed by litigation, but, so far as this record discloses, it has not been so extensive nor of such a character as to cause a delay of nearly five years, leaving the creditors of the estate without satisfaction of their claims. In all cases a reasonable time—the extent of it depending upon the particular circumstances—is necessary to enable the person charged with the duty of winding up the affairs of an estate to collect the assets and to get them into condition for distribution or convert them into cash in order to realize funds necessary to meet the demands of creditors. It is the policy of the law, however, that the proceedings be conducted with dispatch, to the end that the estate shall not be wasted by needless expense incident to delay and the continuation of allowances made to the widow. Creditors, if any, are entitled to prompt satisfaction of their claims, and those entitled to the residue to have distribution made of them. In re Tuohy's Estate, 33 Mont. 230, 83 Pac. 486; State ex rel. Mannix v. District Court, 51 Mont. 310, 152 Pac. 753.

After an examination of the record, we think that the order of the district court should be set aside, and that the respondent should be required to account for property disposed of without authority of law, for assets in the way of rents and profits of real estate in her possession which have apparently been lost through her neglect or want of attention, and to furnish information in detail as to the condition of the estate. We think, too, that she should be expedited in bringing the affairs of the estate to a close, or, as the only alternative, that some suit-

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able person be substituted in her place who has capacity and disposition to do so.

[2, 3] 1. Upon the death of the decedent the estate was ostensibly solvent. As we shall presently see, owing to the loss of the rents and profits of the real estate for which the respondent has failed to account, the accumulations of interest upon established claims, and the expenses already incurred and hereafter necessary, it is now questionable whether, after other allowances which the respondent will in any event be entitled to as the surviving widow, the assets will be sufficient to satisfy the claims of the creditors.

By her inventory returned on February 18, 1911, there appears to have come into the hands of the respondent, with the other property, 45 head of mixed cattle and 7 work horses, valued at $1,225. In her third annual exhibit dated July 17, 1913, she accounted for 46 head of cattle of an estimated value of $1,500, and 4 head of horses valued at $250. On October 14, 1913, she made application to the court for an order authorizing her to sell at public auction or at private sale, for cash, all the property belonging to the estate. This application recited that the above-mentioned property was still in her hands. By subsequent orders from time to time the original order was amended by extending the time within which the sale might be made until November 2, 1914. Under this order sales of real estate were made which will be noticed later, but of no other property. In her report she makes account of her disposition of the cattle as follows:

"One Gene McCarthy was a creditor of the estate in excess of the value of the cattle mentioned in the inventory filed herein, and she, the executrix, turned over to him the said cattle in satisfaction of said claim with the approval of the court."

In her testimony at the hearing she stated that McCarthy was her nephew and in her employment, and that she had sold to him both the cattle and the horses for the purpose of discharging his claim for services rendered in keeping her accounts. There is nothing in the record showing that McCarthy had a claim against the deceased at the time of his death, nor any substantial showing that he had rendered services to the respondent of any value. Nor is it disclosed that the court had granted the respondent authority to make disposition of the property otherwise than by sale for cash under the order of sale. When this became apparent from the testimony of the respondent herself under the questioning of counsel for the creditors, she undertook to justify her course, so far as the cattle were concerned, by claiming that they had never been the property of the estate, but had belonged to herself, and this, too, in face of the fact that she had repeatedly in her inventory, her several accounts, and in her application for the order of sale charged herself with them as property of the estate. She did not undertake to explain or justify her disposition of the horses otherwise than as heretofore stated. Upon this showing these items should have been disapproved, and the respondent charged with the property as part of the assets of the estate, on the ground that her disposition of it had been made without authority. Even though the services had been rendered, it was nevertheless the duty of respondent to submit the liability incurred for them to the court for allowance and pay it in the manner directed by the court, viz., by the sale of property for cash.

[4-8] 2. The evidence discloses that the respondent had been in possession of the following real estate which had belonged to her husband: The Ward ranch, consisting of 240 acres, valued at $6,000; the Lansing ranch, consisting of 1,100 acres, valued at $11,000; the Little home ranch, consisting of 320 acres, valued at $8,000; the Little river ranch, consisting of 400 acres, valued at $14,000; the Reed ranch, consisting of 852 acres, valued at $43,000; and the Morse ranch, consisting of 680 acres, valued at $9,600. Objection was made to the approval of the account on the ground that the respondent had failed to charge herself with revenues derived or properly derivable from this property, specifically the Reed and Lansing ranches.

An executor or administrator must take into his possession all the estate of his decedent, real and personal, and collect all debts due to the estate. Rev. Codes, § 7603. He is "chargeable in his account with the whole of the estate of the decedent which may come into his possession, at the value of the appraisement contained in the inventory, except as provided in the following sections, and with all the interest, profit and income of the estate." Section 7628. The following sections in the chapter (sections 7629–7633) relieve him from liability for losses to the estate occurring without his fault, and prescribe the measure of his expenses and the compensation which he may have for his services. Under the rule declared in section 7628, the executor or administrator is chargeable, not only with the assets which actually come into his hands, but also with those which by reason of his negligence he has failed to get into his hands. Wheeler v. Bolton, 92 Cal. 159, 28 Pac. 558; Estate of Kennedy, 120 Cal. 458, 52 Pac. 820. Since under section 7603 he is entitled to the possession of the real estate of his decedent for the purposes of administration, the same rule must apply with reference to the rents and profits which in the exercise of ordinary care and diligence ought to be received from it. So if he has occupied it himself, or by his negligence has failed to secure from it such reasonable amount of revenues in the way of rents and profits as it ought to yield, he must be charged with their loss. In re Alfstad's Estate, 27 Wash. 175, 67 Pac. 593. The burden, however, is

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upon the heir or creditor seeking to charge him with loss due to negligence, because, though the estate has apparently suffered loss, there is no presumption that he has been guilty of the fault causing the loss. Wheeler v. Bolton, supra.

Applying these rules to the facts in the case in hand, is the respondent executrix properly chargeable with the rents of the Reed and Lansing ranches? At the time of the death of decedent the Reed ranch was in possession of one Reed under some sort of an agreement the nature of which does not appear. In any event the respondent did not gain possession of it until the early part of September, 1913. The value of the crops on it at that time, harvested in part and turned over to her, was $6,000. It does not appear what became of these crops, except that the respondent charged herself in her account with $275, the value of hay and grain sold by her. This she claimed she had paid to a bank in Boulder, in Jefferson county, without, however, giving any explanation why this disposition had been made of it or exhibiting a voucher showing that it had in fact been paid. In her petition for the order of sale she stated that the crops were worth $2,000. Reed testified that the reasonable rental value of the ranch was $1,500 per annum. The witness Rorvig testified that he offered the respondent $1,100 rental for about 300 acres of this ranch for the year 1914, but that she refused it. The foregoing evidence is not disputed. There is also undisputed evidence that from the time the executrix took possession up to the time the account was filed this ranch had been in possession of Gene McCarthy, and had been used by him for the pasturage of sheep. With reference to the ownership of the sheep, the evidence leaves it in doubt whether they belonged to McCarthy or to him and the respondent jointly. Be this as it may, a prima facie case is made which, in the absence of explanation, is sufficient to justify a charge against the respondent for the crops for the year 1913 and for the reasonable rental value of the ranch thereafter; and this whether the sheep belonged to her and McCarthy or to him exclusively.

The Lansing ranch had been in substantially the same condition. It passed into the hands of the respondent at the date of her appointment. At that time the fences were in good repair, and the land had a rental value of $300 or $400 per annum. During the year 1914 it was being used by McCarthy in connection with the Reed ranch, for the pasturage of the sheep referred to above.

Throughout the hearing the respondent exhibited an indisposition to make any disclosures touching the condition or use made of these or any of the lands belonging to the estate, and made no other than such as were forced from her under the pressure of cross-examination by counsel. As to the Reed and Lansing lands, it is clear that respondent has been using them as her own and appropriating the rents and profits derived from them to her own benefit. As to the other lands, there is little tangible evidence showing what use, if any, has been made of them. The record shows that little, if any, revenues have been derived from them—a condition of affairs hardly conceivable when we consider their extent and value. The court should have required a full accounting in this behalf and charged the respondent accordingly.

[9] 3. At his death the decedent had become indebted to the American National Bank at Helena to an amount approximately $30,000, and had deposited with it, as collateral, securities valued in respondent's inventory at $34,777.94. The evidence discloses that these securities consisted of promissory notes made by various persons to the decedent, and a contract for the sale by the decedent of certain mining property to one Gruell, which called for a payment by the latter of $20,000. The bank did not present a claim against the estate. The indebtedness due it had at the time respondent filed her account been discharged by payments made by the makers of some of the notes and to the amount of about $10,000, and a payment by Gruell of the amount due on the contract. The unpaid notes were thereupon delivered to the respondent. No mention of the contract had been made in the inventory. In her testimony at the hearing respondent for the first time disclosed that the bank held this security. Her report contains this statement:

"The debt to the said bank has been fully paid and the said collaterals returned to the executrix, who holds them as assets of the estate."

This is all the information furnished. Objection was made to the approval of the account by counsel, on the ground that it did not comply with the requirements of the order which directed a full disclosure of the condition of the estate, specifically with reference to the securities mentioned in the inventory. With this contention we agree. In order that the court might determine whether the respondent had exercised diligence in collecting these notes, whether they are of value, and therefore whether the estate is insolvent and should be administered as such by stopping the respondent's allowance theretofore made and still continued, it was important that a full disclosure should be made as to the condition of the securities and whether they are substantial assets to which the creditors could look for the satisfaction of their claims. If these securities are worth their face value and the respondent is found properly chargeable with a substantial sum in the way of rents and profits, the estate is apparently solvent; otherwise it is not. Such information as was given by the respondent was too indefinite to furnish the basis for any

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intelligent conclusion as to the real condition of the estate.

4. Though, as we have already said, the estate was at the outset apparently solvent and amply sufficient to satisfy the claims of the creditors, upon the disclosures made by the report and the testimony of the executrix, no definite conclusion can be reached as to what the actual condition is in this regard. Upon this condition of the record we do not think we ought, on this appeal, to venture to determine it. Except so far as the fact of insolvency will control the district court in continuing respondent's extra allowance which she claims in her account, and in permitting her to retain control of the administration, the inquiry is immaterial. Since the order must be reversed in any event, we refer the inquiry on this subject to the district court upon a full disclosure by the respondent.

[10] 5. In the inventory certain farm implements which came into the hands of the respondent were valued at $135. These assets, and also the horses heretofore referred to, are stated by the respondent in her report and in her testimony to be of no value. From the testimony of the witness Davidson it appears without dispute that the farm implements had been used by the respondent in cultivating a part of the lands belonging to the estate. Since they were admittedly assets of the estate and were included in the inventory, she ought to have been charged with their value. Rev. Codes, § 7628. The disposition made of the horses has been shown in the former part of this opinion. The respondent is upon her own testimony chargeable with their value.

[11] 6. It appears that at the time of his death the deceased was the owner upon the record of deeds in Broadwater county of 560 acres of land in addition to that mentioned in the inventory, known as the Runnimede ranch. This was returned in the inventory at the value of $5,000, with a notation that it was claimed by the respondent as her own. With reference to this the report states:

"That W. B. Dolenty during his lifetime was the owner of the so-called Runnimede ranch, consisting of 560 acres, appraised at $5,000. The said W. B. Dolenty was indebted to his wife, the executrix, in the sum of $5,000, evidenced by his promissory note. That in consideration of said indebtedness W. B Dolenty executed and delivered some time in June, 1904, a deed to said property to Isabel Dolenty, his wife, which deed was never recorded and is lost. Isabel Dolenty has been in the open, notorious possession of said property for over ten years last past," etc.

In his order approving the report, the district judge properly refused to charge the respondent wtih this as an asset of the estate, and thus to determine the ownership of the title. A district court sitting in probate has only the special and limited powers conferred by statute, and has no power to hear and determine any matters other than those which come within the purview of the statute or which are implied as necessary to a complete exercise of those expressly conferred. State ex rel. Bartlett v. District Court, 18 Mont. 481, 46 Pac. 259; In re Davis' Estate, 27 Mont. 490, 71 Pac. 757; In re Tuohy's Estate, supra. Among the powers conferred by the part of the Codes relating to probate proceedings (part 3, tit. 12, c. 1) we do not find any provision authorizing the court, in connection with the settlement of estates, to determine questions of title between the estate and persons claiming adversely to it. These questions must be determined in proper proceedings instituted for that purpose. State ex rel. Barker v. District Court, 26 Mont. 369, 68 Pac. 856; In re Tuohy's Estate, supra.

[12-15] The respondent by her claim put herself into a position in which she cannot represent the estate, and thus the creditors, and at the same time assert title in herself adversely to the estate. It is suggested by counsel that this situation might be removed by the appointment of a special administrator to litigate the question of title with the respondent. This, however, cannot be done, because the estate is an entirety, and there can be but a single administration of its affairs. Murphy v. Nutt, 51 Mont. 82, 149 Pac. 713, L. R. A. 1915E, 797. Moreover, the powers of a special administrator are limited to the preservation and protection of the estate temporarily, until a general administrator or an executor has been appointed. Rev. Codes, § 7474. Conceding, therefore, that one may be appointed upon removal of an executor, until a general administrator can be appointed in his stead, this cannot be done until the executor has been removed. The only remedy for the situation thus brought about is to remove the respondent and substitute a successor for her who may bring such action as may be necessary to determine the title. Since the respondent, however, is the sole beneficiary under the will, this would be wholly unnecessary unless it should appear that the estate has become insolvent, in which event only could the creditors have any interest in it.

[16] 7. Certain sales of real estate were made in 1914, ostensibly under the order of October 14, 1913, to E. A. Kimpton and Laura T. Galen. The facts in relation to them are recited in State ex rel. Mannix v. District Court, 51 Mont. 310, 152 Pac. 753. It was there held that they were void for the reasons stated. The property which was the subject of them is therefore still the property of the estate, and the respondent is chargeable with it. In its approval of the account the district court treated these sales as valid, allowing the respondent to charge herself with the proceeds only. This was error.

8. Finally it is urged that it was the manifest duty of the court to revoke the letters of respondent and appoint some one else in her stead, for the reasons that it was disclosed: (1) That more than five years had

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elapsed since her appointment, with no apparent intention on her part to close the estate; (2) that because of her delay in bringing its affairs to a close the estate had become insolvent; (3) that she had been guilty of squandering and misapplying the assets; (4) that she had disposed of property belonging to the estate without lawful authority; and (5) that she had failed to account for property coming into her hands, as well as the rents and profits derivable from it, with studied effort to use it for her own benefit. Prima facie these charges are sustained by the foregoing recitals. There is apparent no justification for the delay in closing the estate and the disregard of the rights of the creditors. The respondent seems to have been proceeding upon the assumption that, inasmuch as she is the sole beneficiary under the will, she is entitled to use and enjoy the estate as her own and to discharge the claims of the creditors whenever it may suit her convenience.

The order is reversed, and the proceeding is remanded to the district court, with directions to require the respondent to make a full and complete accounting, giving in detail the present condition and value of all of the assets of the estate; to charge her with such as she has disposed of without authority or order of court, as well as such as she has failed to receive by her want of diligence, including the reasonable value of the use of all the lands in her possession; to ascertain whether by reason of her delay and inattention, or for any other reason, the estate has become insolvent, and, if so, to remove her and appoint some one in her stead who can have the title to the Runnimede ranch determined; and, in any event, to compel the speedy closing up of the affairs of the estate by the sale of its property and the payment of the claims of the creditors.

Reversed and remanded.

SANNER and HOLLOWAY, JJ., concur.

On Motion for Rehearing.

BRANTLY, C. J. [17-19] The directions addressed to the district court in the opinion heretofore delivered in disposing of the appeal herein, contains the following:

"To ascertain whether by reason of her [the executrix's] delay and inattention, or for any other reason, the estate has become insolvent, and, if so, to remove her and appoint some one in her stead who can have the title to the Runnimede ranch determined."

In his petition for rehearing counsel for the executrix insists that in making this direction the court overlooked the recent decisions in the cases of In re Blackburn's Estate, 48 Mont. 179, 137 Pac. 381, and State ex rel. Cotter v. District Court, 49 Mont. 146, 140 Pac. 732. These decisions are not referred to in the opinion, but they were not overlooked, nor is anything said during the discussion of this case even remotely inconsistent with anything said in either of them. In the first we said:

"It is, however, the policy of our law that the widow shall control in limine the administration of her late husband's estate. Shiels' Estate, 120 Cal. 347, 52 Pac. 808; Dorris' Estate, 93 Cal. 611, 29 Pac. 244. To that end she is authorized to either administer it herself, or to nominate some person in whom she places trust and confidence to administer it for her. In re Watson's Estate, 31 Mont. 438, 78 Pac. 702. No condition or limitation is imposed upon her choice save that she or the person she nominates be competent; nor does the fact that she asserts claim to property which the other heirs contend belongs to the estate render her or her nominee incompetent. Rev. Codes, § 7436; Rice v. Tilton, 13 Wyo. 420, 80 Pac. 828; Brundage's Estate, 141 Cal. 538, 75 Pac. 175; Estate of Bauquier, 88 Cal. 302, 26 Pac. 178, 532."

This is entirely in accord with the express declaration found in section 7432 of the Revised Codes. Under this section the surviving wife or husband has the exclusive right to the appointment in the first instance because it is therein so declared, provided he or she is a competent person within the requirements of section 7436. Furthermore, the person so entitled may request some other competent person to be appointed, if he or she does not desire to act. The principal controversy in the case arose upon the question whether, after the wife had exercised the right to have substitution made, the appointment of the substitute was revocable at the request of the wife when supported by proof that she had been induced by unfair means to consent to the substitution. It was held that upon a proper showing revocation may be had and the wife be permitted to take the appointment, but that otherwise the waiver of the right is irrevocable. In the second case was involved the question whether the surviving husband was entitled, as against the father of the deceased wife, to be appointed special administrator of her estate pending a contest of the validity of her will. It was held that the right of the husband was exclusive under section 7472 of the Revised Codes, because it is therein provided that in making such appointment preference must be given in the order stated in section 7432. It was there said:

"The surviving husband or wife is entitled to general letters of administration, to the exclusion of any other person (Rev. Codes, § 7432), unless at least one of the grounds of incompetency enumerated in section 7436 is shown. In selecting a person to act as special administrator, the court or judge is expressly required to give preference to the person who is entitled to letters testamentary or of administration."

Both of these cases refer to the restrictions put upon the power of the court in making the appointment in limine. They do not justify the conclusion, even remotely, that this court intended to imply, by anything said in either of them, that such an administrator or executor may with immunity adopt a course of conduct which is not only wasteful of the estate, but is wholly disregardful of the rights of its creditors. This would

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have been to nullify the power vested in the court by sections 7488 and 7489: To call to strict account and suspend and, if necessary, to remove an administrator or executor who has been guilty of any of the delinquencies therein mentioned. It would be a monstrous doctrine to say that after his appointment the administrator may despoil or waste the estate at his pleasure, leaving those entitled to it without the means of redress. Even without the provisions in these sections, it would seem to us that the power vested in the district court to conduct the administration of estates, implies also the power to compel the trusted appointee to collect and preserve the assets of the estate put in his charge and to effect a speedy distribution of them to those entitled to share in them. True, insolvency of the estate is not a ground for the refusal of the appointment to the surviving spouse; nor is the fact that it has become insolvent subsequent to the appointment a ground for his or her removal. It is equally true, however, that the sections of the statute supra authorizing removal make no distinction between the surviving spouse and any other person whose appointment was properly made in the first place. These sections are aimed at any person who has shown himself incompetent and untrustworthy.

In the original opinion it was pointed out that it is wholly immaterial what claim is made by the executrix to the Runnimede ranch, unless it should be shown on another hearing that the estate is insolvent, and the question must be determined whether it belongs to the estate. It was further pointed out that, in case this exigency should be shown to exist, a removal of the executrix would be necessary in order that the question of ownership may be determined. It is now insisted that, instead of removing the executrix, the court should appoint a special administrator to bring appropriate action against the executrix. This subject was considered fully in the original opinion. The conclusion there stated is justified on the ground that the administration is an entirety and there can in the nature of things be but one. It may be justified upon the further ground that jurisdiction in probate is statutory and limited, and authority for what is done by a court in the exercise of it must be directly granted by the statute conferring it, or by necessary implication, and no authority to create a double or divided administration is to be found in the statutes. However this may be, we are not disposed to recede from the conclusion heretofore announced. Certainly the executrix was not rendered incompetent to receive the appointment in limine because she asserted claim to property ostensibly belonging to the estate (In re Blackburn's Estate, supra); but when the exigencies which have arisen since her appointment have put her in a position so antagonistic to the creditors that she cannot do justice to them and the estate, and at the same time establish her right, she ought to be relieved from her position and some fit person put in her place. She cannot bring an action against herself. Phillips v. Phillips, 18 Mont. 305, 45 Pac. 221. Hence the creditors cannot obtain relief.

[20] As to the suggestion that the executrix cannot be deprived of the right to nominate her successor, it may be said that in limine she had the right to the appointment, or, as an alternative, to nominate some one to serve in her stead. Having chosen to take the appointment, the right to nominate another was waived. In the case of In re Blackburn's Estate, supra, it was held that, the right to the appointment having been deliberately waived by the wife, the renunciation becomes irrevocable. By parity of reasoning it would seem that, when the wife or husband has chosen to take the appointment, it cannot thereafter be renounced and nomination be made instead. But, conceding this to be permissible when the renunciation is voluntary, in case of removal for misconduct or because of an assertion of rights adverse to the estate, the acting husband or wife ought not to be allowed to name a successor, for the reason that the person selected would more than likely be biased in favor of the adverse claim.

Rehearing denied.

SANNER and HOLLOWAY, JJ., concur.

(58 Okl. 752)

FIRST NAT. BANK OF WELLSTON v. REED. (No. 8569.)

(Supreme Court of Oklahoma. Nov. 28, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⊜568—RECORD—CASE-MADE—REQUISITES.

A case-made, settled and signed prior to the time fixed in the notice of settlement served upon defendant in error, in the absence of defendant in error or his counsel, where no amendments have been suggested thereto or notice otherwise waived, is a nullity.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2523–2529; Dec. Dig. ⊜568.]

Error from District Court, Lincoln County; Tom D. McKeown, Judge.

Action between the First National Bank of Wellston and Milton H. Reed. From the judgment, the bank brings error. Motion to dismiss overruled.

Ira E. Billingslea, of Wellston, for plaintiff in error. Erwin & Erwin, of Wellston, for defendant in error.

HARDY, J. Motion to dismiss is filed, setting up, among other grounds, that the case-made was signed and settled in the absence of defendant in error, and without notice to him of the time and place of settlement, and

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that no amendments were suggested by him thereto.

The records show that notice of settlement of case-made was served upon defendant in error on the 23d day of June, 1916, reciting that case-made would be presented for settlement on July 3, 1916. The certificate of the trial judge shows that same was settled and signed on June 26, 1916, seven days before the time set for such settlement in the notice, and was settled and signed in the absence of defendant in error or counsel representing him, and that no amendments were suggested or notice otherwise waived. For this reason the case-made is a nullity and should be stricken from the files. Sand Springs Ry. Co. v. Oliphant, 157 Pac. 284; Jones v. Jones, 35 Okl. 453, 130 Pac. 139; Charles v. Hillman et al., 150 Pac. 461; Allen v. McLaren, 157 Pac. 349.

The second ground of the motion to dismiss is that the judgment appealed from is not shown to have been entered upon the journal of the court below. This ground should be overruled. St. L. & S. F. Ry. Co. v. Tallaferro, 160 Pac. 610.

While the case-made is a nullity and should be stricken from the files, the record contains a certificate of the court clerk certifying that it is a true and correct transcript, and the case will be retained for consideration of errors assigned which appear on the face of the record.

The motion to dismiss will be overruled. All the Justices concur.

(58 Okl. 754)

Ex parte BURTON. (No. 8714.)

(Supreme Court of Oklahoma. Nov. 28, 1916.)

(Syllabus by the Court.)

HABEAS CORPUS ⇐120—DISCHARGE—REVIEW ON APPEAL.

Where, upon judgment of conviction for a felony and sentence to a term of imprisonment, the amount of appeal bond to be given by defendant in the judgment is fixed and time allowed in which to execute and file same, and defendant tenders an appeal bond within the time allowed which the clerk refuses to approve and no complaint of the action of the clerk is presented to the trial court, or judge thereof, but a petition for writ of habeas corpus is filed in the Criminal Court of Appeals which is denied, and afterwards a petition for writ of habeas corpus is presented to the Supreme Court upon the same state of facts, and it appears that the conclusion reached by the Criminal Court of Appeals is correct, the writ will be discharged and petitioner remanded to the custody of the respondent.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 121; Dec. Dig. ⇐120.]

Application by Joe Burton for writ of habeas corpus. Writ discharged.

F. E. Riddle, of Chickasha, and H. H. Edwards, of Mangum, for petitioner. R. McMillan, Asst. Atty. Gen., and A. R. Garratt, Co. Atty., of Mangum, for respondent.

HARDY, J. Petitioner, Joe Burton, was convicted of manslaughter in the first degree in the district court of Greer county, and on September 1, 1916, was sentenced to imprisonment in the state penitentiary for a term of 15 years. Notice of appeal was duly served. At the time of passing sentence, the court granted an extension of 90 days in which to prepare and serve case-made and fixed the amount of the appeal bond at $12,000 and allowed 20 days from that date in which to execute and file same. Bond was not given within the time allowed. On September 30th, Hon. T. P. Clay, the regular judge of the Eighteenth judicial district, of which Greer county forms a part, made an order extending the time within which an appeal bond might be given until and including the 20th day of October, on which last-named date he granted a further extension of 10 days. On October 19th, Hon. R. W. Higgins, the regularly elected judge of the Fourth judicial district, who had been assigned by the Chief Justice of this court to hold court in Greer county and before whom petitioner was tried and convicted of said crime, made an order extending the time theretofore granted for a period of 20 days. When the original order of extension was made fixing the time in which appeal bond might be given and case-made prepared and served, the court fixed no time in which the appeal should be filed in the Criminal Court of Appeals. On October 21, 1916, upon motion of the county attorney of Greer county, Judge Clay, in chambers set aside the various orders of extension theretofore made in the cause for the reason that in his opinion said orders were invalid because no time had been fixed in which the appeal should be lodged in the appellate court. The order directed the sheriff of Greer county to execute the judgment against petitioner by delivering him to the Warden of the state penitentiary.

Petitioner insists that the various orders of extension were valid, and that the time in which his appeal should be filed in the Criminal Court of Appeals was fixed by section 5991, Rev. Laws 1910, at six months from the date of the judgment, and that under the provisions of section 5994, where the court fixes the time within which the appeal bond should be given and the time in which the case-made should be prepared and served, the order operated to stay the execution of the judgment during the time fixed by the various orders for the giving of said appeal bond. On the other hand, respondent contends that the original order did not operate as a stay of said judgment because it failed to fix the time in which the appeal should be filed in the Criminal Court of Appeals. Such was the construction placed upon the statute by that court prior to the adoption of the present code. Ex parte Tyler, 2 Okl. Cr. 455, 102 Pac. 716; Killough v. State, 6 Okl. Cr. 311, 118 Pac. 620.

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The statutes now in force contain some important revisions which are said to change this rule. We deem it unnecessary to determine this question for the reasons hereinafter given. Petitioner alleges that he presented a good and sufficient bond to the clerk on October 21st, which the clerk arbitrarily refused to approve upon the erroneous view of the law that he was without authority so to do because the various orders of extension had been vacated. In the return to the writ, the order setting aside these extensions is set out, and it is further alleged that the court clerk of Greer county had refused to approve said bond because the sureties thereon in his opinion were insufficient.

In Ex parte Tyler, 2 Okl. Cr. 455, 102 Pac. 716, Tyler had been convicted of forgery and sentenced to a term of imprisonment and prayed an appeal. Time had been fixed in which to prepare and serve a case-made, and the amount of the appeal bond set and time fixed in which same should be given. He presented a bond to the clerk of the district court which the clerk refused to approve, and thereupon filed an original petition in the Criminal Court of Appeals for a writ of habeas corpus. In the opinion by Judge Doyle it is said:

"In the first question presented, this court is asked to review the action of the clerk of the district court of Blaine county in refusing to approve the bail bond offered by petitioner, and that said bond be examined and approved by this court. * * * If a party feels himself aggrieved by the action of a clerk of the district court in refusing to approve a bail bond, and complains that the action of the clerk is unreasonable, arbitrary, and oppressive, he should present his grievance to the trial court or judge thereof. Before filing the petition in error in this court, only the question of excessive bail will be considered. However, when an appeal is perfected, and the crime is a bailable one, pending the appeal, this court will on proper showing make all necessary orders relating to bail."

From the above quotation it appears that that court will not pass upon the sufficiency of sureties upon a bail bond offered by defendant after judgment of conviction and before his appeal is lodged therein, but after filing his petition in error will, on a proper showing, make all necessary orders relating to bail; and this petitioner, by properly filing his petition in error, may secure all the relief to which he is entitled, including the approval of a bail bond if sufficient and his discharge from further custody, which procedure is authorized by section 5995, Rev. Laws 1910. Killough v. State, supra.

In re Raidler, 4 Okl. 417, 48 Pac. 270, presents another phase of the question here involved. The petitioner there was convicted in the district court of Kingfisher county of attempting to rob the United States mails, and sentenced to a term of imprisonment in the penitentiary at Columbus, Ohio. An appeal was granted and the amount of the appeal bond fixed. He filed a petition in the Supreme Court of the territory alleging that he had presented a good and sufficient bond which the clerk refused to approve, and prayed for a writ of habeas corpus, and also that a writ of certiorari be issued commanding the clerk of the district court and the judge thereof to certify their action in reference to his application for bail to the Supreme Court, and that that court examine and approve the bond. One of the reasons there given by the clerk for refusing to approve the bond tendered was that the sureties had not qualified thereon before him in person, but had executed their schedules before other officers. In denying the relief sought, the court said:

"It is the duty of these sureties to appear before the clerk of the district court of Kingfisher county, and satisfy him of their sufficiency and this court should not interfere by habeas corpus, if at all, in such cases, until every proper means has been employed to give a bond as the statute contemplates and requires. They cannot justify before some other officer than the clerk of the district court, and then institute habeas corpus in the Supreme Court to be admitted to bail in such cases, because the clerk declines to approve the bond."

It is further urged that, even though the action of the clerk in refusing to approve the bond will not be inquired into in this proceeding, the orders of extension had not expired, and petitioner was entitled to remain in the county jail until the expiration thereof. At the time this case was submitted, all of the purported orders of extension had expired, and no bond had been approved by the clerk; therefore the time in which petitioner was entitled to remain in the county jail according to his own contention has now expired, and there is nothing for us to do but remand him to the custody of respondent. Previous to the filing of the petition in this case, it appears that petitioner had applied to the Criminal Court of Appeals for a writ upon the same state of facts here presented, which application was by that court denied. While the order of the Criminal Court of Appeals denying the writ is not a bar to a further application to this court, still its order made in the premises is entitled to consideration, and, it appearing that the conclusion reached is correct, it will be followed by this court. Ex parte Justus, 26 Okl. 101, 110 Pac. 907.

The writ should be discharged, and the petitioner remanded to the custody of respondent, and it is so ordered. All the Justices concur.

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(62 Okl. 71)

HART et al. v. WEST et al. (No. 7641.)

(Supreme Court of Oklahoma. Sept. 26, 1916. Rehearing Denied Dec. 19, 1916.)

(Syllabus by the Court.)

INDIANS ⊂⊃13 — ENROLLMENT—CONCLUSIVENESS.

Under Act May 27, 1908, c. 199, § 3, 35 Stat. 313, providing that the enrollment records of the Commissioner to the Five Civilized Tribes should be conclusive evidence as to the age of an enrolled citizen or freedman, the enrollment record, giving the age of an Indian as 10 years, is conclusive that on that date she had passed her tenth birthday and had not yet reached her eleventh, but is not conclusive that she was exactly ten years of age on that day, and does not establish that she was a minor when she made a conveyance of land four months less than eight years thereafter; and in such case any competent evidence is admissible to establish the exact age.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. ⊂⊃13.]

Commissioners' Opinion, Division No. 4. Error from District Court, Nowata County; W. J. Campbell, Judge.

Action by Laura B. West, née Pathkiller, and another, against B. L. Hart and another to quiet title to real estate. Judgment for plaintiffs, and defendants bring error. Reversed and remanded for new trial.

M. E. Michaelson, of Bartlesville, for plaintiffs in error. L. C. Mayfield, of Lebanon, Mo., and Anselan Buchanan, of Vinita (W. D. Humphrey and A. C. Hough, both of Nowata, of counsel), for defendants in error.

EDWARDS, C. This action was filed in the district court of Nowata county to quiet title to certain land allotted to Laura B. West, née Pathkiller, a citizen of the Cherokee Tribe of Indians of one-fourth blood. The enrollment record of the plaintiff Laura B. West is dated December 17, 1900, and shows the allottee at that time to be ten years of age. On August 17, 1908, allottee executed a warranty deed conveying said land to J. S. Calfee, and by a series of conveyances title passed to B. L. Hart, and an oil and gas lease passed to A. D. Morton, one of the defendants herein. The action is to cancel the conveyance making up the chain of title from Laura B. West to B. L. Hart, and also the oil and gas lease to A. D. Morton, upon the ground that Laura B. West was a minor on the 17th day of August, 1908, the date of her original conveyance. The answer of B. L. Hart, in addition to other matters, denies the minority of Laura B. West at the date of her original conveyance. The only evidence offered by plaintiffs below upon the issue of the age of Laura B. West upon the date of her conveyance is a certified copy of the testimony taken at the hearing of the application of the father of Laura B. West for enrollment of himself and family, to the introduction of which objections were made on several grounds. At the conclusion of testimony defendants demurred to the evidence, which demurrer was overruled, exceptions saved, and the defendants elected to stand upon their demurrer and introduced no evidence.

By section 3 of the Act of Congress of May 27, 1908, the enrollment record is made conclusive evidence of the age of an allottee. This section has been applied and construed in numerous cases in this court, and it has been ruled by the Commissioner of the General Land Office that the department should hold that the age of a citizen of the Five Civilized Tribes, as given in the application for enrollment, should be construed, for the purpose of the government, as representing the age of the applicant at that time, and that the date of the application should be held to be the anniversary of the date of birth, except where the records show otherwise. In the instant case the age of the allottee on December 17, 1900, was ten years, and the enrollment record did not show on what date prior to that time she became ten years of age.

The general rule, as stated by 13 Cyc. 738, is as follows:

"It is presumed that the grantor in a deed was competent to execute the same at the time of its execution, and the burden of proving incompetency is on the person alleging it."

In the case of Jackson v. Lair, 150 Pac. 162, it is said by Mr. Commissioner (now Justice) Thacker, in construing this statute:

"But that record did not show, nor tend to show, her precise age within the year 1908. It throws no light whatever upon the date, within that year, at which she became 18, and therefore capable of conveying. This question, unsettled by the enrollment record, must necessarily be determined by indulging a legal presumption or by recourse to other evidence than the record."

In the very recent case of McDaniel v. Holland, 230 Fed. 948, 145 C. C. A. 139, in a case identical in principle with the case at bar, it is said:

"We may accept the record introduced, as conclusive that the plaintiff was nine years of age at the date of the enrollment October 11, 1900; but this does not prove that he was a minor on September 25, 1912, as the finding by the commission that he was nine years of age on October 11, 1900, is entirely consistent with the fact that he had arrived at the age of 9 years at any time within one year prior to October 11, 1900, for after arriving at the age of nine years he would be nine until he arrived at the age of ten, which would be a period of one year."

Then, after referring to the rule adopted by the General Land Office of holding the application date of the enrollment record as the anniversary of the allottee, that court concludes:

"But the clause reading, 'and that the date of the application shall be held to be the anniversary of the date of birth except where the records show otherwise,' was not a construction of the statute, but was a plan adopted by the

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Land Department, 'for the purposes of the government,' in the administration of the duties devolved upon it in connection with Indian lands. It may be conceded to have been a convenient plan for the purposes of the government, and no doubt as between the government and the Indian it was workable, but as against the defendants in this action it was, and is, a pure fiction, not supported by even a probability. If in this case the question was whether or not the plaintiff was nine years of age on October 11, 1900, the judgment of the commission under the statute would be conclusive; but, as we have before indicated, that is not the question. The question here is: Was the plaintiff a minor on September 25, 1912? That question the enrollment record introduced in evidence did not determine, and, of course, is not conclusive. The enrollment record introduced in evidence left the date of birth of the plaintiff an open question to be established by competent evidence."

This court, in the very recent case of Heffner v. Harmon, 159 Pac. 650 (No. 7547), not yet officially reported, has also held, in a case identical with the case at bar, that the age of the allottee, where the date of birth is not shown by the enrollment record, may be shown by competent evidence.

It follows that the judgment should be reversed, and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

(61 Okl. 310)

TEMPLE NAT. BANK v. JOHNSON.

(No. 8055.)

(Supreme Court of Oklahoma. Nov. 28, 1916.)

(Syllabus by the Court.)

BANKS AND BANKING ⟸270(11)—NATIONAL BANKS—RECOVERY OF USURY PAID.

A petition against a national bank, filed for the recovery of alleged usurious interest, should contain an allegation that the taking and receiving of the same was knowingly done, or an allegation to an equivalent effect, and where such an averment is lacking it is error to overrule a general demurrer thereto.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1042–1053; Dec. Dig. ⟸270(11).]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Cotton County; Cham Jones, Judge.

Action by H. M. Johnson against the Temple National Bank to recover penalty for usury. From a judgment for plaintiff, defendant appeals. Reversed, with directions to sustain demurrer to petition.

L. M. Gensman and W. T. Dixon, both of Lawton, for plaintiff in error. I. K. Revelle, of Walters, for defendant in error.

BURFORD, C. This was an action to recover the penalties for usury under section 5198, Rev. St. U. S. (U. S. Comp. St. 1913, § 9759), instituted originally in a justice court and, after judgment there, tried de novo upon appeal to the district court.

The bill of particulars filed by plaintiff contains no allegation that the alleged usury was knowingly charged or received, or any allegation of equivalent import. There was a general demurrer to this bill of particulars, which was overruled and exceptions saved. Upon the trial the court's instructions contained no reference to the fact that usury by a national bank must be knowingly received or charged in order to justify a recovery under the statute. To these instructions defendant duly excepted. Defendant then offered an instruction containing this element, which was refused and exceptions saved. Each of these rulings was clearly error. The cause of action is statutory, and one of the necessary elements of a recovery is that the "taking, receiving, reserving or charging" of the usury shall be "knowingly done." If the petition failed to so allege, it was fatally defective, and, if alleged therein, the defendant had a right, under the statute, to have this question submitted to the jury. First National Bank of Mill Creek v. Ellis, 27 Okl. 699, 114 Pac. 620, Ann. Cas. 1912C, 687; First National Bank v. Landis, 27 Okl. 710, 113 Pac. 718.

The cause should be reversed, with directions to the trial court to set aside the judgment and the order overruling the demurrer to the petition and to sustain said demurrer.

PER CURIAM. Adopted in whole.

(62 Okl. 23)

COMMONWEALTH COTTON OIL CO. v. HUDSON et al.

(No. 5483.)

(Supreme Court of Oklahoma. Jan. 11, 1916. Rehearing Denied Feb. 29, 1916. Second Petition for Rehearing Denied, Dec. 12, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⟸870(1)—COURTS ⟸37(3)—JURISDICTION OVER PERSON—OBJECTION—WAIVER.

A defendant who has objected to the jurisdiction of the court over his person may, after his objection has been overruled, in any manner defend against the action without waiving his objection; but, if he does more, and, aside from his defense, voluntarily demands affirmative relief in the same action, and thus invokes the jurisdiction of the court in a matter unnecessary to his defense, he will be deemed to have waived such objection.

(a) Testing the sufficiency of the petition by demurrer, or by motion to make more definite, to the end that it may be intelligently answered and defended, is not asking such affirmative relief as will deprive the defendant of the benefit of his objection to the jurisdiction.

(b) Where the objection of a defendant to the jurisdiction of the court over his person has been overruled and exceptions saved, he is not required to appeal from such action within the statutory time allowed for appeals, but may save the point and have it reviewed here on appeal from the final judgment in the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3451, 3494, 3499; Dec. Dig. ⟸870(1); Courts, Cent. Dig. §§ 149, 151; Dec. Dig. ⟸37(3).]

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2. PROCESS ⟸120 — WITNESS — EXEMPTION — REPRESENTATIVE OF CORPORATION.

The exemption allowed a witness, while actually attending court in obedience to the commands of a subpœna, from being served with summons in a suit in a county in which he does not reside, and would ordinarily not be suable, extends to the service of summons on him in his representative capacity as managing officer or agent of a corporation.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 150; Dec. Dig. ⟸120.]

Commissioners' Opinion, Division No. 1. Error from District Court, Pawnee County; L. M. Poe, Judge.

Action by M. W. Hudson and another, partners as Hudson & Smith, against the Commonwealth Cotton Oil Company, a corporation. Judgment for plaintiffs, and defendant brings error. Reversed and dismissed.

Robert A. Lowry, of Stillwater, for plaintiff in error. McNeill & McNeill and L. V. Orton, both of Pawnee, and J. M. Springer, of Stillwater, for defendants in error.

BREWER, C. This suit was filed on November 28, 1911, in the district court of Pawnee county by Smith and Hudson, doing business as copartners, against Commonwealth Cotton Oil Company, as defendant, to recover damages in a large sum, alleged to have been caused by the breach by defendant of the terms of a contract between the parties relative to furnishing yardage and facilities for watering a herd of cattle to be put on feed for the market. A summons was served on John H. Bellis in Pawnee county, wherein the suit had been filed; he being admittedly the managing agent of the defendant, in the full superintendency and control of its business. After the service of the summons, defendant appeared specially and filed a plea attacking the jurisdiction of the court, the grounds of which, substantially stated, are: That defendant is a domestic corporation located, situated, and doing business in Payne county, wherein its principal place of business is located at the town of Cushing; that it was not on the date of the alleged service of summons, nor had it at any previous time, been situated in Pawnee county, nor had it ever had its principal place of business or office in such county; that none of its principal officers resided in Pawnee county, nor were any of its said officers or agents in said county on the date of service, except its managing agent, John H. Bellis; that he was only found in said county as he was passing through it on a railroad train, under the necessity and commands of process out of the county court of Payne county, commanding his appearance as a witness therein on said day; that in going from his place of residence to attend said county court in obedience to said process he went on a certain railroad train, which was the usual, proper, and convenient method for him to pursue, and in doing so he passed through Pawnee county, and was therein served with the summons in this suit; that same was not legal or binding, because of the exemption afforded witnesses in attendance upon courts under process from being thus sued or served with process outside the county of their residence. To support this plea defendant introduced the subpœna under which he was traveling when served, the affidavit of said Bellis, and that of the county judge, showing that Bellis attended on that date, under the subpœna as a witness, in a certain criminal case pending in Payne county. The court overruled the plea to the jurisdiction, and defendant reserved its exception to the action of the court.

Afterwards defendant filed a motion asking the court to require plaintiffs to make their petition more definite in certain matters, so that it could intelligently answer and defend against the same. It then filed its answer to the petition, saving and reserving at all times its objections to the jurisdiction of the court to proceed with the suit. At a trial judgment was rendered against defendant for a large sum of money, from which it appeals, and presents at the threshold of the case this question of jurisdiction.

Section 5064, Rev. Laws 1910, reads:

"A witness shall not be liable to be sued in a county in which he does not reside, by being served with a summons in such county, while going, returning or attending, in obedience to a subpœna."

[1] The proof in this case is unequivocal, clear, and convincing that the defendant's managing agent was caught and served in Pawnee county with the summons in this case, at a time when he was in transit through that county, on no business of his own or that of his company, but solely because of the commands of the process of the county court of Payne county. There is not the slightest question but what the trial court ought to have sustained the plea to its jurisdiction, and that by not doing so it has permitted this suit against defendant in a county other than that in which it was domiciled, doing business, and had its principal place of business. It is, we think, the well-settled rule of this court that, upon the overruling of such a plea to the jurisdiction, defendant may go on and answer and defend the suit brought against him, and, having saved his exceptions to the ruling of the court on his plea to the jurisdiction, may have such ruling reviewed here upon an appeal, bringing up the whole case. The latest expression of this court may be found in the case of Wm. Cameron & Co. v. Consolidated School Dist. No. 1, 143 Pac. 182, in the syllabus of which case the whole law involved here is very aptly and tersely stated. It follows:

"A defendant who has objected to the jurisdiction of the court over his person may, after his objection has been overruled, in any manner

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defend against the action without waiving his objection; but, if he does more, and, aside from his defense, voluntarily demands affirmative relief in the same action, and thus invokes the jurisdiction of the court in a matter unnecessary to his defense, he will be deemed to have waived such objection."

This rule begins with the holding in Chicago Bldg. & Mfg. Co. v. Pewthers, 10 Okl. 724, 63 Pac. 964, and Chicago Bldg. & Mfg. Co. v. Kirby, 10 Okl. 730, 63 Pac. 966; in which latter case it is said in the syllabus:

"Where a court has no jurisdiction over the particular cause or of the person of the defendant, and the defendant appears specially for the purpose of calling the attention of the court to such irregularities, and the court thereupon overruled his motion to such jurisdiction, he may save his exception, file his answer, and proceed to trial without waiving such error; and he may take advantage of such error on appeal to a higher court."

The same doctrine is announced in the following cases: Austin Mfg. Co. v. Hunter, 16 Okl. 86, 86 Pac. 293; St. L. & S. F. R. Co. v. Clark, 17 Okl. 562, 87 Pac. 430; Okl. Fire Ins. Co. v. Barber Asphalt Pav. Co., 34 Okl. 149, 125 Pac. 734. And in Spaulding et al. v. Polley, 28 Okl. 764, 115 Pac. 864, the same rule is announced by Mr. Justice Williams, who in that case held that not only could a person save his exceptions to the action of the court in overruling his plea to its jurisdiction over his person, and have same reviewed by the Supreme Court, although he had thereafter demurred and answered and tried the case, but held further that he did not have to appeal thereon within one year, but might have the benefit of his exceptions in an appeal of the whole case taken in apt time after the rendition of the final judgment therein, and in which holding Buxton v. Alton-Dawson Mer. Co., 18 Okl. 287, 90 Pac. 19, holding otherwise, was specifically overruled.

With such a line of decisions directly in point, we are not concerned with the great conflict upon this question, which will be noticed by an examination of the decisions. But an exceedingly valuable note will be found attached to the case of Corbett v. Physicians' Casualty Ass'n, 16 L. R. A. (N. S.) 177.

It is contended that, even though the plea to the jurisdiction was good and should have been sustained, yet that the same was waived by the defendant; and the grounds for this is the claim that defendant went beyond what was necessary in his defense of the suit, and asked for affirmative relief, thus waiving the defect in jurisdiction under the doctrine of Wm. Cameron & Co. v. Consolidated School Dist. No. 1, supra. Of course, this claim is sound in law, if it is sound in fact. To determine this has required an examination of defendant's pleadings. This we have made, and from it we conclude that defendant did not invoke any affirmative relief, but all it did was merely in aid of its defense, and with no purpose of obtaining any relief, except that it go hence freed from the claims and liabilities alleged against it in plaintiffs' petition. Neither was the motion to make more definite a waiver. It will be recalled that in Spaulding v. Polley, supra, the party complained of the want of jurisdiction, tested the sufficiency of the petition by demurrer, as well as by answer, after his plea to the jurisdiction had failed, and yet, he was allowed the benefit of his plea in this court, and the cause was reversed thereon. The reason given by the courts for holding that making a defense does not waive the jurisdictional point is that, in theory at least, the defendant has been brought into court wrongfully, and is there under protest, and answers and defends himself, in a sense, under compulsion, and that, such being the case, he may do so, still preserving his rights on the point of jurisdiction. Now, if he can thus answer and defend himself, we can see no reason why he could not ask that the petition he must answer be made definite on certain points, so that he may intelligently answer. We therefore believe and hold that the service of the summons in this case was unlawful, because of the privilege and exemption existing at the time, and that the court erred in overruling the plea to the jurisdiction.

[2] On this phase of the case one other point needs consideration. This point is raised by the claim that the exemption does not apply, for the reason that the witness was served with summons, not as an individual, but in his representative capacity as agent of defendant corporation. To sustain this point reliance is had upon the case of Currie Fertilizer Co. v. Krish (Ky.) 74 S. W. 269, which case, it may be fairly said, supports the contention made. But the Supreme Court of Tennessee, in the case of Sewannee Coal C. & Land Co. v. Williams & Co., 120 Tenn. 339, 107 S. W. 968, refused to follow the Kentucky court as against the weight of authority and sound reasoning. In the last-named case it is said:

"Jurisdiction can be obtained of the corporation only by service of process on its officers or agents who are presumed to be interested in the corporation. We see no reason why the exemption should not apply to a suit against the corporation, with service of process on its officer, as well as if it were a suit against the individual. He is interested in either event. The case of Mulhearn v. Press Publishing Co., decided by the New Jersey court and reported in 53 N. J. Law, 153, 21 Atl. 186, 11 L. R. A. 111, is directly in point and well considered. The rule in that state is in accord with the line of authorities cited above. The court says: 'When a person happens to be an agent or officer, a service upon whom is a service upon a corporation in a foreign jurisdiction, service upon him in his representative capacity is quite as likely to be inimical to the rule of privilege as if the service was made in an action brought against the officer personally. The interest of the officer in the corporation which he represents would naturally deter him from a course of conduct which would operate to the prejudice of his corporation. The repugnance of an officer to having his corporation drawn into litigation in a foreign jurisdiction would be quite as likely

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to keep him at home as if it was merely the danger of service in a personal action.' This reasoning is sound, and certainly within the spirit of the rule."

We are satisfied with the views of the courts of Tennessee and New Jersey on this point, without going into other reasons against the validity of the service which might be advanced; same being made upon the idea that the agent of a corporation does not, in traveling around from one state or one jurisdiction to another, carry the corporate entity around with him into places where it is not domiciled, has no property, no business, and no agent. Along this line there is considerable authority. See St. Clair et al. v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222, and cases cited; Louden Machinery Co. v. American Mal. Iron Co. (C. C.) 127 Fed. 1008, and cases cited.

This cause should therefore be reversed and ordered dismissed.

PER CURIAM. Adopted in whole.

(61 Okl. 311)

PETROLEUM IRON WORKS CO. v. BULLINGTON. (No. 7919.)

(Supreme Court of Oklahoma. Nov. 28, 1916.)

(Syllabus by the Court.)

1. TRIAL ⟸156(2)—DEMURRER TO EVIDENCE.
It is only where the evidence and all the inferences to be drawn therefrom is insufficient to support a verdict for the plaintiff that a demurrer to the evidence can properly be sustained, or a verdict directed for the defendant.
[Ed. Note.—For other cases, see Trial, Cent. Dig. § 355; Dec. Dig. ⟸156(2).]

2. APPEAL AND ERROR ⟸1064(1) — INSTRUCTIONS—PREJUDICIAL ERROR.
The jury is not supposed to know when the court correctly or incorrectly states the law, and it is prejudicial error for the court to give conflicting instructions to the jury, and thus leave the jury to decide conflicting principles of law.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. ⟸1064 (1); Trial, Cent. Dig. §§ 525, 553.]

3. TRIAL ⟸243—INJURIES TO SERVANT—INCONSISTENT INSTRUCTIONS.
Instructions numbered 15½ and 19, respectively, given in this case, carefully considered, and *held* to be in direct conflict.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 564, 565; Dec. Dig. ⟸243.]

Commissioners' Opinion, Division No. 1. Error from District Court, Pawnee County; Conn Linn, Judge.

Action by James Bullington against the Petroleum Iron Works Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Keaton, Wells & Johnston, of Oklahoma City, and L. V. Orton, of Pawnee, for plaintiff in error. McNeill & McNeill, of Pawnee, for defendant in error.

COLLIER, C. Suit was brought by James Bullington against the Petroleum Iron Works Company, to recover damages for personal injuries alleged to have been sustained by the negligence of said company.

The negligence alleged, upon which recovery is predicated, is that the defendant negligently constructed and maintained steps without banisters, leading from the ground to the top of a tank upon which the plaintiff was employed.

The defendant demurred to the petition, which was overruled and excepted to. Thereupon the defendant filed his answer denying each and every allegation of the petition, except that the plaintiff was in its employ at the time stated; (2) that the injury occurred by reason of plaintiff's own negligence directly contributing thereto; (3) that plaintiff was familiar with the character of the steps referred to and assumed all risks incident to ascending and descending the same. To this answer the plaintiff replied, denying each and every material allegation, except that the steps were open and visible.

The uncontradicted evidence is that the plaintiff was employed as a laborer by defendant; that he ascended said steps in the morning, descended said steps at noon, and that he again ascended said steps, and in descending said steps at the completion of his day's work, with the other persons engaged with him in the work, that he fell from said steps and was severely injured. It is further in evidence that said gang of workmen, working with the said Bullington, were being directed by a foreman known as the "Bull Gang Boss"; that banisters had been furnished for said steps and were lying on the ground near said steps, but had not been attached to same; that said steps shook when persons were upon them, and there was nothing at the sides of the steps to prevent persons from falling off; that plaintiff had not complained of the condition of the steps; that he was unaccustomed to the character of work in which he was engaged, and he admitted that he had signed a written statement some time after the accident in which he said:

"There was some kind of a piece on one of the steps. I caught my heel on this piece and that knocked my step off and caught my heel on something and knocked the heel off my slipper. When my foot struck the piece it sounded like iron. I fell off the steps and fell down underneath."

Upon the completion of the testimony, the defendant demurred thereto, which was overruled and excepted to. Thereupon the defendant requested the court to direct a verdict for the defendant, which was overruled and excepted to.

Among other instructions given by the court are instructions numbered 15½ and 19, respectively, which read as follows:

"No. 15½. You are further instructed that an employer is not liable to an employé on account of any injuries sustained by such em-

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ployé from the negligence of a fellow servant, and all such persons engaged in the same common work are fellow servants, even though one may be a foreman in general charge of the job."

"No. 19. Where the master gives to a person power to superintend, control, and direct the men engaged in the performance of work, such person, as to the men underneath him, is a vice principal, and it can make no difference whether he is called a superintendent, conductor, boss or foreman. For his negligent acts and omissions in performing the duties of the master the master is liable."

To the giving of said instruction No. 19, the defendant duly excepted, and assigns the same as error. The jury returned a verdict in favor of the plaintiff in the sum of $———. Within the statutory time, the defendant moved for a new trial, which was overruled, excepted to, and judgment rendered upon the verdict. To reverse said judgment, defendant brings error.

We are of the opinion that the petition was not subject to the demurrer directed against it, and that the court did not err in overruling the same.

"Where the evidence presents an issue of fact, whether clear or obscure, it is the duty of the court to submit such issue to the jury for its determination." Blair v. Lewis, 157 Pac. 905.

"It is only when the evidence, with all the inferences that the jury can reasonably draw therefrom, is insufficient to support a verdict that the court is authorized to direct a verdict for the defendant." St. L. & S. F. Ry. Co. v. Clampitt, 154 Pac. 40.

[1] Applying the foregoing rules to the demurrer to the evidence and the request for a directed verdict, we are unable to see that the court committed prejudicial error in overruling the demurrer to the evidence or in refusing to direct a verdict.

[2, 3] We are of the opinion that the giving of instruction No. 19 was prejudicial error, by reason of the fact that said instruction is in conflict with instruction No. 15½. By instruction No. 15½ the jury are instructed that all the persons engaged in the same kind of work are fellow servants, even though one may be a foreman in general charge of the job, and that the employer is not liable to an employé on account of injuries sustained from the negligence of such fellow servant, while in instruction No. 19 the jury are instructed that where the master gives power to superintend, control, and direct men engaged in the performance of work that he is to the men under him a vice principal, whether he is called superintendent, conductor, or foreman, and for the negligent acts and omissions of such person the master is liable. In other words, in one instruction the court in effect instructs the jury that the company is liable for the negligent acts of the said "Bull Gang Boss," and on the other hand he instructs the jury that the company was not liable for the acts of the said "Bull Gang Boss," thus leaving the jury to select or determine the law of the case.

"The instructions of the court should clearly and intelligently set forth the law applicable to the issues and evidence submitted, without being conflicting * * * or misleading." K. C., M. & O. Ry. Co. v. Roe, 150 Pac. 1035.

"The jury should not be left to decide between conflicts in the charge, without having their attention directed thereto by the court and being instructed as to which of the antagonistic principles is correct and applicable, and which should be disregarded." Savannah Electric Co. v. McClelland, 128 Ga. 87, 57 S. E. 91.

"Where two contradictory instructions are given a new trial will ordinarily be granted, unless it plainly appears that the jury have not been misled thereby." Union Pac. Ry. Co. v. Jno. W. Milliken, 8 Kan. 647.

"Conflicting or contradictory instructions furnish no correct guide to the jury, and the giving thereof is erroneous. Instructions of this character are misleading, as the jury is not supposed to know when the judge states the law correctly or incorrectly, and they should not be left to decide conflicting principles of law. * * * The giving of contradictory instructions is ordinarily held as grounds for reversal." 38 Cyc. 1604F, and authorities therein cited.

It follows that the court committed prejudicial error in refusing to grant a new trial.

This cause should be reversed and remanded.

PER CURIAM. Adopted in whole.

(61 Okl. 308)

FIRST NAT. BANK OF EUFAULA v. SOUTHERN SURETY CO. (No. 7650.)

(Supreme Court of Oklahoma. Nov. 28, 1916.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS ⇐347(2)—CONTRACTORS' BONDS—PERSONS PROTECTED.

A person loaning money to a contractor to pay for labor and material furnished to such contractor is not protected by the provisions of a bond executed in conformity to section 3881, Revised Laws of 1910.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 877; Dec. Dig. ⇐ 347(2).]

Commissioners' Opinion, Division No. 3. Error from Superior Court, Muskogee County; H. C. Thurman, Judge.

Action by the First National Bank of Eufaula against the Southern Surety Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Turner & Turner and Carl W. Gust, all of Eufaula, for plaintiff in error. William T. Hutchings, of Muskogee, and Stanard, Wahl & Ennis, of Shawnee, for defendant in error.

HOOKER, C. Section 3881, Revised Laws of 1910, is:

"Whenever any public officer shall, under the laws of the state, enter into contract in any sum exceeding one hundred dollars, with any person or persons, for purpose of making any public improvements, or constructing any public buildings or making repairs on the same, such officer shall take from the party contracted with, a bond with good and sufficient sureties to the state of Oklahoma, in a sum not less than the sum total in the contract, conditioned that such

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contractor or contractors shall pay all indebtedness incurred for labor or material furnished in the construction of said public building or in making said public improvements."

It appears from the facts here that on or about the 3d day of January, 1913, the Nick Peay Construction Company entered into a written contract with the city of Eufaula to make certain public improvements therein, and in order to secure the performance of its contract it did on said day execute a bond to the city of Eufaula with the Southern Surety Company as its surety, whereby it was obligated that the Nick Peay Construction Company shall well and truly pay all indebtedness incurred for any and all labor and material furnished in the construction of said extension in the performance of said contract, then this obligation to be null and void; otherwise to remain in full force and effect.

It is alleged in the petition in this case that the First National Bank of Eufaula loaned to the Nick Peay Construction Company the sums of money sued for herein to enable it to pay for the labor and for the material used by it in the construction of said municipal improvements, and that money thus furnished by the bank to said company was actually used by the company in the work embraced in the contract and covered by the conditions of the bond, and by reason of the failure of the company to pay the bank said money it is sought here by the bank to make the Southern Surety Company liable to the bank for said money upon the theory aforesaid. It is asserted by the bank that the provisions of the bond which provided that the principal shall well and truly pay all indebtedness incurred for any and all labor and material furnished in the construction of said extension in the performance of said contract make the Southern Surety Company liable for the money due by the construction company to the bank, inasmuch as it is alleged that said money was used by the company for the purpose of paying the claims of laborers and materialmen who were clearly entitled to sue and recover the amount due them upon the bond; while the Southern Surety Company contends that the bond which was executed by the Construction Company with it as surety under the provisions of section 3881 of Revised Laws of 1910 will not justify a recovery against it for the money due the bank. It contends that the object and purpose of requiring this bond was to secure laborers and materialmen against loss and extending to them a lien upon the bond which under the law they are not entitled to assert upon public buildings, or against public property.

We have carefully considered the question at issue here, and we believe that the great weight of authority supports the contention of the defendant in error.

This court, in the case of Rockwell Bros. v. Keatley, 152 Pac. 449, said:

"The sole question presented for our consideration is whether the bond, conditioned, as provided by section 6164, Comp. Laws 1909, that the contractor shall pay all indebtedness incurred for labor and material furnished in the construction of said public building, is broad enough to include money loaned to the contractor for the purpose of paying for such labor and material. The protection offered by the bond was to those who might supply the contractor with labor and material in the completion of his contract. It was not given for the purpose of protecting a party advancing money on a commission contract, whereby such party was to receive a commission for the use of said money of $1.00 per thousand. * * * The principle involved is discussed in Bank v. Rundle [107 Fed. 227, 46 C. C. A. 251] 52 L. R. A. 505, wherein it was held that, where a bank furnished money to pay labor claims, it was not protected by a bond conditioned to pay persons supplying the principal with labor or material in the prosecution of his work, and in referring to the bond the court said: 'It did not extend to a bank which might lend money for the purpose of paying for such work and material.' * * *

"We therefore conclude that a person loaning money to a contractor to pay for labor and material furnished to such contractor is not protected by the provisions of a bond conditioned that the contractor shall pay all indebtedness incurred for labor and material furnished in the construction of a public building."

We see no reason to change the rule laid down in this state in the case above cited, and the judgment of the trial court denying to the plaintiff in error the right to recover against the Southern Surety Company herein is hereby affirmed..

PER CURIAM. Adopted in whole.

(61 Okl. 309)

FIRST NAT. BANK OF EUFAULA v. SOUTHERN SURETY CO. (No. 7649.)

(Supreme Court of Oklahoma. Nov. 28, 1916.)

(Syllabus by the Court.)

OTHER DECISION FOLLOWED.

Same as in First Nat. Bank v. Southern Surety Co. (No. 7650) 161 Pac. 539.

Commissioners' Opinion, Division No. 3. Error from Superior Court, Muskogee County; H. C. Thurman, Judge.

Action between the First National Bank of Eufaula and the Southern Surety Company. From the judgment, the Bank brings error. Affirmed.

Turner & Turner and Carl W. Gust, all of Eufaula, for plaintiff in error. Wm. T. Hutchings, of Muskogee, and Standard, Wahl & Ennis, of Shawnee, for defendant in error.

HOOKER, C. Under the authority of Rockwell Bros. v. Keatley, 152 Pac. 449, and First National Bank of Eufaula v. Southern Surety Co. (No. 7650) 161 Pac. 539, this day decided by this court, but not yet officially reported, this cause is affirmed.

PER CURIAM. Adopted in whole.

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(58 Okl. 773)

LUSK et al. v. WHITE. (No. 7899.)

(Supreme Court of Oklahoma. Oct. 24, 1916. On Rehearing, Dec. 12, 1916.)

(Syllabus by the Court.)

1. RELEASE ⟸13(5)—CONSIDERATION—VALIDITY.

In order to support a release a legal consideration is necessary, but it is not essential that the consideration should be adequate, and, in the absence of fraud, the written release of damages on account of injuries received by the negligence of a railroad company, upon consideration of the continued employment by the company of the person injured, is a valid consideration, and such release may be successfully pleaded in bar of an action for recovery of damages against which the release was given.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 26; Dec. Dig. ⟸13(5).]

2. CONTRACTS ⟸99(3) — PRESUMPTIONS — FRAUD.

It is a well-settled rule that fraud is never presumed, and that, where a written contract is attacked on that ground, the contract will be upheld, unless the allegations of fraud are established by clear and convincing evidence, and the fraud must be predicated upon existing facts, and cannot consist of mere promises as to future action.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 449–453, 1199; Dec. Dig. ⟸99(3).]

3. EVIDENCE ⟸448—PAROL EVIDENCE RULE.

Where a written contract is unambiguous, its terms cannot be changed by evidence dehors the contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066–2082, 2084; Dec. Dig. ⟸448.]

4. MASTER AND SERVANT ⟸278(3)—INJURIES TO SERVANT—EVIDENCE.

In an action to recover damages for negligence on the part of defendants, the negligence averred was that said brake had been carelessly and negligently permitted by the defendants to become out of order, and would not operate properly, which fact was unknown to the plaintiff. Plaintiff himself testified that he did not know of his own knowledge that there was anything the matter with the brake, except what he thought ought to have been the result of the use by him of the same; while the defendants offered conclusive evidence of inspection and proof that the brake complained of was in proper order. *Held*, that plaintiff failed to show actionable negligence on the part of the defendants as to said brake.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 958; Dec. Dig. ⟸278(3).]

5. NEGLIGENCE ⟸121(5)—ACTIONS—BURDEN OF PROOF.

To entitle the plaintiff to recover in an action for damages for injuries received, the burden is upon him to prove by a preponderance of the evidence the negligence of the defendants, and that the negligence averred and proved was the proximate cause of the injuries received by the plaintiff.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 229; Dec. Dig. ⟸121(5).]

On Rehearing.

6. MASTER AND SERVANT ⟸285(7), 286(13)—NEGLIGENCE—PROXIMATE CAUSE—QUESTIONS FOR JURY.

Evidence examined, and *held* sufficient to take the case to the jury upon the question of the primary negligence of the defendant, and whether the negligence averred and proved was the proximate cause of the injuries received by the plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1016, 1020; Dec. Dig. ⟸285(7), 286(13).]

Commissioners' Opinion, Division No. 1. Error from District Court, Garfield County: James B. Cullison, Judge.

Action by George D. White against James W. Lusk and others, receivers of the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendants bring error. Reversed and remanded, with instructions.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and J. H. Grant, both of Oklahoma City, for plaintiffs in error. Parker & Simons, of Enid, for defendant in error.

COLLIER, C. This is an action brought by the defendant in error against the plaintiffs in error to recover damages for injuries alleged to have been received by the defendant in error by reason of the negligence of the plaintiffs in error. Hereinafter the parties will be designated as they were in the trial court.

There are two causes of action set up in the petition. The first cause of action is to recover for injuries received, which occurred on the 5th day of September, 1914, and the averments of negligence as to the same are that the car on track No. 4 had carelessly and negligently been left standing by the employés of defendants other than the plaintiff, in a position too close to the track on which was the car on which plaintiff was riding, and not sufficient space allowed between said car on track No. 4 and the other track to allow for passage of said car. The second cause of action is for injuries received on December 14, 1914, and the averments of negligence as to the same are "that said brake had been carelessly and negligently permitted by the defendants to become out of order and would not operate properly, which fact was unknown to the plaintiff," and plaintiff attempted to set said brake and stop said caboose at the place where it was intended to set on one of said tracks.

The answer of the defendants to the first cause of action, among other defenses, sets up that there had been a full settlement, adjustment, accord, and satisfaction between plaintiff and defendants covering all claims, causes of action, and rights growing out of the alleged injuries to the plaintiff, in this, to wit, that on the 10th day of November, 1914, the said plaintiff, in consideration of the employment of said plaintiff for one day as switchman at the usual rate of pay and for such further time and in such capacity as may be satisfactory to said defendants, which said employment was given to and accepted by the said plaintiff in settlement for any and

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all injuries that he may have sustained at Enid, Okl., on the 5th day of September, 1914, on account of falling from a car while switching in the yards of said defendants in the city of Enid, did release and forever discharge said defendants, their agents and employés, from any and all liability and all claims and demands resulting from the injuries received by the said plaintiff at the time and place above stated. And said plaintiff did thereby release and discharge said defendants and each of them from all suits, actions, causes of action, and claims for damages for said injuries, and did further acknowledge full satisfaction of all such liability and causes of action, as more fully appears from the release signed by said plaintiff, a copy of which is hereto attached, marked Exhibit A and made a part hereof. The exhibit which is attached to the answer, omitting the caption, is in words and figures as follows:

"Whereas, I, the undersigned, on or about the 5th day of September, 1914, was injured at or near Enid, Okl., in the state of Oklahoma, on the line of the St. Louis & San Francisco Railroad, Thos. H. West, W. C. Nixon, W. B. Biddle, receivers, while in the employ of said receivers, and under circumstances which I claim render said receivers liable to me in damages, although said claim and liability are denied by said receivers; and

"Whereas, said receivers will not employ or retain in their employment any person who has an unadjusted claim against them for damages, and I desire to be re-employed by said receivers and to remain in their employment:

"Now, therefore, in consideration of the promise of said receivers to employ me for one day as switchman at the usual rate of pay (the execution hereof being conclusive evidence that said receivers have made me such promise), and for such further time and in such capacity as may be satisfactory to said receivers, and no longer, I agree to and do hereby compromise said claim and release and forever discharge said receivers, their agents and employés, from any and all liability and all claims and demands for all damages resulting from the injuries received by me at the time and place above stated; and I do hereby release and discharge said receivers and each of them from all suits, actions, causes of action, and claims for damages for said injuries; and I hereby acknowledge full satisfaction of all such liability and causes of action; it being expressly understood and agreed that said receivers are not bound or obligated by these presents or otherwise (except as to said one day) to retain me in any particular kind of employment or for any definite time.

"I further represent and state that at the time of signing and sealing this release I am of lawful age and legally competent to execute it, and before signing or sealing it I fully informed myself of its contents and executed it with full knowledge thereof, this 10th day of November, 1914."

For answer to the second cause of action there is a general denial of each and every allegation contained in said second cause of action, plea of contributory negligence, and assumption of risk on the part of the plaintiff.

The plaintiff filed reply to the answer of defendants denying each and every allegation of the answer; that the pretended settlement and release pleaded is contrary to law, public policy, and is null and void; that said pretended settlement and release is wholly void for want of consideration; that said pretended settlement and release is merely a form used by defendants and which they employ for the purpose of endeavoring to intimidate and prevent employés who have received injuries on their line of railroad from attempting to gain compensation therefor, and by reason whereof they seem to take advantage of the necessities of their employés who are obliged to have work by means of which to earn a living for themselves and families; that said pretended settlement and release was procured from him by fraud on the part of the defendants and their duly authorized agents; that by reason of the fact that at the time the agents of defendants asked plaintiff to sign said release said plaintiff refused to sign the same if it would have any effect on his claim for damages against said defendants, and so told said agent.

Plaintiff in his reply to the answer of defendants to the second cause of action denies all and singular each and every allegation and statement of new matter therein contained.

Upon the conclusion of the evidence defendants moved the court to separately direct a verdict in favor of the defendants, and each of them, on the first and second causes of action alleged in plaintiff's petition, for the reason that under the evidence and pleadings herein it appears that plaintiff herein is not entitled to recover on said first and second causes of action, which motion was overruled and duly excepted to.

Thereupon the defendants moved the court to direct a verdict in favor of the defendants on the second cause of action alleged in plaintiff's petition, for the reason that under the evidence and pleadings herein the plaintiff, George D. White, is not entitled to recover against said defendants, which motion was overruled and duly excepted to.

[1] The evidence in this case is very voluminous, and we have carefully examined the same, and, from the view which we take of the cause, we deem it unnecessary to set out the evidence. If it be admitted that the defendants were liable to the plaintiff by reason of negligence for the injuries which he received on the 5th day of September, 1914, as averred in his first cause of action, we are of the opinion that the written compromise and settlement entered into by the plaintiff with the defendants was a complete answer thereto, unless it appears that said written settlement was obtained by fraud and without consideration. Having executed the agreement of settlement and compromise, as to which there is no dispute, the burden was upon the plaintiff in order to escape the effect of such compromise and settlement to show by a preponderance of the evidence that the same was obtained by fraud and misrepresentations and was without considera-

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tion on the part of defendants; and this burden, we think, he has failed to discharge, especially in view of the fact of his statement in the said writing that prior to signing and sealing the same the plaintiff had full information himself of its contents, and executed it with full knowledge thereof.

In St. L. & S. F. R. R. Co. v. Bruner, supra, 152 Pac. 1103, this court, in the syllabus, say:

"Where the execution of a written instrument is admitted, but want of consideration therefor pleaded, the burden is upon the party executing the instrument to prove by a preponderance of the evidence the want of consideration."

In Ball v. White, 150 Pac. 901, it is held in the fourth and fifth paragraphs of the syllabus:

"It may be laid down as a general rule that there is sufficient consideration for a promise made in writing, if there is any benefit to the promisor, or any loss or detriment to the promisee. It is not necessary that a benefit should accrue to the person making the promise.

"Where the execution of a written instrument is admitted, but want of consideration therefor pleaded, the burden is upon the party executing the instrument to prove by a preponderance of the evidence the want of consideration."

In the case of Forbs v. St. Louis, I. M. & S. Ry. Co., 107 Mo. App. 661, 82 S. W. 562, in which the contract is almost identical with the contract in the instant case, it is held:

"In order to support an agreement a legal consideration is requisite, but it is not essential that the consideration should be adequate in value. An employé who had been injured executed a release of his right to sue for damages 'for and in consideration of the re-employment' of the servant 'for such time only as may be satisfactory to' the employer. *Held* that, though agreement to re-employ was vague and indefinite in duration, it constituted a sufficient consideration for the release."

In the body of the opinion the court say:

"In reply plaintiff admitted the execution of the release, but, to evade its legal effect, charged it was wholly without consideration, and therefore not binding upon him. It appeared from the testimony that the accident occurred about midnight, and he lost 2½ nights' wages, for which he had been receiving the rate of $45 per month, in consequence of his injuries, but resumed work on the night of the 23d, and was discharged April 26th. While, as a general rule, in order to support an agreement, a legal consideration is requisite, it is not essential to the validity of a contract that the consideration therefor should be adequate in value. A valuable consideration, although small, or even nominal, in absence of fraud, is enough to support the agreement entered into upon the faith of it. Beach, Contracts, vol. 1, par. 5. To quote from the early case of Marks v. Bank, 8 Mo. 316: 'It is unnecessary that the consideration should be adequate in point of actual value; the law having no means to decide upon this matter. If the least benefit or advantage be received by the promisor from the promisee or a third person, or if the promisee sustain any—the least—injury or detriment, it will constitute a sufficient consideration to render the agreement valid'—the reason for such doctrine being that it is the policy of the law not to weigh the quantum of consideration, but refrain from interference with the freedom of contract, suffer the parties to freely exercise their judgment and will in consummating agreements and determine for themselves the benefits derived from their bargains. 6 Am. & Eng. Ency. of Law (2d Ed.) p. 694, par. 5. In the language of a tribunal of another state, adopted in Blaine v. Knapp, 140 Mo. loc. cit. 251, 41 S. W. 787 [789]: 'Courts of law must allow parties to make their own contracts, and can enforce only such as they actually make. Whether the contract is wise or unwise, reasonable, or unreasonable, is ordinarily an immaterial inquiry.' Neither bad faith nor duress in obtaining the release were attributed to defendant, but it was executed by plaintiff of his own volition, comprehending that it relieved the defendant of liability, but actuated on his part by the desire to secure re-employment, and the cause of his discharge shortly ensuing was independent of and disconnected from the casualty. The re-employment of appellant, though vague and indefinite in duration, constituted a sufficient consideration for the discharge of defendant from liability, if any existed, and, as presented in this proceeding, the release confronts plaintiff as an impassable barrier to the maintenance of this action, and the judgment is affirmed."

While the authorities are in conflict upon the question of consideration herein involved, we think that the weight of authority is as concluded by us, that a sufficient consideration is shown for the execution of the release which is pleaded as a bar to the first cause of action. 34 Cyc. 1052–1054; Quebe v. G., C. & S. F. R. R. Co. (Tex. Civ. App.) 77 S. W. 442; Penn. Co. v. Dolan, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289; Chas. L. Smith v. St. Paul & Duluth R. R. Co, 60 Minn. 330, 62 N. W. 392; Thomas Hobbs v. Brush Elect. Lt. Co., 75 Mich. 550, 42 N. W. 965; J. T. Carroll v. M., K. & T. R. R. Co., 30 Tex. Civ. App. 1, 69 S. W. 1004; Forbs v. St. L., I. M. & S. R. Co., 107 Mo. App. 661, 82 S. W. 562; G., C. & S. F. Ry. Co. v. C. A. Winter, 38 Tex. Civ. App. 8, 85 S. W. 477.

[2, 3] The plea that the execution of said release on the part of the plaintiff was obtained through fraud on the part of the agent of the defendant, we think, is not supported by the evidence. Besides, to sustain by the evidence offered the allegations of fraud would be to permit the terms of an unambiguous written instrument changed by parol evidence. Again, the basis of said fraud charged, being the promise of the agent in regard to future action as to payment to plaintiff for lost time, does not support the allegations of fraud.

In 20 Cyc. 20, the rule is laid down as follows:

"As a general rule, false representations upon which fraud may be predicated must be of existing facts, or facts which previously existed, and cannot consist of mere promises or conjectures as to future acts or events, although such promises are subsequently broken, unless the promise includes a misrepresentation of existing facts, or the statement is as to some matter peculiarly within the speaker's knowledge, and he makes the statement as a fact."

In St. L. & S. F. R. R. Co. v. Bruner, supra, in the opinion, this court say:

"The rule is well settled that fraud is never presumed, and that, where a written contract is attacked on that ground, the contract will be upheld, unless the allegations of fraud are established by clear and convincing evidence."

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In the absence of fraud, adequacy of the consideration, we do not think, can be inquired into upon the ground that competent persons may make contracts for any lawful consideration that they desire.

[4, 5] The second cause of action is predicated upon a defective brake, and we are of the opinion that there is no evidence whatever to sustain the contention of such defective apparatus. Before the defendant can be held to be liable on the second cause of action, it must be shown by a preponderance of the evidence that the defendant was negligent, and that the negligence averred in said second cause of action was the proximate cause of the injuries received. Plaintiff himself testified that he did not know of his own knowledge that there was anything the matter with the brake that night, except what he thought ought to have been the result of the use by him of same, and, when to this evidence is coupled the evidence of the defendants, it is conclusively shown that there was no defect whatever in the brake, and therefore there was a total failure on the part of the plaintiff to show any actionable negligence on the part of the defendants, as averred in his second cause of action.

That, to entitle plaintiff to recover upon said second cause of action, the burden was upon him to prove the negligence as averred in said second cause of action by a preponderance of the evidence, is so well established as to not require support by citation of authorities. This burden of proof the plaintiff has failed to discharge.

We are of the opinion that the motions of the defendants for a directed verdict on the first cause of action and for a directed verdict on the second cause of action were each well founded and should have been sustained, and that in overruling said motions the court committed reversible error.

From the conclusions that we have reached in this case it is unnecessary to review any other of the many errors assigned.

This cause should be reversed and remanded, with instructions to the trial court to enter judgment for the defendants and each of them upon each cause of action set up in plaintiff's petition.

PER CURIAM. Adopted in whole.

On Rehearing.

PER CURIAM. [6] Upon rehearing the Supreme Court approves the opinion prepared by the Supreme Court Commission upon the first cause of action, and orders judgment entered pursuant to the recommendation therein contained.

As to the second cause of action, a more thorough examination of the record convinces the court that there was sufficient evidence adduced at the trial to carry the case to the jury upon the question of primary negligence of the company and whether the negligence averred and proved was the proximate cause of the injuries received by the plaintiff. This portion of the opinion prepared by the commission is therefore disapproved by the court. The judgment of the trial court, however, as to this cause of action must also be reversed, and the cause remanded for a new trial, for the reason that, the jury returned a general verdict in favor of the plaintiff upon both causes of action in the lump sum of $1,687.50; hence we are unable to ascertain from the record before us the amount of recovery the plaintiff is entitled to upon his second cause of action.

It is therefore ordered that the judgment of the court below shall be reversed, and the cause remanded for the rendition of judgment in favor of the defendants upon the first cause of action, and for a new trial as to the second.

(62 Okl. 223)

PAHLKA v. CHICAGO. R. I. & P. RY. CO.

(No. 7502.)

(Supreme Court of Oklahoma. Nov. 28, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐635(3)—RECORD—DEFECTS—DISMISSAL.

The fact that a case-made does not show that it contains all of the evidence is not necessarily ground for the dismissal of an appeal, where a consideration of all of the evidence is not necessary to a determination of the questions raised upon the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2779, 2829; Dec. Dig. ⇐635(3).]

2. APPEAL AND ERROR ⇐697(1)—RECORD—CASE-MADE—RECITALS.

Where the case-made has a recital that it contains all of the evidence, the position of such recital in the case-made is immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2918, 2919, 2921; Dec. Dig. ⇐697(1).]

3. APPEAL AND ERROR ⇐562 — RECORD — CASE-MADE—CONTENTS.

Where an exhibit to the evidence is too bulky or cumbersome to be incorporated in a case-made, or is otherwise incapable or impracticable of being incorporated therein, and the case-made contains a description of the exhibit sufficient to enable this court to determine the evidentiary value of the exhibit, it will not be held that the case-made does not contain all of the evidence, on account of the omission of such exhibit from the case-made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2495–2499; Dec. Dig. ⇐562.]

4. APPEAL AND ERROR ⇐653(3), 663(2) — RECORD — CASE-MADE — INCORPORATION OF EVIDENCE.

Where a case-made contains an orderly and sequential recital of the proceedings in a cause, together with a specific recital that it contains all of the evidence, followed by the proper certificate of the trial judge, attested by the clerk; and appellee, after notice of the settlement of the case-made, makes no suggestions of amendments thereto, the case-made will be taken as true and containing a full record of the case sufficient to present the questions raised on ap-

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peal, the record not containing its own material impeachment; and where, under such circumstances, the case-made upon its face shows that exhibits are omitted, this court will permit the correction of such case-made so as to supply such omission; and when such omitted exhibits are supplied by such a correction, under a proper certificate of the trial judge, attested by the clerk, and the opposing party has pointed out no other deficiency in the case and no other material deficiency appears, the case-made, in view of the original recital that it contains all of the evidence considered in conjunction with the amendment, will be *held* to sufficiently show that it contains all of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2818, 2854; Dec. Dig. ⊂⊃653(3), 663(2).]

5. APPEAL AND ERROR ⊂⊃1001(3), 1004(1)—REVIEW—QUESTIONS OF FACT.

Where a verdict cannot be justified upon any hypothesis presented by the evidence, it will not be allowed to stand; and, under this rule and section 5033, Revised Laws of 1910, where, in a suit for injury to property, a verdict is favorable to plaintiff upon the question of the general liability, but assesses the damages of plaintiff at the nominal sum of $1 and costs, when the evidence reasonably supports the general finding in favor of plaintiff, and all of the evidence upon the measure of his damages shows the same to be in an exceedingly larger sum than $1, and the assessment of the damages at $1 is not supported by any of the evidence, the verdict and judgment thereupon should be set aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3934, 3944, 3946; Dec. Dig. ⊂⊃1001(3), 1004(1).]

6. WATERS AND WATER COURSES ⊂⊃179(4) — INJURIES BY FLOWAGE — ACTIONS — DAMAGES.

Record examined, and *held* that there was error in the assessment of damages.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 250, 263; Dec. Dig. ⊂⊃179(4).]

7. APPEAL AND ERROR ⊂⊃1068(2)—REVIEW—PREJUDICIAL EFFECT OF ERROR — INSTRUCTIONS.

Where a verdict of a jury is favorable to plaintiff upon the question of general liability of defendant to plaintiff, as distinguished from the measure of the liability, error in instructions upon the question of general liability, not affecting the measure thereof, may not be presented by such plaintiff on appeal, except in so far as such erroneous instructions may have tended to confuse the issues in the minds of the jury. Erroneous instructions examined, and *held* to have had such confusing result.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4226; Dec. Dig. ⊂⊃1068(2); Trial, Cent. Dig. §§ 525, 526.]

8. WATERS AND WATER COURSES ⊂⊃171(2) — INJURIES FROM FLOWAGE — LIABILITY — ACT OF GOD.

A railroad company, in the construction of a bridge across a stream and roadbed embankments across adjacent bottom lands, must regard the known flood conditions of the stream, even though such conditions include extraordinary flood; and an act of God, such as an unprecedented rainfall and resulting flood, which will excuse from liability, must not only be the proximate cause of the loss, but it must be the sole cause. If the injury is caused by an act of God, commingled with the negligence of the defendant, as an efficient and concurrent cause, and the injury would not have occurred except for such negligence, the railroad company will be liable.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 218; Dec. Dig. ⊂⊃171(2).]

9. WATERS AND WATER COURSES ⊂⊃171(1)—INJURIES FROM FLOWAGE—JUSTIFICATION—CONGRESSIONAL GRANT.

In a suit for damages resulting from overflow of lands, caused by negligent construction and maintenance of a railroad bridge and embankment, a congressional grant of franchise and right of way, to construct and maintain such railroad, bridge, and embankment, does not, by implication, grant immunity from the results of negligence in the construction and maintenance thereof, and thereby flooding adjacent lands with the overflow waters of a stream; it not appearing that there is granted any flood right to such lands.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 216, 217, 221, 222; Dec. Dig. ⊂⊃171(1).]

10. ACTION ⊂⊃53(2)—INJURIES FROM FLOWAGE—"PERMANENT"—SUCCESSIVE CAUSES OF ACTION.

In a suit for damages resulting from a negligent condition in the construction and maintenance of a railroad bridge and embankment, even though such structures be permanent in their nature, such negligent condition will not be held "permanent" if it is abatable by an expenditure of either labor or money and the abatement of such causal negligent condition is consistent with the rightful use and maintenance of the structures; and a cause of action for damages, occasioned by negligence in a structure not permanent under this rule, arises at the time of the actual injury, and successive actions may be maintained for successive injuries in such a case.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 566–592; Dec. Dig. ⊂⊃53(2).

For other definitions, see Words and Phrases, First and Second Series, Permanent.]

11. VENDOR AND PURCHASER ⊂⊃218—ACTIONS FOR INJURY TO LAND—ACCRUAL.

In cases of injury from negligence in a permanent structure, where actual injury is not the obvious or necessary result, assuming the continuance or recurrence of ordinary conditions, the cause of action rises at the time of actual injury, and not at the time of the erection of the structure; and, in cases of injury from permanent cause, where, assuming the continuance or recurrence of ordinary conditions, the injury is the obvious or necessary result, the cause of action arises at the time of the creation of the cause, viz. the erection of the negligent structure.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 456; Dec. Dig. ⊂⊃218.]

Commissioners' Opinion, Division No. 3. Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by Charles W. Pahlka against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

J. S. Jenkins and J. Will Laws, both of Oklahoma City, for plaintiff in error. R. J. Roberts, C. O. Blake, and W. H. Moore, all of El Reno, and K. W. Shartel and Blake & Boys, all of Oklahoma City, for defendant in error.

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JOHNSON, C. Upon August 31, 1914, in the district court of Oklahoma county, Charles W. Pahlka, plaintiff in error, sued defendant in error, the Chicago, Rock Island & Pacific Railway Company, a corporation, for $4,685, damages to property caused by flood waters of the South Canadian river, and alleged to have resulted from the negligent construction and maintenance of a certain bridge and embankments of defendant.

The physical situation involved is as follows, to wit: The farm of plaintiff lay between the prongs of a horseshoe bend in the South Canadian river, the bend or hump of the shoe extending northward, and the prongs of the shoe in southernly directions, the east prong taking a slightly southeasternly course. In other words, the river, running east, at a point just west of the farm, turns northward, then, at a point northwest of the farm swings into an east by northeast curve to a point a little northeast of the farm, where the river turns into a southeastward course to a point almost east of the point of the first northward bend above mentioned, from which last point it then continues east. High lands on the south face the opening of the horseshoe bend of the river. Plaintiff's farm lies between the first point of deviation from the eastward course and the last-mentioned point of return to the directly eastward course, or between the ends of the east and west prongs of the horseshoe bend described. The railroad of defendant extends almost directly north and south, opposite the eastern line of plaintiff's land, crossing the eastern prong of the horseshoe bend in the river at a point just northeast of the land in question. At this crossing point is the railroad bridge in question; and, on the upper or west side of the right of way, extending away from each end of the bridge, there is a long embankment or dike, erected for the purpose of protecting the railroad right of way from the waters of the river in times of flood. The result of this situation is that, in times of extraordinary flood, such as the one involved, the openings at the bridge of defendant are not sufficient to carry away the flood waters of the river; that these flood waters accumulate above the embankments, above described, and overflow the lands in the horseshoe bend, including the farm of plaintiff.

In May, 1914, there was an extraordinary flood in the South Canadian river. At a point west of the farm of plaintiff, and at a point about at the beginning of the west prong of the horseshoe bend of the river, a stream of overflow water broke over the river bank and ran down towards the south end of the embankment of defendant, crossing one corner of plaintiff's farm (covering in its course about 4 or 5 acres of plaintiff's land). This overflow water, striking defendant's embankment, was backed up and formed into a lake some five or six feet deep, extending back over all of the lands of plaintiff, washing plaintiff's dwelling house and barn from their foundations, seriously damaging both houses, the furniture in the dwelling and corn in the crib, killing 182 chickens belonging to plaintiff, destroying the following crops of plaintiff, to wit: Six acres of alfalfa, 55 acres of growing wheat, and 75 acres of corn, and leaving a thick deposit of sand over about two-thirds of the land upon which these crops stood, and the other land of plaintiff. Plaintiff owned 130 acres of the land, and was renting 75 acres more of it. Plaintiff sued for the damages to his house, furniture, barn, corn in crib, chickens, crops, and land owned by him.

In addition to setting forth the flooding of his land and the damages, as above mentioned, plaintiff alleged that the said bridge and embankments of defendant were negligently constructed, in that no opening was provided therein of sufficient size to carry off the flood waters of the river, and that the said embankments and bridge were so constructed as to form a dam and obstruct the flood waters of the river; that such negligence caused said flood waters to overflow his lands and resulted in the damages sued for by him; and that such negligence, as such cause of his damages, was susceptible of remedy or abatement by lengthening the bridge, removing said dike, and making openings in the embankment so as to permit the passage of the waters.

Defendant pleaded a general denial; that the said bridge and embankments were constructed in a workmanlike and careful manner and without negligence; that originally the railroad and appurtenances, along the route in question, was constructed by the Chicago, Kansas & Nebraska Railway Company, under a grant to it of franchise and right of way by an act of the Congress of the United States; that after the construction thereof, defendant purchased such railroad and appurtenances from the said grantee in such franchise; that, after such purchase and construction, defendant constructed a new bridge and grade or dump of more substantial and durable substances and materials than used by its grantor in the old bridge; that the said bridge and embankments were carefully and skillfully constructed by defendant and its said grantor, and that in such construction defendant and its grantor did no more than was necessary for the purposes for which such construction was designed and as contemplated by said act of Congress; and that after such construction said grantor and defendant maintained and used said railroad and embankment without negligence and for the purposes contemplated and expressed in such act of Congress, and in accord therewith.

It appears from the pleadings and evidence that in about the year 1904, a flood and overflow, similar to the one in 1914, occurred,

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which washed out the bridge and embankments originally constructed by the Chicago, Kansas & Nebraska Railway Company, as a result of which the bridge and embankments in controversy were constructed by the defendant, the giving way of the embankments in the flood of 1904 permitting the waters to pass on, and thus not causing the same injuries to nearby lands, appearing to have resulted from the 1914 flood.

Plaintiff acquired his lands in the year 1913 and more than two years after the construction of the bridge and embankments, as they existed at the time of the 1914 flood.

The case was tried to a jury, which returned a general verdict in favor of plaintiff, assessing his damages at $1 and costs. Judgment was rendered accordingly, plaintiff's motion for a new trial overruled, and plaintiff appeals.

Among other assignments of error, it is contended by plaintiff in error: (1) That the verdict and answers of the jury to the special interrogatories were contrary to the law and the evidence, and not supported by any of the evidence, and that the jury erred in the assessment of the damages; (2) that the lower court erred in giving certain instructions and in refusing certain requested instructions; and (3) that the court erred in instructing upon the theory of the defendant and not instructing upon the theory of plaintiff.

Defendant in error, in its brief on the merits, submits a motion to dismiss the appeal upon the ground that the case-made does not contain a recitation that it contains all of the evidence, and points out evidence not contained by the case-made, namely, Exhibits 1 and 2, and objects to a consideration of the questions raised on account of such alleged defects in the record.

[1] The fact that the case-made does not contain all of the evidence is not necessarily ground for the dismissal of the appeal. Section 5241 of Revised Laws 1910 specifically authorizes the making of a case, which may contain only so much of the evidence as is necessary to present questions proposed on appeal, or none of the evidence if it is unnecessary to a consideration of propositions advanced; and section 5243 specifically provides that the appeal shall not be dismissed, even when the evidence is stated in a manner insufficient for the purposes for which the case is made until an opportunity is given to correct the deficiency. See opinion of this court in cause No. 7694, St. Louis & San Francisco Railroad Co. v. Taliaferro, 160 Pac. 610, not yet officially reported.

However, in this case, in order to determine the propositions presented, a consideration of the evidence is essential; and it, therefore, becomes necessary to determine the sufficiency of the case-made, as showing the evidence.

[2-4] While the case-made does not contain a recitation of its contents upon one formal recital sheet, immediately preceding the official certificate, as is the customary practice, yet it does contain a formal, orderly, sequential recital of the case in the lower court, including the evidence, and, as conforming to the statutory rules of pleading (section 4737, Revised Laws 1910), in fact shows, in ordinary and concise language, as effectually as if specifically set forth in the customary, stereotyped, formal recital at the end of case-made, that the necessary proceedings are therein contained. In addition to this, at the close of the evidence, on page 363 of the case-made, is a formal recitation that the case-made contains all of the evidence. This court has held that the position of the recital in the record is immaterial, so long as the case substantially shows that it contains the necessary proceedings, and that the orderly and sequential recital of the proceedings, as hereinabove mentioned as existing in this case, followed by the rule certificate of the trial judge (the certificate in this case is in the language of the rule of this court, rule 17 [137 Pac. x]), attested by the clerk, imports verity, and is a substantial showing that the case contains all of the evidence and other proceedings. De Bolt v. Farmers' Exchange Bank, 148 Pac. 830 (not yet officially reported); Higgins v. Street, 19 Okl. 42, 92 Pac. 155; American Steel & Wire Co. v. Coover, 27 Okl. 131, 111 Pac. 217, 30 L. R. A. (N. S.) 787. And see St. L. & S. F. R. R. Co. v. Taliaferro, supra.

Under the above rule, the original case-made was sufficient, but for the fact that defendant in error, in its brief, filed before the amendment hereinafter mentioned, pointed out that, as a matter of fact, the case-made did not contain all of the evidence, in that Exhibits 1 and 2, being the muniments of title of plaintiff, were omitted from it. Decisions from this court are cited, holding that where the showing of the case-made that it contains all of the evidence is contradicted by the record itself, the record will control. Upon this showing of the omission of Exhibits 1 and 2, leave was granted to correct the case-made; and an amendment to the case-made has been filed, supplying the omitted exhibits.

In connection with the objection of defendant in error that Exhibits 1 and 2 were omitted from the case-made, defendant in error asserts that the certificate of the stenographer is not sufficient. This objection goes to the fact that the stenographer's certificate to the evidence, in referring to the exhibits and documentary evidence, states that his record contains all exhibits and documentary evidence "possible to be transcribed." It should be borne in mind that the objection of defendant in error only points out the omission of Exhibits 1 and 2, which have been supplied by the amendment. In our examination of the record we find that it

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does not contain some samples of dirt, taken from the overflowed lands, and introduced in evidence as exhibits to defendant's evidence. We do not know how these exhibits could have been copied into the record, or the substance of them shown in the briefs of the parties, if the strict letter of the rule would have to be followed in such a case. The certificate of the stenographer was apt, and the exhibits were not "possible to be transcribed," and under these circumstances, we shall hold that it was not necessary for plaintiff in error to do the impossible to save his rights on appeal.

The rule seems to be that where a physical object is introduced in evidence which is too bulky or cumbersome to be incorporated in the case-made, or otherwise impracticable of incorporation therein, a description of such object is sufficient. 3 Cyc. 27 (note 19); Colby v. Herron, 88 Ill. App. 299; Seaverns v. Lischinski, 82 Ill. App. 298; Pierce v. Edington, 38 Ark. 150.

The soil exhibits in this case were used by witnesses, and are sufficiently described for the purpose of presenting their evidentiary effect.

An engineering blueprint was offered to and used by witnesses in giving their testimony, and identified as Exhibit 10, and this does not appear in the case-made. We do not find where it was introduced in evidence. Maps, drawings, etc., used to illustrate the evidence of witnesses, and not put in evidence, need not be copied into the case-made. Albion Consol. Min. Co. v. Richmond Min. Co., 19 Nev. 225, 8 Pac. 480, 3 Cyc. 58, notes. This exhibit would be about as difficult of translation into the case-made by a stenographer not a skilled engineer, as the soil exhibits. It was fully delineated, described, and explained by the testimony of witnesses; and its physical presence is not necessary under the rule above announced.

In the lower court defendant in error suggested no amendments to the case-made, at the settlement of either the original or amended case-made. Our statute (section 5244, Revised Laws 1910), after providing for notice of settlement of case, suggestion of amendments, etc., contains this provision, viz.:

"* * * And if no amendments are suggested by the opposing party, as above provided, said case *shall be taken as true and containing a full record of the cause*, and certified accordingly." (Emphasis ours.)

This statute recognizes the right of a party to have the case-made show proceedings material to his side of the case, and provides a default on his failure to act. By his silence, the party says to the lower court:

"This record is a true and complete case-made, and contains everything necessary to present my side of the appeal."

Such action is a waiver of the incorporation of exhibits, where the exhibit is described in the record, and the substance of the testimonial value of the exhibit is in the record. See Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131.

This record, as heretofore pointed out, contains an orderly, sequential statement of all the proceedings in the case, including the evidence, together with the recital that it contains all of the evidence. Its only impeachment was as to the omission of Exhibits 1 and 2, which have been inserted by amendment. The only points of omission now lie in the exhibits, which were impracticable of original incorporation or of present correction, but which are sufficiently described; and defendant in error, the case-made being substantially correct, has defaulted in its right to object to technical imperfection. The motion to dismiss will be overruled; and the record will be held to be sufficient to present all questions raised on the appeal, including the sufficiency of the evidence.

Defendant in error contends: (1) That the bridge and embankment were permanent structures, that injury to the land of plaintiff resulted as a permanent injury at the time of the erection of the structures and prior to the acquisition of the land by plaintiff, and that plaintiff, having acquired the land subsequent to the permanent injury, had no cause of action for injuries arising subsequent to his acquisition of the land; (2) that the right to maintain the bridge and embankment was a federal guaranty; (3) that the bridge and embankment were constructed and maintained without negligence, but with due skill and care, pursuant to the federal guaranty above mentioned; and that these matters considered, the verdict and judgment should be sustained.

[5-8] The general verdict was for plaintiff. This was a finding of negligence in the construction and maintenance of the bridge and embankments. Defendant did not appeal, and thus may not present the absence of the liability established by the verdict and judgment, except possibly as bearing upon harmless error in the assessment of plaintiff's damages. All of the instructions, the giving and refusal of which are assigned as error by plaintiff in error, as well as those bearing upon the theory of defendant to the exclusion or omission of the theory of plaintiff, went to the question of the liability of defendant to plaintiff, and did not affect the measure or amount of the liability, or rather damages. The general liability, as distinguished from its measure, having been established by the verdict and judgment in favor of plaintiff, errors in instructing upon the general liability, adversely to plaintiff, are not material to this appeal, except in so far as they may have tended to confuse the issues, generally, in the minds of the jury, in arriving at the measure of liability, if such be the probable consequence. The real issues here, therefore, are: (1) The sufficiency of the case-made; (2) error in the assessment of the amount of recovery; and (3)

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harmfulness in the error, if any, in the assessment of the amount of recovery, which amounts to an inquiry as to whether the verdict, finding the existence of general liability, was supported by any evidence and is in harmony with the law. The latter proposition will involve a consideration of the instructions.

As above stated, the verdict was for the plaintiff, assessing his damages in the sum of $1. We have carefully read and considered the entire record. The finding in favor of plaintiff is amply supported by the evidence, but the assessment of the damages in the nominal sum of $1 has no evidential foundation whatsoever. Liability being established (and the verdict found it to exist), there is not one word of evidence in the record which could possibly warrant the assessment made. Plaintiff and defendant both proved the destruction of plaintiff's crops of, approximately, 6 acres of alfalfa, 55 acres of growing wheat, and 75 acres of corn, the killing of his chickens (according to the evidence of plaintiff, 182 in number), the washing away of his house and barn, and the deposit of a thick stratum of sand over his farm. Plaintiff's witnesses testified to his damages in the sum of about $3,000. Defendant's witnesses testified that the value of the destroyed crops alone was over $600. The special findings of the jury were to the effect that plaintiff was damaged nothing by reason of the destruction of his crops, and the injury to his house, barn, and land, and found that he was only damaged in the sum of $1 for loss of chickens. These findings were contrary to all of the evidence. The general verdict in reality was for $1 for the loss of chickens, and yet there was no contradiction of the evidence of plaintiff that he lost 182 chickens of the approximate value of $60. No syllable of evidence distinguished the cause of the loss of any chicken from the cause of the injuries to the remainder of the property. All of the evidence showed that all of the injuries were occasioned by the same agency, which the jury found to have been the result of defendant's negligence in the construction and maintenance of its bridge and embankment.

The only explanation of the assessment of damages by the jury at $1, deducible from the record, is that the jury was dissatisfied and confused by the instructions of the court; that the nine members of the jury signing the verdict must have felt that, under the instructions of the court, the law was not such that they could comply with their oaths and administer justice; and that they rendered this verdict as a protest against what they considered an unjust condition of the law, and one which they refused to follow to the extent of taxing the costs against plaintiff.

The charge of the court was virtually a direction of a verdict for defendant upon the question of liability. Instructions numbered 10, 12, and 13, read as follows, viz.:

"(10) You are instructed that under the law it was the duty of the defendant railway company, in the location and construction of its railroad line, to construct its bridges across streams in such manner as to offer the least resistance to the current of the stream, and, having done so, that it cannot be charged with the changing of the course or bed of the stream in such manner as to impair the efficiency of its bridge structure, after the same has been permanently built, and if you find from the evidence in this case that the bridge of defendant across the stream at the place complained of was originally located at right angles to the stream, so as to present as small resistance as possible to the flow of waters, and that afterwards the change in the course of the stream caused the current of the stream to strike the bridge at a different angle, and not in a line straight with the opening of the bridge; that this was a matter over which the defendant cannot be held to be responsible. And if you find that when the bridge was constructed it was located at right angles with the stream, and that any of the injury or damage was caused to the plaintiff, by reason of the current of the river, in the flood of 1914, striking said bridge at a different angle from that which existed when constructed, then you will not charge the defendant with such damage."

"(12) The defendant company may construct embankments and dykes to protect its properties, and to make safe its operation of its road from encroachments of the stream, and from superabundant water in times of flood, but in doing so it must place the embankment and dykes that the natural and probable consequence of such embankment and dykes, in times of ordinary flood, will not be caused to overflow the lands of others, and, unless you find from the evidence that the defendant company constructed a dyke and embankment of such excessive size and at such improper places, and in such negligent manner, as would naturally be expected to cause the injuries complained of, then you should find for the defendant.

"(13) By the term 'permanent structure' is meant such a structure as by reason of its size, weight, durability, and use will endure without material alteration except through human labor, and is such as from its own nature remains in the position, and substantially in the condition, in which it was constructed, except for the ordinary repairs made necessary by the use thereof for the purposes for which it was designed."

The first part of instruction numbered 10 assumed that the bridge was a permanent structure; and, on this assumption, the latter part of the instruction directed the jury that no change in the course of the stream in its relation to the openings in the bridge could give rise to a duty upon the part of defendant to alter the openings in the bridge to meet the changed conditions, and that defendant would not be liable for damages caused by the openings of the bridge not carrying off the waters of the stream if such waters, at the time of the flood in question, struck the bridge at a different angle from the angle formed by the stream and bridge at the time of the construction of the latter. The instruction overlooked the relations of the embankment to the change in such angle, and to the causes of the injury, and no other instruction supplied the omission. Under all of the evidence, the principal, if not the entire, cause of the injury was the course taken by a part of the flood waters of the

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streams so as to cause the waters to approach the opening in the bridge, after deflection by the embankment to an angle different from the original angular relation of the stream and bridge; and this deflection by the embankment, as related to the contention that the deflection was caused by negligent construction and maintenance of the embankment without sufficient openings, was an essential part of the cause of action of plaintiff. The permanence of the bridge and embankment was one of the main questions of fact for the jury, and so recognized by the other instructions and special interrogatories submitted to the jury; and the assumption of permanence, included in this instruction, invaded this province of the jury. If the structures were not permanent, in the sense hereinafter set forth, a change in conditions would undoubtedly have given rise to new duties upon the part of the railroad company, a consideration of which alternative by the jury was foreclosed by the instruction. The instruction overlooked the relations of a flood, extraordinary or otherwise, to the construction of the bridge and to any altered relations between the stream and structures; while all of the evidence showed that the bridge and embankment were constructed in the year 1905 or 1906, immediately following a similar flood and overflow in 1904, giving rise to a duty in the railroad company to contemplate and prepare for the recurrence of such a flood in the future.

Instruction No. 12 predicated the liability of defendant upon failure to construct the bridge and embankment in such manner as to carry off the waters in times of ordinary flood; while the entire cause of action of plaintiff was based upon injuries resulting from extraordinary flood, which was within the known flood conditions of the river, as evidenced by results of the flood of 1904. The instruction, in this, violated the principles laid down by this court in the case of Missouri, K. & T. Ry. Co. v. Johnson, 34 Okl. 582, 126 Pac. 567, where it was held to be the duty of the railroad company, in the construction of such a bridge and embankment, and in the maintenance thereof, to meet the known flood conditions of a stream, even though such conditions be extraordinary, and that before the unusual condition, as an act of God, may relieve the liability, it must be the sole cause of the injury as not being coupled with negligence. This rule has been consistently followed by this court in the cases hereinafter cited in our comment on the thirteenth instruction. Plaintiff requested an instruction in line with the doctrine of the Johnson Case, supra, which was refused.

Instruction No. 13, supra, while probably in one sense a correct definition of the term "permanent structure," was too restrictive in its application, as a legal term, in this case. This court has repeatedly held that:

"When a cause of injury is abatable, either by an expenditure of labor or money, it will not be held permanent." City of Ardmore v. Orr, 35 Okl. 305, 129 Pac. 867; A., T. & S. F. Ry. Co. v. Eldridge, 41 Okl. 463, 139 Pac. 254; St. L. & S. F. R. Co. v. Ramsey, 37 Okl. 448, 132 Pac. 478; C., R. I. & P. Ry. Co. v. McKone, 36 Okl. 41, 127 Pac. 488, 42 L. R. A. (N. S.) 709; C., R. I. & P. Ry. Co. v. Morton, 157 Pac. 917 (not yet officially reported).

This court in City of Ardmore v. Orr, supra, quoted and expressly disapproved an authority which laid down the rule included in this instruction.

It may be said that, in its exact expression, this rule bears a contradiction, in that every human edifice might be altered by the expenditure of labor or money, and that therefore, under the strict letter of the rule, no artificial improvement could be permanent. However, the spirit of the rule contemplated an extension of its effect, not expressly stated in the former decisions of this court. Giving it such an express extension, the rule would be that a negligent condition in an artificial structure, permanent in its nature, will not be held permanent if such negligent condition is abatable by an expenditure of either labor or money and such abatement is consistent with the rightful use and maintenance of the structure.

Plaintiff requested an instruction in the language of the rule as sustained by the above cases, and it was refused. The abatableness of negligent conditions originating in the construction of the bridge and embankment, if such negligence existed, was a necessary element of the cause of action of plaintiff for maintaining the condition; for negligence in construction, as distinguished from its continuance in the maintenance, had occurred long prior to the acquisition of the lands by plaintiff, and was long since barred by the statute of limitations, if the injury would necessarily have resulted from the negligence in construction. Under the instruction as given, the duty to abate, where it could reasonably be done, was not recognized; and, under the tenth and twelfth instructions, supra, nothing was left to the jury but to decide for the defendant.

These instructions are noted here as bearing upon and explanatory of the peculiar result reached in the verdict. In our opinion, the jury was confused by the instructions, and this confusion resulted in an erroneous assessment of the damages. This court has held that:

"Where a verdict cannot be justified upon any hypothesis presented by the evidence, it will not be allowed to stand." Earley et al. v. Johnson, 160 Pac. 482 (not yet officially reported).

The part of this verdict which assessed plaintiff's damages violates this rule, and the verdict should be set aside.

[9] Defendant in error contends, in effect, that the verdict and judgment, if erroneous, have not resulted in harm to any rights of plaintiff in error, because, as contended by it,

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under every condition of the evidence and record plaintiff in error had no cause of action, for the following reasons, to wit: (1) That the right to construct and maintain the bridge and embankments was a federal guaranty under the Congressional grant of right of way and franchise hereinabove mentioned; and (2) that the bridge and embankments were permanent structures, erected and causing the injuries, if any, as permanent injuries, long prior to the acquisition of the land by plaintiff.

The proposition of federal guaranty is clearly not applicable to the situation. The contention of plaintiff was that his injuries resulted from negligence in the construction and maintenance of the bridge and embankment. It can hardly be contended that the federal grant would convey the right not to exercise diligence, or rather the right to be guilty of wrong or negligence. There is no showing of a specific grant of the right to flood lands adjacent to the right of way granted, and we cannot believe that Congress could have intended or implied the right and franchise to construct and maintain the railroad, with its bridges and embankments, in any manner except such as is consistent with the general legal duty of a railroad under similar conditions, which is defined in the cases from this court hereinabove cited. Our conclusion here is the same as was reached by this court in the following cases, viz.: A., T. & S. F. Ry. Co. v. Eldridge, 41 Okl. 463, 139 Pac. 254; C., O. & G. Ry. Co. v. Drew, 37 Okl. 396, 130 Pac. 1149, 44 L. R. A. (N. S.) 38.

[10, 11] We cannot agree with the theory that plaintiff cannot recover because the bridge and embankments were permanent structures, erected and causing the injuries, if any, as permanent injuries, long prior to the acquisition of the land by plaintiff. The question of the permanence of the structures was one for the jury, under proper instructions. While, in answer to a special interrogatory, the jury found that the structures were permanent as defined in the instructions, the definition of the term "permanent structure," in the instructions was not sufficiently broad to meet the rule announced by this court, as hereinbefore stated. There was a conflict in the evidence upon this question, and under a proper instruction, the finding of the jury might have been different.

Regardless of the question of the permanence of the improvements, the right of action for injuries does not necessarily accrue at the time of the construction of the improvement. In cases of injuries resulting from permanent improvements, as to the time when the right of action arises, the distinction seems to be that, where the injury is the natural result of the erection of the permanent improvement, or may be regarded as obviously consequential, the cause of action arises at the time of the construction of the improvement; but that, where the injury is not such natural result, or not obviously consequential, the right of action arises at the time of the actual injury. The line of cleavage seems to lie in the certainty or uncertainty of the injurious result.

As sustaining its position that the injury in this case, if any, resulted at the time of the construction of the improvement, defendant in error cites Gulf, C. & S. F. Ry. Co. v. Moseley, 161 Fed. 72, 88 C. C. A. 236, 20 L. R. A. (N. S.) 885; St. L. & S. F. R. Co. v. Stephenson, 43 Okl. 676, 144 Pac. 387. These cases do not support the theory of defendant in error. The Stephenson Case, supra, specifically held:

"While the rule is well established that there may be as many successive recoveries as there are successive injuries caused by a permanent structure, when its construction and continuance are not in themselves *necessarily* injurious, yet, where the pleadings and evidence, as in the instant case, show *conclusively* that the permanent character of a railroad embankment, and its continuance as originally constructed, *necessarily* produced the injury to the freehold and caused the depreciation in the value thereof complained of at the time of construction, and that such injury had *wholly occurred* when plaintiff acquired the land, it must be held that she took it in its then known condition." (Emphasis ours.)

The case dealt with *surface* waters and an *obviously consequential* injury.

The Moseley Case, supra, cited by defendant in error, by the Circuit Court of Appeals of the United States, specifically stated that it pertained to obviously consequential injury, and expressly announced the rule we have hereinabove stated as the proper rule, and used this language, viz.:

"It is to be conceded that there is much conflict in the decisions of courts touching the application of the statute of limitations to nuisances of this character. This conflict has arisen especially in reference to the erection of railroad embankments across creeks and swales, draining large areas of adjacent land without sufficient ditches or culverts to carry off the waters on occasions of freshets, whereby the land becomes flooded by overflows, damaging annual crops, and the like. In such case there is not infrequently present elements of uncertainty, such as the insufficiency of the openings in the embankments, which, the presumption may be indulged, the railroad might at any time in the future sufficiently enlarge, rather than submit in the first action to the recovery of all the consequential damages. In the second place, where the damage is to crops, it may depend entirely upon the possibility of the nonrecurrence of the overrunning flood in any given year, or the contingency of no crop being planted thereon, or being cultivated in a product subject to little damage from a temporary overflow. Such are not the conditions of the nuisance in question."

The facts in this case coincide with the antithetical supposition of facts expressed in the above quotation.

The text-writers support the theory that, though the improvement be permanent, if the injurious result is not the necessary consequence, the cause of action arises only when the injury is done, and not at the time of the construction of the improvement. Farnham

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on Waters and Water Rights, p. 2648; Gould on Waters (3d Ed.) § 210. This theory was accepted by this court in the Stephenson Case, above quoted, and in the case of A. T. & S. F. Ry. Co. v. Eldridge, 41 Okl. 463, 139 Pac. 254, and by inference in the various overflow cases from this court hereinabove cited. The cases cited by defendant in error go off upon the theory of the permanence of the injury, as distinguished from the cause of the injury, after the injury either has actually occurred, or, assuming the continuance of usual or ordinary conditions, becomes the necessary or obvious result of the permanent improvement. This case is a fair illustration of the predicament in which a plaintiff would find himself, in a suit brought immediately following the construction of the improvements and before the actual injury. If the owner of the land in controversy had brought suit in 1906, immediately after the construction of this bridge and embankment, what would have been the predicate for his assertion of liability or his measure of damages? His damages, though liable to have been incurred, had neither resulted nor were certain to result. It is elemental in the law of damages that negligence, unaccompanied by injurious result, does not give rise to liability. Where, assuming the continuance or recurrence of usual conditions, damage to value is certain to result, the value is immediately depreciated and an injurious result thereby accomplished; but where the damage simply may occur, the element and degree of depreciation are purely speculative and incapable of estimation, and the injury is not complete. The point of demarcation between the two classes of cases, in the very nature of things, is not clear, and may not itself be the subject-matter of an invariable rule, but necessarily must be determined from the circumstances of each case, by an application of the general rule as to the measure of certainty of the result.

We must hold that when a cause of an injury is abatable, either by an expenditure of labor or money, it will not be held permanent, it being clear that the abatement of the causal negligent condition in a structure, rightfully maintained except for the negligence, is consistent with the rightful use and maintenance of the structure if the structure is otherwise permanent in its nature; that a cause of action for damages, occasioned by a structure, not permanent under the above rule, arises at the time of the actual injury, successive actions being maintainable for successive injuries, the respective injuries not being total or permanent; that, in cases of injury from permanent cause, the cause of action arises at the time of the actual injury, and not at the time of the creation of the cause where such actual injury is not the obvious or necessary result, assuming the continuance or recurrence of ordinary conditions; and that, in cases of injury from permanent cause, where the injury is the obvious or necessary result, assuming the continuance or recurrence of ordinary conditions, the cause of action arises at the time of the creation of the cause, viz. the construction of the improvement.

Under the above holdings, the error in the assessment of the damages of plaintiff was prejudicial to his substantial rights; and the judgment of the lower court should be reversed, and the cause remanded for further proceedings in accordance herewith.

PER CURIAM. Adopted in whole.

(24 Wyo. 491)

PARKER v. STATE. (No. 877.)

(Supreme Court of Wyoming. Dec. 23, 1916.)

1. CRIMINAL LAW ⟸1064(1)—APPEAL—PRESENTATION BELOW—MOTION FOR NEW TRIAL.

Where, in a homicide case, wherein the extreme penalty has been imposed, it appears from the entire record that fundamental errors amounting to a denial of justice have been committed, and further appears that the court should have granted more time in the exercise of the discretion given it by Comp. St. 1910, § 6287, providing that motion for new trial shall be filed within ten days unless additional time be granted, the Supreme Court will not strictly enforce Supreme Court rule 13 (105 Pac. xiii), providing that nothing which could have been assigned as ground for new trial below will be considered unless it was properly presented by the motion for new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2676; Dec. Dig. ⟸1064 (1).]

2. CRIMINAL LAW ⟸1048—REVIEW—EXCEPTIONS BELOW.

Where, in a capital case, it clearly appears from the record that such error has been committed as amounted to a denial of substantial justice and deprived defendant of a fair trial, the judgment should be reversed, though proper exceptions were not taken below.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2656, 2657, 2670; Dec. Dig. ⟸1048.]

3. CRIMINAL LAW ⟸1043(2)—REVIEW—INSTRUCTIONS—EXCEPTIONS BELOW.

Where, in a capital case, the instructions as a whole presented an erroneous view of the law as applicable to the facts in evidence, a general exception to the instructions is sufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2654; Dec. Dig. ⟸1043 (2).]

4. HOMICIDE ⟸286(3)—INSTRUCTIONS—"PREMEDITATED MALICE."

In a homicide case, it was error to instruct that to constitute "premeditated malice" no particular time need intervene between the formation of the intention and the act, but it is enough if the intent to commit the act with the full appreciation of the result likely to follow was present at the time the act was committed; such instruction in effect stating that defendant could be found guilty of murder in the first degree if the intent to kill was present in defendant's mind when the act was committed.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 587–590; Dec. Dig. ⟸286(3).

For other definitions, see Words and Phrases, First and Second Series, Premeditated Malice.]

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5. HOMICIDE ⇐22(2), 23(2) — "MURDER IN THE FIRST DEGREE"—"MURDER IN THE SECOND DEGREE"—"PREMEDITATION."

It is the "premeditation," that is, thinking over, deliberating upon, weighing in the mind beforehand resulting in a deliberate intention to kill, which constitutes the killing murder in the first degree. The killing, however malicious, which is not the result of premeditation, is second degree murder only.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 37, 40; Dec.Dig. ⇐22(2), 23(2).

For other definitions, see Words and Phrases, First and Second Series, Premeditation; Murder in the First Degree; Murder in the Second Degree.]

6. HOMICIDE ⇐311—INSTRUCTIONS—PUNISHMENT.

An instruction in a homicide case, which, after telling the jury that they could qualify their verdict by adding the words "without capital punishment," stated that, in case of conviction, it was the duty of the court to fix the penalty in its discretion within the limits prescribed by statute, was erroneous, in that the jury would naturally conclude therefrom that, if they did not qualify their verdict, the court had discretion to impose either the death penalty or life imprisonment.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 662, 663; Dec. Dig. ⇐311.]

7. HOMICIDE ⇐300(2)—INSTRUCTIONS—JUSTIFICATION.

An instruction that to justify a homicide a person must be in the lawful pursuit of his business and without blame was too broad.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 616; Dec. Dig. ⇐300(2).]

8. HOMICIDE ⇐116(4)—JUSTIFICATION—DANGER.

To justify a homicide, it is not essential that the danger be in fact "apparent and imminent," but is sufficient that the assault on defendant be of such a character as to create in his mind a reasonable belief that the danger is imminent, and that it is necessary to take the assailant's life to protect himself from death or great bodily harm.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 161; Dec. Dig. ⇐116(4).]

9. CRIMINAL LAW ⇐1166½(12)—REVIEW—REMARKS OF COURT.

Where the attitude of the court toward counsel for defendant in a murder case, as shown by statements and remarks of the court in the presence and hearing of the jury during the trial, is calculated to belittle and disparage such attorney and create the impression that there is little, if anything, in the defense, thus depriving defendant of a fair and impartial trial, the judgment will be reversed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8125; Dec. Dig. ⇐1166½(12).]

Error to District Court, Lincoln County; David H. Craig, Judge.

Daniel Parker was convicted of murder in the first degree, and brings error. Reversed.

R. R. Rose, of Kemmerer, for plaintiff in error. D. A. Preston, Atty. Gen., for the State.

BEARD, J. The plaintiff in error, Daniel Parker, was convicted of the crime of murder in the first degree, in the district court of Lincoln county, and sentenced to suffer death. From that judgment he brings the case to this court, assigning numerous errors and irregularities occurring on the trial, which his counsel contends were prejudicial and deprived the defendant of a fair and impartial trial.

An information charging the defendant with murder in the first degree was filed in the district court May 3, 1915. May 4, 1915, he was arraigned, and, being without counsel, and it appearing that he was without means to employ counsel, the court appointed R. R. Rose, Esq., an attorney at law, to defend him. The trial was commenced May 10th, and a verdict of murder in the first degree was rendered by the jury May 15th. A motion for a new trial was filed May 26th, was denied the same day, and judgment pronounced May 27th.

[1] The Attorney General insists that a number of alleged errors discussed by counsel for plaintiff in error are not properly before the court for consideration because not sufficiently specified in the motion for a new trial. In answer to that contention counsel for plaintiff in error seeks to excuse the imperfections in the motion on the ground that he was denied sufficient time by the court within which to prepare the motion. It appears that on May 24th, and within the ten days allowed by statute for filing such motion, an application for ten days' extension of time within which to do so was made, supported by the affidavit of counsel, in which affidavit he states that the verdict was returned on Saturday afternoon, May 15th, and that at 10 o'clock on the following Monday (May 17th), by appointment of the court as attorney to defend another person (one Cirej) also charged with murder in the first degree, he was required to enter upon the trial of said case, which trial was not concluded until Saturday afternoon, May 22d; that during said time the official court reporter who reported this case was constantly engaged in court and could not furnish counsel with the evidence or remarks of the court, and that for those reasons he was unable to prepare a more complete and specific motion. The application was heard on May 26th, at which time the court extended the time for filing the motion until 2 o'clock p. m. the following day. Those facts are not disputed, and so far as they appear by the journal entries are fully sustained. The statute (section 6287, Comp. Stat. 1910) provides that the motion, except for newly discovered evidence, shall be filed at the term and within ten days after the verdict was rendered, unless additional time be granted by the court upon good cause shown. We think in the circumstances in this case the court, in the exercise of its discretion and in justice to defendant, should have allowed more time than was granted within which to file the motion; and for that reason the rule requiring the grounds for a new trial to be specifically stated should be

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enforced with less strictness than where such conditions do not exist. The rule (rule 13, Supreme Court Rules, 104 Pac. xiii), "Nothing which could have been properly assigned as a ground for a new trial in the court below will be considered in this court, unless it shall appear that the same was properly presented to the court below by a motion for a new trial," etc., is a statutory one, and has been and should be enforced by this court, especially in civil and in criminal cases of less magnitude than the one before us; but where a defendant is put upon trial for his life, convicted, and the extreme penalty imposed, if it appears to this court from an examination of the entire record that such fundamental errors have been committed upon the trial as to amount to a denial of justice, and that the defendant has been deprived of his right to a fair and impartial trial, it will not insist upon a rigid enforcement of the rule.

[2] The Attorney General also invokes the application of the statute defining exceptions and the time and manner in which they are to be taken, and calls attention to the fact that a number of matters assigned as error were not excepted to at the time, and therefore cannot be considered. He has cited in his brief quite a number of cases decided by this court in which the rule was sustained and applied. Many of them are civil cases, and of the criminal cases cited but one of them (Cook v. Territory, 3 Wyo. 110, 4 Pac. 887) was a capital case; and it does not appear that the instructions given by the court on its own motion in that case and to which no exceptions were taken were claimed to be fundamentally erroneous. The taking of the life of a human being as a punishment for crime has not in later years met with general approval; and appellate courts have inclined to the view that in capital cases it is not only their right, but their duty, to examine the record for the purpose of ascertaining whether or not the defendant has been deprived of his constitutional right to a fair and impartial trial. But it is only in those cases where it clearly appears that such fundamental errors have been committed on the trial as to deprive the defendant of his substantial rights, or that the ruling, decision, or other matters complained of clearly appear to have been prejudicial to the defendant, that the judgment should be reversed, and especially so where exceptions have not been timely taken, or the errors have not been fully stated in a motion for a new trial. Seng v. State, 20 Wyo. 222, 122 Pac. 631. However, if it clearly appears from the record that such fundamental and prejudicial error has been committed as to amount to a denial of substantial justice, or to deprive the defendant of a fair trial, the court should not hesitate to reverse the judgment and grant a new trial, although proper exceptions were not taken at the time. 14 R. C. L. 808; Thornley v. State, 36 Tex. Cr. R. 118, 34 S. W. 264, 35 S. W. 981, 61 Am. St. Rep. 836; Patten v. United States, 42 App. Cas. D. C. 239; Hopt v. Utah, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262; Wiborg v. United States, 163 U. S. 632, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289; Anderson v. State, 8 Okl. Cr. 90, 126 Pac. 840, Ann. Cas. 1914C, 314; Vickers v. United States, 1 Okl. Cr. 452, 98 Pac. 467; People v. Burk, 159 Cal. 783, 115 Pac. 1101.

The defense in this case was self-defense; and, other than the deceased and defendant, there were no witnesses to the affray, if any there was, until after the first of the four shots which were fired by defendant, one of which caused the death of deceased. Defendant testified that deceased assaulted and knocked him down before he fired the shots, and that he shot in self-defense.

[3] The record discloses that at the time the instructions of the court were given to the jury the defendant's counsel objected and excepted to "instructions numbered 8, 9, 10, 11, 13, 15, 18, 19, 21, and 32," and the giving of those instructions were in like manner assigned as error in the motion for a new trial. The Attorney General, in his brief, insists that those instructions cannot be here reviewed for the reason:

"That the objection is to these instructions as a whole, and not individually, and that, if any instruction in the group is correct, the other instructions will not be considered."

He cites Dickerson v. State, 18 Wyo. 440, 111 Pac. 857, 116 Pac. 448, in support of the contention. But that was not a capital case, and the objection there was quite different from that in this case where certain instructions only and not all were objected to; and, aside from what we have already said as to capital cases, the present case comes within the rule announced in Palmer v. State, 9 Wyo. 40, 59 Pac. 793, 87 Am. St. Rep. 910, where it was held that, where the instructions as a whole present an erroneous view of the law as applicable to the facts of the case, a general exception is sufficient. The eighth instruction was one of those excepted to, and which counsel for the state argue correctly states the law. It is as follows:

"Malice means that condition of mind which prompts one to do a wrongful act intentionally, without legal justification or excuse. It does not mean mere spite, hatred, or ill will, but signifies that state of disposition which shows a heart regardless of social duty and fatally bent on mischief; and premeditated malice means that the act was done with malice and premeditation. Malice, as used here, may be presumed from the intentional use of a deadly weapon in a manner likely to produce death."

[4, 5] Had the court not erroneously defined premeditated malice in the sixth instruction, this one might not have been erroneous or prejudicial. But by the sixth instruction (not excepted to at the time) the jury was told:

"To constitute premeditated malice no particular time need intervene between the formation of the intention and the act; it is enough

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if the intent to commit the act with the full appreciation of the result likely to follow was present at the time the act was committed."

Applying that definition of "premeditated malice" to that term as it is used in the eighth instruction, the jury was, in effect, told that the defendant could be found guilty of murder in the first degree if the jury found from the evidence that the intention to kill was present in the mind of defendant at the time the act was committed, which under our statute would constitute murder in the second degree only, and is not punishable with death. The statute declares that "whoever purposely and with premeditated malice * * * kills any human being is guilty of murder in the first degree," and "whoever purposely and maliciously, but without premeditation, kills any human being, is guilty of murder in the second degree." It is premeditation, that is, thinking over, deliberating upon, weighing in the mind beforehand, resulting in a deliberate intention to kill, which constitutes the killing murder in the first degree. The killing however malicious, which is not the result of premeditation, is second degree murder only.

Under statutes like ours which make premeditation the distinction between murder in the first degree and murder in the second degree, the foregoing instructions were clearly and fundamentally erroneous and misleading, and could not have been otherwise than prejudicial to defendant. The error in the instruction was clearly stated in Ross v. State, 8 Wyo. 351, at page 384 et seq., 57 Pac. 924; and, while it may be said that the point was not necessary to the decision in that case, the court said it deemed it proper to discuss the question and announced its conclusion for assistance and guidance in future trials, with which conclusion we fully agree, and do not deem it necessary to here repeat what was there said. See, also, State v. Moody, 18 Wash. 165, 51 Pac. 356; People v. Maughs, 149 Cal. 253, 86 Pac. 187; and cases cited in Ross Case.

[6] The jury was instructed (No. 18):

"You are instructed that with the punishment which would follow a verdict of conviction you have nothing whatever to do, further than this: The statute provides that, in case you find the defendant guilty of murder in the first degree, you may qualify your verdict by adding thereto the words 'without capital punishment.' In that event the death penalty could not follow, and the only sentence which the court would have power to impose would be life imprisonment. The right to add these words to your verdict, and thus limit the power of the court to a sentence of life imprisonment, is an absolute right given you by the statute, and your right to do so cannot be questioned either by the court or any one else. Aside from this one limitation, in this court the law casts the burden and duty upon the court, in case of conviction, to fix the penalty in its discretion within the limits prescribed by the statute. * * *"

The jury was not otherwise informed as to the limits of punishment imposed by the statute, and, from the language used, would naturally conclude that, if it did not qualify its verdict as stated, then it was within the power of the court in its discretion to impose either the death penalty or life imprisonment, which is not the law; but the jury may have taken that view of it as it returned its verdict without adding the words "without capital punishment."

[7, 8] Again, in instruction No. 21, the jury was told:

"In order to justify and excuse homicide a person must be in the lawful pursuit of his business and without blame, and the danger menacing him must have been present, apparent, and imminent; and at the time of the killing he must be acting under a reasonable belief that he is in imminent danger of death or of suffering great bodily harm from the deceased, and that it is necessary for him to kill the deceased in order to prevent the death of or great bodily harm to himself. The apparent necessity which will excuse the taking of human life under the doctrine of self-defense in a case of homicide involves two considerations: First, the defendant himself must have entertained an honest belief in the existence of such necessity; and, second, the circumstances surrounding him must have been such as to impress a reasonable man, under the same state of facts, with the belief of his imminent peril, and of the existence of an urgent necessity to take the life of his assailant, as the only apparent alternative of saving his own life, or else of preventing the infliction on him, the defendant, of great bodily harm. * * *"

This instruction was excepted to and assigned as error in the motion for a new trial. The instruction is erroneous in several particulars. The statement that "to justify and excuse homicide a person must be in the lawful pursuit of his business and without blame" is too broad a statement; and that the danger must have been "apparent and imminent" is not true. The assault must be of such character as to create in the mind of the defendant a reasonable belief that the danger is imminent and that it is necessary to take the life of his assailant in order to protect himself from death or great bodily harm; but it is not necessary that the danger be in fact imminent. If the circumstances are such as to create in the mind of a reasonable man an honest belief that he is then in such imminent danger, and, so believing, he kills his assailant, he is excusable. This instruction as to the law of self-defense is quite lengthy and contains other statements which, if not clearly conflicting, are at least confusing and misleading.

[9] A number of statements and remarks of the court in the presence and hearing of the jury during the trial are assigned as error prejudicial to defendant. We shall not refer to all of them. The homicide occurred on the evening of February 21, 1915, some time soon after 7 o'clock, on a vacant lot in the town of Kemmerer. One Haddenham was the first witness called for the prosecution, and testified on direct examination:

That he was in a room behind a saloon with four or five other men, "and Dan Parker [defendant] come there about 7 or a little after, come in the door. I was lying on a bench be-

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hind the table. He came in the door and said, 'Haddenham, come out here; want to see you.' I got up; went straight to him. As soon as I got out, he says to Mink Porter [the deceased], 'You have mistreated me.' I grabbed him by both arms, pushed him out of the door, and says, 'You don't want any trouble here, Dan.'"

Witness testified that defendant's attitude toward deceased was not threatening. The court asked the witness, "Was there any trouble between defendant here and Mink Porter while you were there?" to which he answered, "No, sir." On the cross-examination the following occurred:

"By Mr. Rose: Q. How far into the room did the defendant come? A. Just to the edge of the door. Q. That is, he opened the door and just entered so as to be inside the room, but really back of the door, is that right? By the Court: He didn't say that. Don't repeat your imagination to this court. Mr Rose: We except. By the Court: The court is right; there is no such evidence. Take it all down. Mr. Rose is afraid something will creep in."

A little further on witness was asked:

"Did you notice position of both of his hands as you were walking toward him? A. Yes, sir. By the Court: You don't have to answer those questions that way. Mr. Rose, if you don't cross-examine the witness in line of direct examination, the court himself, without exception, will not permit you to go any further. Mr. Rose: I want to make myself plain to the court. The direct examination has covered everything that occurred in that house, has it not? Now, if the court please, I wish to show by this witness on cross-examination that the defendant when he entered this house neither said nor did anything indicating any intention to mistreat or attack the deceased. By the Court: Now you stop right here. This court wants you to understand, with other members of the bar, that if you have got a case you will present it, but not through supposition, but only what is founded on the evidence of the direct examination; don't say to the witness, You have testified you have done so and so. Ask him what the facts are. That is what the jury wants."

Again:

"By Mr. Rose: Q. Now, Mr. Haddenham, the defendant entered the west door of the room. You were lying on a bench at the east end of the room? A. Yes, sir. By the Court: You hadn't said that; he said you did. Cross-examination can't put the witness' testimony in his mouth. I never heard anything about him lying on a bed anywhere. If they did, they know more than you and I do."

One Penrod, a witness for the prosecution, testified that just before the shooting he walked along the street behind defendant, saw him cross the street, and heard a shot. He was asked:

"What did you do after you heard the first shot? A. I turned around, could see the form of Dan Parker past the shop corner; two more shots fired, one right after another, then a pause. Dan moved kind of northeast, then another shot. By the Court: What did you see—Dan Parker or his ghost?"

The defendant was a witness in his own behalf, and testified that he had lived in Kemmerer two years, came from Kansas City, that his wife died December 1, 1914, and that he took her body to Kansas City for burial. He was then asked:

"Did you then return to Kemmerer? A. Yes, sir; I did. By the Court: Wait a minute, ask him some legal question. I want to be fair in this case. You try it legally, Mr. Rose."

The foregoing, we think, discloses the attitude of the trial court toward the counsel for defendant, and that it was calculated to belittle and disparage the attorney for defendant before the jury, and to convey to the jury the impression that there was little, if anything, in the defense. A number of other matters are complained of as prejudicial, to which we do not think it necessary to refer, as they are not likely to occur on another trial. Whether the evidence was sufficient to warrant the verdict returned by the jury we express no opinion; but, whether innocent or guilty, the defendant was entitled to a fair and impartial trial, which from a careful examination and consideration of the record in the case we are convinced was not accorded to him. He was entitled to have the crime with which he stood charged correctly defined; to have the law of self-defense correctly stated; to have his defense presented without disparagement; and to have reasonable time under the circumstances for his attorney to prepare a motion for a new trial so as to properly and fairly present the errors claimed to have been committed on the trial. The case being a capital one, and as the judgment, if enforced, will deprive a human being of his life, we have deemed it our duty to look into the record for the sole purpose of ascertaining whether or not such fundamental error was committed on the trial as to deprive the defendant of his constitutional right to a fair trial, and in doing so we have followed the humane rule adopted by other appellate courts, by considering some errors which appear to us to be fundamental, although not shown by the record to have been excepted to at the time.

Being convinced that the defendant did not have a fair trial, the judgment of the district court will have to be reversed, and the cause remanded for a new trial; and it is so ordered.

Reversed.

POTTER, C. J., concurs. SCOTT, J., did not sit.

(24 Wyo. 507)

CIREJ v. STATE. (No. 876.)

(Supreme Court of Wyoming. Dec. 23, 1916.)

1. HOMICIDE ⊂⊃294(1)—INSTRUCTIONS—INSANITY.

An instruction that before defendant, charged with murder, could be excused on the ground of insanity, the jury must believe from the evidence that at the time of the killing he was without sufficient reason to know what he was doing, was erroneous, since defendant may have had sufficient reason to know what he was doing, and not have had reason sufficient to determine whether his act was right or wrong.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 605; Dec. Dig. ⊂⊃294(1).]

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2. CRIMINAL LAW ⊂⊃778(7)—INSTRUCTIONS—INSANITY—BURDEN OF PROOF.

Such instruction was also erroneous as tending to mislead the jury as to the burden of proof; the burden being on the state to establish the sanity of defendant beyond a reasonable doubt where his insanity is an issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1848, 1851, 1960, 1967; Dec. Dig. ⊂⊃778(7).]

3. CRIMINAL LAW ⊂⊃823(9)—HARMLESS ERROR—INSTRUCTIONS—INSANITY.

In a murder case, an instruction tending to mislead the jury as to the burden of proof on the question of insanity was harmless where another portion of the charge directed an acquittal if the jury entertained a reasonable doubt as to defendant's sanity at the time of the homicide.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1994, 3158; Dec. Dig. ⊂⊃823(9).]

4. CRIMINAL LAW ⊂⊃1172(2)—INSTRUCTIONS—THREATS.

In a homicide case, it was not prejudicial to instruct that evidence had been introduced tending to show threats made by defendant against deceased prior to the homicide, and that such evidence should be taken in connection with all other evidence and considered in determining defendant's guilt or innocence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3155; Dec. Dig. ⊂⊃1172(2).]

5. HOMICIDE ⊂⊃286(3)—INSTRUCTIONS—"PREMEDITATED MALICE."

In a homicide case, it was error to instruct that to constitute "premeditated malice" no particular time need intervene between the formation of the intention and the act, but it is enough if the intent to commit the act with the full appreciation of the result likely to follow was present at the time the act was committed.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 591; Dec. Dig. ⊂⊃286(3).

For other definitions, see Words and Phrases, First and Second Series, Premeditated Malice.]

6. HOMICIDE ⊂⊃311—INSTRUCTIONS—PUNISHMENT.

An instruction in a homicide case, which, after telling the jury that they could qualify their verdict by adding the words "without capital punishment," stated that in case of conviction it was the duty of the court to fix the penalty in its discretion within the limits prescribed by statute, was erroneous, in that the jury would naturally conclude therefrom that, if they did not qualify their verdict, the court had discretion to impose either the death penalty or life imprisonment.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 662, 663; Dec. Dig. ⊂⊃311.]

Error to District Court, Lincoln County; David H. Craig, Judge.

Matt Cirej was convicted of murder in the first degree, and brings error. Reversed.

R. R. Rose, of Kemmerer, for plaintiff in error. D. A. Preston, Atty. Gen., for the State.

BEARD, J. The plaintiff in error, Matt Cirej, was convicted of murder in the first degree and sentenced to suffer death. From that judgment he brings error.

The case was tried in the district court of Lincoln county at the same term, and immediately following the case of State of Wyoming v. Daniel Parker, which case, entitled in this court Daniel Parker v. State of Wyoming, 161 Pac. 552, was this day decided. The same attorney was appointed by the court to defend in this case as in the Parker Case. The grounds for a new trial as contained in the motion therefor are that the verdict was not sustained by sufficient evidence and is contrary to law, and that the court erred in giving instruction No. 17 and instruction No. 21. Each of those instructions was excepted to at the time, and all of the instructions are contained in the bill of exceptions; but Nos. 17 and 21 are not mentioned or discussed in the brief of counsel for plaintiff in error, and under the rule, if strictly enforced, the objections thereto would be deemed waived. But, as this is a capital case, and the entire record being before us, we have examined the same for the purpose of ascertaining whether or not it discloses such fundamental error as deprived the defendant of a fair trial.

[1-3] The defense was insanity; and instruction No. 17 is as follows:

"The court instructs the jury that the law presumes every man sane until the contrary is shown by the evidence, and before the defendant can be excused on the ground of insanity the jury must believe from the evidence that the defendant at the time of the killing was without sufficient reason to know what he was doing, or that, as a result of mental unsoundness, he had not then sufficient will power to govern his action by reason of some insane impulse which he could not resist or control."

The statement that before the defendant can be excused on the ground of insanity the jury must believe from the evidence that the defendant at the time of the killing was without sufficient reason to know what he was doing is not a correct statement of the rule of law in such cases. The defendant may have had sufficient reason to have known what he was doing, and yet may not have had sufficient reason to determine the quality of his act as to whether it was right or wrong. The instruction is also objectionable as tending to mislead the jury as to the burden of proof; the rule in this state being that, when the question of insanity is in issue, and there is evidence tending to prove insanity, the burden rests with the state to establish the sanity of the defendant beyond reasonable doubt. State v. Pressler, 16 Wyo. 214, 92 Pac. 806, 15 Ann. Cas. 93. The instruction does not, however, state that it devolved upon the defendant to prove his insanity, and the jury in another portion of the charge having been correctly informed that, if it entertained a reasonable doubt as to defendant's sanity at the time, it should acquit him, we do not think that such prejudice is made to appear on that account as to warrant a reversal of the judgment. Flanders v. State, 156 Pac. 39.

[4] We find nothing prejudicial in the twenty-first instruction. By it the jury was told that evidence had been introduced tend-

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ing to show threats made by defendant against the deceased prior to the homicide, and that such evidence should be taken in connection with all the other evidence and considered by the jury in determining the guilt or innocence of the defendant.

[5, 6] The more serious and important questions arise on two other instructions given to the jury, and which are literal copies of two instructions considered in Parker v. State, supra, in the first of which instructions the court, in defining premeditated malice, which under the statute must be alleged and proved in order to constitute murder in the first degree, told the jury that:

"To constitute premeditated malice no particular time need intervene between the formation of the intent and the act; it is enough if the intent to commit the act with the full appreciation of the result likely to follow was present at the time the act was committed."

In the other instruction referred to above the jury was told:

"That with the punishment which would follow a verdict of conviction you have nothing to do, further than this: The statute provides that in case you find the defendant guilty of murder in the first degree, you may qualify your verdict by adding thereto the words 'without capital punishment.' In that event the death penalty could not follow, and the only sentence which the court would have power to impose would be life imprisonment. The right to add these words to your verdict, and thus limit the power of the court to a sentence of life imprisonment, is an absolute right given you by statute, and your right to do so cannot be questioned, either by the court or any one else. Aside from this one limitation, in this court the law casts the burden and duty upon the court, in case of conviction, to fix the penalty in its discretion within the limits prescribed by the statute. * * *"

Both of these instructions were considered in the Parker Case, supra, and held to be fundamentally erroneous, and prejudicial to defendant; and the reasons for so holding are there stated and the authorities cited, and need not be here repeated.

Following the decision in the Parker Case with respect to those two instructions, and for the error in instruction No. 17, the judgment of the district court is reversed, and the cause remanded for a new trial.

Reversed.

POTTER, C. J., concurs. Scott, J., did not sit.

(24 Wyo. 513)

OHAMA v. STATE. (No. 879.)

(Supreme Court of Wyoming. Dec. 23, 1916.)

CRIMINAL LAW ⟸1056(1)—APPEAL—OBJECTION BELOW.

Where, in a capital case, the evidence is conflicting on whether defendant left the room after the beginning of the quarrel and then returned and renewed the quarrel, and the court erroneously instructs that an intent to kill at the instant the shot was fired was sufficient to constitute premeditated malice, and thereby render the act murder in the first degree, the judgment should be reversed, though defendant's counsel neglected to object and save an exception to the instruction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2668, 2670; Dec. Dig. ⟸ 1056(1).]

Error to District Court, Lincoln County; David H. Craig, Judge.

T. Ohama was convicted of murder in the first degree, and brings error. Reversed.

McMicken & Blydenburgh, of Rawlins, for plaintiff in error. D. A. Preston, Atty. Gen., and Wilfred O'Leary, Deputy Atty. Gen., for the State.

POTTER, C. J. The plaintiff in error was charged with the crime of murder in the first degree, and convicted of that crime by an unqualified verdict, and sentenced to suffer death. The case is here on error, and is in somewhat the same condition as the Parker and Cirej Cases, 161 Pac. 552, 556, this day decided. It was tried at the same term of court, and the same instructions were given as in those cases defining premeditated malice and explaining the right of the jury to qualify its verdict, if murder in the first degree, by adding thereto "without capital punishment." No exception was taken to either instruction, or to any other, and they were not mentioned in any way in the motion for new trial. The plaintiff in error, hereinafter referred to as the defendant, is represented here by different counsel than at the trial in the district court, and they did not come into the case until after the motion for new trial had been filed and overruled.

It appears that the defendant was arraigned on May 4, 1915, and, having informed the court that he was without and unable to secure counsel, the court appointed counsel to defend him. And thereupon he entered a plea of not guilty; the journal entry reciting that he waived his right to the statutory time in which to plead. And the case was set down to be tried at 10 o'clock on the following morning. It appears that the trial was commenced on the morning of May 5th, and was concluded on that day by the rendition of the verdict finding the defendant guilty of murder in the first degree. No objections appear to have been made or exceptions taken during the trial.

Because of the failure of counsel appointed by the court to apply for time in which to prepare for trial and interpose objections and preserve exceptions so as to entitle the defendant to be heard in this court upon alleged manifest errors under the ordinary rules of appellate procedure, it is contended that the defendant did not have a fair trial, and that the errors are so serious and prejudicial as to justify a reversal of the judgment in the absence of exceptions. And it is argued that the record clearly shows such incompetence or gross neglect of counsel prejudicial to defendant as to furnish suf-

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ficient ground for a new trial. Whether the mere neglect or incompetence of assigned counsel, appearing to have prejudiced defendant's rights, would justify a reversal, need not be determined. But the fact that defendant's counsel was appointed by the court, and that the trial was allowed, without objection, to proceed without reasonable time for preparation, if such be the case, might be proper to be considered in connection with a showing by the record that no objection was made or exception taken to erroneous and clearly prejudicial instructions defining the crime of which this defendant was convicted, or relating to the right of the jury to qualify their verdict by adding "without capital punishment," in determining whether the failure to so object or except has deprived the defendant of the right to have the errors considered in this court or make such consideration improper.

As explained in the Parker Case, the instruction defining premeditated malice, the element distinguishing murder in the first degree from second degree murder, was radically and fundamentally erroneous. And in this case, as in that, it was clearly prejudicial; for, while the defense was self-defense, the jury, if disbelieving that the act was committed in self-defense, might have found upon the evidence, if properly instructed, that there was not such premeditation as to constitute murder in the first degree. The deceased, Sadagi Muragishi, was shot by the defendant with a pistol or revolver, and expired within a few minutes after the shooting. There were only two eyewitnesses to the homicide besides the defendant, and they testified on the trial as well as the defendant; the testimony of the three being taken through an interpreter. The defendant testified in his own behalf and the others as witnesses for the state. From the testimony of the two who testified for the state it appears that the shooting occurred during a scuffle or fight following or as a continuation of a quarrel between the deceased and the defendant, and, as one of said witnesses states, when each of them had his arm around the other. They all agree that the deceased had been chiding the defendant for drinking and playing pool instead of attending to his work, as he should, or making preparation for his work on the following day, and applied an epithet to the defendant the meaning of which we do not understand, nor is it explained in the evidence, except that the defendant referred to it as a bad nickname, and he did not want it, because he had just come to the camp (a coal-mining camp in which the homicide occurred). The two witnesses aforesaid for the state testified that after the beginning of the quarrel the defendant went out of the room and returned in four or five minutes, when the quarrel was again started by his referring to what the deceased had said, and that after a few words they commenced to fight. The defendant testified that the deceased came toward him with a knife, and that he shot to defend himself. But the other witnesses testified that they did not see him have any knife, and that no knife was found about him after he was shot. The defendant also testified that he did not leave the room, but, in effect, that the quarrel was continuous, and that he had the revolver on his person in a pocket all the time.

If the defendant left the room after the beginning of the quarrel, and then returned and renewed the quarrel, that fact might tend to show premeditated malice. But it is impossible to ascertain whether the jury believed that the defendant left the room and returned, or based the verdict upon the theory of the erroneous instruction that an intent to kill at the instant the shot was fired would be sufficient to constitute premeditated malice and thereby render the act murder in the first degree, or upon what theory or belief as to the facts the verdict was based. This being a capital case, we think, for the reasons stated in the Parker Case with reference to the instructions aforesaid, the rule as to objections and exceptions should not be strictly enforced. That rule of practice is a salutary one in most cases, and should not be departed from even in criminal cases, except, in a case like this, where deemed necessary to the security of the defendant's right to a fair trial or the just administration of the law. The reasons for the rule are not of such paramount importance as to outweigh all considerations of justice where manifestly prejudicial errors involving the life of the accused have occurred, and may have caused a verdict requiring the extreme penalty of the law to be imposed. State v. Wright, 104 La. 44, 28 South. 909; Schlencker v. State, 9 Neb. 300, 2 N. W. 710. In the Nebraska case cited it was held that the absence of an exception in a capital case does not necessarily deprive the prisoner of his right to a new trial for errors prejudicial to him; and the error considered was in defining premeditated malice, as in this case. The court said that the instruction completely ignored premeditation as an independent element of murder in the first degree, and left the jury to understand that a deliberate intention unlawfully to kill was alone sufficient evidence of premeditated malice, and would warrant a conviction for the highest degree of homicide.

In at least one state there is a statutory recognition of the impropriety of requiring an exception to authorize in a capital case the consideration of prejudicial errors to see if justice requires the ordering of a new trial. People v. Lyons, 110 N. Y. 618, 17 N. E. 391; People v. Pallister, 138 N. Y. 601, 33 N. E. 741.

We think it not only proper, but our duty, to order a reversal of the judgment, and

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that the cause be remanded for a new trial; and it will be so ordered.

Reversed.

BEARD, J., concurs. SCOTT, J., did not sit.

(82 Or. 465)

CITY OF PORTLAND v. SCHMID et al.*

(Supreme Court of Oregon. Dec. 19, 1916.)

1. EMINENT DOMAIN ⇐254—APPEAL AND REVIEW—WAIVER OF APPEAL.

A municipality, in condemnation proceedings to secure property for sidewalk purposes, waives its appeal from judgment fixing damages by taking and using the property pending the appeal.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 665; Dec. Dig. ⇐254.]

2. EMINENT DOMAIN ⇐254 — APPEAL AND REVIEW—WAIVER OF APPEAL.

An appeal by a municipality from judgment in condemnation proceedings fixing damages for sidewalk property will be held waived where the city constructed the sidewalk pending appeal, notwithstanding that thereafter, on advice of the city attorney, sidewalk was removed by city.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 665; Dec. Dig. ⇐254.]

Department 1. Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Condemnation proceedings by the City of Portland against Charles Schmid and others. From a judgment for defendants, plaintiff appeals. On motion to dismiss appeal. Motion granted, and appeal dismissed.

Harrison Allen and J. R. Latourette, both of Portland (Griffith, Leiter & Allen, Latourette & Latourette, and Ralph R. Duniway, all of Portland, on the brief), for the motion. L. E. Latourette, of Portland (W. P. La Roche, City Atty., of Portland, on the brief), opposed.

BENSON, J. [1] This was a proceeding by the city of Portland to condemn a portion of lot 1 in block 315 for the purpose of widening Washington street. Upon a trial the jury returned a verdict in favor of the defendants fixing the amount of damages to be recovered in excess of benefits to be derived from the improvement. A judgment was subsequently entered thereon, from which the plaintiff perfected its appeal. Thereafter the city authorities took possession of the premises, erected a sidewalk thereon, and opened the same to the public for its use. About a month later, at the request of the city attorney, the sidewalk was again set back to the old line, and the defendants now move to dismiss the appeal upon the ground that the plaintiff has forfeited its right of appeal by accepting the fruits of the judgment and entering upon and occupying the premises sought to be condemned. Plaintiff, while admitting that the pavement was laid up to the newly established line and that the sidewalk was constructed upon the premises and used by the public, insists that these acts were inadvertently performed by the city's agents and employés without authority, and that therefore the city ought not to be held to have waived its right of appeal. We do not deem it necessary to enter into any discussion of the evidence as to this question, and it is enough to say that, in our judgment, the evidence satisfactorily discloses that the city authorized the occupation and use of the land, and that its inadvertence consisted in a failure to hold a timely consultation with its legal advisers.

[2] There remains then a consideration of the question as to whether or not the taking and occupation of the land constitutes a waiver of the appeal. It may be said at the outset that it is so well established as to be regarded as elementary law that a litigant cannot accept the benefits of an adjudication and afterward appeal therefrom. Practically every state in the Union has so held, and the doctrine is sustained in this state in Moore v. Floyd, 4 Or. 260; Portland Cons. Co. v. O'Neil, 24 Or. 54, 32 Pac. 764; Bush v. Mitchell, 28 Or. 92, 41 Pac. 155; Moores v. Moores, 36 Or. 261, 59 Pac. 327; Roots v. Boring Junction Lumber Co., 50 Or. 298, 92 Pac. 811, 94 Pac. 182; Oregon Elec. Ry. v. Terwilliger L. Co., 51 Or. 107, 93 Pac. 334, 930; Kellogg v. Smith, 70 Or. 449, 142 Pac. 330. It is true that the money part of the judgment has not been paid, but the defendants are the only ones who might complain of this. If it had been paid, the authorities are abundant to the effect that such payment would constitute a waiver of the appeal, but it must not be overlooked that the one signal benefit sought by the plaintiff in this litigation was the right to occupy the land in controversy, which it did, and the fact that it subsequently regretted the action and removed the sidewalk could not restore its lost right. Portland Cons. Co. v. O'Neil, supra.

It follows that the appeal must be dismissed.

MOORE, C. J., and McBRIDE and BURNETT, JJ., concur.

(89 Or. 302)

MALAGAMBA v. McLEAN et al.

(Supreme Court of Oregon. Dec. 19, 1916.)

INJUNCTION ⇐163(2)—TEMPORARY INJUNCTION—MOTION.

In a suit to enjoin the sale of real estate and apply the equitable interest which plaintiff's judgment debtor has in the property, owned by his wife, in which a temporary injunction was granted on appeal, where a dissolution of the restraining order would enable the owner to dispose of the lot, and to determine on the restraining order whether the complaint states a cause of suit would be to decide the main question involved, a motion to dissolve the injunction on that ground will be denied.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 358; Dec. Dig. ⇐163(2).]

*Rehearing denied January 9, 1917.

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Department 2. Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Suit for injunction by D. Malagamba against Irena C. McLean and others. From a judgment dismissing the suit, plaintiff appeals. On motion to dissolve a temporary injunction issued by the Supreme Court. Motion denied.

F. C. Hesse, of Astoria (Norblad & Hesse, of Astoria, on the brief), for appellant. A. C. Fulton, of Astoria (G. C. Fulton, of Astoria, on the brief), for respondents.

HARRIS, J. Irena C. McLean and Arch McLean are husband and wife. Arch McLean and D. Malagamba were partners doing business under the firm name of Arch McLean & Co. Irena C. McLean obtained a judgment against the partners for $2.795.91, together with interest and costs. Malagamba commenced a suit which terminated in a decree dissolving the partnership and a judgment against Arch McLean for $1,850.80, together with other sums. The judgment obtained by Irena C. McLean was prior to the one secured by Malagamba. The partnership being without assets, Irena C. McLean caused the issuance of an execution and a levy on the individual property of Malagamba. Arch McLean is insolvent, and consequently Malagamba is unable to enforce the satisfaction of his judgment by execution, levy, and sale. Irena C. McLean owns lot 5 in block 46, McClure's addition to Astoria. A building was constructed upon that lot. Claiming that the building had been erected by Arch McLean and paid for by him, and that therefore he had an equitable interest in the property, Malagamba commenced this suit against the McLeans and the sheriff to stay the progress of the execution issued on the Irena C. McLean judgment and to compel her to apply on her judgment the value of the alleged equitable interest ascribed to Arch McLean.

The defendants demurred to the complaint filed by Malagamba, and the circuit court ruled that the pleading did not contain facts sufficient to constitute a cause of suit; and, the plaintiff refusing to plead further, the court dismissed the suit. Malagamba appealed, and upon his application we issued an order which, pending the appeal, and until a final hearing, stays the execution on the Irena C. McLean judgment and enjoins the sale of lot 5. The defendants contend that the complaint does not state facts sufficient to constitute a cause of suit, and they therefore moved for a dissolution of the restraining order. The very purpose of this suit is to apply whatever equitable interest Arch McLean may have in lot 5 on the judgment held by Irena C. McLean, and it is apparent that a dissolution of the restraining order would enable the McLeans to dispose of lot 5 before the cause can be heard on the merits. To determine, on this motion to dissolve the restraining order, whether the complaint states a cause of suit, would be to decide the main question involved in the controversy. For aught that appears in the record, the appeal is presented in good faith, and under all the circumstances we prefer to continue the status quo until the final hearing, and at that time determine the merits of the litigation.

The motion to dissolve the injunction is denied.

MOORE, C. J., and BURNETT and BEAN, JJ., concur.

(82 Or. 299)

STANFIELD v. MAHON.

(Supreme Court of Oregon. Dec. 19, 1916.)

APPEAL AND ERROR ⟸345(1), 356—TIME OF TAKING—DISMISSAL—STATUTE.

Under L. O. L. § 201, providing that upon a jury trial, judgment in conformity with the verdict shall be entered by the clerk on the day the verdict is rendered, section 548, as amended by Laws 1911, c. 143, providing that a motion for a new trial shall not stay the six months' time formerly limited in which to take an appeal until the motion was determined, and that the appeal to be effectual must be taken within six months from the entry of judgment, and section 550, as amended by Laws 1913, c. 319, § 1, subd. 5, requiring an appeal to the Supreme Court to be taken within 60 days from the entry of the judgment appealed from, an appeal to the Supreme Court must be taken within 60 days from the original entry of judgment, when a motion for new trial is not granted, and otherwise the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1895, 1926, 1927; Dec. Dig. ⟸345(1), 356.]

In banc. Appeal from Circuit Court, Harney County; Dalton Biggs, Judge.

Replevin by R. N. Stanfield against James Mahon. Judgment for defendant, and plaintiff appeals. Appeal dismissed.

This action of replevin was tried and on the 11th day of April, 1916, a finding was made as follows:

"We, the jury impaneled and sworn to try the above-entitled case, find for the defendant, and that defendant was entitled at the commencement of this action to the immediate possession of the 147 head of sheep mentioned in the complaint as security for the payment of the amount of damage done to defendant's land described in the answer and also for the reasonable care of said sheep while being so held by him, and we assess the damage and expense in the sum of $400, and find that defendant had a special interest and property right in said sheep to the extent of the aforesaid amount; we also find that the value of the said 147 sheep was $624.75, and that the defendant is entitled to the return of said sheep."

Judgment was entered in the journal on the day the verdict was returned. The plaintiff's counsel served and filed a notice of appeal on the 22d day of June, 1916, and thereafter gave the required undertaking and caused a transcript to be filed in this court. The defendant's counsel move to dismiss the

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appeal because it was not taken within 60 days from the time the judgment was given as provided by law. Gen. Laws Or. 1913, c. 319, subd. 5.

J. W. Biggs and G. A. Rembold, both of Burns, for the motion. L. R. Webster, of Portland (P. J. Gallagher, of Ontario, on the brief), contra.

PER CURIAM. Resisting the motion the plaintiff's counsel filed an affidavit showing that when the verdict was found a motion was made to set it aside and for a new trial; that this application was taken under advisement by the court and it was tacitly agreed between counsel for the respective parties that no judgment should be entered or execution issued until the motion for a new trial was determined; that by reason thereof the affiant believed the judgment would not be entered until it was decided whether or not a new trial would be granted; that on the 22d day of May, 1916, he examined the court records and found the judgment had not been docketed; that some time later he learned from the judge that inasmuch as 60 days had about elapsed since the application for a new trial was made, the latter would allow the statute of limitations to overrule the motion, and as soon as possible thereafter the notice of appeal was served and filed; that examining the docket and finding no judgment had been entered the affiant relied upon the implied agreement and was surprised to find that the judgment had been entered in the journal on the 11th day of April, 1916, but not noted in the judgment docket until the 22d day of June, 1916, and then as of the 11th day of April, 1916. The counter affidavit of defendant's counsel is to the effect that when the verdict was returned, the court upon their motion immediately gave judgment which was thereupon entered in the journal; that no agreement, express or implied, was made that the entry of the judgment should be delayed; and that the only understanding reached was that execution should not immediately be issued, but that a reasonable time would be allowed to pay the judgment.

When a trial has been had by jury, judgment shall be given by the court in conformity with the verdict and so entered by the clerk within the day on which the verdict is returned. L. O. L. § 201. Section 548 of L. O. L., which enactment was incorporated as section 547, B. & C. Comp., was amended so as to provide that a motion for a new trial should not operate as a stay of the 6 months' time formerly limited in which to take an appeal until the motion was determined, but that the appeal to be effectual must be taken "within 6 months from the date of the original entry of judgment." Gen. Laws Or. 1911, c. 143. Section 550, L. O. L., was subsequently amended so that an appeal to the Supreme Court should be taken "within sixty (60) days from the entry of the judgment, order or decree appealed from." Gen. Laws Or. 1913, c. 319, subd. 5.

In construing these provisions it has been held that an appeal to this court must be taken within 60 days from the original entry of the judgment, when a motion for a new trial is not granted. Barde v. Wilson, 54 Or. 68, 102 Pac. 301; Macartney v. Shipherd, 60 Or. 133, 117 Pac. 814, Ann. Cas. 1913D, 1257; Gearin v. Portland Ry. L. & P. Co., 62 Or. 162, 124 Pac. 256; Hahn v. Astoria National Bank, 63 Or. 1, 114 Pac. 1134, 125 Pac. 284; Tucker v. Davidson, 80 Or. 254, 156 Pac. 1037. Assuming, without deciding, that parties to a suit or an action could by agreement extend the limitation prescribed by statute for taking an appeal from a judgment or decree, which enactment relates exclusively to a matter of jurisdiction of this court, the alleged tacit agreement relied upon by plaintiff's counsel is denied by counsel for the adverse party, except in respect to their promise not to issue execution until a reasonable time to pay the judgment had elapsed. No conclusive showing has been made by plaintiff's counsel to take this case out of the general rule referred to, and as more than 60 days had elapsed from the time the judgment was entered in the journal until the notice of appeal was served and filed, no jurisdiction of the cause was obtained by this court.

The appeal is therefore dismissed.

(82 Or. 639)

McCOMAS v. NORTHERN PAC. RY. CO. et al.

(Supreme Court of Oregon. Dec. 19, 1916.)

1. PUBLIC LANDS ⇐71—RAILROAD GRANT—TITLE.

Act Cong. July 2, 1864, c. 217, 13 Stat. 365, granting land to aid in the construction of the Northern Pacific Railroad, operated as a present grant beginning with the date when the plat of the road was filed in the office of the Commissioner of the General Land Office June 29, 1883, so that eo instanti the title of the grantee in all of the land to which the statute applied vested.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 232, 236; Dec. Dig. ⇐71.]

2. PUBLIC LANDS ⇐75—SWAMP LANDS—RAILROAD GRANT—"CLAIM."

Under Act Cong. July 2, 1864, granting lands to aid in the construction of the Northern Pacific Railroad free from pre-emption or other claims at the time the line of the road was definitely fixed and a plat filed in the General Land Office, the filing of the swamp land list by the state of Oregon under Act Congress approved September 28, 1850, c. 84, 9 Stat. 519, applicable to that state by Act March 12, 1860, c. 5, 12 Stat. 3, constituted a "claim" excluding such land from the operation of the railroad grant.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 238–240; Dec. Dig. ⇐75.

For other definitions, see Words and Phrases, First and Second Series, Claim.]

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3. ADVERSE POSSESSION ⟸100(6)—COLOR OF TITLE—DEED.

The grantee of lands from the state of Oregon which the state had acquired under the swamp land acts, Act Cong. September 28, 1850, as extended by Act Cong. March 12, 1860, who at once entered into possession, had color of title under his deed.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 563–566, 568–571, 573: Dec. Dig. ⟸100(6).]

4. PUBLIC LANDS ⟸81(1)—MINERAL SELECTIONS—STATUTE.

Under the express provision of Act Cong. July 2, 1864, granting lands to aid in the construction of the Northern Pacific Railroad, the indemnity in lieu of mineral lands must be taken out of unoccupied agricultural lands.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 250; Dec. Dig. ⟸81(1).]

5. PUBLIC LANDS ⟸81(1)—RAILROAD GRANT—WITHDRAWAL—EFFECT.

Under Act Cong. July 2, 1864, granting land to aid in the construction of the Northern Pacific Railroad, and excluding mineral lands and in lieu thereof giving a selection out of unoccupied agricultural lands, the cancellation or rejection of swamp land list filed by the state of Oregon under Act Cong. Sept. 28, 1850, as extended by Act Cong. March 12, 1860, constituting such a claim as to exclude the land from the railroad grant, would not operate to extend the grant over a disputed tract in the matter of filing indemnity selections.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 250; Dec. Dig. ⟸81(1).]

In Banc. Appeal from Circuit Court, Umatilla County; Gilbert W. Phelps, Judge.

Suit to quiet title by E. W. McComas against the Northern Pacific Railway Company and others. Decree for plaintiff, and defendants appeal. Decree affirmed.

This is a suit to quiet title to certain lands in Umatilla county. The plaintiff asserts title by prescription. The defendants claim under the act of Congress of July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific Coast, by the Northern route." 13 Stat. at Large, p. 365. From a decree in favor of the plaintiff, the defendants appealed.

Charles A. Hart, of Portland (Carey & Kerr, of Portland, on the brief), for appellants. J. H. Raley, of Pendleton (Raley & Raley, of Pendleton, on the brief), for respondent.

BURNETT, J. Although other lands are included in the complaint, the parties stipulated disposing of the title to all except the following: Lots 2 and 4 of section 5, and lots 1 and 2, the north half of the northeast quarter, and the northeast quarter of the southeast quarter, of section 7, all in township 5 north, range 30 east W. M. There is substantially no dispute about the facts in the case.

[1] Section 3 of the congressional enactment mentioned reads, in part, as follows:

"That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. * * * Provided, further, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected as above provided. * * *"

The line of the road was definitely fixed, and the plat thereof filed in the office of the Commissioner of the General Land Office June 29, 1883. This act has been construed to operate as a present grant beginning with that date, so that eo instanti the title of the grantee vested in all lands to which the statute applied.

[2, 3] It appears that the Governor of Oregon, operating under "An act to enable the state of Arkansas and other states to reclaim the swamp land within their limits," approved September 28, 1850, and made applicable to the states of Minnesota and Oregon by the act of March 12, 1860, filed with the proper authorities of the general government in 1872 a list of lands, including those in controversy, which it claimed were swamp lands inuring to the state of Oregon under the acts of Congress last mentioned. On August 10, 1892, and March 15, 1895, the state of Oregon conveyed these lands to the plaintiff's predecessors in interest from whom by mesne conveyances he deraigns title. The grantees in those deeds at once entered into possession of the realty therein described, and they and their successors in interest have continuously maintained that tenure until the present time, claiming title, and have made improvements on the premises amounting in value to $10,000 and upwards. As before stated, the plaintiff contends that this constitutes adverse possession under color of title which vests in him the fee-simple estate as against the defendants, although, as the fact appears to be as to some of the disputed subdivisions, the swamp land claim of the state of Oregon has never been adjusted, while as to others it has been rejected by the officers of the general government. It

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is agreed that all the realty in question lies within the 40-mile place limits of the railway line, so that if no claim existed against it at the time the line of the road was definitely fixed it would be among the 20 alternate sections per mile on each side of the designated line of road. The contention of the defendants is that the presence of the state's swamp land list in the proper United States Land Office constituted a claim against the land which took it out of the operation of the grant with the result that the tracts were part of the public domain and not subject to holding by adverse title. Some of this very land was patented to the defendant railway company, which, assuming that the patent had been issued inadvertently, quitclaimed the property to the United States and then, after the commencement of this suit, filed in the United States Land Office at La Grande what it termed mineral indemnity selections covering the most of the premises in controversy. The defendants say these selections have been approved and depend upon them for their title to the land.

Conceding, as the precedents seem to hold, that the filing of the swamp land list by the state of Oregon constituted a claim within the meaning of the railway grant excluding the lands from its operation proves too much for the defendants. The plaintiff has clearly established color of title by deed from the state for the very land. He deraigns title from this source which the defendants say took the property out of the operation of the grant. It is beyond question that the property has been in the exclusive possession of the plaintiff and his grantors under this color of title for more than ten years prior to the commencement of the suit.

[4, 5] The authority for filing mineral indemnity selections is found in the provision of the congressional statute "that all mineral lands be and the same are hereby excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected as above provided," that is to say, "no more than ten miles beyond the limits of said alternate section." The indemnity, therefore, must be taken out of unoccupied agricultural lands; but this land has been in fact occupied all this time. Moreover, in Bardon v. N. P. R. R. Co., 145 U. S. 535, 545, 12 Sup. Ct. 856, 860 (36 L. Ed. 806) the Supreme Court of the United States, speaking by Mr. Justice Field, in construing this same legislation, said:

"Not only does the land once reserved not fall under the grant should the reservation afterwards from any cause be removed, but it does not then become a source of indemnity for deficiencies in the place limits. Such deficiencies can only be supplied from lands within limits designated by the granting act or other law of Congress."

In Northern Lumber Co. v. O'Brien, 204 U. S. 190, 27 Sup. Ct. 249, 51 L. Ed. 438, the act was again under consideration. A claim to certain lands within the 40-mile place limit prescribed by the grant made before the Northern Pacific Railway Company had filed its map of definite location was found to be ineffectual, although an order of the Land Department withdrawing it from the category of public lands had been predicated upon it. Under these conditions, Mr. Justice Harlan, speaking for the court, said:

"When the withdrawal order ceased to be in force, the lands so withdrawn did not pass under the later grant, but became a part of the public domain, subject to be disposed of under the general land laws, and not to be claimed under any railroad land grant."

If the filing of the swamp land list therefore constituted such a claim as to exclude the land from the operation of the railroad grant, the cancellation or rejection of that list would not operate to extend the grant over the disputed tract. In other words, the grant does not purport to affect or attach to any subsequent status of the title. On the other hand, if the mere filing of the swamp land list did not affect the title granted in præsenti by the congressional enactment, the holding of the plaintiff and his grantors has been clearly adverse for sufficient length of time to ripen into a fee-simple estate as against the defendants. Still further, under the authority of the Bardon Case, the indemnity selections could not be made from any land except what had always been exempt from any claim excluding it from the provisions of the act in the first place. In default of other legislation, the grant embodied in the act of July 2, 1864, attached at the date of the filing of the plat of definite location or never. Whatever the general government afterwards might do towards extinguishing the claim of the state under its swamp land filing or the assertion of title by the plaintiff it would not inure to the benefit of the defendants in the matter of filing indemnity selections. The act evidently applied to virgin public domain and to no other, both in the original taking and in subsequent indemnity selections.

The plaintiff comes within the reason of the rule of Boe v. Arnold, 54 Or. 52, 102 Pac. 290, 20 Ann. Cas. 533, to the effect that one may enter upon public lands, and by holding the same adversely to all persons except the government may acquire title thereto as against those other parties. Under the authorities quoted, it is clear that the rights of the defendant under the act of July 2, 1864, never attached to this land, and that it had no right to include it subsequently in its indemnity selections. It is also equally plain that as between the parties to this suit the adverse possession of the plaintiff and his grantors for more than ten years has vested the title in the latter as against the company.

The decree of the circuit court is affirmed.

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(82 Or. 303)

BLACKWELL v. OREGON SHORT LINE RY. CO. et al.

(Supreme Court of Oregon. Dec. 19, 1916.)

1. CARRIERS ⟸228(5)—CARRIAGE OF LIVE STOCK—DELAY—EVIDENCE.
Evidence, in an action for delay in transporting live stock, *held* to sustain a finding that the cattle were ready to be loaded, in accordance with an arrangement with the carrier, at the time of the departure of the train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960; Dec. Dig. ⟸228(5).]

2. CARRIERS ⟸207(2)—CARRIAGE OF LIVE STOCK—DELIVERY TO CARRIER.
A shipper and the carrier may make such stipulations upon the matter of delivery to the carrier as they see fit, and when made they are to govern.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 195; Dec. Dig. ⟸207(2).]

3. CARRIERS ⟸206—CARRIAGE OF LIVE STOCK—NOTICE OF DELIVERY TO CARRIER.
Where the station agent and conductor of a common carrier were informed the day before an intended shipment that the cattle were to be put into the pens for shipment according to custom, no further formal notice was necessary.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 916, 917; Dec. Dig. ⟸206.]

4. CARRIERS ⟸206—CARRIAGE OF LIVE STOCK—ACCEPTANCE OF SHIPMENT.
Where, in accordance with a recognized custom, a shipper notified the railroad company that he intended to ship a certain number of cattle next day, and had them ready to be loaded upon the arrival of the train, such acts, known to the carrier and not objected to, constituted a delivery and an acceptance of the shipment; no written receipt or bill of lading being necessary.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 916, 917; Dec. Dig. ⟸206.]

5. CARRIERS ⟸205—CARRIAGE OF LIVE STOCK—LIABILITY.
The liability as common carrier begins with the actual delivery of the goods for transportation, and not merely with the formal execution of a receipt or bill of lading.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 918, 920, 923; Dec. Dig. ⟸205.]

6. CARRIERS ⟸228(3)—CARRIAGE OF LIVE STOCK—DELAY—EVIDENCE.
In an action for damages for delay in transporting a shipment of live stock, evidence as to its market value at destination and of shrinkage per head *held* admissible; the value at the point of shipment and at destination being concededly the same except for the shrinkage.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960; Dec. Dig. ⟸228(3).]

7. CARRIERS ⟸230(12)—CARRIAGE OF LIVE STOCK—DELAY—DAMAGES.
In an action for damages through delay in transporting a shipment of live stock, an instruction that the measure of damage would be the depreciation in the value of the animals caused by the negligent delay *held* proper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 961; Dec. Dig. ⟸230(12).]

8. CARRIERS ⟸231—DELAY IN SHIPMENT—ACTIONS—PARTIES.
Where the agent of a common carrier is joined as defendant in a suit for damages for delay in a shipment of live stock, but no cause of action is stated against him, and instructions are given as though the carrier were the sole defendant, his name should be stricken from the judgment.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. ⟸231.]

In Banc. Appeal from Circuit Court, Malheur County; Dalton Biggs, Judge.

Action by N. Y. Blackwell against the Oregon Short Line Railway Company and another, for damages for delay in transporting a shipment of live stock. Judgment for plaintiff, and defendants appeal. Affirmed.

Plaintiff instituted this action against the railroad company for the recovery of damages alleged by him to have been sustained from the asserted delivery to the carrier at Juntura, Or., of 197 head of cattle at about 8 o'clock on the morning of September 16, 1915, and the carrier's failure to transport them from Juntura on the defendant's regular train which it is averred left there after the stock had been delivered to the carrier. The allegation of the complaint in that respect is in substance that at about 8 o'clock a. m. on the above-named date the plaintiff delivered to the defendants and they received and accepted from him the said cattle to be by the defendant Oregon Short Line Railway Company transported from Juntura to Hope in Malheur county, Or., within a reasonable time, which is from 2 to 5 hours. It is thereupon alleged that the carrier failed to transport the cattle within a reasonable time, but that they were held in the company's pens at Juntura until the following morning when they went forward on the regular morning train, that by reason of such failure to carry and deliver said cattle and to care for them they were reduced in flesh, weakened, and made unfit for market to plaintiff's damage in the sum of $1,500. The railway company denied that the cattle were delivered at 8 o'clock a. m. on September 16, 1915, or before the morning of September 17th, when 7 carloads of stock were received and transported from Juntura to Hope, Or. It also denied any damages. The cause was tried by the court and a jury, and a verdict found for the plaintiff. From a following judgment for $933.44, the defendants appealed.

A brief outline of the case, which the evidence tended to prove, is as follows: The plaintiff is a dealer in live stock, and has followed that business for several years, shipping both to Eastern and Coast markets. During the season of 1915 he was engaged for a part of the time in shipping cattle out of Juntura, Or., over the road of the defendant Oregon Short Line Railway Company. Prior to the shipment complained of he had made one or two similar shipments, and had ordered cars for the transportation of the cattle in question, which cars the company had ready at Juntura. The plaintiff was buying these cattle by weight, the drovers bringing them in, holding them outside the yards one night, and weighing them the next morning.

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On the day prior to that on which plaintiff alleges he made delivery, plaintiff informed Delsole, the agent for the railway company at Juntura, that he would be ready on the following morning to ship 7 cars of cattle on the regular train. Plaintiff was instructed by Delsole to have his cattle at the yards at about 8 o'clock a. m. as the train would be in about that time. Following these instructions the plaintiff secured the assistance of several parties and had the cattle in the stockyards when the train backed up to load. Another shipper, William Jones, had 2 cars of cattle in the yards when the plaintiff arrived with his cattle, having put them in the night before, and they were then in the loading chutes. When the train came in plaintiff had his cattle close to the corral and before it backed up to the stockyard to load Jones' cattle, he had his in the pens. Before placing them there he cut out a portion of 37 head of feeders that did not have to be weighed, putting them in a separate pen preparatory to loading. Upon getting the cattle into the pens he and part of his men proceeded with dispatch to weigh the remaining 160 head, which were beef cattle. Some considerable time after the train backed down to the stockyards the railroad men and Mr. Jones proceeded to load his 2 cars. The conductor stated that when this was accomplished he asked plaintiff when he would be ready to load, and was told that it would take some time. This, however, is denied by the plaintiff. The conductor states that afterwards he made the same inquiry of a man who was helping to cut out the cattle, and he was told that it would be 2 or 3 hours. The evidence tended to show further that thereupon the conductor took his engine and proceeded to the station; that he returned in a short time, picked up the 2 cars of Mr. Jones' cattle, and, without further investigation as to whether or not the plaintiff was ready to load, placed the 2 cars of Jones' stock in the train, and before plaintiff was aware of it left the station at about 9 a. m. At this time there were about 3 cars of plaintiff's cattle ready to load, consisting of 1½ or 2 cars of beef cattle, and the 37 head of feeders, and a sufficient number of men on hand to attend to the loading. Plaintiff finished weighing the cattle at 9:30 or 9:35 a. m. Upon ascertaining that the train had departed, he immediately telegraphed to an officer of the defendant corporation, stating that his stock had been left in the yards, and requested "power" with which to move them, also stating that unless defendant could furnish equipment, the cattle were at the disposal of the company. He waited all day for an answer, making inquiries of the agent regarding the same, but receiving none. The service on this branch railroad consists of one train a day each way, a mixed train carrying passengers, freight, baggage, mail, express, and such live stock as there is for shipment at the various stations along the line. It was the custom of the defendant company to wait upon shipments until all the live stock tendered for shipment at the various stations along the line could be loaded, waiting in some instances several hours. Sometimes the train was delayed until the afternoon before departing from Juntura. Defendant's agent stated that in the neighborhood of 1,000 cars of live stock were shipped over this branch during the shipping season of 1915, and that this tonnage was handled by this single train, except in a few instances, when special ones were run. Plaintiff's cattle were in the yards without feed for more than 24 hours, and upon arrival of defendant's train on the following morning, September 17th, were loaded in 25 minutes and shipped out at about 9.30 o'clock a. m. The shrinkage was about 100 pounds to the head, and the value of the cattle at Juntura was 5.75 or 6 cents a pound. It appears from the evidence that the damage caused by the failure to ship the cattle within a reasonable time was from $5 to $10 a head, and that while the cattle were in the yard waiting the railway company furnished them water, but no feed.

On behalf of the defendant company, Mr. Delsole testified that Blackwell had shipped cattle on the 15th of that month, and that the train was held 2 hours; that on that day he informed Blackwell that he would have to have his cattle in the next morning at about 8 o'clock; that he did not get them in by that time nor by the time the train arrived; that when the train came back to the station after the cars containing Jones' cattle were attached, he told the dispatcher it would be 1½ or 2 hours before Blackwell would be ready to load. The dispatcher answered instructing them that the train should not wait. He said that they never left stock when they were ready to be loaded.

H. B. Thompson, of Pocatello, Idaho (Geo. H. Smith, of Salt Lake City, Utah, and Wm. E. Lees, of Ontario, on the brief), for appellants. P. J. Gallagher, of Ontario, for respondent.

BEAN, J. (after stating the facts as above). [1] It is candidly stated in defendants' brief as follows:

"The basic question, therefore, so far as the railroad company is concerned, was whether the plaintiff delivered and the defendant received the cattle at about 8 o'clock on the morning of the day in question and before the departure of the morning train, * * * and if the cattle were delivered before the departure of that train it was the duty of the carrier to take them out then, that being the only scheduled train on the branch as provided by the published and filed schedule."

It will be seen that there was a sharp conflict in the evidence as to the preparedness for the shipment of the cattle in question at the time of the departure of the train. The testimony on the part of the plaintiff tended to show, and the jury found, that

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when the train arrived at Juntura the cattle were near by the stockyard of the defendant where the men were cutting out the feeders as it was a better place for such work than in the yards; that they were in the yard when the train backed up to load the Jones cattle; and that when the latter were loaded and out of the way, Blackwell had about 3 cars of his cattle ready to load, and, except for some misunderstanding caused probably on account of strained diplomatic relations between Blackwell and the defendant's servants, would have commenced to load the cattle into the cars while other men weighed the remainder so that there would have been but a few of the cattle left to load when the weighing was completed at about 9:30 o'clock, and the train would not have been delayed on account of loading the Blackwell cattle any appreciably longer time on that day than it was on the following day when they were loaded in 25 minutes. It appears that Juntura is a small station on this branch line, and that the railway company did not maintain a yard, nor provide any means for placing the cars for loading cattle until the regular daily train arrived, and did not expect the stock to be loaded in advance of its arrival. There were 7 carloads of plaintiff's animals, and they could not all be loaded at once. The loading chute held but one car, and if they were loaded and transported at all, under the prevailing conditions, the daily train must be held to afford a sufficient length of time for so doing. The jury found according to the theory of the plaintiff, and this must be assumed to be the true one. It was not the theory of the defendant, as indicated by the evidence, that it would have disarranged the train schedule and prevented the regular connection for the railroad men to have devoted 35 or 40 minutes to the loading of plaintiff's cattle on the 16th, but that it would be 1½ or 2 hours before Blackwell would be ready to commence loading. The jury did not find the condition as claimed by the servants of defendant to exist. It could fairly find from the evidence that when defendant's train left Juntura plaintiff's cattle were, for all practical purposes, ready to be loaded upon the cars; that plaintiff had made arrangements with defendant through its agent to have the cattle there at about 8 a. m. on that morning; and that he complied with the requirements of the railway company in this respect.

The conditions on the branch line of the defendant railway are different from those upon which the opinion was based in Cohen v. Minneapolis, St. P. & S. S. M. Ry. Co., 162 Wis. 73, 155 N. W. 945, cited by defendants, where plaintiff requested a fast stock train to wait for live stock which was not loaded into the cars but which should have been loaded before the train arrived.

[2] It is deduced from the general rules in 4 R. C. L. § 409, p. 951, that a common carrier is bound to accept and carry live stock that is tendered to it for shipment in good condition. As to the delivery for shipment we find in the notes to Norfolk & W. R. Co. v. Harman & Crockett, 91 Va. 601, 22 S. E. 490, 44 L. R. A. 290, 292, 50 Am. St. Rep. 85, the following rules:

"The duty of a carrier of live stock to receive, transport, and deliver it is not fully discharged unless the carrier makes provision at the place of loading to properly receive and load the stock, and provision at the place of unloading to properly deliver the stock to the consignee. Covington Stockyards Co. v. Keith, 139 U. S. 128 [11 Sup. Ct. 469], 35 L. Ed. 73."

"And the refusal of a railroad company to ship cattle from a station after they had been delivered according to the terms of the contract of shipment at stockyards of the company at that station and placed in such stockyards relieves the shipper from the necessity of making any further delivery or offer to deliver. Louisville, N. A. & C. R. Co. v. Godman, 104 Ind. 490 [4 N. E. 163]."

In the present case the general rule is subject to the conventional arrangements made between Blackwell and the agent of the railway company on the previous day, to the effect that plaintiff should have his cattle there at the stockyard at Juntura ready to load at about 8 a. m. on September 16, 1915, when the train came in and was ready to receive them. Lackland v. Chicago & A. R. Co., 101 Mo. App. 420, 74 S. W. 505. What actions of the shipper will constitute delivery to a carrier are necessarily governed by the surrounding circumstances of each case. Such conventional arrangements may be varied by usage or by a particular course of dealing between the parties. They may make such stipulations upon the matter of delivery as they see fit, and when made they are to govern. 4 R. C. L. 690, § 168.

[3] The station agent and conductor of defendant were informed on the day before the intended shipment that the plaintiff's cattle were to be put into the pens for shipment, and no further formal notice was necessary. 1 Hutchinson on Carriers (3d Ed.) § 115; Mason v. Mo. Pac. Ry. Co., 25 Mo. App. 473; Nelson v. Chicago, B. & Q. R. Co., 78 Neb. 57, 110 N. W. 741.

[4] A delivery of cattle to a carrier may be either actual or constructive, and when made in accordance with the recognized custom and practice prevailing in the dealings between shippers of live stock and the railway company it will bind the carrier and constitute an acceptance, and when the facts are in dispute the question of delivery is for the jury. 4 R. C. L. p. 692, § 170; 4 Elliott on Railroads, § 1413; Deming v. Merchants' Cotton-Press & S. Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518. But no formal acceptance is necessary where the agent has knowledge of the delivery of the goods with the intention that they be shipped and makes no objection thereto. It is not essential that there be any written receipt or bill of lading.

[5] The liability of the carrier as common

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carrier begins with the actual delivery of the goods for transportation, and not merely with the formal execution of a receipt or bill of lading. 6 Cyc. 413. The trial court properly overruled defendant's motion for a nonsuit and request for a directed verdict in its favor.

The court charged the jury practically in conformity with the law as above stated. Instruction No. 9, excepted to by defendant, is as follows:

"If you find that plaintiff brought his cattle to the stockyards of the defendant railroad company for transportation on the train from Juntura to Hope in accordance with the directions of its agent, or in accordance with its recognized custom of receiving cattle for transportation, then this would constitute a sufficient delivery to compel the defendant to transport them within a reasonable time."

[6] It is contended on the part of the defendant that the court erred in receiving evidence concerning the market value of the cattle at Hope, Or., on September 17, 1915, in the condition in which they were delivered and of the shrinkage per head between the time they were delivered to the railroad company at Juntura and when they reached Hope on the following day. The measure of damages was based upon the loss in the weight and value of the cattle caused by the delay in the shipment from Juntura and delivery at Hope. Both places are in the same county about 40 miles apart, which is a stock-raising district, a place of purchasing and not a selling market for beef cattle, as the term is usually understood. It appears that upon the trial of the cause the value, whether at Juntura or at Hope, was assumed by the attorneys and witnesses to be the same, except for the shrinkage caused by the unnecessary delay in shipping and delivery. The question as to the usual and ordinary loss of weight in the shipment for such a distance was all detailed and explained to the jury. It could not be ascertained exactly. The jury was in a position to and undoubtedly did determine the amount of deterioration in the value of the cattle which was the usual and natural consequence of a failure to carry and deliver them within a reasonable time and which would be regarded as reasonably within the contemplation of the parties to the contract when the same was made. Levy v. Nevada-California-Oregon Ry. Co., 160 Pac. 808; Howell v. St. Louis & Hannibal Ry. Co., 171 Mo. App. 92, 153 S. W. 578.

[7] The court charged the jury to the effect that if they found for plaintiff the measure of damages would be the depreciation in the value of the animals caused by the negligent delay in the shipment. 4 R. C. L. p. 998, § 466. We find no variance from the rule as to damages, either in the admission of evidence or instructions to the jury, which would change the result or constitute reversible error.

[8] The agent, Delsole, was named as defendant in the action. No cause of action against him was stated in the complaint, and no attention seems to have been given him upon the trial. The lower court instructed the jury as though the railway company was the only defendant. Delsole's name should be stricken from the judgment.

Finding no prejudicial error in the record, the judgment against the defendant Oregon Short Line Railway Company is affirmed.

(82 Or. 314)

COLVIN v. GOFF et al.

(Supreme Court of Oregon. Dec. 19, 1916.)

1. EVIDENCE ⟸420(7) — PAROL EVIDENCE — FAILURE OF CONSIDERATION — CONDITIONAL DELIVERY.

The rule that parol evidence cannot be introduced to contradict or vary the terms of a written instrument excludes all evidence between the maker and payee of the note that the liability of the former should be conditional, unless the condition affects the consideration, so that as a result of its failure there is a total or partial failure of consideration.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1800, 1804, 1943; Dec. Dig. ⟸420(7).]

2. EVIDENCE ⟸444(6) — PAROL EVIDENCE — FAILURE OF CONSIDERATION—ADVANCES OF MONEY.

Where one of several defendants jointly indicted for a crime, who had been acquitted, advanced to another, who had been convicted, money to enable the latter to prosecute his appeal, taking a note therefor, parol evidence is not admissible to show an agreement that the makers should be liable on the note only in case the conviction was reversed, since that condition did not affect the consideration for the note, and, if considered as a collateral contract, was void for want of consideration.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1943, 2049; Dec. Dig. ⟸444(6).]

In Banc. Appeal from Circuit Court, Grant County; Dalton Biggs, Judge.

Action by Ben Colvin against Lester Goff and another to recover the amount of a promissory note. Judgment for the plaintiff, and defendants appeal. Affirmed.

This is an action upon a promissory note. The note is in the usual form, payable upon demand, with the ordinary provision for interest and for attorney's fees in case of suit. The answer, which is too lengthy to be inserted, admits the execution of the note, and sets up the following affirmative defense: That in May, 1913, plaintiff, defendants, and J. B. Gingles and Monard Fix were jointly indicted by the grand jury of Grant county for cattle stealing; that plaintiff and defendants were arrested upon said charge on May 24, 1913; that on November 22 the defendant Goff was duly convicted, and that on the 23d of November the indictment was dismissed as to the defendant Clark; that thereafter, in December, 1913, the defendant Goff being desirous of appealing to the Supreme Court from the judgment of convic-

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tion against him, the plaintiff agreed to advance to the defendants, Goff and Clark, the sum of $600, to be applied by the defendant Goff to the payment of the expenses of said appeal, and to further advance to defendants the sum of $400, making $1,000 in all which the defendants were to repay share and share alike, and it was further mutually agreed in the event that the judgment of the circuit court should be affirmed that the said sum of $600 was not to be repaid to plaintiff; that in August, 1912, plaintiff delivered to defendant Jim Clark $100, with instructions to deliver said sum to J. B. Gingles and Monard Fix, the codefendants with plaintiff and defendants in the criminal action, and that defendant delivered the $100 as directed; that on May 16, 1914, the defendants and plaintiff entered into a final contract whereby it was agreed that these defendants would make, execute, and deliver to plaintiff the promissory note sued upon, conditioned by said contract that said promissory note would become a binding contract on the part of defendants only in the event that the Supreme Court would reverse the judgment of the circuit court against defendant Goff, and it was then mutually agreed that, if said judgment should be affirmed, the said note should become void and of no effect, and that defendants, in pursuance of said agreement, executed the note in suit, and that the $700 mentioned therein is the same $600 advanced to defendants by plaintiff, together with the $100 delivered by plaintiff to Clark; that on June 9, 1914, the Supreme Court affirmed the judgment against defendant Goff; that in accordance with the agreement between plaintiff and defendants the note became null and void and of no effect and the consideration thereof failed; and that at no time since its execution has the same been a binding contract upon the part of defendants to pay plaintiff the sum of $700 or any sum. The new matter being denied by a reply, the case came on for trial. The plaintiff introduced the promissory note and rested. The defendants offered evidence tending to prove the new matter alleged in the answer, but upon objection the testimony was excluded by the court upon the ground that such matter did not constitute a defense. There was a verdict for plaintiff, and defendants appeal.

A. D. Leedy, of Canyon City, for appellants. J. Roy Raley, of Pendleton (Errett Hicks and Otis Patterson, both of Canyon City, on the brief), for respondent.

McBRIDE, J. (after stating the facts as above). [1] While the amount involved here is comparatively small, the question presented is interesting by reason of apparent variance in the decisions of many of the courts, although these seeming contradictions disappear upon a close analysis of the decided cases. It is an elementary general rule that parol evidence cannot be introduced to contradict or vary the terms of a written instrument, and this rule applies as well to promissory notes as to other written contracts. Burnes v. Scott, 117 U. S. 582, 6 Sup. Ct. 865, 29 L. Ed. 991; Kelsey v. Chamberlain, 47 Mich. 241, 10 N. W. 355; Whitwell v. Winslow, 134 Mass. 343; Cooper v. German Nat. Bank of Denver, 9 Colo. App. 169, 47 Pac. 1041; Davis v. Stout, 126 Ind. 12, 25 N. E. 862, 22 Am. St. Rep. 565; Prescott v. Hixon, 22 Ind. App. 139, 53 N. E. 391, 72 Am. St. Rep. 291; Graves v. Clark, 6 Blackf. (Ind.) 183; Getto v. Binkert, 55 Kan. 617, 40 Pac. 925; San Jose Savings Bank v. Stone, 59 Cal. 183. See note to section 81a, Daniel, Neg. Instruments. This rule has been applied in cases very similar to the one at bar. Thus in Foster v. Jolly, 1 Cromp. M. & R. 703, which was a suit to recover against the maker of a promissory note payable 14 days after date, the defense was that the defendant's brother-in-law contracted the debt for which the note was given as agent for a certain co-operative society, and was sued for the amount. The brother-in-law gave the names of certain members of the society who were sued for the debt and a judgment obtained. The brother-in-law also confessed judgment, and was put in jail upon a ca. sa., and gave the note in question upon an alleged promise that its payment should not be enforced in case the plaintiff should recover a verdict against the other members of the society. This was held not a good defense; Lord Abinger, C. B., saying:

"I am of opinion that the evidence tendered by the defendant went to vary the contract appearing on the face of the note. It is not a question of consideration or collateral security. The consideration of the instrument was not impeached, nor was it given as a collateral security, but the defense attempted to be established was in direct contradiction of the terms of the note. The maker of a note payable on a day certain cannot be allowed to say, 'I only meant to pay you upon a contingency,' that is at variance with his own written contract. The case must be governed by that of Rawson v. Walker."

In Central Savings Bank v. O'Connor, 132 Mich. 578, 94 N. W. 11, 102 Am. St. Rep. 433, which was an action upon promissory notes, the defendant pleaded a collateral agreement very similar to the defense here:

"That the notes were given for the amount of a chattel mortgage which plaintiff held upon the property of the J. R. Pearson Company, which property defendant O'Connor had purchased; that the title to said notes never passed to said plaintiff; that the notes were delivered to plaintiff upon the clear and distinct understanding and condition agreed to by plaintiff that in case the said J. R. Pearson Company should thereafter be forced into bankruptcy by any of its creditors, upon proceedings instituted by them for that purpose, and adjudicated a bankrupt, said notes would thereupon, in the event of the happening of such contingency, become and be null and of no effect, and were not to be paid, and that it was upon said condition said notes were delivered to said plaintiff."

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The court said:

"The meritorious question is whether the defense set out in this notice is one which can be established by parol testimony. It is doubtless true, as contended by the appellants' counsel, that it may be shown that a promissory note, unconditional in terms, was conditionally delivered; that is to say, that it was placed in the hands of the payee, but with the distinct understanding that it was not to be operative or to become a binding obligation until the happening of some event. Brown v. St. Charles, 66 Mich. 71, 32 N. W. 926; Burke v. Dulaney, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698. On the other hand, the rule is firmly established that, where a promissory note for a certain amount, payable at a certain time, is delivered into the hands of the payee, to take effect presently as the obligation of the defendant, parol evidence to introduce conditions or modifications of the terms is not admissible. The case of Hyde v. Tenwinkel, 26 Mich. 93, illustrates this rule. It was there held that an attempt to show a verbal contemporaneous agreement to reduce a note from an absolute and specific promise to a defeasible engagement was inadmissible. The same rule has been followed; one of the recent cases being Phelps v. Abbott, 114 Mich. 88, 72 N. W. 3; Burns & Smith Lumber Co. v. Doyle, 71 Conn. 742, 43 Atl. 483, 71 Am. St. Rep. 235. We think it clear that the present case falls within that line of cases which precludes parol evidence offered to vary the terms of a written instrument. If we adopt the testimony of the defendant as correctly stating the transaction, and more certainly if we adopt the terms of the notice of defense by which the defendant was bound, these notes were delivered to take effect presently, but upon the alleged parol agreement that they were to become void in the event that a certain contingency should happen. This is no more than averring that plaintiff entered into a contemporaneous parol agreement that, while the defendant's obligation bound him to pay absolutely the sums of money at specified times, yet in a certain contingency this sum should not be payable at all, and the notes be redelivered. It is suggested also that there was a total failure of consideration. This cannot be held, for the reason that there was transferred to the defendant, in consideration for the notes, the chattel mortgage and promissory note of the J. R. Pearson Company, which note had indorsers against whom it would be enforceable. There was no absolute and total failure of consideration, and no defense of partial consideration was noticed under the general issue."

Other cases tending more or less to support the doctrine announced in the case last cited are Stoddard v. Nelson, 17 Or. 417, 21 Pac. 456; Wilson v. Wilson, 26 Or. 251, 38 Pac. 185; Murray v. Kimball Co., 10 Ind. App. 184, 37 N. E. 734; Garner v. Fite, 93 Ala. 405, 9 South. 367; Hubble v. Murphy, 1 Duv. (Ky.) 278; Clanin v. Esterly Harvesting Machine Co., 118 Ind. 372, 21 N. E. 35, 3 L. R. A. 863. The case of Wilson v. Wilson, supra, has some features in common with the case at bar. The defense was that the promissory note in question was, in fact, intended as a mere memorandum, and was not to be paid until the amount thereof was realized from the proceeds of a mine which had been transferred to the defendant. This court held adversely to defendant's contention. Cases which, when casually examined, seem to hold an opposite view, are numerous, but, as we have before observed and shall presently show, the contradiction is more apparent than real, and most of the cases can be harmonized and shown to be subject to a general rule consistent with the safety of commercial paper and with the general rules of law respecting the admission of parol evidence to contradict or vary the contents of written instruments. The case of Ware v. Allen, 128 U. S. 590, 9 Sup. Ct. 174, 32 L. Ed. 563, may justly be termed a leading case on this subject. In that case, which was a suit in equity to enforce the payment of two promissory notes for $5,000 each, made in favor of plaintiff by the firm of Allen, West & Bush, the facts were that one T. P. Ware, a brother of plaintiff, was indebted to the defendants for merchandise in the sum of $18,000. His business was conducted by the plaintiff, and was so embarrassed that the debts could not be paid. Plaintiff a year or two before had conducted a business in his own name at the same place, and, being likely to fail, had sold out his business to his brother, but, ostensibly as the agent of the latter, continued to manage and control it. In this condition of affairs plaintiff visited Allen, West & Bush and represented that his brother was unable to pay his debts; that his creditors were becoming impatient; that he himself held two notes for $5,000 each against his brother; that he desired the defendants to institute proceedings by attachment to collect their claim and his own, and for that purpose proposed that he should transfer his notes against his brother to them, taking their note for $10,000, and that, if they would consent to this arrangement, he would show them sufficient reason for seizing the property by attachment. The defendants expressed their doubt as to the legality of such a course, and said that they would like to consult their counsel before making the arrangement, but plaintiff seemed impatient of this delay, and insisted that in the meantime somebody else might attach the property and defeat both their claims; and finally, reluctantly yielding to his importunities, the defendants took his notes and gave their own as requested. Before the note was signed it was distinctly agreed that it was to be of no effect until defendants should have had an opportunity to consult their counsel, and he should assure them that the proceeding was lawful, and the attachment for the full amount of both claims could be enforced. The defendants' counsel, upon being consulted, emphatically disapproved of it, and advised the defendants to have nothing to do with it or with the notes of W. P. Ware against his brother. The defendants then sued and attached for their own debt and collected it. Subsequently W. P. Ware brought a suit in equity, as required by the law of Mississippi where an attachment is sought, and the defense above stated was upheld. Mr. Justice Miller, after reflecting severely upon the conduct and motives of plaintiff in procuring the agreement and in-

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timating that the whole proceeding was probably a fraud, said:

"We did not think it necessary to inquire further into the evidence brought to sustain this defense; for we are quite clear that the testimony does establish the agreement alleged by the defendants to have been made at the various interviews between the persons composing the firm of Allen, West & Bush, or some of them, and the plaintiff, at and before the time when they delivered to him the instrument sued on and received from him the two notes made by his brother, T. P. Ware; that the firm were to have an opportunity to consult counsel, upon whom they relied, as to the validity of the transaction; and that, if such advice was adverse, then the instrument given by them was to be of no effect. It also sufficiently appears that they were advised, without hesitation, by the counsel to whom they had reference in those conversations about the agreement, that the transaction was not one that would stand the test of a legal investigation. This is to be considered in connection with the fact that the firm only brought suit for their own claim, and have since returned, or offered to return, the notes of W. P. Ware, which were given him by his brother and delivered to them when the paper was executed. We are of opinion that this evidence shows that the contract upon which this suit is brought never went into effect; that the condition upon which it was to become operative never occurred, and that it is not a question of contradicting or varying a written instrument by parol testimony, but that it is one of that class of cases, well recognized in the law, by which an instrument, whether delivered to a third person as an escrow or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or to be ascertained thereafter."

In the case of Pym v. Campbell, 6 El. & Bl. 370, cited by Mr. Justice Miller, it appeared that the defendants agreed in writing to purchase an interest in an invention; the agreement being absolute on its face. In an action for breach the defendants showed that, when the negotiations had progressed so far that the price had been agreed upon in case defendants concluded to buy, a meeting was arranged at which the plaintiff was to explain his invention to two engineers appointed by defendants, when, if they approved, the machine should be bought. At the time appointed the defendant and the engineers attended, but the plaintiff did not appear. The plaintiff finally arrived after one of the engineers had gone. The engineer present approved, and it was proposed that, as the parties were all present, and it might be troublesome to meet again, a paper should then be drawn up and signed which, if the absent engineer approved, should be the agreement, but that, if he disapproved, the paper should not be an agreement. This was done, and the absent engineer upon subsequent inspection disapproved of the machine. The court held the defense good. Erle, J., saying:

"I think that this rule ought to be discharged. The point made is that this is a written agreement, absolute on the face of it, and that evidence was admitted to show it was conditional; and if that had been so it would have been wrong. But I am of opinion that the evidence showed that in fact there was never any agreement at all. The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement; and, if in fact he did sign the paper animo contrahendi, the terms contained in it are conclusive, and cannot be varied by parol evidence; but in the present case the defense begins one step earlier; the parties met and expressly stated to each other that, though for convenience they would then sign the memorandum of the terms, yet they were not to sign it as an agreement until Abernethie was consulted. I grant the risk that such a defense may be set up without ground, and I agree that a jury should therefore always look on such a defense with suspicion; but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible."

In La Grande National Bank v. Blum, 26 Or. 49, 37 Pac. 48, the defense pleaded was that at the time of the execution of the note in suit the plaintiff entered into an agreement with defendants whereby defendants were to collect for plaintiff two promissory notes held by plaintiff against one O. N. Ramsay, which it delivered to defendant under an agreement that he would pay over the proceeds if collected, or, if unable to do so, would return the notes, and that the note in suit was given to secure the compliance with said contract, and that defendant had performed his part of the agreement. This was held a good defense, Mr. Justice Bean saying:

"If the note was given to secure the performance of Blum's contract to collect and pay over to plaintiff the proceeds of the Ramsay notes, or to return them if not collected, and Blum has performed his agreement, such performance would manifestly operate as a failure of consideration."

Another case cited by counsel for defendant is McKnight v. Parsons, 136 Iowa, 390, 113 N. W. 858, 125 Am. St. Rep. 265, 22 L. R. A. (N. S.) 718, 15 Ann. Cas. 665. In this case the note was given as the purchase price of a cow which was warranted to be a good breeder, and there was an agreement that the note should not be negotiable until the cow should have been bred and have a calf. The payee negotiated the note before due, and it subsequently turned out that the cow was barren. As between the payee and the purchaser there was an evident failure of consideration, and the dispute arose collaterally as to whether the assignee of the note was an innocent purchaser. It was contended that the agreement of the payee of the note to negotiate it until the time agreed upon and the failure of the payee to deliver the cow with calf according to the contract constituted such a fraud upon the purchaser as placed upon the assignee of the note the burden of pleading and proving that he purchased the note in good faith and without notice, and this contention was held good; the court saying incidentally that it was

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competent to show that the delivery of the note was conditioned and that the condition had not been complied with. Many other cases along the same line might be cited, notably Beach v. Nevins, 162 Fed. 129, 89 C. C. A. 129, re-reported in 18 L. R. A. (N. S.) 288, which contains copious notes citing many decisions sustaining the principal case. See, also, Excelsior Sav. Fund & Loan Association v. Fox, 253 Pa. 257, 98 Atl. 593, reported and annotated in Cent. L. J. vol. 83, No. 16, the notes to which cite many decisions sustaining the main case as well as those opposed or apparently in conflict. From all these decisions we are of the opinion that this general rule may be deduced. It may be shown as between the maker and the payee that prior to the delivery of the note its payment was made conditional whenever the condition or contingency affects the consideration; that is to say, if the maker of the note stipulates that it shall take effect only upon the happening of an event, and the failure of such contingency affects the consideration to the extent that he does not get the value or thing that he has bargained for, it is a good defense, because there is a failure of consideration, or, if the note is given upon a stipulation that it shall not be effective unless a particular event shall happen, and by reason of a failure of the event to happen the maker does not reap the benefit contemplated by reason of its occurrence, there is a failure of consideration and the stipulation is good. Take the case of Ware v. Allen, supra, one of the inducements to sign the note was to facilitate the collection of a debt. The note would not have been signed unless the proposed contract would effectuate that purpose. It was agreed that the contract would not be complete until the makers of the note ascertained from counsel whether the proposed arrangement would effectuate that purpose. The note was not the complete contract, but only one part of the contract. The contract was not to be complete until counsel approved it. He did not approve it, and therefore it was incomplete, and the makers of the note had nothing of value for the note which they had given. In its final analysis, leaving out of consideration the fraudulent practices of Ware and the evident fact that the notes of his brother which he left in the possession of the defendants were collusive and worthless to them, there was a failure of consideration. In the case of La Grande Nat. Bank v. Blum, supra, the consideration of the note was a contract to collect and pay over certain moneys to the plaintiff. If the moneys were collected and paid over, there was nothing due the plaintiff and the consideration failed; and it was so held. So also in the case of Pym v. Campbell, supra, the contract was incomplete. A part of the contract was that before it became a complete contract the makers of the note should have the benefit of certain expert advice which was in itself a thing of value, and that the contract should not be complete until he should obtain such favorable advice. The favorable advice was not given, the contract was not completed, the defendants purchased no machine, and the plaintiff held a note utterly without consideration. If the defendants had advanced money under such circumstances, they could have recovered it back, and by the same token they would not be required to pay a note which was given in lieu of an advancement of money. It seems plain to us that, unless the happening of the alleged contingency or its failure to happen is so intimately related to the transaction as to amount to a failure of consideration, it cannot be pleaded as a defense. Such is the opinion of Mr. Daniel. He says:

"It has been held in a number of cases that a note may be delivered to the payee to take effect only upon a condition precedent, and that default in the fulfillment of such conditions may be shown by parol evidence, and will defeat recovery as between immediate parties. But unless the nonfulfillment of the condition goes to the failure of consideration this would seem to trench upon fixed principles of law. Evidence of want of consideration is admissible between original parties. 'Every bill or note imports two things: Value received, and an agreement to pay the amount on certain specified terms. Evidence is admissible to deny the receipt of value, but not to vary the engagement.' The cases amply sustain the foregoing views, which seem to us altogether correct. It has been held that it is competent to show by parol that at the time a note was made it was agreed that it should be held for nothing on the happening of a certain event. But unless such event operated a failure of consideration, we cannot perceive upon what principle such a view could be taken. The consideration of contracts in writing is in general open to inquiry, and it is not an infringement of the rule excluding parol evidence to add to, vary, or contradict writings, to receive parol evidence of the actual consideration for the purpose of determining its validity, or its failure, or that from any cause it is sufficient or insufficient to support the contract." Daniel, Neg. Instruments, § 81a.

In this view of the law let us consider the defense pleaded in the answer here.

[2] It is admitted that the defendants received from plaintiff $700 in cash. It is true that it is alleged on behalf of Clark that the plaintiff "delivered" to him $100 of the money, and that he "delivered" it to Monard Fix, but the pleading artfully evades any allegation that he was acting as the agent or bailee of plaintiff, and is entirely consistent with the fact that he borrowed it on his own account for the purpose of paying or "delivering" it to Monard Fix. If such should be the case, perjury could never be predicated upon the falsity of this allegation in the answer. The fact remains that these defendants between them received $700 of plaintiff's money and gave their note for it; that $700 was the consideration for the note. They substantially admit that it was given for a full consideration, but say it was to become void upon a contingency. What is the contingency? "If the Supreme Court of Oregon affirms the judgment against Goff, the

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note shall become void." This is the allegation in a nutshell. How does this affect the consideration? Not at all. It is not alleged that plaintiff was in any way personally or financially interested in the result of Goff's appeal. His acquittal could cancel no debt or lessen by a single dollar his obligation to plaintiff. It is not alleged that plaintiff wished or urged or procured him to appeal. On the contrary, it is alleged that "Lester Goff was desirous of appealing from his conviction," and that the plaintiff agreed to advance him the necessary money for that purpose. So far as the record shows, the plaintiff had no more interest in the result of the appeal than any bank would have. It was not a part of the consideration of the note which by its terms went into effect at once and could have been negotiated the next day. There was nothing to be done to make it a complete contract. For the reasons given above the alleged agreement is not even a good collateral contract, as it was entirely without consideration, so that, whether we view it as an attempt to plead a contract not completed or a collateral contract rendering the note void by reason of a condition subsequent, the defense must fail.

The judgment is affirmed.

(29 Idaho, 716)

Ex parte MARTIN.

(Supreme Court of Idaho. Dec. 16, 1916.)

1. JUDGMENT ⇐316—MODIFICATION OF DECREE—JURISDICTION OF COURT—CUSTODY OF CHILD.

Where by its decree the probate court of Bannock county surrendered the custody of a minor child to its mother "pending the good conduct and ability to care for said child by its mother," and thereafter the mother removed, with the child, from Bannock to Ada county, the probate court of Bannock county was then without jurisdiction to arbitrarily change or modify its decree theretofore entered, and thereby permanently deprive the mother of said minor child, in the absence of notice to the mother of the proceedings to modify such decree, and such action of the probate court of Bannock county was therefore void.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 615; Dec. Dig. ⇐316.]

2. ADOPTION ⇐7—GUARDIAN AND WARD ⇐6—VOLUNTEER GUARDIANS—CONTROL OF WARD.

Where a child was never legally surrendered to or placed in the custody of the Children's Home Finding and Aid Society, the society never had authority to exercise any control over it or to legally act as its guardian and consent to its adoption.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 7-10; Dec. Dig. ⇐7; Guardian and Ward, Cent. Dig. § 7; Dec. Dig. ⇐6.]

3. HABEAS CORPUS ⇐99(3)—CUSTODY OF CHILDREN.

Parents should not be permanently deprived of the custody of their children and the right to act as their legal guardians, even though the custody of the child must for good reasons be temporarily surrendered, except in strict accordance with law and under circumstances where such deprivation is fully warranted.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84; Dec. Dig. ⇐99(3).]

4. HABEAS CORPUS ⇐99(1)—CUSTODY OF MINOR—SURRENDER OF RIGHT.

Under the provisions of section 5774, Rev. Codes, either of the parents of a minor child is entitled to the custody and guardianship of such child while competent to perform such duty and not otherwise unsuitable, and the surrender of this legal right to be effective must be made in accordance with law and the procedure prescribed therefor.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84; Dec. Dig. ⇐99(1).]

5. HABEAS CORPUS ⇐99(1)—CUSTODY OF CHILDREN.

Held that, under the facts of this case, the writ of habeas corpus must issue as prayed for, returnable before the district judge in whose jurisdiction the child now is, in order that the questions relative to the guardianship and custody of said minor child may be determined.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84; Dec. Dig. ⇐99(1).]

Application by Eva Martin for a writ of habeas corpus. Writ granted.

S. L. Tipton, of Boise, for petitioner. John F. Nugent and S. E. Blaine, both of Boise, for relators.

BUDGE, J. This is an application for a writ of habeas corpus by the mother of Esther Lovejoy, a minor child, now about three years old, who, it is alleged in the petition for the writ, is unlawfully restrained of her liberty by Henry and Lilla V. Rogers, husband and wife, of Canyon county, and the Children's Home Finding and Aid Society of Idaho.

It appears from the petition that in the spring of 1915 Fletcher and Eva Lovejoy, then husband and wife, were living together in the city of Pocatello with their family, of which the minor child Esther was a member; that Fletcher Lovejoy failed and neglected to provide his family with the necessaries of life, due to the fact that he was an habitual drunkard. One W. L. Hurlbert, a citizen of Pocatello, in the latter part of March, 1915, filed a petition with the probate court of Bannock county in which it was alleged that Fletcher Lovejoy and his wife had failed and neglected to provide for their minor children the necessaries of life, and prayed that they be surrendered to the care and custody of the Children's Home Finding and Aid Society of Idaho; whereupon the probate court issued a citation to Fletcher Lovejoy and his wife, wherein they were cited to appear before said court and show cause why said minor children should not be committed to the care and custody of the Children's Home Finding and Aid Society. Eva Lovejoy, mother of the children, appeared before the court, and upon a hearing had upon the allegations of the petition the court found the allegations to be true, and entered its decree as follows, viz.:

"That it is for the best interest of said children that they be removed from the custody and control of Fletcher and Eva Lovejoy and be surrendered to the Children's Home Finding and Aid Society of Idaho."

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And it was further provided in said decree that the commitment of Esther Lovejoy to the Children's Home Finding and Aid Society be suspended "pending the good conduct and ability to care for said child by its mother."

Thereafter Eva Lovejoy removed with said child to Boise, where she found a home with her parents and the grandparents of her minor child. The child was at no time delivered into the custody of the Children's Home Finding and Aid Society; neither did that society at any time exercise control over the child.

On or about the 14th day of March, 1916, while the child, with the permission of its mother, was temporarily visiting with Henry and Lilla V. Rogers of Canyon county, the probate judge of Bannock county, without the knowledge or consent of Eva Lovejoy, mother of the child, modified its former decree, wherein the custody of the child was given to its mother, Eva Lovejoy, and committed the child unconditionally to the Children's Home Finding and Aid Society of Idaho.

On or about the 20th day of March, 1916, while the child, with the consent of its mother, was still visiting with Henry and Lilla V. Rogers, they, without the knowledge or consent of its mother, filed their petition for adoption of the minor child with the probate court of Canyon county, and thereafter the Children's Home Finding and Aid Society, in writing, consented to the adoption of the minor child, Esther Lovejoy, by Henry and Lilla V. Rogers; and on the same day the probate court of Canyon county entered an order in which it was adjudged and decreed:

"That the petitioners, Henry and Lilla V. Rogers, adopt the said minor child, Esther Lovejoy, from and after that date, and said Esther Lovejoy be regarded and considered in all respects as the child of Henry and Lilla V. Rogers, his wife, and that said Henry and Lilla V. Rogers and said minor child should thereafter sustain towards each other all legal relations of parent and child, as provided by law."

From the petition it appears that Eva Lovejoy, mother of Esther, was not notified or present at the hearing had before the probate judge of Bannock county when the latter order was made by that court unconditionally depriving her of the care and custody of her minor child; neither was she present or served with notice of the hearing had before the probate court of Canyon county when that court entered its decree whereby Esther Lovejoy was unconditionally surrendered to the care and custody of Henry and Lilla V. Rogers.

It further appears from the petition that on or about the 15th day of February, 1916, Eva Lovejoy filed her complaint in the district court in and for Ada county, praying for a decree of divorce from Fletcher Lovejoy upon the ground that he was an habitual drunkard and had been guilty of extreme cruelty towards her. In the complaint she also prayed for the custody of their minor child, Esther. Summons was thereupon duly issued and service made on Fletcher Lovejoy on the 8th day of April, 1916, and thereafter a decree of divorce was awarded to Eva Lovejoy, upon the grounds alleged in her complaint. The trial court, in addition to granting the decree of divorce, awarded the custody of the minor child, Esther, to its mother, with the proviso that said minor child had not theretofore been legally adopted.

It also appears that Eva Lovejoy since the granting of the decree of divorce has remarried to one Elza Martin. In her petition Mrs. Lovejoy, now Martin, alleges that her present husband is financially able to care for, educate, and support her minor child, Esther, and that he has consented that the child be brought to their home to reside with them, where she will be under the care and custody of her mother, and that he has fully consented and approves of the present proceeding brought for the purpose of regaining the possession and custody of the minor child, Esther.

The foregoing are substantially the facts as they appear in the petition and are admitted to be true by the answer, but it is contended that, even admitting the allegation to be true, they are insufficient to warrant this court in granting the relief prayed for.

We have carefully considered the briefs and authorities submitted by counsel who appear on behalf of the petitioner, and the briefs and authorities cited by counsel who appear in opposition to the issuance of the writ of habeas corpus, and we have reached the conclusion upon the showing made that it will not be necessary for us at this time to construe the act of the Legislature found in the Session Laws of 1909 at page 38 (House Bill No. 267) and the amendment thereto (Sess. Laws 1911, c. 185, p. 614), and, as urged by counsel for the petitioner, to determine the constitutionality of certain provisions of the law conferring power upon probate judges in this state in the matter of the protection of neglected children, and authorizing their commitment to charitable societies, or the power given to such charitable societies under the provisions of the laws of this state to permanently deprive parents of the care and custody of their minor children, in order to determine the validity of the proceedings had touching the matter of the adoption of the child, Esther.

[1] Reverting to the proceedings had before the probate court of Bannock county, and for the purposes of this hearing conceding that the proceedings were regular up to and including the order made on or about the month of March, 1915, where by its decree the probate court surrendered the custody of the minor child, Esther, to its mother "pending the good conduct and ability to care for said child by its mother," it is quite evident

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to our minds that after the entry of the foregoing decree and the removal of the mother with the child from Bannock county to Ada county the probate court of the former county was without jurisdiction to arbitrarily change or modify its decree theretofore entered, and thereby permanently deprive the mother of the custody of her minor child, Esther. This would be particularly true in the absence of notice of the proceedings to modify said decree given to Eva Lovejoy. Neither Eva Lovejoy nor the minor child was residing in Bannock county at the time the probate judge concluded to unconditionally deprive the mother of her child and surrender it to the Children's Home Finding and Aid Society of Idaho.

It would be an anomaly for this court to sustain the action of a probate court in a matter of this kind, where it appeared that the mother was not within the jurisdiction of the court and received no notice of the modification of its decree depriving her of the custody of her minor child, without an opportunity to be heard in her own defense. From the facts appearing in the petition in this case we are able to reach but one conclusion, which is that the action on the part of the probate court of Bannock county was without jurisdiction and absolutely void.

[2] It necessarily follows that, if the action of the probate court of Bannock county was void, the Children's Home Finding and Aid Society of Idaho had no authority to consent to the adoption of the child by Henry and Lilla V. Rogers, of Canyon county. The child never having been legally surrendered to, or placed in the care and custody of, the Children's Home Finding and Aid Society, that society was clearly without authority to exercise any right or control over it, or to legally act as its guardian and thereby consent to its adoption.

We come now to a consideration of the proceedings had in the probate court of Canyon county. These proceedings, as appears from the petition, were had without the knowledge or consent either of Fletcher Lovejoy or Eva Lovejoy, parents of Esther, and neither consented, in writing or otherwise, to the adoption of their minor child by Henry and Lilla V. Rogers, or were present at or had notice of the hearing had on or about the 20th day of March, 1916, before the probate judge of Canyon county, where an opportunity should have been given the parents of Esther, or either of them, to appear and answer the petition filed by Henry and Lilla V. Rogers, of Canyon county, for the adoption by them of the minor child, Esther. The matter of primary importance in a proceeding of this character is the future welfare and best interests of the minor child, which, under the facts and circumstances of this case, deserves careful consideration and diligent inquiry.

[3] Parents should not be permanently deprived of the custody of their children and the right to act as their legal guardians, even when under certain circumstances the custody of the children must be temporarily surrendered, except in strict accordance with the statutes and under circumstances which fully warrant such drastic action.

[4] Section 5774, Rev. Codes, provides that:

"Either the father or mother of a minor [child], being themselves respectively competent to transact their own business, and not otherwise unsuitable, must be entitled to the guardianship of the minor."

While either of the parents are competent, and not unsuitable, they are absolutely entitled to the guardianship of their minor children, and the surrender of this legal right must be made in accordance with the statutes and the proceedings therein prescribed.

[5] We have reached the conclusion that upon the showing made in the petition, which is not denied, the writ of habeas corpus ought to issue; and it is so ordered.

In view of the fact that the last proceedings had with reference to the adoption of the minor child, Esther, were had in Canyon county, and the validity of such proceedings may be involved in the hearing upon the return to the writ of habeas corpus, as well as the question of whether or not Eva Martin is a fit and proper person to have the future care and custody of her minor child, which should, in our judgment, be carefully inquired into, the writ will issue to Henry and Lilla V. Rogers and the Children's Home Finding and Aid Society of Idaho directing and commanding them and each of them to have the body of Esther Lovejoy before the Honorable Ed. L. Bryan, district judge of the Seventh judicial district in and for Canyon county, at a time and place to be by him fixed and specified, not to exceed ten days from the date of the rendition of this decision, at which time said district judge will hear such testimony as may be offered, and which would be material, tending to establish the fitness of Eva Martin to have the future care and custody of her daughter, Esther, and if upon such hearing it appears that she is a fit and proper person to have the care and custody of her minor child, and is so situated that she is able to properly maintain, care for, and educate such child, an order shall be made by the district judge in accordance with the views of this court as expressed in the foregoing opinion.

SULLIVAN, C. J., and MORGAN, J., concur.

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(29 Idaho, 639)

BOECK v. BOECK.

(Supreme Court of Idaho. Dec. 2, 1916.)

1. GROUNDS FOR DIVORCE—"EXTREME CRUELTY"—STATUTE.
"Extreme cruelty," as a ground for divorce, is defined by section 2649, Rev. Codes, to be "the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage."
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Extreme Cruelty.]

2. WITNESSES ⟸53(1)—HUSBAND AND WIFE—DIVORCE.
Under the provisions of section 1 of an act of the Legislature approved March 13, 1909 (Sess. Laws 1909, p. 334), either party to an action for divorce may call the other as a witness.
[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 137; Dec. Dig. ⟸53(1).]

3. WITNESSES ⟸276—EXAMINATION—CALLING OF ADVERSE PARTY.
That act of the Legislature permits a party to a civil action to call as a witness the adverse party and to prove by him a fact, or facts, in issue which could not be otherwise readily established, and allows such witness to be examined according to the liberal rules of cross-examination whereby leading questions may be propounded. Trial courts have the same control over such examination that they have over cross-examination, and it is an abuse of judicial discretion and of the privilege granted by the act to permit a party calling his adversary as a witness to inquire into the entire controversy and to examine him with respect to matters about which other evidence is readily available.
[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 976–978; Dec. Dig. ⟸276.]

4. WITNESSES ⟸338—IMPEACHMENT—MODE.
The right to impeach a witness and the methods of impeachment are statutory, and, if a witness is to be discredited in this manner, the statute must be conformed to.
[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1114, 1115, 1118; Dec. Dig. ⟸338.]

5. DIVORCE ⟸46—REMEDY—RIGHT TO.
Divorce is a remedy for the relief of an injured spouse who has not been the voluntary, procuring cause of the acts relied upon to invoke it, and it is not available for one who, disregarding the solemnity of the nuptial vows, prompts the other party to the marriage to conduct which would be inexcusable if committed against a husband or wife who was honestly endeavoring to sustain the marriage relation.
[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 145–159; Dec. Dig. ⟸46.]

6. DIVORCE ⟸46—ACTIONS—DEFENSES.
Where it appears that the plaintiff in an action for divorce, by disagreeable and nagging conduct, was the procuring cause of the commission of the acts complained of, a decree dissolving the bonds of matrimony should not be granted and, if granted, will be reversed.
[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 145–159; Dec. Dig. ⟸46.]

Appeal from District Court, Ada County; Chas. P. McCarthy, Judge.

Action by L. Wardell Boeck against John Boeck. From decree for plaintiff, defendant appeals. Reversed, and cause dismissed.

James F. Ailshie, of Cœur d'Alene, and Hawley & Hawley and Chas. F. Koelsch, all of Boise, for appellant. E. J. Frawley and Wyman & Wyman, all of Boise, for respondent.

MORGAN, J. [1] This is an appeal from a decree of divorce granted to respondent in a suit wherein the cause of action stated is "extreme cruelty," which is defined by section 2649, Rev. Codes, as "the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage."

[2-4] In order to sustain the allegations of her complaint, respondent called appellant as her first witness and required him to testify under the provisions of an act of the Legislature approved March 13, 1909 (Sess. Laws 1909, p. 334), wherein it is provided:

"Section 1. A party to the record of any civil action * * * may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses; and the testimony given by such witness may be rebutted by the party calling him for such examination, by other evidence. Such witness when so called, may be examined by his own counsel, but only as to matters testified to on such examination.

"Sec. 2. Nothing contained in the act shall be construed in such manner as to compel the husband or wife to testify against the other, nor to compel a witness to disclose information or communications which are privileged by law."

Appellant insists that it was error for the court to permit respondent to call him as a witness and to compel him to testify in the case against his will, and urges that to do so was to violate the second section of the act. This contention cannot be sustained. The disqualification of husbands and wives as witnesses is to be found in subdivision 1 of section 5958, Rev. Codes, and it provides:

"A husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other nor to a criminal action or proceeding for a crime committed by violence of one against the person of the other."

Clearly, the wife consented in this case that her husband testify. He was produced by her as a witness in an effort to sustain, in part, the allegations of her complaint, and by permitting him to be so produced neither the provisions of section 2 of the act of 1909, nor of subdivision 1 of section 5958, supra, were violated.

While it is entirely clear to our minds that a husband or wife may be called as a witness for the other in an action for divorce under the provisions of the act of 1909, supra, it is equally clear that those provisions are intended to extend to a party to a civil action the right to examine his adversary

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without being bound by the testimony thereby adduced, and that this is a privilege which may be, and in this case was, abused.

We had occasion to say, in case of Darry v. Cox, 28 Idaho, 519, 155 Pac. 660, with respect to this statute:

"It permits a party to a civil action or proceeding to call as a witness the adverse party * * * and to prove by him a fact or facts in issue which could not, probably, be otherwise established, and to allow such witness to be examined according to the liberal rules of cross-examination whereby leading questions may be propounded. * * *

"Under the general rule, prior to the adoption of this act, a party calling such a witness as therein referred to was bound by his testimony. This law modifies that rule and permits such testimony to be rebutted. It is suggested that the purpose of the act is abused, and that a plaintiff may call the defendant as a witness thereunder and inquire into the entire defense, not confining himself to facts which cannot be otherwise readily shown. Trial courts have the same discretion to limit an examination of this kind that they have of cross-examination, generally, and should exercise that discretion to the end that the purpose of the law be not abused."

The examination of the defendant in this case occupies 94 typewritten pages, and covers, in scope, almost the entire controversy between the parties. While the act of the Legislature under consideration does not so state, expressly, it is not to be construed to mean that the order of proof may be reversed in civil actions and the contention of the party holding the negative of the issue of fact be first inquired into. As heretofore indicated, the privilege granted by the statute was abused in this case, and it was the duty of the trial judge, at the conclusion of the examination of the witness, to sustain a motion, which was made by his counsel, that his evidence be stricken from the record. It is but fair to the learned trial judge to note that this case was tried in the district court prior to the announcement of the rule stated in Darry v. Cox, supra, which appears to be the first pronouncement by this court upon that subject.

Appellant assigns as error the action of the court in overruling his objection to a question propounded to the witness Mrs. O. E. Krider, during her direct examination while her deposition was being taken, on behalf of respondent, in Washington county, Pa. It appears that this witness had, between August, 1910, and March, 1913, been a servant in the household of appellant and respondent. During the taking of her deposition she was asked as to the reputation for truthfulness of Hazel Boeck, daughter of appellant, who was, at the time of the trial of this case, about 18 years of age. The form of the examination is:

"Q. Do you know what her reputation is, or was at the time you knew her, for truthfulness? (To this question an objection was interposed that it was incompetent, irrelevant, and immaterial, which objection was insisted upon and was overruled at the time the deposition was read.) A. Yes, sir. Q. In the community in which she lives? A. Yes, sir. Q. What is her reputation? A. Untruthfulness, as near as I can make out. What do you mean by reputation, her good repute? Q. That's it, her reputation as to whether she tells the truth. A. She has the reputation of being a story-teller among her schoolmates."

According to the certificate of the officer before whom the deposition was taken, this examination was had on February 28, 1914. The purpose of this part of it was clearly to discredit and impeach Hazel Boeck, who was not produced as a witness until during the trial of the case, which commenced on July 13th of that year, several months after the deposition was taken. We are not familiar with any rule whereby the credibility of a person may be impeached in anticipation that some time he may become a witness, and, in the absence of such a rule, these questions touching the reputation of Hazel Boeck for truthfulness, at the time they were propounded to the witness Mrs. Krider, were clearly incompetent, and the objection should have been sustained when insisted upon at the time the deposition was read at the trial. Furthermore, the form of the question is objectionable. Section 6082, Rev. Codes, provides:

"A witness may be impeached by the party against whom he was called * * * by evidence that his general reputation for truth, honesty, or integrity is bad."

In the questions propounded to the witness Mrs. Krider, the general reputation of Hazel Boeck for truth, honesty, or integrity was not called for, nor was it stated in the answer thereto. The right to impeach a witness and the methods of impeachment are statutory, and if a witness is to be discredited in this manner the statute must be conformed to.

[5, 6] Appellant's principal contention presented by this appeal is that the evidence is insufficient to sustain the findings of fact and to establish "extreme cruelty" as defined by section 2649, supra.

Respondent, in her complaint, charges appellant with 71 different acts of cruelty, many of which, however, are not sustained by the proof, many more are trivial matters, and but few are sufficiently serious, even unexplained, to constitute extreme cruelty.

The oral and documentary evidence introduced in this case consists of more than 1,300 pages of typewritten matter, largely devoted to unimportant disagreements, misunderstandings, and acts of the parties which have little or no probative force and with a discussion of which we do not propose to encumber the reports. Out of this mass, however, may be gleaned a few facts so conclusively established as to leave no room for controversy. These are that plaintiff and defendant were married in the year 1901; that they are both physicians and successfully practiced their profession together un-

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til 1910, when respondent's health failed, and when, with the consent and at the solicitation of appellant, she went to California to procure needed rest; that up to the time of her departure their married life had been remarkably harmonious and free from any cause or desire for separation on the part of either of them; that she remained in California for a period of nearly two years, during which time, as is shown by the correspondence of the parties, appellant was very devoted to her and furnished no ground or excuse for any change in their relations the one with the other; that shortly after her departure, as is also shown by their correspondence, respondent became estranged from appellant and desired a division of the community property and a divorce; that she finally yielded to appellant's entreaties and reluctantly returned to their home in Boise, where, some time afterward, she resumed the practice of her profession and where they continued to reside together until their separation, which occurred in the month of October, 1913, and that during the months which intervened between her return and the date of their separation respondent does not appear to have made any effort to get along harmoniously with appellant, but her attitude toward him was cold, distant, disagreeable, and nagging, and was calculated to and did prompt him to certain acts which, in the absence of misconduct upon her part, would have amounted to extreme cruelty as defined by our statute.

Divorce is a remedy for the relief of an injured spouse who has not been the voluntary, procuring cause of the acts relied upon to invoke it, and it is not available for one who, disregarding the solemnity of the nuptial vows, prompts the other party to the marriage to conduct which would be inexcusable if committed against a husband or wife who was honestly endeavoring to sustain the marriage relation.

In Spofford v. Spofford, 18 Idaho, 115, 108 Pac. 1054, this court said:

"The party to the marital contract who by his acts and conduct thus invites a remonstrance, protest, or demonstration from the other party to the contract, must expect to exercise a degree of patience and forbearance which the law and good morals would not expect of him under more favorable circumstances."

A careful examination of the entire record convinces us that respondent was the procuring cause of the commission of almost all the acts established by the evidence against appellant which are sufficiently serious to be worthy of consideration. We therefore conclude that she is not entitled to the relief which she demands.

The decree of divorce heretofore granted is reversed, with direction that the cause be dismissed.

The parties have community property from which costs may be paid, and no judgment will be awarded therefor.

SULLIVAN, C. J., and BUDGE, J., concur.

(29 Idaho, 724)

STATE v. CURTIS.

(Supreme Court of Idaho. Dec. 16, 1916.)

1. CRIMINAL LAW ⟸1043(2)—APPEAL—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

Where an information against several defendants alleges in the last clause that one of them is a fugitive from justice, and upon the trial of one of them the whole information is read to the jury, and the reading of the information as a whole is objected to by counsel for the defendant who is being tried, but without specifying any objection to the reading of the clause alleging that his codefendant is a fugitive from justice, the latter question cannot be raised for the first time on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2654; Dec. Dig. ⟸1043(2).]

2. CRIMINAL LAW ⟸427(3) — TRIAL — EVIDENCE—ORDER OF PROOF.

Where, in a criminal case against two defendants, one of whom is a fugitive from justice, the jury is justified in concluding from all the evidence that the defendant on trial was a confederate of the other, then the acts of the other, committed in pursuance of the criminal design, are binding on the defendant upon trial, and the order in which the proof was admitted is not material, the question being one of sufficiency of proof rather than order of proof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1013; Dec. Dig. ⟸427(3).]

3. CRIMINAL LAW ⟸1167(1)—HARMLESS ERROR—INFORMATION.

Where an information in a criminal case charges the offense of presenting for payment certain false claims, to wit, bonds, and refers to the bonds as false and fraudulent, but states in detail facts showing that the offense really consists in presenting for payment genuine bonds as the basis of a false claim, and such allegations are substantiated by the proof, the defendant is not prejudiced by any inaccuracy in designating the offense, and a judgment, convicting him of the offense which the pleaded and proven facts show to have been committed, will not be disturbed. State v. Altwatter, 29 Idaho, 107, 157 Pac. 256, cited and followed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3101; Dec. Dig. ⟸1167(1).]

4. FALSE PRETENSES ⟸49(1)—FALSE CLAIMS—EVIDENCE—ADMISSIBILITY.

Held, that the evidence in this case is sufficient to establish the fact of ownership of the bonds which are the subject of the prosecution, in Blaine county.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 62; Dec. Dig. ⟸49(1).]

5. CRIMINAL LAW ⟸743—TRIAL—JURY QUESTION.

Where one accused of the commission of a crime attempts to explain the fact of his possession of the fruits of the crime, the question of the reasonableness of such explanation is a question of fact for the jury, and the appellate court is not justified in substituting its opinion for that of the jury, unless it finds that the defendant's explanation under all of the circumstances was so clearly satisfactory that

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it was unreasonable for the jury not to give it credence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1722; Dec. Dig. ⊂⊃743.]

6. CRIMINAL LAW ⊂⊃829(1) — TRIAL — INSTRUCTIONS.

The trial court in a criminal case is warranted in refusing to give to the jury an instruction requested on behalf of defendant, where it appears that the matter embraced in such requested instruction is fairly and fully covered by some other instruction given by the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⊂⊃829(1).]

7. CRIMINAL LAW ⊂⊃822(1) — TRIAL — INSTRUCTIONS.

In a criminal case, the instructions given by the court to the jury must be read and construed as a whole.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1994, 3158; Dec. Dig. ⊂⊃822(1).]

8. FALSE PRETENSES ⊂⊃49(1)—PRESENTATION OF FALSE CLAIMS—PROSECUTION—EVIDENCE.

Held, that no error of law which would justify a reversal appears in the record of this case, and that the evidence is sufficient to support the verdict under the law applicable.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 62; Dec. Dig. ⊂⊃49(1).]

Appeal from District Court, Lincoln County; James R. Bothwell, Judge.

H. D. Curtis was convicted of the offense of presenting for payment to the county treasurer of Blaine county false and fraudulent claims, and he appeals. Affirmed.

Sullivan, Sullivan & Baker, of Hailey, for appellant. J. H. Peterson, Atty. Gen., and Procter K. Perkins, Pros. Atty., of Hailey, for the State.

McCARTHY, District Judge. This case is appealed from the district court of the Fourth judicial district, for Lincoln county. The defendant was jointly charged, with L. A. Duvall, W. F. Horne, and H. R. Plughoff, with the crime of presenting for payment to the treasurer of Blaine county certain false and fraudulent claims. The information alleges that for some time prior to December 18, 1914, certain bonds and coupons were in the possession, for safe-keeping, of the Hailey National Bank of Hailey, Idaho, and were taken from the custody of said bank by the defendants on or about the 18th day of December, 1914; that the bonds had never been issued by the said county of Blaine to any person or persons, and that the defendants had no interest or claim in said bonds; that the defendants, with intent to defraud the county of Blaine, on or about December 18, 1914, at the said county of Blaine, in the state of Idaho, presented these bonds for payment to the then treasurer of said Blaine county. In several places the information also refers to said bonds as false and fraudulent. The defendant Curtis demanded and was granted a change of venue to Lincoln county, and a separate trial. Upon his trial the jury found him guilty. Upon this verdict the court rendered judgment that the defendant is guilty of presenting false and fraudulent claims to the treasurer of Blaine county, Idaho, and that he be punished therefor by imprisonment in the state prison of the state of Idaho for not less than 18 months nor more than 5 years. From this judgment the defendant appeals to this court upon all questions of law and fact. The defendant specifies certain errors of law which he claims occurred upon the trial, and also contends that the evidence is insufficient to support the verdict of the jury..

[1, 2] The first point relied upon by appellant is that the trial court erred in permitting the clerk to read the last clause in the information, which stated that the codefendant Horne was a fugitive from justice. The statement in the information that Horne was a fugitive from justice was a proper allegation as against Horne himself. Rev. Codes, § 7662. In all felony cases the information must be read to the jury upon the trial. Rev. Codes, § 7855. The only objection made by the defendant's counsel was an objection to the reading of the information at all. This was obviously not a sound objection. If there was any merit in the point that the last clause should not have been read upon the trial of the defendant Curtis, it should have been raised by an objection to the reading of that clause. The judge properly overruled the objection to the reading of the information. No proper objection having been made to raise the point that the last clause should not be read, the point, if any, is waived.

The second point is that the court erred in admitting evidence of acts of the defendant Horne prior to proof of a conspiracy. If from all the evidence in the case the jury were justified in concluding, as it did, that the defendant Curtis was a confederate of the defendant Horne, then the acts of Horne, committed in pursuance of the criminal design, would be binding on the defendant Curtis. The question of the order in which the proof was admitted would not then be controlling. The question for this court to decide is now one of the sufficiency of the proof rather than of the order of the proof. If the court finds that the whole of the evidence is sufficient to connect Curtis with Horne, then the act of Horne in cashing the bonds is binding on Curtis, whether the court erred in passing on the order of proof or not.

[3] The next point is a claim of variance between the information and the proof. The information is drawn under Rev. Codes, § 6385:

"Every person who, with intent to defraud, presents for allowance or for payment to any state board or officer, or to any county, town, city, ward, or village board or officer, authorized to allow or pay the same if genuine, any false or fraudulent claim, bill, account, voucher, or writing, is guilty of a felony."

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It is claimed that the information charges the defendant with presenting for payment certain false writings, to wit, bonds, and that the proof shows the presentment of genuine bonds as the basis of a false claim. The preliminary part of the information charges the defendants formally with presenting false and fraudulent claims. It then goes on to plead the facts in regard to the bonds with great particularity, stating that the bonds were regularly issued and executed but not delivered, and that the defendants had no claim to or interest in them, but that they presented them for payment. Although pleading facts which show that the bonds themselves were regularly executed, the information refers to them in several places as false and fraudulent. If the information had charged the defendants with presenting false writings and stopped there, the proof that the writings were genuine, but that the claim based upon them was false, in that delivery was necessary to make them valid, and that they had never been delivered, would have raised a serious question of variance. But those are not the facts in the present case. The information charges the defendants with presenting a false claim. It then goes on to state how they did it. The only mistake of the pleader, if any, is in referring to the bonds as false writings. This mistake could not mislead the defendant to his prejudice. He was bound to know that the charge against him was making the false claim based upon the bonds. The requisites of an information are the same as those for an indictment. Rev. Codes, § 7657. It must contain a statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended. Rev. Codes, § 7677. It must be direct and certain as regards the offense charged and the particular circumstances of the offense charged, when they are necessary to constitute a complete offense. Rev. Codes, § 7679. The information in this case measures up to these standards. In view of the particular facts pleaded, the allegation that the bonds were false, if regarded as inaccurate, may be treated as surplusage. This court has held that where the information incorrectly names an offense, but states special facts showing what the offense really is, the defendant is not prejudiced by the mistake in designating the offense and a judgment, convicting him of the offense which the facts pleaded constitute, will not be disturbed. State v. Altwatter, 29 Idaho, 107, 157 Pac. 256. So, in this case, the facts pleaded in the information constitute the offense of presenting false claims for payment, and that is the offense of which the jury found the defendant guilty. If the evidence supports such finding it is sufficient.

The next point is that the evidence is insufficient to warrant a conviction. It is first contended that the evidence is not sufficient to prove that Blaine county was the owner of the bonds in question. The material allegation of the information in this regard is that the bonds were ready to be issued and delivered, but had never been issued or delivered by said Blaine county to any person or persons, and that the defendants then and there had no interest or claim whatever therein. We think the evidence in the record is sufficient to prove this allegation, as the jury found.

[4-7] The next contention is that the evidence is insufficient to connect the defendant Curtis with the alleged offense. The defendant is connected with the transaction: First, by his delivery of the bonds to Horne; and, secondly, by the delivery of $1,000 to him by Horne, and his receipt of the same. The delivery of the bonds to Horne was a necessary step in the commission of the offense. In determining the question of whether that delivery was an innocent act or was committed with a guilty intent, the fact that Horne later handed the defendant Curtis $1,000, and that Curtis received the same, for which there was no reason except the delivery of the bonds, is of great significance. From it a reasonable inference may be drawn that there had been an understanding between Curtis and Horne. If not, Horne's act was a very rash one. If he attempted to bribe an innocent man, he would be subjecting himself to the danger of instant exposure. Unexplained, or in the absence of a reasonable explanation, these facts would certainly justify a conviction. The defendant attempted to explain his possession of the $1,000 by stating that, although he at once connected it with the bond transaction, he did not mean to keep it, but wanted to see his lawyer, Mr. L. L. Sullivan, before deciding what to do. The money was delivered to him on January 18, 1914. The evidence shows that shortly after receiving the money he tried to get into communication with his lawyer, and followed that by other attempts, but did not succeed in doing so until January 31st. On January 30th after learning that Mr. Sullivan would be in Hailey the next day, the defendant told Mr. Perkins, the prosecuting attorney of Blaine county, that they would then want to see him about the bond matter. On January 31st, he showed Mr. Ensign, the cashier of the bank of which he was president, a package, and told him he wanted him to know he had it. At the same time he told him about delivering the bonds to Horne. He did not tell him at that time that it was the package which contained the $1,000, but we think from all the evidence that it was the package referred to. On January 31st, after consulting with his lawyer, Mr. L. L. Sullivan, they called for Mr. Perkins and explained to him what had occurred. On January 23, 1915, a check

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drawn by the county treasurer of Blaine county on the Hailey National Bank, of which defendant was president, in favor of the First National Bank of Shoshone, Idaho, for $4,995, came to the Hailey National Bank, but payment on it was stopped by Mr. Ensign, the cashier, on the order of the county treasurer. This check was introduced in evidence upon the trial as State's Exhibit A 2. During his cross-examination, the following question was asked the defendant:

"Q. Now when that check came into your bank for payment and the payment was stopped, you knew at that time that the check was in payment of part of the coupons which had been delivered by you to Mr. Horne? [This question referred to the check, State's Exhibit A 2.]"

The defendant answered:

"Mr. Ensign told me that later on, about the check, and I suspicioned that."

He does not say just when it was that his suspicions were aroused, but the jury would be justified in believing that it was before January 30th or January 31st, the dates when he made a partial disclosure to Mr. Ensign and a disclosure to the prosecuting attorney. This check incident, however, occurred after he had first tried to get into communication with Mr. L. L. Sullivan, his attorney. Mr. Baker, an associate of the law firm of Sullivan & Sullivan, at Hailey, and Mr. L. L. Sullivan, corroborated Curtis to the effect that he tried to get into communication with Mr. Sullivan on a business matter. The evidence also shows that as soon as he had consulted with Mr. L. L. Sullivan, he called in the prosecuting attorney and made a statement to him. The trial judge told the jury that the reasonableness of the defendant's explanation of his possession of the $1,000 was for it to decide, in instructions which we think were fair to the defendant. The jury found that the explanation was not a reasonable one. The question is whether his consulting his lawyer and making the disclosure after such consultation raises a reasonable doubt. The act of Curtis in trying to get into communication with his lawyer was not necessarily that of an honest man. It might be that of a dishonest man who became frightened by the thought of the possible consequences of his participating in the crime, and who wanted to see his lawyer in order to know what to do. So, also, the mere fact that he made a disclosure under the circumstances shown in the record does not necessarily prove that he was an innocent man. The jury evidently found that the explanation was not a reasonable one. We are not prepared to say that this conclusion of the jury was erroneous.

In State v. Seymour, 7 Idaho, 257, 61 Pac. 1033, this court held that where a reasonable explanation of possession of stolen property is given and there is no conflict of evidence in regard thereto, and the witness is not impeached, the jury should have acquitted. In that case the defendant's statement that he bought the horse was corroborated by another apparently disinterested witness. In this case the defendant is corroborated by witnesses Sullivan and Baker only to the extent of proving that he wanted to see his lawyer after receiving the money. This fact does not, of itself, prove either guilt or innocence. It is a question of reasonable inference. The jury evidently found that a reasonable inference of innocence could not be drawn from that fact so as to overcome the inference of guilt which was drawn from his delivery of the bonds to Horne and Horne's stealthily paying him $1,000 of the proceeds of the bonds, which would be about one-fourth of the total amount obtained, and his receipt of the same. It is true that the state must prove the guilt of a defendant beyond a reasonable doubt. That is a question in the first instance for the jury, which sees the witnesses and hears the testimony. In a case where the question is whether the defendant's explanation of his possession of the fruits of a crime is reasonable, this court is not justified in substituting its opinion for that of the jury, unless it finds that the defendant's explanation was so clearly satisfactory that it was unreasonable of the jury to refuse to give it credence. From all of the evidence, we cannot so hold in this case.

The last point is in regard to the instructions. The defendant complains that certain requested instructions should have been given. In each case we find that the request was amply and fairly covered by some other instruction given by the court. Counsel often request several instructions of the same purport, with slightly different shades of meaning, for the sake of argumentative effect. It would be undue emphasis for the court to give several instructions to the same effect on the same point. It is sufficient if the point is clearly and fairly explained in a single instruction where that is possible. It is contended that instruction No. 7, given by the court, is erroneous, in that it does not contain an explanation of the element of intent to defraud. However, the rule is elementary that the instructions given must be read and construed as a whole, and that no one instruction shall be singled out as stating all the law of the case. In instruction No. 8 we find that the court said that the state must prove an intent to defraud on the part of the defendant, and the same matter is specifically treated in other instructions. We do not assume that the jury regarded simply instruction No. 7, but that it read, considered, and applied all the instructions, as it was its duty to do.

[8] Our general conclusion is that we find no error of law in this record which would justify a reversal, and that the evidence is sufficient to support the verdict, under the

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law applicable. The judgment of conviction is therefore affirmed.

BUDGE and MORGAN, JJ., concur.

(98 Kan. 394)

NORRIS v. ROSS TP. (No. 20371.)

(Supreme Court of Kansas. June 10, 1916. Rehearing Denied Jan. 6, 1917.)

(Syllabus by the Court.)

HIGHWAYS ⊂=208 — PERSONAL INJURIES — PROXIMATE CAUSE — LIABILITY OF TOWNSHIP.

In an action against a township to recover damages for injuries alleged to have been caused by a defect in the highway, it is *held* that the petition fails to state a cause of action for the reason that it shows the proximate cause of plaintiff's injury was the frightening of his horse, and not a defective condition of the highway.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 522–525; Dec. Dig. ⊂=208.]

Appeal from District Court, Cherokee County.

Action by Gus Norris against Ross Township. From judgment for defendant, plaintiff appeals. Affirmed.

E. M. Tracewell and Charles Stephens, both of Columbus, for appellant. F. W. Boss, of Columbus, for appellee.

PORTER, J. In this action plaintiff sued to recover damages for injuries alleged to have been caused by a defective highway. The court sustained a demurrer to the petition, from which ruling the plaintiff appeals.

The highway in question runs east and west. The petition alleged that for several weeks prior to plaintiff's injury, a culvert in this highway had been allowed to remain out of repair, so that persons using the highway were obliged to drive around the south end of the culvert where the ground was about 2½ feet lower, and that during several weeks travelers had continuously used and made a well-beaten path around the low place and up the embankment to the traveled portion of the highway immediately east and west of the culvert. It alleged that on the same day plaintiff was injured the township sent its agents and employés to remove the culvert and construct a new one of concrete, and in preparing for this they placed a pile of dirt just south of the old culvert and in the north part of the traveled way around the place, and also placed just west of the culvert a concrete mixer which they covered with a canvas so insecurely fastened that it flapped in the wind; that on the evening of that day when it was too dark for him to see an object clearly, he was traveling over the highway in a top buggy "attached to a kind, roadworthy horse, going west"; that his horse took the traveled way in the wellbeaten path "used by vehicles traveling said road." The petition then proceeds:

"When his buggy, so drawn by said horse, reached a point about opposite said culvert the north front wheel of said vehicle ran onto and over said pile of dirt which defendant, its said officer, agent, and employés, had on that day placed in said traveled way; that when the north back wheel of said buggy ran up onto said dirt and again tipped said vehicle toward the south, plaintiff looked down, as said hind wheel passed down off said dirt, to see what was causing such tipping of his vehicle, and while in this position the wind from the north flapped the south part of said canvas toward his horse in such a way as was likely to and did greatly frighten same; that when said horse took fright it lunged forward and out of said low place in an angle against and onto said high ground, at said defective place in said highway, so that the right wheels of said buggy went up onto said high embankment before the left wheels touched same, thereby causing said plaintiff to be thrown over toward the left side of his buggy in such a way that he lost his balance in the buggy which caused the lines to slip in his hands and he thereby lost control of his horse which ran to the intersection section highway just west of said culvert and swung quickly to the south thereon in such a way as to throw this plaintiff, violently and forcibly, against the ground."

After enumerating the "bones, muscles, ligaments, tendons, tissues, and nerves" which were torn and strained and the other injuries to plaintiff, the petition prays for damages in the amount of $20,445 and costs, stating that:

"The proximate cause of all of which was the defective condition of said traveling way, from said low part to said high part west of said culvert, which caused him to be thrown about in his buggy and the lines to slip in his hands and the consequent loss of control of his horse, in the absence of all of which his injuries would not have been by him received."

It seems that the first petition, to which this one is an amendment, contained no reference to the low place at the south end of the culvert, but predicated a right of action solely upon the presence in the highway of the mixer, the canvas, and the pile of dirt, and alleged they were the cause of the injury. Because the township trustee could not have had five days' notice of these conditions, the court sustained a demurrer to the petition, and the plaintiff attempted to "mend his hold" by alleging the existence of the low place, "the high embankment," and the slipping of the lines in his fingers when he lost his balance by the swaying of the vehicle. The abstract sets out the opinion of the trial court, which shows that the demurrer was sustained as to the amended petition on the ground that the proximate cause of the injury was the frightening of the horse by the flapping canvas, and, since the petition shows that the concrete mixer and canvas were placed there on the same day or the day before the accident, the township trustee could not have had the five days' notice required by the statute. The opinion comments, too, on the fact that there is nothing in the petition to show that the injury might not have occurred if the alleged defects of the embankment had not existed, because it alleges that the travel around the culvert had created a well-worn way up the embank-

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ment. The opinion shows that the trial court was also convinced that two causes contributed directly to the injury: The frightening of the horse, and the turn in the highway 100 rods west, where it is not alleged there was any defect.

An action of this kind can be maintained against a township only by virtue of the statute (section 658, Gen. Stat. 1909), which requires that the trustee must have had five days' notice of the defect which caused the injury, otherwise the township is not liable. Therefore the negligence of the officers and employés in permitting the concrete mixer, with the unfastened cover thereof, or the pile of dirt, to remain in the highway adds nothing to plaintiff's cause of action. The road around the culvert was a temporary one. A 2½-foot depression at the end of a culvert is a common thing, and the approach up the slight embankment was a well-beaten path worn by continual travel for several weeks. Whatever the sharpness of the incline, it appears not to have been so steep or abrupt as to overturn the buggy when the horse, frightened at the flapping canvas, lunged forward. The pile of dirt left there that day had already twice tipped the buggy, as first the front and then the rear wheel passed over it. The plaintiff looked down to see what caused the tipping, and while he was in this position the horse took fright at the flapping canvas, lunged forward, and jostled plaintiff so that he lost control of his horse.

We think the trial court was correct in holding that the petition fails to state a cause of action. Where the question of proximate cause arises on demurrer to the petition it is necessarily one of law for the court. Railway Co. v. Columbia, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399; Gas Co. v. Dabney, 79 Kan. 820, 102 Pac. 488; Eberhardt v. Telephone Ass'n, 91 Kan. 763, 139 Pac. 416. The proximate cause of the injury was the frightening of the horse, and not the condition of the highway. In Railway Co. v. Bailey, 66 Kan. 115, 71 Pac. 246, where a horse became frightened at escaping steam and ran up a pile of sewer pipe in the street, it was said:

"The proximate cause of the injury—that without which it would not have occurred—was the frightening of the horse. This stood first in the line of causation." 66 Kan. 122, 71 Pac. 248.

See, also, Eberhardt v. Telephone Co., supra.

The judgment is affirmed. All the Justices concurring.

(99 Kan. 285)

BRENNAMAN v. LESLIE. (No. 20428.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⊂⊃1011(1)—REVIEW—FINDING.

A general finding by a trial court is conclusive, when based on sufficient, although conflicting, evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⊂⊃ 1011(1).]

Appeal from District Court, Stafford County.

Action by D. H. Brennaman against C. E. Leslie. From judgment for plaintiff, defendant appeals. Affirmed.

C. M. Williams, of Hutchinson, and Ray H. Beals, of St. John, for appellant. Paul R. Nagle, of St. John, for appellee.

MARSHALL, J. The defendant appeals from a judgment against him for $231.19. The plaintiff was the defendant's tenant. In their dealings each sold property to the other. This resulted in each having an account against the other. The plaintiff in his petition declared on the account due him, gave the defendant credit for certain items, and asked judgment for $392.46. The defendant's answer set up a promissory note given by the plaintiff to the defendant, set out items due from the plaintiff to the defendant, and gave credit for most of the items which the plaintiff claimed were due him. The answer also alleged a settlement of the accounts and alleged that by that settlement it was determined that the plaintiff owed the defendant $70. The answer further alleged that there was $174.59 due the defendant on the promissory note, and asked that judgment be rendered for that amount, in the event that the court found that the settlement had not been made.

There was little dispute as to the items of the accounts. The dispute was over indorsements on the promissory note and over the settlement. On these questions the evidence was conflicting. The trial was by the court. The court determined these questions in favor of the plaintiff and rendered judgment accordingly. There was evidence tending to support the finding and judgment, and, under repeated declarations of the court, that finding and judgment must stand.

The judgment is affirmed. All the Justices concurring.

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(98 Kan. 740)

HAYES et al. v. WAGGENER et al.

(No. 20342.)

(Supreme Court of Kansas. Oct. 7, 1916. Rehearing Denied Nov. 10, 1916.)

(Syllabus by the Court.)

1. MORTGAGES ⟸543—FORECLOSURE—RIGHT TO POSSESSION—"DEFENDANT OWNER."
The words "defendant owner" in sections 476 and 492 of the Code (Gen. St. 1909, §§ 6071, 6087), which provide that the defendant owner shall be entitled to the possession of real estate sold under execution until the expiration of the redemption period, and may assign his rights to another, are broad enough to include an owner of real estate which is sold under a foreclosure judgment rendered on a cross-petition in a suit in which such owner was the plaintiff, and the mortgagee was the defendant.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1562; Dec. Dig. ⟸543.]

2. JUDICIAL SALES ⟸32—WHO MAY QUESTION—ATTORNEY.
Third persons whose rights are not affected thereby cannot complain of the action of an attorney who becomes the purchaser of his client's real estate at a judicial sale.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 69; Dec, Dig. ⟸32.]

3. MORTGAGES ⟸543—SALE—RIGHT TO POSSESSION—EFFECT OF CONTRACT.
A defendant owner's right to the possession of real estate sold under execution or order of sale during the redemption period is not affected by a contract between the holder of the certificate of sale and his assignee which purports to grant to such assignee the right to possession before the expiration of the redemption period.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1562; Dec. Dig. ⟸543.]

Appeal from District Court, Atchison County.

Action by Perry Hayes and another, partners as Hayes Bros., against B. P. Waggener and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

James A. Troutman, of Topeka, and P. Hayes, of Atchison, for appellants. T. A. Moxcey, of Atchison, for appellees.

PORTER, J. This was an action to quiet title to the west 23 feet of the east 102½ feet of lots 1 and 2 in block 46 old Atchison, Atchison county (referred to in the pleadings as tract No. 1), and also the west 45½ feet of lots 3 and 4 in block 46 (referred to in the pleadings as tract No. 2). B. P. Waggener, the defendant, in answer to the third amended petition, disclaimed any right, title, or estate in that part of the property referred to as tract No. 1, and the only controversy remaining is over tract No. 2. The trial court sustained the defendant's motion for judgment on the pleadings, and this is the judgment we are asked to review.

There is no dispute over the facts. Martha Mangan, the former owner of the property, was insane, and her guardian secured a loan of $1,000 from plaintiffs through an order of the probate court, and gave a mortgage upon a part of the property to secure payment. The guardian defaulted in the payments on the note and failed to pay the taxes. Subsequently a suit was brought by the guardian to set aside the mortgage. In that suit Perry Hayes and W. C. Hayes came back with a cross-petition and asked to foreclose their mortgage and for judgment for taxes paid. They prevailed in their cross-petition, and recovered judgment for $2,753.11, which was made a first lien on the property, which was ordered sold to satisfy the judgment. A tax deed which Perry Hayes had acquired was held void, but he was given a lien for the taxes, interest, and costs, all of which merged in the judgment. Subsequently the property was sold under order of sale and purchased by one William Schaap for $7,300. The sale was confirmed, and certificate issued to Schaap; all the proceedings reciting that the sale was subject to the owner's right of redemption, which would expire 18 months after the sale. Subsequently the probate court made an order directing the guardian of Martha Mangan to sell her right or equity of redemption, and her equity was purchased by James S. Gibson for $450. The certificate of sale to Schaap is dated June 16, 1910. The petition alleges that on the 21st day of July, 1910, Schaap sold and conveyed a portion of both of said tracts to Perry Hayes and W. C. Hayes for $6,800, which sum they paid to him and that he executed to them a deed for the property. The petition also alleges that at the same time Schaap placed the grantees therein named in possession of the premises, and that the plaintiffs have ever since been, and now are, in the open, notorious, actual, and physical possession thereof under and by virtue of said deed. It may be mentioned here that the statute (Civ. Code, § 476) provides that the defendant owner shall be entitled to the possession of the property during the period of redemption. The petition alleges that on the 31st day of December, 1913, the sheriff executed and delivered to the plaintiffs a sheriff's deed based upon the decree and the proceedings in the foreclosure case, which it is alleged perfected their title to tract No. 1, but did not include tract No. 2.

[2] The petition further alleges that B. P. Waggener was the attorney for the guardian of the insane person, and that he purchased the property at the sheriff's sale in the name of William Schaap, and furnished the $7,300 purchase money, and that subsequently he purchased the equity of redemption of his client through James S. Gibson, who acted for him. The petition alleges that because of Mr. Waggener's relation to Mrs. Mangan as her attorney he was disqualified by law from attempting to purchase the property of his client, directly or indirectly, and the plain-

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tiffs contend that whatever title to the property Waggener acquired inured by operation of law to the benefit of plaintiffs because of their deed from the sheriff. Mr. Waggener admits in his answer that he purchased the property, that Schaap and Gibson both acted as his agents, and that he furnished the money for which the property sold, and also the $450 paid for the right of redemption of his client. So far as the record discloses, it may be said that his action in this respect appears to have been for the best interest of his client. Some one was obliged to furnish money with which to purchase the property to protect her interests. It appears that no one on behalf of his client has ever objected to what he did, and plaintiffs are not in position to take any advantage of the fact that while acting as her attorney he purchased the property.

[1] One of the principal contentions made by plaintiffs is that because the mortgage was foreclosed in an action in which the mortgagor, the insane person, was plaintiff, and not defendant, the statute gave her no equity of redemption or right that could be sold by the order of the probate court. This is based on an unreasonable construction of the language of section 476 of the Code, which provides that "the defendant owner may redeem any real property sold under execution," etc., and on the words "defendant owner" in section 492 of the Code, which provides that "the rights of the defendant owner in relation to redemption may be assigned or transferred, and the purchaser or assignee thereof shall have the same right of redemption as the defendant owner." Mrs. Mangan was the defendant in the cross-petition filed by Perry Hayes and W. C. Hayes, and her rights were protected to the same extent as though the mortgage had been foreclosed in an original action brought by the mortgagee against her as defendant.

[3] In the present suit the plaintiffs appear to rely for a foundation on causes of action which were finally merged and extinguished in the judgment entered in their favor in the foreclosure case. All the claims they had against the real estate by virtue of the mortgage, interest and costs, as well as all claims against the property by reason of their tax deed, were merged in that judgment, and they received and receipted to the clerk for the amount of their judgment and costs out of the $7,300 paid into the hands of the clerk by William Schaap, who acted for Mr. Waggener. All their causes of action were merged in the final judgment, and thereby extinguished. Price v. Bank, 62 Kan. 735, 64 Pac. 637, 84 Am. St. Rep. 419. Of course William Schaap, as purchaser at the sheriff's sale and as holder of the sheriff's certificate, could make no contract to place the plaintiffs in possession of the premises or give them any rights of possession which would in any manner affect the owner's right of redemption. Plaintiffs purchased with full notice of the decree to which they were a party; and whatever possession they may have obtained by virtue of the deed did not afford a basis for a subsequent action to quiet title. All the deed from Schaap conveyed was an assignment of his interest as purchaser at the sheriff's sale, and the deed expressly recited that the property was subject to redemption. Besides, the statute, as well as the orders of the court in the proceedings, preserved the owner's right of redemption. The question of the propriety of Mr. Waggener's conduct in purchasing the property of his client at the judicial sale was one that could arise only between himself and his client. The plaintiffs accepted and received the amount of their judgment, interest and costs, out of the proceeds paid by him into the hands of the clerk, and are now estopped from claiming that the sale was void. The only interest they had in the sale was the satisfaction of their own judgment. The pleadings admit that their judgment was satisfied. As stated, subsequent to their acceptance of the amount of their judgment they took what amounted to nothing more than an assignment by Schaap of his certificate of sale in which it was recited that his right, title, and interest in the property was sold subject to redemption.

Under the admitted facts in the case the ruling of the trial court in rendering judgment in favor of the defendants was proper. There was no occasion for a jury as the law entitled defendant to judgment on the admitted facts. Besides, it was purely an equity case triable only by the court.

The judgment is affirmed. All the Justices concurring.

(98 Kan. 745)

HART v. HART. (No. 20354.)

(Supreme Court of Kansas. Oct. 7, 1916. Rehearing Denied Nov. 10, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⟸1024(4) — REVIEW — QUESTIONS OF FACT — MOTION TO CORRECT JUDGMENT.

On a motion to correct the entry of a judgment so that it should speak the truth, where it was found upon disputed evidence that the judgment as originally entered did not correspond with the judgment actually rendered, the finding which was based in part on the knowledge and recollection of the judge as to the true judgment rendered must be upheld on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3823, 4026; Dec. Dig. ⟸ 1024(4).]

Appeal from District Court, Stafford County.

Action by Anna M. Hart against Millard M. Hart. From a judgment for plaintiff, defendant appeals. Affirmed.

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C. R. Douglass, of St. John, for appellant. Paul R. Nagle and Harry T. Gray, both of St. John, for appellee.

JOHNSTON, C. J. This proceeding involves the validity of an order of the court correcting an entry of judgment. On September 17, 1914, Anna M. Hart brought this action against Millard M. Hart, her husband, to secure a divorce, and the court at that time made some preliminary orders relating to temporary alimony, including a provision for medical treatment for the plaintiff and for expenses of the litigation. The following day the defendant moved the court to modify the orders as to alimony required to be paid and as to the enjoining of the disposition of the property. Shortly afterwards the defendant filed a plea in abatement alleging that the plaintiff had become insane and was mentally incompetent to bring an action at the time the divorce proceeding was begun or to contract with attorneys in reference to the commencement of an action. Upon this plea a hearing was had on October 21, 1914, and an order was then entered sustaining the plea and directing the dismissal of the action. The findings and orders made at that time are in dispute. Some time later a motion was made to correct the entry of judgment, and upon the testimony before the court it was found that the entry did not speak the truth. According to the original entry the court found that the plaintiff was insane when the action was begun, whereas the court upon the testimony held that the finding that was actually made was that she was not insane when the action was brought, but had become mentally incapacitated since that time. Although not mentioned in the original entry it was found that in rendering judgment the court in pursuance of an agreement of the parties made an order respecting the payment of costs and an attorney's fee.

The final judgment does not purport to amend the judgment that was rendered, but merely to make the entry speak the truth. It is conclusively settled that the court may at any time correct a judgment entry so that it will conform to the judgment that was actually rendered. State v. Linderholm, 90 Kan. 489, 135 Pac. 564, and cases cited. The amendment may be made upon any satisfactory evidence, parol as well as written. Although there are decisions in other courts to the contrary it has been determined here that a correction of the judgment may be based on the knowledge and recollection of the judge as to the facts which occurred at the trial and of the findings and orders that were then made. Christisen v. Bartlett, 73 Kan. 401, 84 Pac. 530, 85 Pac. 594. Here the district judge has determined that the entry originally made did not express the judgment that was actually rendered by him, but that the modified entry does correctly recite what took place at the trial according to his knowledge and recollection, and other testimony was produced which supported his determination. What transpired when the judgment was announced is a disputed question of fact, and upon the record before us it must be held that the evidence justified the amendment of the record.

The judgment is affirmed. All the Justices concurring.

(98 Kan. 754)

HIGLEY v. DOEGE. (No. 20367.)

(Supreme Court of Kansas. Oct. 7, 1916. Rehearing Denied Nov. 10, 1916.)

(Syllabus by the Court.)

1. SALES ⇐194—REMEDIES OF SELLER—ACTION FOR PRICE.

In an action to recover $700 alleged to be due as the purchase price of a player piano, plaintiff testified that defendant was to pay $350 when the instrument was delivered, and that plaintiff was to take defendant's old piano in payment of the balance. An instruction which charged that if defendant failed to pay the $350 at the time of delivery, plaintiff was thereby relieved from all obligation to accept the old piano and could recover judgment for $700, was error.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 508; Dec. Dig. ⇐194.]

2. SALES ⇐366—REMEDIES OF SELLER—ACTION FOR PRICE.

In view of all the circumstances, it is *held* that the judgment in plaintiff's favor for $700 and interest should be modified and judgment given in her favor for $350, with interest and the right to the possession and ownership of the old piano, or in case it cannot be delivered to her, to judgment in addition for its value at the time of the sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1078; Dec. Dig. ⇐366.]

Appeal from District Court, Leavenworth County.

Action by Anna E. Higley against Mary Doege. From a judgment for plaintiff, defendant appeals. Modified and remanded.

Lee Bond, of Leavenworth, for appellant. Arthur M. Jackson, of Leavenworth, for appellee.

PORTER, J. The action in the district court was to recover the sum of $700 alleged to be due as the purchase price of a player piano sold and delivered to the defendant.

[1, 2] The petition alleged that the defendant agreed to pay $700 for the instrument. The plaintiff testified that the agreement was that the defendant was to pay her $350 in cash when the player piano was delivered, and the plaintiff was to take the defendant's secondhand piano for the other $350. There was some conflict in the testimony, the defendant testifying that the piano was not purchased outright, but that she agreed to pay $350 and give her old piano in exchange for the new one if her daughter was satisfied with the new one, and that it was to remain in her house long enough for the daughter to make up her mind whether she liked

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it or not. The petition was drawn on the theory that the piano had been sold for $700, and that this sum was due. The plaintiff's proof showed, however, that she had agreed to take the old piano in for half of the purchase price and was to receive $350 in cash. The court instructed that if the defendant after accepting the piano failed to pay the $350 in cash, the plaintiff was under no obligation to accept the old piano as part payment. In some other respects the instructions we think tended to confuse the jury. After the jury had been out for several hours and were unable to agree upon a verdict they submitted to the court the following question:

"In case a verdict for the plaintiff is rendered would the deal be consummated as originally intended—that is, the old piano being taken in at a $350 valuation?"

The court in answer to this question gave an additional instruction to the effect that in case of a verdict for the plaintiff the deal could not be consummated as originally intended because the defendant had repudiated the contract and had not offered to give the plaintiff the old piano, and the court instructed that in case the jury found for the plaintiff the amount of their verdict should be the $700.

We think the instructions were erroneous in view of the facts admitted by the plaintiff, and that justice and equity will best be subserved by a modification of the judgment. It seems that the defendant offered to return the new piano to the plaintiff, and upon plaintiff's refusal to accept it stored it subject to plaintiff's order, and that it is now in the hands of a storage company. There is no reason why the plaintiff should not be entitled to recover the $350, with interest thereon from the date of the sale, and she should also be entitled to the possession and ownership of the secondhand piano, or its value at the time the agreement was entered into in case it cannot now be delivered to her.

The judgment will therefore be modified, and the cause remanded for further proceedings in accordance with these views. All the Justices concurring.

(98 Kan. 761)

TRUMAN v. KANSAS CITY, M. & O. R. CO.

(No. 20377.)

(Supreme Court of Kansas. Oct. 7, 1916. Rehearing Denied Nov. 10, 1916.)

(Syllabus by the Court.)

1. MASTER AND SERVANT ⟸264(10)—VARIANCE—PREJUDICE.

Where a cause of action sufficiently pleads and the evidence sufficiently proves such negligence as will render a defendant liable thereon, it is not a material variance that the same cause of action also alleged other acts of negligence which were not established by the proof, when the superfluous allegations not proved could not have misled the defendant to his prejudice. Civ. Code, § 134 (Gen. St. 1909, § 5727).

[Ed. Note.—For other cases, see Master and Servant, Cent.Dig. § 870; Dec.Dig. ⟸264(10).]

2. MASTER AND SERVANT ⟸351 — INJURIES TO SERVANT—STATUTORY PROVISIONS.

In the conduct of its car repair shop, a railroad company which has elected not to come under the provisions of the Workmen's Compensation Act (Laws 1911, c. 218; Laws 1913, c. 216), is governed by the Factory Act (Laws 1903, c. 356), and its liability for injuries sustained by its workmen in such car repair shop is controlled by the latter act, and not by the Common Carrier's Liability Act (Laws 1911, c. 239), following Bubb, Adm'x, v. Railway Co., 89 Kan. 303, 131 Pac. 575.

[Ed. Note.—For other cases, see Master, and Servant, Dec. Dig. ⟸351.]

3. MASTER AND SERVANT ⟸270(11, 12)—INJURIES TO SERVANT—ACTIONS—ADMISSIBILITY OF EVIDENCE.

Where a workman in a car repair shop sustained injuries to his hand which came in contact with an unguarded circular saw, it was not error to exclude evidence that the sawing machine had been examined and found without fault by the state factory inspector; nor was it material error to exclude testimony that other saws were similarly operated in the community without safeguards.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 921, 922; Dec. Dig. ⟸270(11, 12).]

4. APPEAL AND ERROR ⟸1005(1)—REVIEW—QUESTIONS OF FACT—VERDICT.

Ordinarily a jury's finding that it is practical to attach a safeguard to a piece of dangerous machinery, when such finding is approved by the trial court, is conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948; Dec. Dig. ⟸1005(1).]

5. MASTER AND SERVANT ⟸265(4)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

The court's instructions to the jury that the plaintiff was not required to prove that it was practical to attach a safeguard to the machinery which injured him, and that the burden to prove its impracticability rested on the owner of the machine were proper and in conformity to the provisions of the Factory Act and the doctrine announced in Caspar v. Lewin, 82 Kan. 604, 109 Pac. 657, 49 L. R. A. (N. S.) 526.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 880, 899; Dec. Dig. ⟸265(4).]

6. DAMAGES ⟸132(8)—EXCESSIVE DAMAGES—PERSONAL INJURIES.

A judgment for $8,000 as damages to plaintiff's hand discussed, and *held* to be excessive. Plaintiff given option of a judgment for $5,000 or a new trial.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 379; Dec. Dig. ⟸132(8).]

Appeal from District Court, Sedgwick County.

Action by Charles E. Truman against the Kansas City, Mexico & Orient Railroad Company. From a judgment for plaintiff, defendant appeals. Modified and affirmed, on condition.

Jno. A. Eaton, Dudley W. Eaton, and Hyden J. Eaton, all of Kansas City, Mo., and Holmes, Yankey & Holmes, of Wichita, for appellant. George W. Adams and John W. Adams, both of Wichita, for appellee.

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DAWSON, J. The plaintiff obtained a judgment for $8,000 as damages for injuries to his right hand while operating a circular saw in the car repair shop of the defendant at Wichita. The saw, which was 30 inches in diameter, revolved upon an adjustible steel table, projecting a few inches above the table top and a considerably larger part of the saw, some 22 inches of it, revolved beneath the table. The machine had a device for feeding boards and timbers into the saw, and the speed of this feeding device was regulated by a system of cone pulleys, one-half of which were attached to the machine below the table top and about 10 inches distant from the saw. To change the speed of the feeding device it was necessary to reach under the table and shift a belt from one cone pulley to another by hand. There was no mechanical belt shifter or other contrivance for shifting the pulley belt, and the space under the table between the cone pulleys and the saw was open and unguarded. It was also in evidence, and in conformity to an elementary principle of mechanics, that it is inconvenient and difficult to shift the belt of a system of cone pulleys except when the machine is running.

As to the manner and extent of his injuries the plaintiff testified:

"One of the boys brought in a board and wanted it ripped; and I started the saw and after I got it started the belt underneath the machine wouldn't pull the feed to feed it and it was dangerous to feed it without the feed running. We used to put on rosin on the belt to make it pull the feed, and the master mechanic cut us out on the rosin; then we put on what was called belt dressing. It is in sticks about 9 inches long and about 1½ through. You take that in your hand and hold it on the belt which is underneath the saw and runs from the main shaft where the saw was applied down to another shaft below that. It has three different feeds on it, and on these feeds there is a high speed, middle speed, and low speed. You have to put this belt on there by your hands; there is no belt shifter fixed to shift that. You have got to shift it when it is in operation with your hands. * * * The only way you have, you have got to go around and get behind the machine and get down in there to shift this belt. So I applied this dressing to it. In applying the dressing it jumped from this one, the middle one, down to the low speed again, and throwed my hand over like that and cut these two fingers off and injured this one until it isn't any good. At times I can't use it. In my trade I can't use a hammer or a saw, and the fleshy part of my hand hurts and it swells up here on the knuckle of the other one; my finger is helpless, so all I have is one finger and the thumb. There is a continual hurt all the time, even at nights. It is my right hand. * * * Up to the time of my injury I was able to use tools. I was drawing wages of $2.24 a day. I have never done any housework to amount to anything. My occupation is car man, car carpenter. I had steady employment with the Orient at that time. My health was good. My nervous system was in good condition. I was stout physically and had no physical infirmities and was able to put in a full day's work and earn a steady salary. These two fingers are off right at the fingers of my hand; they are the two small fingers on the right hand. The other finger is affected; that is, you see it is impossible to straighten it any more than just like that; and if I just bump it or shake it a little it is helpless. I can straighten it out like that. It is affected right in the joint. It was cut where the scar is—cut clear to the bone. It was stiff for about two months and a half. I am able to just ordinarily use it. I can close it about half. I can't catch around anything with it. There is no strength in the second finger; it is weak, helpless. I have practically only one finger on that hand. I haven't got the strength in the arm that I had before. I have worked part of the time since the accident. I am now working for the Missouri Pacific, drawing $1.60 a day, trucking freight. If I go to lift anything I just get my arm under it because I can't lift anything with this because I ain't got strength enough. I made an effort to see if I could get better wages, but I couldn't."

Certain special questions were answered by the jury:

"(3) State what was the direct and proximate cause of plaintiff's injuries. Ans. By his hand coming in contact with an unguarded saw."

"(6) Was it practicable to safeguard said saw in question at the point where plaintiff was injured? Ans. Yes."

"(8) Could plaintiff have shifted the belt running on the two cone pulleys underneath the table while the machine was stopped? Ans. No."

[1] Defendant's chief grounds of appeal and errors assigned will be noted in order. It was not error to overrule defendant's demurrer to the evidence, nor was there any material variance between the pleading and the proof. Civ. Code, § 134 (Gen. St. 1909, § 5727). It is true that one of the grounds of plaintiff's first cause of action was the defendant's failure to furnish some suitable device for shifting the belt, and this allegation was not sustained by the evidence and was resolved for defendant by the jury's special findings. But the first cause of action also alleged:

"That defendant was negligent in failing to have said circular saw and each and every part thereof properly and safely guarded so that the said plaintiff in working in and about the same and operating said saw could not come in contact with said saw and be injured thereby."

The evidence was sufficient to support that allegation, and the jury so found. The other alleged negligence may be treated as superfluous and immaterial. It did not prejudice the defendant.

[2] No purpose would be served by reviewing again the question whether a railroad company which employs many workmen in its car shops is amenable to the Factory Act of 1903. That has already been fully determined. Bubb, Adm'x, v. Railway Co., 89 Kan. 303, 131 Pac. 575; Slater v. Railway Co., 91 Kan. 226, 137 Pac. 943. Of course, a railroad company, in its transportation business, is likewise governed by the Common Carrier's Liability Act of 1911 (chapter 239), and by a good many other acts as well. But the car repair shop of a railroad is a factory, and in the operation of it the railroad company is as much bound by the Factory Act (section 7) as it would be if that were its only corporate business and it were not engaged in the transportation business

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at all. Many modern railroads maintain hotels for the convenience of their patrons, but it would hardly be contended that in the conduct of their hotels they are not amenable to the laws pertaining to hotels and innkeepers for the safety of guests. The evidence and jury's finding dispose of the contention that no violation of the Factory Act was proven.

"All * * * saws * * * used in a manufacturing establishment shall, where practicable, be properly and safely guarded, for the purpose of preventing or avoiding the death of or injury to the persons employed or laboring in any such establishment." Factory Act (Laws 1903, c. 356) § 4; Gen. Stat. 1909, § 4679.

[3] Complaint is made that the trial court shut out evidence proffered by defendant that the state factory inspector had visited the defendant's shops shortly before plaintiff's accident, and that he had inspected the machine and made no objection to it; and that the other planing mills and sawmills using circular saws in Wichita did not guard the saw blades beneath the tables on which they were operated. Testimony to that effect was excluded, and properly so. The plaintiff's right to recover in no way depended upon what the factory inspector's opinion was touching the defendant's compliance with its duty to guard or screen all dangerous machinery, where practicable, for the safety of its workmen. We hardly think it important as affecting this lawsuit that other circular saws in other Wichita factories were unscreened and unguarded, although it is to be hoped that plaintiff's accident—not to mention the damages assessed against this defendant—has prompted a reformation in that respect.

[4, 5] Certain instructions of the trial court are criticized. The court told the jury, in substance, that the Factory Act had changed the old rules of evidence as to the burden of proof, and that it was unnecessary for plaintiff to prove in the first instance that it was practical to place a safeguard about the saw, and that it was for the defendant to prove that such safeguard was impractical. These instructions are in harmony with what this court said in Caspar v. Lewin, 82 Kan. 604, 109 Pac. 657, 49 L. R. A. (N. S.) 526:

"Under the statute the plaintiff was not required to go further and offer proof in the first instance that it was practicable to guard the shafting. The Legislature was evidently moved by the fact that very often an injured employé is not competent to demonstrate the practicability of providing safeguards, and may not be able to command the expert evidence necessary to do so. The accident may have wrecked the machine, or the factory owner may remove it or deny him access to it. When the employé is killed, or witnesses are killed, the way to recovery is still further embarrassed. On the other hand, the factory owner always possesses the ability to show that additions in the direction of safety would destroy the efficiency of the appliance causing the injury, or would otherwise be impracticable." 82 Kan. 635, 636, 109 Pac. 668 (49 L. R. A. [N. S.] 526).

Counsel for defendant urge us to qualify the doctrine thus quoted. This we cannot do. Moreover, in this case, elaborate photographs of the machine which injured the plaintiff have been submitted to us, and from an inspection of them we could hardly have more hesitancy than did the jury in finding that it was altogether practical to place a screen or other safeguard between the cone pulleys and the saw which injured the plaintiff.

Other errors assigned have been considered, but none of them are of sufficient consequence for any comment nor to affect the result of this review.

[6] We come now to the only question which presents any difficulty in this case. It is urged that the verdict and judgment for $8,000 for the injuries to plaintiff's hand are excessive. We are constrained to hold that this contention is meritorious. While it is true that no amount of monetary award will adequately compensate a person for a permanent physical injury to his body or any of its members, yet in this workaday world where such accidents do happen, it is the only reparation possible; and the law, the courts, and the public have striven to find a fair and approximate monetary measure for human injuries, basing their estimates partly upon many prior similar awards, partly and perhaps unjustly upon the financial ability of the party against whom the award is assessed, partly upon the loss of time and earning power occasioned to the injured party. It would be impossible to recount all the factors which enter into the common and general notions of what is fair and just as a basis to measure the damages for personal injuries. There can be no absolute standard to measure such damages, and a wide latitude of discretion is necessarily left to the good sense and discretion of the jury which fixes the award. The most courageous and practical attempts to measure damages for personal injuries are the Workmen's Compensation Acts. These acts originated in Germany and Great Britain, and in modified adaptations to local conditions have been enacted in this country and in many of the states. Our own act (Laws 1911, c. 218, and Laws 1913, c. 216), which provides a system and measure of monetary awards to be paid by employers for injuries sustained by their workmen, is based chiefly upon the theory that these sums will be paid without cavil, lawsuit, or other expense to the injured workmen. Naturally the awards should be higher where their payment is uncertain, or where contested or delayed. If the plaintiff and his employer, the defendant railroad company, had elected to come under the Kansas Workmen's Compensation Act the award could not have been in excess of 50 per cent. of his preceding average weekly wages for 8 years. This would not amount to more than $2,802.24. Of course, the compensation act is in no way controlling in this case, but the illus-

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tration drawn from its provisions gives some light on defendant's grievance. Counsel for plaintiff would justify the amount of the judgment by computing the life expectancy of the plaintiff, a healthy man, aged 37 years when he was injured, at 30 years, which would be 9,390 working days, at 64 cents per day, which is the difference between his present daily earnings and those before his injuries. This would amount to $6,009.60. The same computation, taking a 25 years' expectancy, would produce $5,009.60. One difficulty with such basis, however, is the questionable assumption that plaintiff's earning capacity would continue throughout his entire life expectancy the same as in the health and vigor of his prime. That could not be. Space and time will not permit us to extend this discussion.

It is with much reluctance that we disturb the amount of the judgment, but after making every fair allowance for difference of opinion we are impelled to hold that the award is at least $3,000 too much; and the case will be remanded to the district court, with instructions to give the plaintiff the option of a modified judgment fixing his damages at $5,000, with the alternative that a new trial be granted. All the Justices concurring.

(98 Kan. 705)

ROBERTS v. MISSOURI, K. & T. RY. CO.

(No. 19640.)

(Supreme Court of Kansas. Oct. 7, 1916. Rehearing Denied Nov. 10, 1916.)

(Syllabus by the Court.)

NEGLIGENCE ⊂=142—VERDICT—SPECIAL FINDINGS—OPERATION AND EFFECT.

Where a recovery is sought by reason of several negligent acts of the defendant and the jury in answer to a special question finds that the negligence upon which they base their verdict is a certain single act of the defendant, the finding, in effect, acquits the defendant of every charge of negligence alleged in the petition or mentioned in the evidence, except the one specifically designated in the finding.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 400–403; Dec. Dig. ⊂=142.]

Appeal from District Court, Labette County.

Action by J. M. Roberts against the Missouri, Kansas & Texas Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

John Madden and C. E. Cooper, both of Parsons, for appellant. W. W. Brown, James W. Reid, and E. L. Burton, all of Parsons, for appellee.

JOHNSTON, C. J. This is a suit to recover for personal injuries sustained by J. M. Roberts while working in one of the shops of the Missouri, Kansas & Texas Railway Company.

In fitting or rolling the flues of boilers an air motor is used. One of the motors used by the defendant was attached by chains to a piece of pipe or flue which was placed about 7 feet high on ladders or horses near the boiler on which the plaintiff was working. It was attached so as to give the motor some play, and that it might be moved back and forth from flue to flue as the occasion required. To enable the workman to handle the motor a platform was made about 2½ feet above the floor of planks, supported on wooden horses. While the plaintiff was standing on this platform operating the motor, the flue or crossbar from which the motor was suspended broke, the motor fell on the platform, and the plaintiff was thrown astride of one of the wooden horses and injured. In his petition he alleged that he was inexperienced in such work, and that the defendant knowing of his inexperience, was negligent in failing to instruct him and to provide for his safety. He charged, too, that the defendant was negligent in failing to furnish proper chains and appliances for attaching the motor to the crossbar or flue. It was also charged that the defendant negligently provided a defective flue for the support of the motor, in that the flue had become crystallized and weak, that the defendant knew, or should have known, of its condition, and was therefore responsible for the break and the resulting injury. On the trial the jury returned a general verdict in favor of the plaintiff, but in answer to special questions stated that they based the verdict alone upon the negligence of the defendant in providing a defective flue. As to the defect in the flue the jury found it was latent, and that it was due to crystallization of the metal, which could not be discovered by an ordinary inspection. On these findings the trial court rightly set aside the general verdict and gave judgment for the defendant. It appears to be conceded that as the case stands the defendant cannot be held liable because of the defect in the flue or crossbar. It is contended, however, that as other grounds of negligence were alleged by the plaintiff and a general verdict was returned in his favor, we should presume that these were established and furnish a basis for the verdict. The contrary of this contention is the rule. Such a finding, in effect, acquits the defendant of every charge of negligence stated in the petition or mentioned in the evidence, except the one specifically designated in the finding. Sugar Co. v. Riley, 50 Kan. 401, 31 Pac. 1090, 34 Am. St. Rep. 123; Hayden v. Railway Co., 87 Kan. 438, 124 Pac. 165; Tecza v. Sulzberger & Sons Co., 92 Kan. 97, 140 Pac. 105; Adams v. Railway Co., 93 Kan. 475, 144 Pac. 999.

It is said that a judgment against the plaintiff should not have been given, because the special findings did not cover all the facts in the case. The findings made were

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based on ultimate and controlling facts which necessarily overthrew the general verdict. The only basis for the verdict or for a recovery by the plaintiff is that the injury suffered by the plaintiff was the result of the defendant's negligence. Since the findings of the jury absolved the defendant from the charge of negligence or of responsibility for the plaintiff's injury, they necessarily compel a judgment in its favor.

It would be idle to consider the minor issues in the case as the findings made preclude a recovery against the defendant for the injury. It is said that the evidence did not justify the findings made, but the sufficiency of the evidence was not raised by the plaintiff before the trial court, and is not available on this appeal.

The judgment is affirmed. All the Justices concurring.

(98 Kan. 757)

STATE v. BAUMAN. (No. 20375.)

(Supreme Court of Kansas. Oct. 7, 1916. Rehearing Denied Nov. 10, 1916.)

(Syllabus by the Court.)

CRIMINAL LAW ⇐1167(1)—HARMLESS ERROR—INFORMATION—REQUISITES.

The amended information while omitting the expression "without the assent of his employer" (first part of section 88 of the Crimes Act [General Statutes of 1909, § 2578]), also the words "unlawfully, feloniously and willfully," charged that the defendant, being the agent, employé, clerk, and servant of C., and "after having received the said sum of $47.56 as such agent, employé and servant of the said * * * and did then and there make away with, secrete, embezzle and convert to his own use the said sum of $47.56, so coming into his possession as aforesaid; contrary to the form of the statutes. * * *" The defendant was convicted of a misdemeanor only. *Held*, that in view of the natural meaning of the language used the defendant was not materially prejudiced by the omissions complained of.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3101; Dec. Dig. ⇐1167(1).]

Johnston, C. J., and Porter, J., dissenting.

Appeal from District Court, Shawnee County.

Henry Bauman was convicted of embezzlement, and appeals. Affirmed.

Hazen & Page, of Topeka, for appellant. S. M. Brewster, Atty. Gen., and W. E. Atchison and Robt. D. Garver, both of Topeka, for the State.

WEST, J. The defendant was charged with embezzling sums amounting to $47.56, and was convicted of embezzling an amount less than $20. A motion to quash was overruled. A motion to elect between the first and last parts of section 88 of the Crimes Act (Gen. Stat. 1909, § 2578) was sustained, the state standing upon the first part of such section. The information was then amended and refiled, certain parts thereof being ordered stricken out by the court. Another motion to quash was overruled, likewise a motion to discharge the defendant. A motion to direct a verdict of acquittal and another to arrest the judgment were likewise denied.

The points presented by the appeal are that the information thus affected omitted the words "unlawfully, feloniously, and willfully," and the expression "without the assent of his employer," or its equivalent. It is conceded by the state that the first expression was inadvertently ordered out, and it is claimed that the omission of the allegation that the embezzlement was without the permission of the defendant's employer was rendered harmless by other language remaining in the charge, and it is suggested that the defendant having induced the court to strike certain language from the information should not be heard to take advantage of the remainder thereof as insufficient. It is further suggested that nothing was really stricken from the information, but certain words indicated by pencil marks were merely ordered to be stricken out, and that at any rate no serious harm was done in view of the minor offense of which the defendant was convicted.

It is to be regretted that any criminal case should be tried upon an information bearing the facial appearance of the disfigured original which is brought up for our examination. It is so difficult to see how the crime of embezzlement can be committed without being unlawful and willful, and if involving more than $20 also felonious, that we do not deem the omission of these adjectives either fatal or seriously material under the circumstances now presented.

The other matter is not so easy. Section 88, c. 31, of the General Statutes of 1909 makes it an essential ingredient of the crime that the embezzlement or the conversion to the use of the agent, clerk, or employé must be "without the assent of his employer," and while it might seem anomalous, if not absurd, to suggest that such a thing as embezzlement with the consent of the employer could be possible, still the Legislature has so worded this section that it was said in State v. Yelter, 54 Kan. 277, 283, 38 Pac. 320:

"The defendant can be held criminally liable only for the money or property of the firm which he embezzled or converted to his own use without the assent of the firm." Page 283 of 54 Kan., page 322 of 38 Pac.

While strictly speaking embezzlement negatives the idea of consent, this is because the very word implies and includes a wrong or fraud against the owner of the fund. But to take, make way with, secrete, or convert to his own use money in his hands would not necessarily render an agent criminally liable unless the assent of the owner were wanting. And when to these statutory terms is added the other of "embezzled" then the entire charge of necessity implies a lack of assent. State v. Combs, 47 Kan. 136, 139, 27

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Pac. 818; State v. Patterson, 66 Kan. 447, 449, 71 Pac. 860.

The rule that the language of the statute substantially followed is sufficient in an information is too familiar to require citations.

The defendant was convicted of a misdemeanor only, and the majority of the court hold that he was not materially prejudiced by the omission of the express allegation that his acts were without the assent of his employer, as the language used bears substantially the same significance.

The judgment is therefore affirmed.

BURCH, MASON, MARSHALL, and DAWSON, JJ., concurring. JOHNSTON, C. J., and PORTER, J., dissenting.

(99 Kan. 8)

BIG FOUR IMPLEMENT CO. (TOWNLEY METAL HARDWARE CO. et al., Interveners) v. KEYSER et al. (SIEMERS et al., Interveners). (No. 19958.)

(Supreme Court of Kansas. Nov. 11, 1916. Rehearing Denied Dec. 19, 1916.)

(Syllabus by the Court.)

1. PARTNERSHIP ⇐243—DEATH OF PARTNER—SETTLEMENT.

While death works a dissolution of a partnership, the community of interest subsists for some purposes long enough to enable the survivors to wind up and settle the affairs of the partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 509, 510, 512, 513; Dec. Dig. ⇐ 243.]

2. PARTNERSHIP ⇐245(3)—DEATH OF PARTNER—ADMINISTRATION OF ESTATE.

A surviving partner who undertakes to wind up the business of the firm is required to do so within a reasonable time and in the way most advantageous to those interested in the estate, and, after paying the debts and the expenses of closing the business, to distribute the assets among the surviving partners and the representative of the deceased partner.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 515; Dec. Dig. ⇐245(3).]

3. PARTNERSHIP ⇐244—DEATH OF PARTNER—ADMINISTRATION OF ESTATE.

The surviving partner is vested with some discretion as to the manner of winding up the business and the time to be taken for that purpose.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 511; Dec. Dig. ⇐244.]

4. PARTNERSHIP ⇐248—DEATH OF PARTNER—ADMINISTRATION OF ESTATE.

A sale of the goods and assets of the partnership may be made in bulk or in the usual course of trade, whichever may be the most advantageous to the interested parties, and if sold at retail some goods may be added to the stock in order to make it more salable and to facilitate the advantageous disposition of the whole; and when this is done in good faith the estate will be liable for the goods purchased as well as the expenses of winding up the business.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 549; Dec. Dig. ⇐248.]

5. PARTNERSHIP ⇐255(1) — DEATH OF PARTNER—ADMINISTRATION OF ESTATE.

When the business is continued by the surviving partner longer than is necessary with the consent of the interested parties, including the representative of the deceased partner, creditors who contributed to the stock and assets of the estate are entitled to payment of their claims in preference to any of the surviving partners or the representative of the deceased partner.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 552, 555–558, 561; Dec. Dig. ⇐ 255(1).]

Appeal from District Court, Clay County.

Action by the Big Four Implement Company against Maggie Keyser and others, in which G. A. Siemers and others intervened. From a judgment for plaintiff and interveners, the Townley Metal Hardware Company and others, defendants and interveners G. A. Siemers and others appeal. Modified and affirmed.

F. L. Williams, J. L. Hogin, C. Vincent Jones, R. C. Miller, and F. B. Dawes, all of Clay Center, for appellants. Pulsifer & Hunt, of Concordia, and Hy. W. Stackpole and W. T. Roche, both of Clay Center, for appellees.

JOHNSTON, C. J. This was an action by creditors to subject a fund to which they had contributed to the payment of their claims.

J. F. Keyser and his sons, W. D. and W. O. Keyser, were engaged in the hardware business at Wakefield. On July 22, 1911, J. F. Keyser died leaving as his only heirs his widow, Maggie Keyser, the two sons mentioned, and two daughters who had not yet reached majority. On August 5, 1911, the widow was appointed administratrix of the estate and on August 28, 1911, W. D. Keyser qualified as surviving partner, giving bond with G. A. Siemers and D. H. Faulkner as sureties. The property of the deceased consisted of little more than his interest in the partnership business. W. D. Keyser had put into the business about $700, and W. O. Keyser had contributed nothing except his services in carrying on the business for which wages were paid. The invoice of the stock of goods, taken after the death of J. F. Keyser, showed that there were goods on hand of the value of $8,342.22, cash $1,378.03, notes aggregating $1,173.50, and open accounts due the firm $1,876.56. The entire stock and assets of the firm amount to $12,770.31. The firm was then indebted to the extent of $6,072.44. Some time after W. D. Keyser took charge of the stock he paid off this indebtedness, but instead of selling the stock in bulk he conducted the business substantially as it had been done prior to the death of his father, and his brother, W. O. Keyser, continued to assist in carrying on the business as he had formerly done. Some new goods were purchased from time to time to take the place of those that were sold, and in transacting the business checks and other docu-

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ments were signed sometimes in the old firm name and sometimes as Keyser & Sons. Mrs. Keyser and her daughter, as well as the families of both sons, were supported from the proceeds of the store. In July, 1913, W. D. Keyser gave notice that he would make a settlement of the partnership estate, and did file what purported to be a final account of his administration; but shortly afterwards he disappeared, and settlement was not made. Mrs. Keyser, as administratrix of the estate of the deceased, also gave notice of a final settlement of the estate, which was not made. After the abandonment of the business by W. D. Keyser, Mrs. Keyser and her son W. O. Keyser executed an assignment of all the stock and assets of the firm to William Jevons as trustee for the creditors, and this instrument was signed by "W. O. Keyser," "Maggie Keyser" and "Keyser & Sons, by Maggie Keyser, a Member of Said Partnership." Under the assignment Jevons took possession of the store, sold goods, bought some new goods, and also collected outstanding accounts and paid debts. After he had been in possession of the property about two months the probate court directed the administratrix to take charge of the store and the assets of the estate, and thereupon Jevons surrendered possession of the goods and all of the assets of the business to her. An inventory was then made, and a little later a sale of the goods was effected, the proceeds from which, with the cash on hand and open accounts, amounted to $4,851.60. From this amount the administratrix was directed to make a payment of $513.20 (but whether it was upon claims or fees is not disclosed), leaving a balance of $4,348.40. She was about to distribute this balance among the heirs of the deceased when this action was brought.

G. A. Siemers and D. H. Faulkner intervened in the action, claiming the rights of creditors. The surviving partner had induced them to sign a note with Keyser & Sons upon the representation that he desired to pay off the claims of the minor heirs. Instead of doing that, it is alleged that the surviving partner placed the money obtained upon the note in his banking account and drew it out from time to time in carrying on the hardware business. The Wakefield Bank, in which the $1,500 was deposited, and from which it was drawn, also intervened with a view of obtaining an allowance for the same claim.

Upon the testimony the court, after allowing the claims of the creditors, held that the fund derived from the sale of the goods should be subjected to the payment of the creditors, and a receiver was appointed to make distribution. The claims of Siemers and Faulkner as well as that of the bank of Wakefield were denied; and these interveners and the Keysers appeal from the judgment rendered.

[1] It is contended that the surviving partner and those associated with him could not bind the estate for the goods purchased and the liabilities created after the death of J. F. Keyser. It is true as the defendants contend that death works a dissolution of the partnership but the community of interest subsists in a way for the time necessary to wind up the partnership business. In Story on Partnership (7th Ed.) § 344, it is said:

"Although as to future dealings the partnership is determined by the death of one partner, yet for some purposes it may be said to subsist, and the rights, duties, powers, and authorities of the survivors remain, so far as is necessary to enable them to wind up and settle the affairs of the partnership."

[2, 3] The settlement of the partnership estate devolves primarily on the surviving partner where he elects to undertake it, and, if he does not, then upon the administratrix of the estate. Gen. Stat. 1909, § 3467. It was the duty of the surviving partner, who assumed the task in this case, to wind up the business within a reasonable time and in the way most advantageous to those interested in the estate, and, after paying the debts and the expenses of winding up the business, to distribute the assets among the surviving partners and the representative of the deceased partner. The surviving partner is vested with some discretion as to the manner of closing the business and the time to be taken for that purpose. He may continue the business long enough to close it up without sacrificing the assets and long enough to make an advantageous disposition of the stock. Frey v. Eisenhardt, 116 Mich. 160, 74 N. W. 501. The statute contemplates that considerable time may be necessary, as the bond required of the surviving partner provides that the partnership business shall be wound up and the debts paid and the surplus fund distributed within two years unless a longer time is allowed by the court. Gen. Stat. 1909, § 3468.

[4] In some cases a bulk sale of merchandise may be the better method, while in others a sale of the goods in the usual course of trade may be to the advantage of the interested parties. In the latter case some articles may be purchased and added to the stock in order to make it more salable and to facilitate an advantageous disposition of the whole. When this is done in good faith the goods purchased as well as the reasonable expenses incurred in carrying on and winding up the business may be paid from the funds derived from the sale. Central Trust & Safe Deposit Co., etc., v. Respass, 112 Ky. 606, 66 S. W. 421, 56 L. R. A. 479, 99 Am. St. Rep. 317; Calvert v. Miller, 94 N. Car. 600; Hoyt v. Sprague, 103 U. S. 613, 26 L. Ed. 585.

[5] The surviving partner is not warranted in unduly prolonging the business of the partnership, and if it be continued lon-

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ger than necessary the representative of the deceased partner may obtain a remedy by applying to the court to secure a closing up of the estate and a distribution of the funds derived from it. In this instance the business was continued a long time, probably longer than was necessary to pay the debts and close up the partnership business. In speaking of a surviving partner it has been said:

"It is his duty to collect the claims as far as possible, to pay off the debts, to sell out the stock of goods to the best advantage; and, while he may continue the business for a short time, in disposing of the stock on hand, yet he is not authorized, without the consent of the representative of the deceased partner, to continue the firm business indefinitely, nor to embark in new enterprises." Didlake, Administratrix, v. Roden Grocery Co. et al., 160 Ala. 484, 489, 49 South. 384, 385 (22 L. R. A. [N. S.] 907, 18 Ann. Cas. 430).

Here the business was continued with the acquiescence and co-operation not only of the surviving partners, but also of the widow, who was the legal representative of the deceased partner. The length of time necessary to wind up the partnership affairs in the way most conducive to the interest of all is not shown in the record. It was continued for some considerable time after the debts which were due when J. F. Keyser died had been paid. In one sense a new partnership was established which included all the interested parties. In buying goods and in transacting business it appears that the name of the old firm was used part of the time, and some of the time the name of Keyser & Sons was employed, and the widow in executing the trust deed mentioned signed the name of Keyser & Sons and designated herself as a member of the partnership. Whether it be treated as an undue continuance of the business by the surviving partner or as a new partnership, it is clear that the creditors whose goods and assets were put into the business and contributed to enlarge the fund are entitled to be paid from the fund in preference to any of the partners or the representative of the deceased partner. Since all the interested parties, including the representative of the estate of the deceased partner, were engaged in the business when the goods were added to the stock, it is only equitable to pay first the debts contracted in the operation of the business and which entered into and became a part of the fund that is to be distributed.

It appears that the two daughters of the deceased were minors when the debts in question were contracted, but their interests in the partnership estate were represented by their mother as administratrix, and, as we have seen, she participated in carrying on the business in which the indebtedness was incurred. If they have suffered any loss through improvident action or through improper administration, they can look to the bond given by the administratrix.

The interveners Siemers and Faulkner are also entitled to the status of creditors and to share in the fund. The note signed by them and for the payment of which they had been obliged to provide was cashed at the bank, and the proceeds of it used in the partnership business. While the surviving partner induced them to execute the note in order that the proceeds might be used to pay the claims of heirs, the testimony clearly shows that the money obtained on the note was used in carrying on the partnership business. They are therefore entitled to prorate with the other creditors in the fund which is the subject of controversy. These interveners instead of the bank are entitled to share in the fund, as the bank had previously taken the obligation of these parties in place of the original note.

The judgment will be modified so as to allow the interveners Siemers and Faulkner to share in the distribution of the fund with other creditors, and in all else the judgment is affirmed. All the Justices concurring.

(99 Kan. 261)

HOLLICKE v. MISSOURI PAC. RY. CO.

(No. 20405.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. CARRIERS ⟸94(5)—CARRIAGE OF GOODS—ACTION FOR FAILURE TO DELIVER—QUESTION FOR JURY.

In an action for damages for the failure of a carrier to deliver two boxes of goods, the evidence *held* sufficient to warrant submitting to the jury an issue whether two boxes short in one shipment were the same two found to be over in another.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 386, 387; Dec. Dig. ⟸94(5).]

2. CARRIERS ⟸94(3)—ACTION FOR FAILURE TO DELIVER—SUFFICIENCY OF EVIDENCE.

In such an action the only evidence as to the contents or value of the missing boxes was that of the plaintiff, who testified that one of them contained 192 suits of underwear, worth $83.87, and the other 63 men's suits, worth $12 each, or $756. Several witnesses testified that his reputation for veracity was bad. The jury returned a verdict for $300. *Held*, on appeal by the defendant, that the verdict must be set aside for lack of any evidence warranting a finding of that amount, because, if the jury disbelieved the only witness on the subject, they had no basis for determining how much he had exaggerated, or for forming an independent judgment as to the value of the goods.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 378–385; Dec. Dig. ⟸94(3).]

Appeal from District Court, Sedgwick County.

Action by J. F. Hollicke against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

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W. P. Waggener and J. M. Challiss, both of Atchison, J. C. Bentley, of Wichita, and A. E. Crane, of Atchison, for appellant. Kos Harris, V. Harris, and I. H. Stearns, all of Wichita, for appellee.

MASON, J. J. F. Hollicke sued the Missouri Pacific Railway Company for its failure to deliver 2 boxes of goods out of a shipment of 19, made from Bison to Sedgwick. He recovered a judgment, from which the defendant appeals.

[1] 1. The failure to deliver the two boxes at Sedgwick was admitted, but the company maintains that they were delivered at Wichita, together with a shipment of 6 other boxes made by the plaintiff to that point from Bison at the same time. That 8 boxes were delivered at Wichita seems established, but the plaintiff insists that the 2 extra boxes must have been from some other shipment, and that at all events they could not have been the 2 boxes missing from the Sedgwick consignment, one of which contained men's suits, and the other underwear, while those delivered at Wichita contained shoes. The jury obviously accepted this theory. The defendant maintains that there was no evidence to support it. There was testimony tending to show that all the boxes bore labels showing their contents, that the missing boxes were larger than those containing shoes, that the extra boxes delivered at Wichita did not correspond to them in size, and that the persons who probably unpacked the boxes at Wichita did not remember that any of them contained underwear or men's suits. The evidence on this phase of the matter was very far from convincing, but is held to have been sufficient to warrant submitting the issue to the jury.

[2] 2. The plaintiff testified that one box contained underwear, worth $83.87, and the other 63 men's suits, worth $12 each. There was no other evidence as to the value of the contents, but a number of witnesses testified that the plaintiff's reputation for veracity was bad. The verdict and judgment were for $300. The defendant asks a reversal on the ground that there was no evidence whatever to support a finding of this amount. The rule is familiar that the party against whom a judgment is rendered may contest it on the ground that it is not supported by any evidence, although conceding that the evidence would have warranted a judgment for a larger amount. Hart v. Gerretson Co., 91 Kan. 569, 138 Pac. 595, and cases there cited; Smith v. Hanson, 93 Kan. 284, 144 Pac. 226. In support of the verdict it is contended that the jury, while believing that the railway company had failed to deliver the two boxes, may reasonably have concluded that the plaintiff had overstated the quantity of goods they contained (there having been some difference in the testimony as to their size), or that the plaintiff, whose veracity the evidence tended to impeach, had exaggerated their value. A jury, of course, may believe a part of the testimony of a witness and reject the rest; and a finding of value may be upheld, although no witness may have testified to the particular amount found. Here, however, all that was stated concerning the goods was the number of suits and the value of each, nothing being said as to their character, quality, or condition, although it is suggested that, as they were shipped from one store to another, they may be presumed to have been somewhat shelfworn. The court is of the opinion that, if the jury disbelieved the testimony of the plaintiff as to the value of the goods, there was nothing in the evidence that enabled them to make an intelligent estimate as to the reduction that should be made from his figures on account of his disposition to exaggerate, or to make an independent appraisement, and therefore that the verdict is unsupported by the evidence, and should be set aside.

The judgment is reversed, and the cause remanded for a new trial. All the Justices concurring.

(99 Kan. 332)

GIDEON v. GIDEON et al. (No. 20462.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

DEEDS ⇐⇒67, 108—DELIVERY—CONSTRUCTION.

The rule is followed that, when a grantor executes a deed and unconditionally delivers it to a third party for the benefit of the grantee, intending to divest title and to part with all control over the instrument, such deed passes title, and that, when the instrument provides that it shall not take effect until the death of the grantor, this will ordinarily be construed to mean that the title vests at once, its enjoyment only to await the grantor's death, and the trial court's decision that the facts bring the case within such rule *held* proper.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 145–148, 294–308; Dec. Dig. ⇐⇒67, 108.]

Appeal from District Court, Sumner County.

Action by Oliver P. Gideon against Peter M. Gideon and Clara Gideon. Judgment for plaintiff, and defendants appeal. Affirmed.

L. H. Finney, of Wellington, for appellants. Foulke, Matson & Wall, of Wichita, and James Lawrence, of Wellington, for appellee.

WEST, J. Malinda C. Gideon executed eight deeds, covering 80 acres of land each to six of her daughters and two tracts of 40 acres each to her two sons, Oliver and Peter. She left these deeds with her attorney with this writing:

"Eight deeds to my children of all my real estate have been this day executed by me and turned over and placed in the possession of W. T. McBride of Wellington, Kansas, to be by him turned over to the children whose names appear as grantees in the deeds respectively. The delivery of the deeds to Mr. McBride is for the said grantees, respectively, but I desire to re-

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tain possession and control of the land and to receive the income and profits thereof during my life, and the deeds are not to be turned over to the children until after my death."

The deeds were placed in an envelope and left with Judge McBride, the envelope being marked:

"Deeds of Malinda C. Gideon to her children, left with Mr. W. T. McBride, to be turned over to the children at her death. Deeds placed in this envelope and sealed in her presence this 18th June, 1910. W. T. McBride."

The daughters at different times secured the actual delivery and possession of their deeds, and Mrs. Gideon took back the deeds to the sons from Judge McBride, and made a new one to the defendant, Peter Gideon, for the entire 80 acres, which she delivered in person, and which was recorded; the defendant giving back a life lease. At this time the plaintiff did not know that any deed to him had been made.

The plaintiff claims under the original deed to the 40 acres; his theory being that the delivery to Judge McBride was a delivery to him, and that the grantor had no right thereafter to withdraw the conveyance and disregard it. It is suggested that, as the plaintiff did not know of the deed, he cannot be held to have accepted it; but the rule that one is presumed to accept a conveyance for his benefit, so strongly announced in Wuester v. Folin, 60 Kan. 334, 56 Pac. 490, is sufficient on this point. It is the rule in this state that, when a grantor executes a deed and unconditionally delivers it to a third party for the benefit of the grantee, intending to divest the title and to part with all control over the instrument, such deed passes title. 60 Kan. 334. In Nolan v. Otney, 75 Kan. 311, 89 Pac. 690, 9 L. R. A. (N. S.) 317, it was held that, when the instrument provides that it shall not take effect until the death of the grantor, this will ordinarily be construed to mean that the title vests at once, its enjoyment only to await the grantor's death, and that this result is not avoided by prescribing that the custodian hold the instrument until certain conditions are complied with by the grantee. Various applications of these principles are found in the following decisions and cases cited therein: Brady v. Fuller, 78 Kan. 448, 96 Pac. 854; Doty v. Barker, 78 Kan. 636, 97 Pac. 964; Zeitlow v. Zeitlow, 84 Kan. 713, 115 Pac. 573; Ross v. Perkins, 93 Kan. 579, 144 Pac. 1004; Stumpff v. Kaechler, 95 Kan. 106, 147 Pac. 821; Rust v. Rutherford, 95 Kan. 152, 147 Pac. 805; Withers v. Barnes, 95 Kan. 798, 149 Pac. 691; Elliott v. Hoffhine, 97 Kan. 26, 154 Pac. 225; Bruce v. Mathewson, 97 Kan. 466, 155 Pac. 787.

While it appears that the grantor did take back the deeds from the custodian, and while she testified, "when I gave the deeds to McBride I still thought it was my land, * * *" she also testified that she did not intend to change the conveyance to Oliver. "I intended, when I gave the deeds to Judge McBride, that he take care of them and that Oliver was to have the land. * * * I intended that Judge McBride would hold them until my death. I intended that Judge McBride would deliver the deeds any time most. Why did you take out the Oliver deed when you deeded to Peter? A. It was a mistake. I don't remember about it. Did you ever intend to make such a transaction? A. No, sir; I didn't." The trial court, from all the evidence, found in favor of the plaintiff, and such conclusion finds fair support in the record, and is in accord with the authorities.

Other matters are discussed, which need not be considered; no material error being found therein, the pivotal point of the case being the question of delivery.

The judgment is affirmed. All the Justices concurring.

(99 Kan. 290)

GREENSTREET v. CHEATUM et al.

(No. 20433.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. CONTRACTS ⟸212(2) — CONSTRUCTION — PAYMENT—REASONABLE TIME.

If the existence of a debt is conditioned upon the happening of an event, it cannot become enforceable until the event happens, but if a promise is made which constitutes a present liability, and payment is postponed until the happening of an event which does not happen, the law requires payment to be made within a reasonable time.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 947–951; Dec. Dig. ⟸212(2).]

2. CONTRACTS ⟸212(2) — CONSTRUCTION — PERFORMANCE—REASONABLE TIME.

One person who had an interest in a residence transferred it to the other upon the agreement that the other would pay the former a certain sum of money, payment to be made when the residence could be sold for a stated price, which was about the actual value of the same. It was also agreed that the liability so fixed should constitute a lien upon the property. The residence was never sold, and about two years after the agreement was made the house was burned, and the obligor collected a substantial amount of insurance for which she had contracted and paid. Shortly afterwards she built another house, which cost only one-third of the insurance received, and which was worth much less than the one which was burned. In this condition it became improbable that the property could ever be sold for the price named in the agreement. *Held*, that liability was created when the agreement was made and the property transferred, that under the circumstances the debt became payable within a reasonable time, and that a reasonable time had elapsed when the action to enforce payment was begun.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 947–951; Dec. Dig. ⟸212(2).]

Appeal from District Court, Kingman County.

Action by A. R. Greenstreet against Ida B. Cheatum and husband. Judgment for plaintiff, and defendants appeal. Affirmed.

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Noble & Tincher, of Medicine Lodge, for appellants. Walter & Connaughton, of Kingman, for appellee.

JOHNSTON, C. J. This action was brought by A. R. Greenstreet against Ida B. Cheatum and her husband to foreclose a lien upon real estate created by the terms of a separation agreement.

The plaintiff and the defendant Ida B. Cheatum, who were formerly husband and wife, were divorced in March, 1912, in contemplation of which they had entered into the contract respecting a division of their property. By its terms the defendant was given all the household goods and personal property and also the property in controversy, which had been owned by the plaintiff and occupied by him and his wife as a home. This property was given, however, subject to the payment to the plaintiff of the sum of $1,450 due and payable as soon as the property could be sold for $3,800, and it was further stipulated that the $1,450 should be a lien upon the property the same as a real estate mortgage. In a subsequent suit a divorce was granted, the wife was awarded the custody of the minor children, and the plaintiff's lien, provided for in the separation agreement was ratified and confirmed. The decree recited that the $1,450 claim and lien should be "due and payable as soon as said real estate can be sold for the sum of $3,800, or when the same is sold for any sum," and provided that the lien should have the status of a real estate mortgage. The property at and after the time the contract was made was estimated to be worth $3,500; the house, a large two-story, thirteen-room residence, with bath and halls, representing about half that value. The defendant and her children lived in the house, and in November, 1912, she married her codefendant, Cheatum. In April, 1914, the house was destroyed by fire, and upon proof of loss the defendant received $2,100 in insurance, and thereafter erected a small six-room house valued at about $700. The lots upon which it was built were found to be worth about $1,800, and, with the small house erected thereon, the property was worth about $2,500. It was further found that in view of the present situation of the property and conditions existing in that locality there is little prospect that the property can ever be sold for the sum of $3,800. The court found that a present existing debt had been established, and that, as no definite time had been fixed for the payment of the debt, it became payable within a reasonable time, and that, as a reasonable time had elapsed for payment, a decree of foreclosure should be entered under which the mortgaged property should be sold to satisfy the plaintiff's lien. Judgment was accordingly given, and the defendants appeal.

[1] The defendants contend that the obligation of the plaintiff to pay the $1,450 was contingent upon the happening of the event named in the separation agreement and the decree of divorce, and that until it does happen no debt exists and no recovery can be had. If the existence of the debt is conditional upon the happening of a contingency, payment, of course, cannot be enforced until the contingency happens. On the contrary, if a debt was in fact created and an absolute liability arose, payment of which was to be made upon the happening of an event which does not happen, the law requires payment to be made within a reasonable time. The intention of the parties as evidenced by their agreement and the attending circumstances must determine whether the debt is contingent or absolute. The plaintiff and his wife, reaching the conclusion that they could no longer live together, agreed upon a division of their property and an assumption by each of certain liabilities. To the wife was given the household goods and personal property, and also the residence which has been mentioned, as her absolute property, for which she obligated herself to pay her husband $1,450, which was made a lien upon the residence. He was to pay two small claims, while she was to pay a lien on the property for $450. Both parties had an interest in the property divided, and it was their manifest purpose that each should have a share of it. As it was not subject to division in kind, it was agreed that she should take all the property and pay him in money $1,450. The property was transferred to her upon the consideration of her obligation to pay the sum of money, and when the property passed to her the indebtedness to him came into existence. It was stated in their agreement that the indebtedness should be treated the same as a real estate mortgage on the property, and that it should be collected the same as any other liability. It was evidently the purpose of the parties that the property would shortly be sold by her, and that $3,800 could be realized from it. Accordingly they fixed the event of the sale as the time when payment of the acknowledged liability should be made. Under the circumstances it is clear that an absolute liability of the wife was created when the property was transferred to her. The amount of the debt was not to depend on the selling price of the property, but was a fixed amount which was made a definite lien on the property. The promise made which she in her agreement calls a liability was fixed, and everything in the promise was definite except the time of payment. It certainly was not contemplated that if circumstances arose which prevented a sale of the property the debt should never be paid. Jones v. Eisler, 3 Kan. 134; Palmer v. Hummer, 10 Kan. 464, 15 Am. Rep. 353. The well-settled rule is that, if a debt in fact exists which has all the essentials except fixing a definite time of payment, or if pay-

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ment is made to depend upon a contingency which does not or cannot happen, the law requires payment to be made within a reasonable time.

In Benton v. Benton, 78 Kan. 366, 370, 371, 97 Pac. 378, 380, the obligor agreed to pay an acknowledged debt as soon as he could, and it was held that the obligation could not be regarded as a conditional one but as an actual liability which is payable within a reasonable time. It was there said:

"The mere admission of the debt is sufficient to establish an absolute legal liability, lacking only the element of maturity to make it available as a cause of action. It is entirely inconsistent with the spirit and purpose of the engagement to suppose for a moment that the parties contemplated that the avowed obligation should never be capable of enforcement, even to the extent of the obligor's ability to pay, unless he should become financially able to meet the entire obligation at once."

In Randall v. Johnson, 59 Miss. 317, 42 Am. Rep. 365, the court was considering a promise to pay a certain sum of money, procured to pay for the rigging of a vessel, within 90 days after the first return trip of the vessel, and it was held that the promise could be enforced although the vessel was lost at sea, and the debt was payable within a reasonable time; that is, in 90 days after the usual time required for a return trip.

In Williston v. Perkins, 51 Cal. 554, it was ruled that, where an agreement was made to pay for work done on a vessel when it was sold, the owner was entitled to a reasonable time to sell the vessel, and, if he failed to sell it within a reasonable time, the debt was enforceable.

In Crooker v. Holmes, 65 Me. 195, 20 Am. Rep. 687, the maker of a note had promised to pay when he sold his residence, and it was held that the debt was absolute, although the time of payment was indefinite.

In De Wolfe v. French, 51 Me. 420, the court held that, when a debt is due absolutely, and the happening of a future event is fixed as the time of payment, which future event does not happen as contemplated, the law implies a promise to pay within a reasonable time.

In Button v. Higgins, 5 Colo. App. 167, 38 Pac. 390, it was held that a person who promised to pay for services when some real estate was sold should be held to pay within a reasonable time.

In Nunez v. Dautel, 86 U. S. (19 Wall.) 560, 561, 562, 563 (22 L. Ed. 161) the court interpreted an obligation to pay a sum of money "as soon as the crop can be sold or the money raised from any other source," as an obligation to raise the money by one means or the other within a reasonable time, and that "it could not have been the intention of the parties that if the crop were destroyed, or from any other cause could never be sold, and the defendants could not procure the money from any other source, the debt should never be paid. Such a result would be a mockery of justice."

Noland v. Bull, 24 Or. 479, 33 Pac. 983, is quite like the case at bar. One who purchased a ranch for $2,000 gave the seller an obligation to pay him $500, the balance of the purchase price of the ranch, as soon as the purchaser could sell the ranch for not less than $2,500. The court held that the promise created an existing debt which the obligor was bound to pay, and that it should be treated as a promise to pay within a reasonable time whether the property was sold or not.

[2] The mortgage debt which the defendant assumed to pay became an actual liability when the property was transferred to her. The payment of the same was postponed to an indefinite time. The fact that a sale was not made for the sum named did not cancel the debt. Neither did the destruction of the house discharge the obligation or any part of it. It only demonstrated that the contingency named as the time of payment was unlikely ever to happen. When the defendant, instead of rebuilding the house from the $2,100 received as insurance, placed a small house upon the lots costing only $700, it became apparent that the property could not be sold for the price named. While the defendant was not required to reinvest the insurance money and restore the building as she might have done, her own act in erecting a cheap building on the premises made it reasonably certain that $3,800 could not be derived from its sale. Under the circumstances we think a reasonable time for payment had elapsed, and the court was justified in entering the judgment of foreclosure.

The judgment is affirmed. All the Justices concurring.

(99 Kan. 321)

SMALL v. SMALL et al. (No. 20455.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

DEEDS ⇐208(1)—DELIVERY—EVIDENCE.

The plaintiff's evidence considered, and *held* that a demurrer to it was properly sustained.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625, 630; Dec. Dig. ⇐208(1).]

Appeal from District Court, Doniphan County.

Action by Maude Dell Small against A. M. Small and others. Judgment for defendants, and plaintiff appeals. Affirmed.

A. Bowers, of St. Joseph, Mo., and C. W. Reeder, of Troy, for appellant. A. L. Perry and J. J. Baker, both of Troy, and S. M. Brewster, Atty. Gen., for appellees.

BURCH, J. The action was one to set aside three deeds of real estate. A demurrer was sustained to the plaintiff's evidence, and she appeals.

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On March 9, 1904, Bowen Small, the owner, executed and acknowledged a deed of the property, which is a farm of 160 acres, to his children and grandchildren. On September 25, 1910, he married the plaintiff. On December 2, 1910, he died intestate. At the time of his death he lived with his wife in a home which he owned in the city of Severance. After his death his estate was probated. His widow remarried, but was divorced from her last husband when the present action was commenced. In September, 1911, at the solicitation of an agent of the defendants, the plaintiff executed and delivered a deed quitclaiming her interest in the farm to the grantees in the Bowen Small deed. A second deed of the same tenor was executed and delivered by the plaintiff to correct a verbal inaccuracy in the first one. These deeds were promptly recorded. The deed of Bowen Small was not recorded until after his death. The action was brought in January, 1915.

The petition alleged that the deed of Bowen Small was void because it had not been delivered by the grantor. The plaintiff testified that Mace Small, a son of Bowen Small, had charge of the farm, farmed it, and paid rent to his father. She said that Mace Small told her, after his father's death, that he was giving his brother, Beattie Small, the rents. Bowen Small kept some stock on the farm and would go there two or three times a week. Sometimes the plaintiff would go with him. A week or so after Bowen Small's death Mace Small and Beattie Small came to the plaintiff's house to look for some papers they said they had to have. They did not say what papers. Twice afterwards they came on the same mission, and on one occasion said a paper was lacking which they could not find. They got papers each time, but the plaintiff did not know what the papers were. The deed in question was filed for record on December 8, 1910. It recited that the grantor was a widower, that it was made in consideration of one dollar and love and affection, and it was in form a warranty deed.

The foregoing evidence did no more than furnish a basis for speculation as to whether or not the deed was among the various papers taken from the decedent's home after his death. The missing paper may very well have been one necessary to the probate proceedings. Mace Small and Beattie Small were not called to testify on the subject. The register of deeds was not called to identify the person who filed the deed for record, and no attempt was made to trace possession of the instrument backward from presentation for registration. The notary public who took the acknowledgment was not called to tell what became of the deed after it passed under his seal. The evidence fails to give any account whatever of the instrument from the date of execution to the date of filing.

The circumstantial evidence touching the subject of proprietorship of the farm did no more than furnish a basis for conjecture. The belief is quite common that a deed delivered before death, but accompanied by some arrangement reserving beneficial use until death, is a better way of disposing of property than by will. The grantees of Bowen Small were his children and grandchildren, and the circumstances that the one who occupied and farmed the place paid rent, and permitted stock to be kept there, were insufficient to warrant the court in making a positive finding of nondelivery. There is no presumption of fraud or wrongdoing on the part of Mace Small, Beattie Small, or any one else, and the burden rested on the plaintiff to furnish substantial evidence to establish her charge that the deed had not been delivered in her husband's lifetime.

The petition alleged that Bowen Small married the plaintiff after making the deed, and that she had no knowledge of the fact that it had been made. The allegation does not amount to a charge of fraud upon the plaintiff's marital rights, and, if it did, there was no evidence to sustain it. There is no evidence that Bowen Small contemplated marriage or even knew the plaintiff when the deed was made. He discussed his financial resources with the plaintiff and enumerated some of them, but did not include the farm among them. He told her he had money in the bank and money loaned out to the children, that he was not wealthy, but that he had plenty to keep her as long as she lived. She said she knew he had a home, and that she had one. When pressed for an answer, she would not say she ever believed her husband owned the farm. Her strongest statement was, "I just thought it belonged to the Smalls."

Since the plaintiff failed to show sufficient cause for cancellation of the deed made before her marriage with Bowen Small, it is not necessary to discuss the evidence relating to the validity of the deeds obtained from the plaintiff to remove whatever shadow rested on the defendants' title because the deed from Bowen Small was not recorded until after his death.

The judgment of the district court is affirmed. All the Justices concurring.

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(99 Kan. 347)

ANDREWS v. UNION PAC. R. CO.

(No. 20475.)

(Supreme Court of Kansas. Dec. 9, 1916. Rehearing Denied Dec. 19, 1916.)

(Syllabus by the Court.)

1. COMMERCE ⇐33—INTERSTATE SHIPMENT—"INTERSTATE COMMERCE."

A shipment of grain from a point in Kansas consigned to a point in Missouri was sold by the consignee to a dealer for delivery in Kansas before it had reached the state line. It was subsequently taken across the state line and back again to an elevator in Kansas, where it was unloaded. *Held*, that the shipment constituted interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 81; Dec. Dig. ⇐33.

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. APPEAL AND ERROR ⇐1064(1)—INSTRUCTIONS—HARMLESS ERROR.

A recovery for the loss of property received for transportation in interstate commerce is provided for by a federal law which superseded state statutes on the subject, and must be based on that law, but an instruction of the court advising the jury that the recovery for the loss might rest on compliance with the terms of a state statute does not require a reversal of the judgment fixing the amount of the loss, since it appears that the erroneous instruction could not have prejudiced the substantial rights of the defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. ⇐1064(1); Trial, Cent. Dig. § 525.]

3. COMMERCE ⇐8—INTERSTATE SHIPMENT—ATTORNEY'S FEES.

The allowance of an attorney's fee in the action to recover the loss and for which provision is made in a state statute is unwarranted and invalid.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. ⇐8.]

Appeal from District Court, Wyandotte County.

Action by F. A. Andrews against the Union Pacific Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed in part, and reversed in part.

R. W. Blair, C. A. Magaw, and T. M. Lillard, all of Topeka, for appellant. A. J. Bolinger and Hal R. Lebrecht, both of Kansas City, Mo., and J. K. Cubbison, of Kansas City, Kan., for appellee.

JOHNSTON, C. J. F. A. Andrews brought this action against the Union Pacific Railroad Company to recover for the loss of a portion of a shipment of corn and for an attorney's fee.

On September 1, 1914, the plaintiff shipped from Rossville, Kan., 66,000 pounds of corn to a commission firm in Kansas City, Mo., the bill of lading reading in part as follows:

"Consigned to order of F. A. Andrews, destination Kansas City, Mo., county of ——, notify Watkins Grain Company at Kansas City, Mo.," etc.

The car arrived at the Union Pacific yards in Kansas City, Kan., on September 3d, and the grain company sold the corn to another firm to be delivered at an elevator in Rosedale, Kan., and ordered the defendant to transfer the car to that point. The defendant's record of this order is as follows:

"Kansas City, Mo., 9—3—1914.

"Received of Watkins Grain Company bill of lading and order for car 121,186. Ordered to Frisco. For Rosedale Elv. This order will be duly executed.

"[Stamp] Union Pacific Railroad:
"Received Sept. 8, 1914, Kansas City, Mo.
"F. D. Fox, Agent."

The car was therefore hauled across the state line into Missouri and transferred to the Frisco lines, over whose tracks it was hauled back again into Kansas to the elevator at Rosedale. The grain was there weighed, and the car was found to contain but 61,220 pounds, making a shortage of 4,780 pounds. On September 16, 1914, plaintiff's agent mailed to the defendant's agent at Kansas City, Mo., a claim for this loss, giving the value as $66, and again on March 8, 1915, he delivered to the agent at Rossville, Kan., a written notice that he had suffered a loss of $64.95, in which he made a demand for damages in the sum of $60 only, and stated that, if the same was not paid within 30 days, suit would be brought for its recovery, with a reasonable attorney's fee. This action was commenced on April 17, 1915. At the trial the court instructed the jury upon the theory that chapter 240 of the Laws of 1911 was the governing statute, and that before the plaintiff could recover for his loss he must prove that he had made a demand upon the defendant for payment of the amount claimed, 60 days prior to the commencement of the action. The verdict was in favor of the plaintiff, awarding him damages in the sum of $60, with an attorney's fee of $50, and in answer to special questions the jury stated that the demand for payment of the amount claimed was made upon defendant on or about September 16, 1914. Defendant appeals.

The statute which controls the disposition of the case depends upon the character of the shipment. If it is intrastate the Kansas statute governs, but if interstate it is controlled by the congressional act commonly designated as the Carmack Amendment. That the shipment in question was interstate there can be no doubt. The consignment was from a point in Kansas to a point in Missouri. The shipment was taken across the state line to the place of consignment in another state, but the car was subsequently returned to an elevator in Kansas and there unloaded. The fact that the car was brought back into Kansas and unloaded there did not take away the interstate character of the shipment, nor would the character of the shipment have been changed even if a delivery had been made before the car crossed the state line into Missouri.

[1] In Shipping Association v. Railway Co.,

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97 Kan. 235, 154 Pac. 1126, syl. par. 2, it was said:

"A shipment of goods consigned to a point in another state constitutes interstate commerce, notwithstanding an actual delivery is made before a state line is crossed."

Other cases to the same effect: Leibengood v. Railway Co., 83 Kan. 25, 109 Pac. 988, 28 L. R. A. (N. S.) 985; Horse & Mule Co. v. Railway Co., 95 Kan. 681, 149 Pac. 436; Enright v. Railway Co., 96 Kan. 546, 152 Pac. 629.

Congress having legislated upon the subject of interstate shipments of this character, neither of the state statutes relied upon by the plaintiff is available. Part 1, 34 U. S. Stat. at Large, c. 3591, p. 595, § 7, pars. 11, 12 (U. S. Comp. St. 1913, § 8592); Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257. The Legislature of Kansas, however, did not intend that chapter 240 of the Laws of 1911 should be applied to interstate shipments; as its application was expressly limited to "transportation from one point in this state to another point in this state." Neither can the action be based on section 7107 of the General Statutes of 1909, which provides for the recovery of an attorney's fee, since the subject is covered by the Carmack Amendment.

[2] The fact that the court submitted the case upon a statute not applicable and which required that a notice of the loss and a demand for payment should have been made 60 days prior to the beginning of the action will not preclude a recovery for the loss actually sustained. Under the federal law the defendant is liable for any loss, damage, or injury to property received by it for transportation. There was a loss of plaintiff's corn shipped over defendant's line, and the latter was given notice of the loss and a reasonable opportunity to pay it before the action was brought. It is true there was some confusion in the demands made by plaintiff upon the defendant. One was made on September 16, 1914, and in that the loss was fixed at 4,780 pounds, for which $66 was asked. Another was made on March 8, 1915, claiming a loss of 4,780 pounds of corn, and the amount claimed for it was $64.95, but the amount demanded was only $60, and this was the amount awarded by the jury. The quantity of corn for which claim was made was the same in each demand but there appears to have been doubt as to the value of the corn. In their special findings the jury stated that the demand was made on September 16, 1914, but this finding probably resulted from the instruction of the court, which submitted the case under the act of 1911. It is manifest that this error did not operate to the prejudice of the defendant. There could have been no doubt as to the quantity of corn that was lost, and very little as to its market price. The final demand was for $60, and ample time was given the defendant to pay the loss before the action was brought. Although the case was erroneously submitted under an inapplicable statute, we are satisfied that the error did not affect the substantial rights of the defendant, and the court is not warranted in reversing a judgment unless it affirmatively appears to have prejudiced the substantial rights of the complaining party. Civ. Code, § 581 (Gen. St. 1909, § 6176); Akin v. Davis, 11 Kan. 580; Woodman v. Davis, 32 Kan. 344, 4 Pac. 262; Ft. S., W. & W. R. Co. v. Karracker, 46 Kan. 511, 26 Pac. 1027; Sutter v. Harvester Co., 81 Kan. 452, 106 Pac. 29.

[3] As the federal law supersedes state statutes on the subject, and the recovery is based on that law instead of section 7107 of the General Statutes of 1909, which provides that an attorney's fee may be allowed in certain cases, the court was not warranted in awarding an attorney's fee. Even if the statute authorizing the allowance of an attorney's fee should be treated as general in its application, it could not be applied to recoveries under the federal statute. In recent decisions of the federal Supreme Court state regulations of this kind are held to be discriminatory and in conflict with the act of Congress regulating interstate commerce. Charleston & W. Car. R. R. v. Varnville Co., 237 U. S. 597, 35 Sup. Ct. 715, 59 L. Ed. 1137, Ann. Cas. 1916D, 333; Atchison & Santa Fé Ry. v. Vosburg, 238 U. S. 56, 35 Sup. Ct. 675, 59 L. Ed. 1199, L. R. A. 1915E, 953.

The judgment of the district court awarding the plaintiff damages in the sum of $60 will be affirmed, but it will be reversed as to the awarding of an attorney's fee. All the Justices concurring.

(99 Kan. 227)

In re OSBORNE'S ESTATE.*
OSBORNE v. OSBORNE. (No. 20339.)
(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. WILLS ⟸796—ELECTION—RIGHT OF WIDOW.

Where no rights have intervened, the probate court has jurisdiction to set aside the election of a widow to take under her husband's will, upon a showing that it was made under a misapprehension brought about by fraud or mistake, or by the omission of the court to make the explanation required by the statute.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2064–2068, 2070; Dec. Dig. ⟸796.]

2. WILLS ⟸796 — PROBATE — ELECTION TO TAKE THEREUNDER.

The evidence *held* to support findings to the effect that the election of a widow to take under her husband's will was made under such circumstances as to justify a judgment setting it aside.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2064–2068, 2070; Dec. Dig. ⟸796.]

Appeal from District Court, Douglas County.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied January 13, 1917.

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In the matter of the estate of William F. Osborne, deceased. Katie A. Osborne, widow, applied in the probate court to have her election to take under the will set aside and the application being denied, appealed to the district court. From a judgment setting aside the election, W. F. Osborne, Jr., executor, appeals. Affirmed.

Means & Rice, of Lawrence, for appellant. Ralph E. Page and C. M. Oakes, both of Ottawa, for appellee.

MASON, J. William F. Osborne died testate January 21, 1914. Six days later a record was made in the probate court, reciting the election of his widow, Katie A. Osborne, to take under the will. On March 9, 1914, she filed an application to have such election set aside because made under a misapprehension of her rights under the will, brought about through her not having been sufficiently advised in that regard. The probate court denied the application, and she appealed to the district court which found that her contentions were well founded, and that no rights had intervened, and set aside the election. The executor appeals.

[1] 1. A reversal is asked principally upon the ground that the probate court had no jurisdiction to set aside the election, and that the district court on appeal had no greater power. In support of this view it is argued that the duty of the probate court in connection with such an election is perfunctory; that its function is completed when it has explained to the widow her rights under the will and under the law; that it acts ministerially, placing upon the record whatever the widow directs, thereby exhausting its jurisdiction; that relief from an ill-advised election can be granted only by a court of equity. This view is perhaps unavoidable, if the probate court is conceived as a mere instrument to make an entry on the record at the direction of the person interested. But we think this is not an adequate conception of the part in the matter to be performed by the probate court. The election is required (save in exceptional cases) to be made personally in court, after an explanation of the legal effect of what is to be done. Gen. Stat. 1909, § 9819. The reception of the election has been held to be a judicial act which cannot be performed by a deputy clerk. Mellinger v. Mellinger, 73 Ohio St. 221, 227, 228, 76 N. E. 615. We regard the entry of the election on the minutes as essentially the record of a decision of the court; it involves an adjudication—an investigation and a finding of the fact that such a choice has actually been made by the widow, implying that she has not only expressed herself to that effect, but has done so understandingly, after the explanations required by the statute have been made. If she should express herself as electing to take under the will and the probate judge knew that such expression was due to her misapprehension of its provisions, through not having received the explanation required by the statute, he would, of course, not accept or record such expression as an election. If the situation were such that a full compliance with the law on his part would have advised him that she was under such a misapprehension, but from a neglect to follow the provisions of the statute he was not informed of it, and therefore made a record, showing an election at variance with her real desire, he would, through inadvertence, have made a finding contrary to the fact—an erroneous decision or judgment that she had elected to take under the will. A probate court is usually held to have the same power to correct its own errors as a court of general jurisdiction. 11 Cyc. 799; 1 Black on Judgments (2d Ed.) § 297; note, 90 Am. Dec. 136. Such is the rule in this state by statute, and the probate court may set aside one of its own orders for fraud or irregularity (Civ. Code, §§ 596, 605; Gen. St. 1909, §§ 6191, 6200), the provision relating to the latter ground covering the results of misapprehension or inadvertence on the part of the judge. Bank v. Ross, Ex'x, 90 Kan. 423, 133 Pac. 538.

In Ohio it has been held that the probate court has no power to set aside an election which it has received and recorded. Davis et al. v. Davis, 11 Ohio St. 386, 391. But the decision cited was explicitly put upon a narrow view of the power of that court, the opinion saying: "Its jurisdiction, in probate and testamentary matters even, is special and not general." In this state, in accordance with the usual rule, the probate court is regarded as being a court of general jurisdiction with respect to matters committed to it. Parnell v. Thompson, 81 Kan. 119, 132, 105 Pac. 502, 33 L. R. A. (N. S.) 658. Our statute enumerating the powers of the probate court is quite similar to that referred to and quoted from in the Davis Case, but this clause, not found in the Ohio act, was added to that of Kansas by amendment in 1868, "to have and exercise the jurisdiction and authority provided by law respecting executors and administrators, and the settlement of the estates of deceased persons." Gen. Stat. 1909, § 2473. In Jones v. Savings Association Co., 10 Ohio Cir. Dec. 41, 42, it was said of the facts in the Davis Case:

"Under such conditions, one might well suppose, at first blush, that the probate court had sufficiently acquired jurisdiction of the subject-matter to adjudicate upon the question of an alleged mistake as to the provisions of the will, upon part of the widow, and the effect thereof upon her rights, but the Supreme Court properly held otherwise."

In Railway v. Devine, 15 Ohio N. P. R. (N. S.) 56, 61, after citing the Davis Case and others of a similar tendency, the court quoted a passage from Woerner on the American Law of Administration, to the effect that the conferring of jurisdiction upon a

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particular subject-matter carries with it the right to decide collateral issues, and added:

"Since the promulgation of the above, the tendency has been to construe even more liberally, and reasonably and substantially widen the jurisdiction of the probate court to meet the exigencies arising in the administration of the duties of said court."

It then quoted from a later decision of the Ohio Supreme Court, and said:

"The foregoing unmistakably indicates a tendency to widen the jurisdiction of the probate court."

In Adams v. Adams, 39 Ala. 274, 603, 605, it was held that a widow's mistake in making her election could only be corrected in a court of general equitable jurisdiction, but the decision appears to have been affected by the fact that she had retained a benefit received under the will, and that therefore the probate court was "not clothed with the requisite power and machinery to do equity between the parties." In several cases courts not having general equitable jurisdiction have been held to be authorized to give relief against an election unadvisedly made. Evans' Appeal from Probate, 51 Conn. 435; In re McFarlin (Del. 1910) 9 Del. Ch. 430, 75 Atl. 281. See, also, State ex rel. Minn. L. & T. Co. v. Probate Court, 129 Minn. 442, 152 N. W. 845, L. R. A. 1915E, 815. While the probate court has no general equitable jurisdiction, in adjudicating matters within its cognizance, it may enforce the principles of equity. Holden v. Spier, 65 Kan. 412, 70 Pac. 348; 27 Am. & Eng. Encycl. of L. 553; 11 Cyc. 795. The fact that relief from elections influenced by fraud or mistake has usually been sought in the district court is not persuasive of a want of jurisdiction in the probate court. The broader powers of a court of equity make that a proper and sometimes a preferable forum for the determination of such a controversy, especially where it is or may be complicated with other matters, such as the restoration of a status that may have been changed in consequence of the election made. We conclude that the probate court had jurisdiction to set aside the election.

[2] 2. We also conclude, for reasons which will be briefly stated, that there was evidence to support the findings, conclusions, and judgment of the district court. The findings that the widow was not informed as to her rights under the will and under the law, and that the probate court did not explain to her the effect of the will, were supported by evidence (some of which was contradicted) tending to show these facts: The will left to the widow during her life, or her widowhood, the homestead and another piece of real estate, the title to go to the testator's three sons upon her death or remarriage. No other specific provision was made for her. Various personal bequests were followed by a clause, to the effect that all property not otherwise disposed of should be "divided according to the laws of the state." The testator had written an addition to the will (which, however, was ineffective for want of witnesses), undertaking to give his wife a half interest in the proceeds of the sale of a tract of land, subject to some minor legacies, the other half to go to the testator's sons. This was read to her at the same time as the will, by a banker in whose custody both documents had been left, and she supposed that it was a part of the will—did not know it from the will—did not understand the nature of a codicil. The probate judge knew nothing of the additional writing, which was not offered for probate. He did not read the will to the widow. He asked her if he should do so, and she said that it had already been read to her. He did not tell her what her rights would be under the will or under the law, beyond answering some questions she asked as to the sale of the home, and there was some conflict as to just what these answers were. We regard this evidence as justifying also the conclusion of the district court that the widow did not, with a full knowledge of her rights, elect to take under the will, and that if her rights had been fully explained to her, she would have discovered the mistake under which she was laboring with respect to the provisions of the so-called codicil being a part of the will.

The fact found by the court that the sons of the testator, knowing that the widow understood the codicil to be a part of the will, permitted her to make her election under that misapprehension, without informing the probate judge of its existence, was inferable from evidence of a discussion between them, after it had been read as though it were a part of the will, in which there was talk about the sale of the land to which it related, and the division of the proceeds, with an offer on the part of the sons to add to the share she was to receive, and from the fact that she was permitted to remain in the belief that the codicil was a part of the will, while the probate judge was not informed of its existence.

The trial court stated as a conclusion from the facts indicated that the sons practiced a fraud upon the widow in this respect, or if their course was due to a mistake on their part, that she should still have relief. The executor maintains that no fraud could have resulted because the residuary clause of the will, which covered the land described in the codicil, called for its division according to law, which would have given the widow an unincumbered half, while the codicil gave her but a half-interest in the proceeds, subject to the payment of legacies. Counsel for the widow, on the other hand, express the opinion that the residuary clause in the will was a mere declaration of intestacy as to the property not specifically disposed of, and that if she elected to take under the will, she could derive no benefit therefrom, citing Compton v. Akers, 96 Kan. 229, 150 Pac. 219.

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We think, in directing the division of the residuary estate according to law, the testator merely adopted a convenient means of indicating how the property was to be divided under the will. Huber v. Carew, 26 Ohio Cir. Ct. R. 389. The rule that one who would receive the same interest, either as devisee or heir, is deemed to take in the latter capacity can hardly apply, for that is based upon the presumption of a greater advantage to the beneficiary. Underhill on Wills, § 609. But apart from the question whether the codicil was more favorable to the widow than the will, the fact that it was presented to her and withheld from the probate judge tended to some confusion, and the incident serves to strengthen the view that her election was not made with a full knowledge of the situation.

Criticism is made of a finding that an election to take under the law would have been of substantial benefit to the widow, and that she would not have elected to take under the will if she had been fully advised. The finding does not mean that the provisions of the law were necessarily to be preferred to those of the will, but that the former offered advantages not given by the latter, upon which such a preference might reasonably be based. The course of the litigation affords a sufficient indication of the desire of the widow to take under the law. The finding that she did not know, until after the election was entered on the record, of the facts regarding some real estate the title to which was in one of the sons, was in accordance with the evidence, and does not imply that she had had no opportunity to inspect the record.

A finding that none of the beneficiaries under the will had changed their situation in view of the election is challenged on the ground that, as the sons had agreed, in consideration of the widow's electing to take under the will, to make some repairs on a building of which it gave her the use (as well as to pay her $2,300 from the proceeds of the sale of the land described in the codicil), it is fair to presume that they had made the repairs mentioned; no evidence having been introduced to the contrary. Wherever the burden of proof may have technically rested in this regard, the appellant, having made no effort to show the facts, is not entitled to a reversal on the naked presumption. Bank v. Brecheisen, 98 Kan. 193, 157 Pac. 259. The agreement, which was signed at the time the election was recorded, that the widow should be paid a specific amount out of the proceeds of the tract referred to in the codicil, seems to indicate that the provisions of that instrument relating to its sale were in the minds of the parties, and that the widow was not fully informed as to her rights, either under the law or under the will.

The application to have the election set aside was made without any great delay; the trial court had a better opportunity than can be afforded on review of determining the state of the widow's mind at the time she indicated a desire to take under the will, the information she had received, and her understanding of the alternatives between which she was required to elect; the conclusion must be upheld that no actual election, with such opportunity for the exercise of an intelligent choice as the statute contemplates, was ever made.

The judgment is affirmed. All the Justices concurring.

(99 Kan. 312)

DAWSON v. BOARD OF COM'RS OF CHEROKEE COUNTY. (No. 20450.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. COUNTIES ⊂⊃139—EXPENSES—FEES OF ATTORNEY GENERAL.

Where the Attorney General and his assistants prosecute and secure the conviction of a person for the violation of the prohibitory liquor law, the county in which the conviction is obtained becomes liable for the fees of the Attorney General and his assistants which have not been paid within one month after the convicted person has been released from jail, whether the release is granted by the district court or by other authorities, and whether or not security for the payment of costs has been given by the convicted party.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 203–207; Dec. Dig. ⊂⊃139.]

2. COUNTIES ⊂⊃132—EXPENSES—FEES OF ATTORNEY GENERAL.

The provisions of the parole law relating to the security for and payment of costs by a paroled person does not operate to repeal or amend the provisions in section 4378 of the General Statutes of 1909 relating to the liability of the county for the fees of the Attorney General and his assistants.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 208; Dec. Dig. ⊂⊃132.]

Appeal from District Court, Cherokee County.

Action by John S. Dawson against the Board of County Commissioners of the County of Cherokee. From a judgment for defendant, plaintiff appeals. Reversed and remanded, with directions to enter judgment for plaintiff.

W. P. Montgomery, of Topeka, for appellant. F. W. Boss, of Columbus, and E. E. Sapp, of Galena, for appellee.

JOHNSTON, C. J. This was an action to recover attorney's fees for securing convictions in a liquor prosecution. From the petition it appears that the plaintiff, as Attorney General, successfully prosecuted R. J. Bland, Charles Dixon, and Harry Brown for selling liquor. They were convicted on April 1, 1913, Bland on eleven counts and the other two on seven counts each. They were fined, sentenced to imprisonment, and the costs taxed against them, and on appeal the judgment of conviction was affirmed as to

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each. After having been confined in jail a short time and long before they had served their sentences, the parties were paroled by the district court—Dixon and Brown being released on April 6, 1914, and Bland about December 15, 1914—the costs, including the statutory fees due the Attorney General and amounting in the aggregate to $625, never having been paid. The answer alleged that on April 6, 1914, prior to their release, the convicted parties each filed a bond approved by the clerk of the district court for the payment of all costs taxed against him in the action, and that, on account of the nonpayment of the costs, actions upon the bonds were then pending. The plaintiff and the defendant each filed motions for judgment upon the pleadings, and from the judgment sustaining defendant's motion and overruling that of the plaintiff the latter appeals.

[1, 2] In behalf of the plaintiff it is contended that the county became liable for the attorney's fees in the cases named when they were not paid within one month after the convicted persons were released from jail. The statute which provides that such fees shall be taxed as costs against the parties convicted has been upheld, and the amount of fees charged against the defendants in those cases, and upon which a judgment against the county is asked, has been adjudicated. State v. Bland, 91 Kan. 160, 136 Pac. 947. The provision under which the recovery against the county is sought provides that, if the prohibitory law is not enforced by the local authorities, the Attorney General and his assistants may institute and conduct prosecutions for the violation of the act and may do and perform any act which the county attorney might lawfully do or perform "* * * and for such services he or his assistants shall receive the same fees that the county attorney would be entitled to for like services, to be taxed and collected in the same manner, except that in all cases where there shall be a conviction, and the attorney's fees as provided for in this act shall not be paid by the defendant within one month after his release from jail, the county where such conviction is had shall then become liable to the Attorney General, or his assistant prosecuting such case, for a fee of twenty-five dollars upon each count upon which the defendant shall have been convicted." Gen. Stat. 1909, § 4378. The attorney's fees in the prosecutions had not been paid when this action was begun, which was many months after the convicted persons had been released from jail.

The statute quoted plainly provides that the county shall become liable for the fees which have not been paid within one month after the convicted parties have been released from jail, but it is contended by the defendant that the release which was granted by the district court under the parole law (Gen. Stat. 1909, § 2468) is not the release contemplated in section 4378. The parole law provides that the court granting a parole shall require the person paroled to give security for the payment of costs, unless he is insolvent or unable to pay them, or to furnish security for their payment, and, if unable to pay or give security, the costs shall be paid by the state or county, but that such payment shall not discharge the liability of the convicted party for the costs. Although the parole law is the later enactment, nothing in it purports to change the provisions of section 4378, making counties liable for the fees of the Attorney General and his assistants where the convicted party is released from jail. The parole statute provides for giving security for costs, and it appears that security for costs was given in the cases under consideration; but the liability of the county for the fees of the Attorney General depends upon the release from jail, and not upon the ability of the convicted person to pay or furnish security for payment. One of the provisions deals with the duty of courts in granting paroles to persons convicted of criminal offenses generally and incidentally the taking of security for costs where the parties are able to furnish it. The other provides for the prosecution of violations of the prohibitory liquor law by the Attorney General and his assistants when the county attorney is unwilling or unable to enforce the provisions of that act, and as an inducement for efficient enforcement the county is made liable for attorney's fees if they are not paid within one month after the persons convicted are released from jail. Each act has a field of its own for operation, and nothing in the title or provisions of the parole law indicates a purpose to repeal or amend the act providing for the payment of the Attorney General for the services he has rendered. It is said that originally only county commissioners could order a release, and that a release by a district court which is subject to revocation could not be regarded as the release referred to in section 4378. So far as that statute is concerned, it is immaterial from whom the release is obtained or by whom it is ordered. Whenever the party convicted fails to pay the attorney's fee within one month after his release, the liability of the county attaches. It was evidently the purpose of the Legislature that the officers should not be required to wait for their fees until the released parties should choose to pay, nor until they could be realized from the security for costs which they might previously have given.

The judgment will be reversed, and the cause remanded, with directions to enter judgment in favor of plaintiff. All the Justices concurring, except DAWSON, J., who did not sit.

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(13 Okl. Cr. 50)

Ex parte BURLESON. (No. A-2885.)

(Criminal Court of Appeals of Oklahoma. Jan. 9, 1917.)

Application of Anna Burleson for writ of habeas corpus. Writ allowed.

J. D. Chastain, of Oklahoma City, for petitioner. B. D. Shear and Frank Watson, both of Oklahoma City, for respondent.

PER CURIAM. The petition of Anna Burleson for writ of habeas corpus filed in this court on December 11, 1916, alleges in substance that she is illegally restrained and unlawfully imprisoned in the city jail of Oklahoma City by W. B. Nichols, chief of police, by virtue of a commitment issued on a judgment of the municipal court, wherein the petitioner was sentenced to pay a fine of $99 and costs, and to be confined in said city jail for 30 days, and in default of the payment of said fine be further confined until the same is satisfied as by law provided.

The issue in this case is the same as in the case of In re Johnson, 161 Pac. 1097, and presents the same question. For the reasons given in the opinion in that case, the writ is allowed, and the petitioner is discharged from custody.

(13 Okl. Cr. 97)

TURNER v. STATE. (No. A-2578.)

(Criminal Court of Appeals of Oklahoma. Jan. 22, 1917.)

Appeal from County Court, Comanche County; R. J. Ray, Judge.

Leo Turner, convicted of a violation of the prohibitory law, appeals. Affirmed.

J. A. Lenertz, of Lawton, for plaintiff in error.

PER CURIAM. On information filed in the county court of Comanche county, charging "that at and within said county and state, on the 17th day of April, 1915, Leo Turner, then and there being, did then and there willfully and unlawfully have in his possession intoxicating liquors, to wit, seventy-five one-half pints and ten pints and six quarts of whisky and six quarts of beer, with the purpose and intent of him, the said Leo Turner, to barter, sell, and give away and otherwise furnish the same to other persons contrary to," etc., the plaintiff in error was convicted, and by the judgment of the court he was sentenced to pay a fine of $500, together with all costs, and that he be imprisoned in the county jail of Comanche county for a period of six months from and after his commitment thereto, and for such further time as shall satisfy said fine and costs, if the same be not paid by the defendant.

The evidence showing possession of the liquors and unlawful intent as alleged is conclusive, and undisputed by any evidence on the part of the defendant. Upon his arraignment, the defendant filed a motion to dismiss, on the ground that the county court was without jurisdiction, because the defendant herein has heretofore been tried and convicted in this court for violating the liquor laws of the state of Oklahoma, that he was sentenced by this court for said offense, and served said sentence; that, if the facts set forth in the information herein are true, they will constitute a second and subsequent offense on the part of the defendant herein, and this defendant is guilty of a felony, and this court is wholly without power or jurisdiction to try said defendant, or to hear and determine the offense set forth in said information, and if found guilty herein the court will be wholly without power and jurisdiction to pass sentence upon the defendant herein. Such motion was overruled. The foregoing presents the only question attempted to be raised. The allegations of the information merely charge a misdemeanor, and the court below very properly overruled the motion to dismiss for want of jurisdiction. Upon the whole case we think the defendant had a fair trial, and there is no doubt of his guilt.

The judgment appealed from is therefore affirmed. Mandate forthwith.

(62 Okl. 300)

THURSTON, County Treasurer, et al. v. CALDWELL et al. (No. 7020.)

(Supreme Court of Oklahoma. Sept. 26, 1916. Rehearing Denied Jan. 30, 1917.)

Commissioners' Opinion, Division No. 5. Error from District Court, McClain County; R. McMillan, Judge.

Action by W. E. Caldwell and others against J. B. Thurston, County Treasurer, and others. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

See, also, 40 Okl. 206, 137 Pac. 683.

Wadlington & Wadlington, of Ada, for plaintiffs in error. J. W. Hocker, of Los Angeles, Cal., and Benj. Franklin, of Purcell, for defendants in error.

JONES, C. This is a case originally filed on the 14th day of October, 1912, in the district court of McClain county, by the defendants in error, W. E. Caldwell et al., in which defendants in error asked for injunctive relief against the collection of certain taxes, a demurrer was lodged against the petition by the defendant in the original suit, which was overruled by the court, from which order of the court an appeal was taken to the Supreme Court of the state of Oklahoma, and an opinion was rendered by the Supreme Court, reversing the decision of the trial court in overruling the demurrer and remanding the case, with directions to proceed in accordance with the opinion, and the de-

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fendants in error, plaintiffs in the original suit, on the 31st day of August, 1913, filed in the district court of McClain county an amended petition, to which amended petition defendant again filed a demurrer, the trial court held the amended petition good, and overruled the demurrer, from which action of the court plaintiff appeals.

After a careful examination of the amended petition, as compared with the original petition, we fail to find any material change. The tender made in the amended petition is wholly insufficient, and in no wise changes the status of the case as it was originally presented to the Supreme Court. We therefore adopt the syllabus and decision of the original case of Thurston v. Caldwell et al., filed December 16, 1913, and found in 40 Okl. at page 206, 137 Pac. 683, as being decisive as to the law of this case.

The judgment of the trial court is therefore reversed, and cause remanded.

PER CURIAM. Adopted in whole.

(99 Kan. 362)

ENTSMINGER et al. v. ENTSMINGER et al. (No. 20528.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. MARRIAGE ⟸58(7) — ANNULMENT — GROUNDS—FRAUD.

A marriage may be annulled for fraud where a man, weakened by age and by physical and mental disabilities, is induced to marry a woman who represents to him that her reputation is good and that she is a virtuous woman, but whose reputation for immorality is notorious, and who has been conducting a house of prostitution for many years.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 122; Dec. Dig. ⟸58(7).]

2. MARRIAGE ⟸37—ANNULMENT—GROUNDS—CONDONATION.

Such fraud is not waived nor condoned by subsequent cohabitation, where the woman, over the objection of the man, is guilty of like misconduct after the marriage.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 108; Dec. Dig. ⟸37.]

Appeal from District Court, Shawnee County.

Action by A. L. Entsminger, revived in the name of George Young, as administrator, etc., and others, against Emma Entsminger, revived in the name of Ella Janess, and others, as heirs at law. From a judgment for plaintiffs, defendants appeal. Affirmed.

Schoch & Rankin, of Topeka, for appellants. J. S. Ensminger and Hazen & Gaw, all of Topeka, for appellees.

MARSHALL, J. The defendants appeal from a judgment annulling the marriage entered into between A. L. Entsminger and Emma Entsminger. The action was commenced by A. L. Entsminger, and in his petition he alleged, in substance:

"That on the 22d day of October, 1914, appellee and appellant were married; that appellee was past 80 years of age at the time of said marriage and was very infirm; that because of his physical infirmities his mind had become weakened and he could not grasp situations as he did in his younger days; that on account of his physical condition he was in great need of some one to take care of him; that on account of his condition he readily yielded to flattery and importuning; that he became acquainted with appellant shortly before the marriage, and that, for the purpose of inducing appellee to marry appellant, she stated and represented to him that she had lived in the city of Topeka for many years, was well known, was a good and virtuous woman, had a good character, and had never had any trouble; that appellee believed in and relied upon the representations so made by appellant and by reason thereof was induced to marry her; that in fact appellant was not a good or virtuous woman, was not a woman of good character, and that she had run what was known as a bawdy-house and had been arrested several times; that appellee was induced to marry appellant because of her false and fraudulent representations so made."

To this petition Emma Entsminger filed a demurrer which was overruled. She then filed an answer which consisted of a general denial and a prayer for divorce.

On the trial special findings of fact were made as follows:

"First. On October 22, 1914, plaintiff and defendant were married in the city of Topeka, Shawnee county, Kan. At the time of their marriage plaintiff had lived in Shawnee county for more than 50 years, and had been married three times prior to the present marriage; his two first wives were dead and the third had been divorced. At the time of their marriage, plaintiff was 82 years of age and was and had been a confirmed cripple for more than 20 years in such a way that he could only go from place to place with great difficulty and by the use of a crutch and cane; that it required considerable effort on his part to dress himself and he was unable to properly care for himself. Plaintiff had lived at Silver Lake, Kan., for a great many years prior to his moving to Topeka. He moved to Topeka about four years prior to his marriage with defendant. On account of his physical ailments and the difficulty with which he was able to go from place to place, he came in contact with but few people. On account of his extreme age and his physical infirmities, his mind had become greatly impaired and weakened. He belonged to the Odd Fellows Lodge at Silver Lake, and shortly prior to his marriage with defendant the lodge appointed one Morton Hutchinson, who was well acquainted with him, a committee to investigate and report his then mental condition. In pursuance to this appointment, Morton Hutchinson came to Topeka, called upon and talked with plaintiff, and from his investigation was of the opinion that his mind was greatly weakened and impaired.

"Second. Defendant had lived in the city of Topeka for more than 20 years, and, while there was no testimony as to her age, yet from appearance she was probably 60 years of age. For a great many years she and her daughter had conducted a house on Tenth street in the city of Topeka between Jackson and Kansas avenue, commonly known and understood to be a house of prostitution. That the house that she was conducting there had a bad reputation. That after living on Tenth street for many years she moved to 826 Monroe street. That she conducted the same kind of a house on Monroe street that she conducted on Tenth street.

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That cabmen frequently hauled men and women both day and night to her house, but in doing so they usually drove to Ninth street before allowing passengers to alight, and such passengers would walk back to defendant's house at 826 Monroe street.

"Third. The acquaintance between plaintiff and defendant prior to their marriage was brief. Occasionally plaintiff passed the house where defendant was living on Monroe street and defendant stopped him and entered into conversation with him, making certain suggestions with reference to treatment for his physical condition; that she frequently went to the sidewalk when she saw him coming and stopped him and conversed with him, and finally invited him into her house. That thereafter she invited him to come and take supper with her, which he did, and following this occasionally then went out buggy riding. That the question of marriage was suggested, and defendant stated that she had lived in Topeka for a long time, that her reputation was good, and that she was a virtuous woman. That plaintiff believed these statements, and on account of his physical condition, and desiring a home, agreed to marry her. That defendant believed at the time of the marriage that plaintiff possessed considerable property, but the only property he had was a house on Jefferson street of the value of probably $2,500, upon which there was a mortgage of $1,400. That this house was renting for $20 per month. Shortly before the marriage plaintiff purchased a house on Monroe street in the city of Topeka for which he agreed to pay $4,500. That he paid $1,500 cash and assumed the payment of a mortgage upon this property of $3,000. Plaintiff has no property other than the above-described real estate and has no money and a very limited amount of personal property. The taxes and interest on the Monroe street property are in default, and a suit is now pending for the foreclosure of this $3,000 mortgage. Plaintiff has no money with which to pay the taxes nor the interest either upon this Monroe street property or upon his Jefferson street property. Plaintiff believed at the time of his marriage to defendant that she was a good reputable woman and of good character and stood well in the city of Topeka and would make him a good home, and he was caused to so believe by her representations, statements, and conduct.

"Fourth. Soon after the purchase of the Monroe street property, plaintiff and defendant moved into this property, and at the time of the bringing of this suit defendant was occupying the same; plaintiff having left the house on account of the conduct of the defendant and was living in the garage on the rear end of said property. After the marriage of plaintiff and defendant and after they had moved into the Monroe street property, defendant attempted to conduct the same kind of a house there that she had conducted on Tenth street and at 826 Monroe street. Plaintiff objected to the conducting of such a house, and defendant said to him that there could be no money made by renting rooms, but that by allowing men and women to come and occupy rooms she could make some days as high as from $5 to $10.

"Fifth. Defendant used the parlor of their house on Monroe street as her bedroom, and plaintiff occupied a different room of the house as a bedroom. That on one evening and after dark, while plaintiff and defendant were sitting in the dining room, the door bell rang and defendant went to the door, allowed a man to enter and to occupy a seat in her bedroom. After he had been there a considerable time and about 9 o'clock, defendant suggested that it was time to retire, but plaintiff knew there was some person in defendant's bedroom, and he then entered the room, turned on a light, and found a man sitting in a chair close to her bed. That plaintiff ordered him out, and he declined to go, and he then struck him with his cane, and the man left the house. At another time plaintiff had arranged for a carpenter to come to the house to make some repairs. That when the carpenter came he started with plaintiff upstairs, when they were stopped by defendant and told that they could not go upstairs. That they then went out on the porch, and in a very short time a man came downstairs and left the house, and a few minutes thereafter a woman came downstairs and also left the house. That on another occasion plaintiff found a man and a woman in one of the rooms upstairs during the daytime in their nightclothes. Plaintiff protested and objected to the conducting of this kind of a house, and finally left the house and a long time thereafter lived in the garage, and since that time has been occupying a room in another residence and getting his meals wherever he could do so.

"Sixth. That at the time of the marriage of plaintiff and defendant, and for a long time prior thereto, defendant was an immoral woman, and the house that she kept was that of a house of prostitution, and that she had been engaged in this immoral practice for a great many years, and that, while her reputation was notorious, yet plaintiff believed that she was a good, virtuous, and reputable woman and would not have married her if he had known her true character.

"Seventh. Defendant has no property except her household goods.

"Eighth. That the defendant had been a resident of the city of Topeka and Shawnee county, Kan., for more than 20 years prior to the marriage.

"Ninth. That during the time that plaintiff and defendant were acquainted prior to their marriage, plaintiff frequently called on her, took her out buggy riding a number of times. That they discussed the matter of their marriage. That on one occasion she voluntarily stated she was a virtuous woman and that she would make it warm for any one who said she did not have a good reputation.

"Tenth. That at the time of the marriage of plaintiff and defendant she had no means or property. That plaintiff had a residence on Jefferson street from which he was receiving $20 a month. That he placed a mortgage on this property for $1,400, and with this sum, and $100 in cash he had on hand, he purchased the property at 829 Monroe street for $4,500, assuming a mortgage thereon for the sum of $3,000. That the plaintiff knew when he married defendant she was going to keep roomers and consented thereto. That plaintiff's income being insufficient, it was necessary for them to keep roomers to pay family expenses.

"Eleventh. That plaintiff at the time he married the defendant understood and appreciated that he was entering into a marriage contract."

The court declared conclusions of law as follows:

"That the marriage contract entered into between plaintiff and defendant was induced through fraud and deception on behalf of defendant, and should therefore be set aside and held for naught."

Notice of appeal was served on the 20th day of December, 1915. A. L. Entsminger died on the 21st day of January, 1916, and Emma Entsminger died on the 9th day of February following. The action was revived, as to A. L. Entsminger, in the name of his heirs at law, and of his administrator, and was revived, as to Emma Entsminger, in the name of her heirs at law. The heirs of Emma Entsminger prosecute this appeal.

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The title to the property owned by A. L. Entsminger at the time of his death is involved in this action. The plaintiffs have filed a motion asking that the appeal be dismissed on the ground that this action is not one that can be revived, and that there is nothing for this court to decide. It is not necessary to pass on this motion for the reason that the judgment will be affirmed in disposing of the case on its merits.

[1] 1. The defendants ask that the judgment be reversed for the following reasons: First, that A. L. Entsminger, at the time he married Emma Entsminger, understood and appreciated that he was entering into a marriage contract; and, second, that false representations and concealments as to prior character and reputation are not grounds for annulling a marriage. These two propositions must be considered together, because A. L. Entsminger was an infirm old man with a weakened and impaired mind, and this condition made him easily subject to the influence of Emma Entsminger. She had conducted a house of prostitution for many years prior to her marriage to the plaintiff. She concealed this fact from the plaintiff and made false statements to him concerning her character. The defendant, by her arts, brought about the marriage. After the marriage she attempted to conduct the same kind of a house as she had conducted previously. To this the plaintiff objected. Because of the defendant's persistence in attempting to conduct a house of prostitution at their home, the plaintiff left the house and lived in the garage.

The surrounding circumstances place this case within the rule of Browning v. Browning, 89 Kan. 98, 130 Pac. 852, L. R. A. 1916C, 737, Ann. Cas. 1914C, 1288. In that case a young man in his nonage sought to have his marriage annulled. He had been inveigled into the marriage by an immoral woman who made false representations to him concerning her previous marriage relations. In the present case, an old man in his dotage sought to have his marriage annulled. He was inveigled into the marriage relation through the false representations of an immoral woman. The conduct of the defendant in the present case was more reprehensible than that of the defendant in the Browning Case. The condition of the plaintiff in the present case rendered him more susceptible to the wiles of an immoral woman than did the condition of the plaintiff in the Browning Case.

The defendants cite Varney v. Varney, 52 Wis. 120, 8 N. W. 739, 38 Am. Rep. 726, to support their contention that a marriage cannot be annulled because of false representations made before the marriage as to previous chastity. There is nothing in the Varney Case to show that the party there defrauded was weakened by age or by mental or physical disability. That case states and follows the general rule. This rule is stated in Browning v. Browning, supra, 89 Kan. on page 102, 130 Pac. 852, L. R. A. 1916C, 737, Ann. Cas. 1914C, 1288, in a quotation taken from 26 Cyc. 905. The remainder of the paragraph in 26 Cyc. 905, from which the quotation in the Browning Case is taken, is as follows:

"But some courts are disposed to relax the severity of this rule, especially where the fraud or deceit has been accompanied by some measure of coercion or imposition, in the case of very young girls duped or decoyed into an unsuitable marriage, and in the case of aged persons of feeble intelligence who have been tricked or deluded. In every case, however, the fraud must have been an effective cause, and one cannot complain of a false representation where he knew the truth at the time, where it was rendered possible only by his own previous immoral conduct, or where the fraud only affects third persons. Imposition in the nature of a fraud may also be ground for annulling the marriage, especially where it was exerted by playing upon the party's superstitions or religious delusions." Page 906.

[2] 2. The defendants insist that A. L. Entsminger, by his subsequent cohabitation with Emma Entsminger, condoned her misconduct and false representations, and ratified the marriage contract. Emma Entsminger did not plead condonement as a defense to the action, but the question of condonement will be considered. The evidence shows that, on the day after his marriage, A. L. Entsminger was told of his wife's previous reputation and conduct, and shows that he thereafter continued to live with her. It does not appear that A. L. Entsminger believed what he was told. He was not under any obligation to do so. Even if he did receive knowledge of his wife's previous misconduct and condoned that misconduct, it was with the understanding that her conduct in the future would be right and proper. She was guilty of the same kind of misconduct after the marriage. If the law of condonation has any place in this controversy, that misconduct revived the previous offenses. 9 R. C. L. 384; 14 Cyc. 637. The conduct of A. L. Entsminger might have amounted to condonation if he had been a vigorous man in full possession of his mental faculties. When his physical and mental condition is taken into consideration, the evidence is not sufficient to show a condonement of the fraud committed against him.

The judgment is affirmed. All the Justices concurring.

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(99 Kan. 343)

MOORHEAD et al. v. EDMONDS et al.
(No. 20465.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1 APPEAL AND ERROR ⟸219(2) — REVIEW — FINDINGS OF FACT.

A judgment will not be reversed because a trial court's findings of fact are incomplete, and do not state all the facts connected with those found, where no request was made for further, clearer, or additional findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1322, 1323; Dec. Dig. ⟸219(2).]

2. SPECIFIC PERFORMANCE ⟸121(3) — ACTIONS—EVIDENCE.

The seventh and eighth findings of fact are supported by the evidence.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 390; Dec. Dig. ⟸121(3).]

3. SPECIFIC PERFORMANCE ⟸53—ACTIONS—RIGHT TO.

Specific performance of a contract for the conveyance of land will not be compelled, where the purchaser secures the contract by fraud, knowing that a contract for the sale of the land has been made with another person.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 160–171½; Dec. Dig. ⟸53.]

Appeal from District Court, Stevens County.

Action by A. C. Moorhead and others against A. O. Edmonds and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Edgar Foster, of Dodge City, and W. E. Eddy, of Hugoton, for appellants. F. S. Macy, of Liberal, F. L. Martin, of Hutchinson, E. W. Davis, of Kansas City, and Van M. Martin, of Hutchinson, for appellees.

MARSHALL, J. The plaintiffs appeal from a judgment denying specific performance of a contract for the conveyance of land to them.

Plaintiff A. C. Moorhead was clerk of the district court of Stevens county. Plaintiff W. W. Hayward was cashier of the Hugoton State Bank. Moorhead and Hayward were partners in the real estate business. J. A. McMichael was a customer of the Hugoton State Bank. Defendant R. M. Crawford was a real estate agent in Hugoton. Defendant A. O. Edmonds owned a section of land in Stevens county. On the 4th day of January, 1915, J. A. McMichael bid in this land at sheriff's sale for $5,200. Of this A. C. Moorhead had knowledge. The land was listed for sale with a number of real estate agents, among whom was defendant R. M. Crawford. The land was not listed with the plaintiffs. Soon after the conclusion of the sheriff's sale, J. A. McMichael withdrew his bid and entered into a written contract with R. M. Crawford for the purchase of the land. This contract contained, among other things, the following provisions:

"Possession to be given upon delivery of deed, which is to be a general warranty deed executed by the present owner or owners, together with abstract showing clear title, with all taxes paid to date, and to be delivered as soon as it can be obtained: Provided, always, that this contract is entered into subject to the will and consent of present owner or owners, and provided, further, that in case the said second party shall fail or refuse to pay or accept land according to the conditions of this contract, he shall forfeit to the said first parties the amount of purchase money paid."

The trial court made findings of fact as follows:

"(1) The defendants R. M. Crawford and James McMichael entered into a written contract on the 4th day of January, 1915, by which McMichael agreed to purchase the land in controversy for the agreed price of $7,000; $3,500 cash, balance on time, secured by first mortgage, with 8 per cent. interest, as shown by written contract in the answer.

"(2) In a short time and on the same day the plaintiffs solicited McMichael to permit them to see the contract, and after examining it asked McMichael why he did not allow them the opportunity to make the sale of the land. McMichael informed them that he did not know they were in the business, and he finally said to them that he would give them the same opportunity he had given Crawford; that he would pay the man who first got him the deed for the land.

"(3) Upon this statement the plaintiffs went to Liberal to try to purchase the land from Edmonds, the owner. Learning that he was at Helena, Okl., they drove there that night, and saw him there the next day.

"(4) At Helena, in the conversation with Edmonds, the owner of the land, Hayward, the plaintiff, concealed from [him] the fact that Crawford who had the land for sale at a net price of $6,800, had made a contract of sale, subject to his consent, to McMichael for $7,000, and Hayward attempted to purchase the land for less than $6,000. Hayward also deceived the defendant Edmonds, by pretending that Moorhead, his partner, was in Hugoton, and induced Edmonds to telegraph to Moorhead, at Hugoton, directing him to see Mr. Nason, at Elkhart, when at the time Moorhead was in the same town in the barber shop.

"(5) On the 7th day of January Nason executed the written contract set up in the petition, for sale of the land to plaintiffs, and put the blank deed offered in evidence up, which was blank as to consideration and as to grantee, and there was no revenue stamp upon it. This deed, with the contract, was put in escrow.

"(6) The plaintiffs gave a check for $500 to Nason, indorsed the check, and forwarded it to Edmonds, and Edmonds cashed it and received the money upon it.

"(7) Edmonds would not have accepted this check, except for the deception practiced by plaintiffs.

"(8) When Edmonds discovered that he had been deceived, that certain facts of which plaintiffs had knowledge were concealed from him, he decided that he would not perform the contract made by Nason, and a short time thereafter, and on the 8th day of February, made a warranty deed of the premises to Crawford. Crawford paid his $6,800 therefor.

"(9) The defendant Edmonds, through his attorney, Macy, offered to pay the $500 back to the plaintiff Hayward. Hayward told Macy to see Moorhead.

"(10) At the trial of this case the defendants in open court tendered and have paid to the clerk of the court the sum of $500 for plaintiffs."

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On these facts the court stated the following conclusions of law:

"(1) The blank deed is not a sufficient writing to authorize the signing of a contract by Nason that would bind Edmonds.

"(2) Nason has no interest in the land. He was the agent of Edmonds, and had no authority to sign the contract in writing.

"(3) Edmonds was induced to accept the $500 upon the contract signed by Nason by reason of deceit and concealment of the truth by the plaintiff Hayward.

"(4) The plaintiffs are not entitled in equity to specific performance of the contract.

"(5) That the temporary injunction hereinbefore granted should be dissolved."

[1] 1. The plaintiffs argue that the first, fourth, and fifth findings of fact are erroneous, in that they are not complete, and do not state all the facts properly connected with those found. The plaintiffs did not request further, additional, or clearer findings of fact. The plaintiffs, if they desired to complain of findings of fact, because they were not complete or clear, should have requested the trial court to correct the findings. Since such a request was not made, this complaint will not be considered. Briggs v. Eggan, 17 Kan. 589, 591; Kellogg v. Bissantz, 51 Kan. 418, 424, 32 Pac. 1090; Pennell v. Felch, 55 Kan. 78, 81, 39 Pac. 1023.

[2] 2. The plaintiffs contend, in effect, that the seventh and eighth findings of fact are not supported by the evidence. An examination of the evidence shows that it amply supports these findings. No good purpose will be served by setting out the evidence.

[3] 3. The plaintiffs complain that the conclusions of law are not based on the findings of fact, and insist that judgment should have been rendered in their favor. These two propositions will be considered together. Some of the conclusions of law are largely conclusions of fact, based on the evidence and on other facts shown in the findings. The controlling conclusion of law is that the plaintiffs are not entitled to specific performance of the contract. The plaintiffs, to support their contention, argue that whether or not the blank deed was a sufficient writing to authorize the signing of a contract by Nason, and whether or not he had any interest in the land, are immaterial in determining the judgment that should be rendered. This does not control the judgment, and therefore does not aid the plaintiffs. The plaintiffs also argue that defendant Edmonds ratified the acts of his agent, Nason, by accepting and cashing the check for $500. The difficulty with the plaintiffs' argument on this question is that Edmonds would not have accepted the check, but for the deception practiced by the plaintiffs, and did not know of this deception until after the money had been received on the check.

The plaintiffs further argue that neither Edmonds nor McMichael was injured, and that Crawford, at the time he accepted the deed from Edmonds, knew of the plaintiffs' rights. This argument is not good. Edmonds has been injured, in that he is liable to Crawford for commission on the sale of the land, if the sale made by Crawford to McMichael is not consummated. McMichael has been injured, in that he has been deprived of title to the land during the litigation. The plaintiffs' right to the land under their contract with Edmonds is subject and inferior to the rights of McMichael and Crawford, for the reason that the plaintiffs, when they secured their contract for the purchase of the land, had actual knowledge of the contract between McMichael and Crawford. Whatever interest the plaintiffs acquired in the land was acquired through the fraud and deception practiced by them when they induced Edmonds to contract with them for the sale of the land at a time when they knew that Edmonds' agent had contracted to sell the land to McMichael. Edmonds had no knowledge of the contract with McMichael at the time he made the contract with the plaintiffs. The plaintiffs are not entitled to specific performance.

The judgment is affirmed. All the Justices concurring.

(99 Kan. 323)

WILLEY v. GOULDING. (No. 20457.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. FORCIBLE ENTRY AND DETAINER ⟸29(4) —EVIDENCE—SUFFICIENCY.

The evidence in an action for unlawful detainer *held* to have a tendency to show that a letter was written by the owner of real estate to his agent containing an offer to rent it to the occupant for a stated amount; that the letter was shown to the occupant, who notified the agent that he accepted the offer; and that the relations of the parties was such that notice to the agent was equivalent to notice to the principal.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 140; Dec. Dig. ⟸29(4).]

2. LANDLORD AND TENANT ⟸25(5)—LEASE—REQUISITES.

Assuming the facts to be established as indicated in the preceding paragraph, a completed contract resulted, which was not affected by a subsequent request by the tenant for the execution of a formal lease containing new terms, so long as he did not insist upon them as a condition to the performance on his part of the original agreement.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 73–75; Dec. Dig. ⟸25(5).]

3. FRAUDS, STATUTE OF ⟸103(1) — SUFFICIENCY OF MEMORANDUM—LEASE.

A sufficient memorandum in writing to satisfy the statute of frauds may consist of a letter from the owner of real estate to his agent, offering to lease it on stated terms, followed by an oral acceptance by the tenant.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 201; Dec. Dig. ⟸103(1).]

Appeal from District Court, Finney County.

Action by M. O. Willey against J. W. Goulding. From a judgment for plaintiff.

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defendant appeals. Reversed and remanded for new trial.

H. O. Trinkle and Albert Hoskinson, both of Garden City, for appellant. Richard J. Hopkins, of Garden City, and Edgar Foster, of Dodge City, for appellee.

MASON, J. J. W. Goulding occupied a room in a building owned by L. W. Fulton under a written lease for one year expiring February 1, 1915, providing for a monthly rental of $30. Prior to the expiration of the lease negotiations were had as to the terms on which Goulding might continue his occupancy, in the course of which a proposition was made that he should pay $40 a month, which was modified by a provision that for one year he might pay $35 a month, he making such repairs as he found necessary. He remained in possession, paying $35 a month, and making some expenditure for repairs. About February 10, 1915, he prepared a written lease, which Fulton refused to sign without the insertion of a clause making it subject to a sale. Goulding refused to accept that addition. About the middle of April, 1915, Fulton sold the property to M. O. Willey, who, upon sufficient notice, brought a proceeding for unlawful detainer against Goulding, which was taken to the district court on appeal. The district court, after hearing the evidence, directed a verdict for the plaintiff on the ground that under the admitted facts the minds of the parties had never met as to the terms of a lease, and that Goulding had become a tenant at will. The defendant appeals.

[1] 1. The ruling made can stand only in case the evidence, with the reasonable inferences therefrom, considered in the most favorable aspect for the defendant, had no tendency to sustain his contention that he was entitled to hold the property until February, 1916. In addition to the matters already stated, there was evidence establishing or tending to establish these facts: On January 10, 1915, Fulton, who was a nonresident, wrote to his agent:

"Now as to leasing the room to Goulding, will say the price will be $40.00 per month in advance. I have a chance to rent it for $40.00 per month and have had it for some time, so you see it is a matter of business with me. You can notify him that his rent will be $40.00 per month after the expiration of his lease. I have a splendid opportunity to rent it for $40.00, so would not consider any other proposition. Please let me hear from you soon."

On January 19, 1915, he again wrote:

"In reply to your letter will say Harry Goulding [the defendant's son] was here last night and he seemed to be satisfied with the proposition I made him, as follows: $35.00 per month for the first year and then to repair the room to suit themselves, and should they want it for two years the rent will be $40.00 per month."

A day or two later Fulton's agent showed this letter to the defendant, who within a few days began making repairs which were completed by February 1st, costing about $100, consisting of painting, papering, and electric light wiring. On or before February 10th he paid $35 as rent for that month to the agent, who remitted it to Fulton on that day, writing him that the roof was leaking, and that Goulding was complaining of it, suggesting that he should ascertain the cost of fixing it, and adding:

"Mr. Goulding is getting a lease drawn up, and it will be ready in a day or so, and I will send it to you for your approval."

Shortly afterwards Goulding gave a form of a lease to the agent, who sent it to Fulton, who on February 24th wrote to Goulding:

"Mr. Griggs [the agent] sent me a lease contract to sign and return to you, but as I want to sell the building I did not return the lease. I am about to sell it now, but in case the deal does not go through we would have to have a sale clause attached to the lease, as I want to sell the building. I will let you know how I come out on the sale in a short time. In case I do not make this sale we will fix up a lease subject to sale, if you still want it. Will write you again in a few days."

We think this evidence was sufficient to warrant a court or jury in finding these facts: Fulton's letter of January 10th, when communicated by his agent to Goulding, amounted to an offer to rent the property for one year at $35 a month, the tenant to make any needed repairs, and to have an option to keep the place another year at $40; the other terms of the tenancy to be such as the law would imply without express agreement, or possibly to be the same as were embodied in the prior lease. Goulding by his conduct, if not in so many words, signified to the agent that he accepted this offer without qualification. The agent's relations to the transaction were such that notice to him of an acceptance was of the same effect as though given to his principal.

[2] 2. If these facts are regarded as established, then a completed contract resulted prior to February 10th. And in that case the circumstance that Goulding afterwards asked to have a lease executed embodying the agreement already made, or even that he proposed the insertion of new conditions in such a lease, could not operate to rescind the contract that had already been entered into, so long as he did not repudiate its terms, or insist upon the proposed new matter as a condition of its performance on his part. The fact that the parties may have contemplated the subsequent execution of a formal instrument as evidence of their agreement does not necessarily imply that they had not already bound themselves to a definite and enforceable contract whose terms could be changed only by mutual consent. Post v. Davis, 7 Kan. App. 217, 52 Pac. 903; 6 R. C. L. 618–620; Note 20 L. R. A. 431; note 110 Am. St. Rep. 755.

It results from these conclusions that the case should have been submitted to the jury to determine the questions of fact already indicated.

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[3] 3. A contract giving the tenant the right of occupancy for one year, with the privilege of two, is within the statute of frauds. 20 Cyc. 214; 29 A. & E. Encycl. of L. 886. Here the making of repairs may possibly have constituted such a part performance as to take the contract out of the statute. But in any event the letter of January 19th signed by Fulton was a sufficient memorandum in writing to satisfy the statute. Considered in connection with other portions of the correspondence, it sufficiently identified the property. The fact that it was addressed and delivered to the agent of the writer, and not to the other party to the contract, does not render it inadequate for the purpose. 20 Cyc. 255; 29 A. & E. Encycl. of L. 855. And the offer having been made in writing, signed by the party sought to be charged, an oral acceptance was sufficient. 20 Cyc. 254; 29 A. & E. Encycl. of L. 858.

The judgment is reversed, and the cause remanded for a new trial. All the Justices concurring.

(99 Kan. 400)

LYNN v. McCUE et al.

STATE ex rel. COMMONWEALTH TRUST CO. v. DOWNER, District Judge.

(Nos. 20995, 20996.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

MANDAMUS ⟸4(1)—REMEDY BY APPEAL.

A decision was given upon an appeal in a complicated, equitable action which involved controversies of a complex character between a number of parties holding conflicting claims. The judgment was affirmed in part and reversed in part, directions being given as to the trial of the undetermined issues. When the mandate was spread of record and the case was again brought before the trial court, that court was vested with jurisdiction and power to interpret the decision and mandate of the Supreme Court which, it is *held*, were fairly open to interpretation, and its interpretation of the decision, as well as its rulings and judgment in the second trial, however erroneous, cannot be regarded as absolutely void, but must be treated as errors to be corrected on appeal, and cannot be corrected by a proceeding in mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 9, 11; Dec. Dig. ⟸4(1).]

Action by Thomas Lynn against B. M. McCue and others, and the Commonwealth Trust Company, in which defendant appeals. Application by State of Kansas, on relation of Commonwealth Trust Company, for writ of mandamus against George J. Downer, Judge of Thirty-Second Judicial District. Appeal dismissed, and peremptory writ denied.

Lee Monroe, of Topeka, and W. S. Roark, of Junction City, for plaintiffs. F. Dumont Smith, of Hutchinson, and Hoskinson & Hoskinson, of Garden City, for defendants.

JOHNSTON, C. J. These cases are a continuation of the litigation of Lynn v. McCue, 94 Kan. 761, 147 Pac. 808, and 96 Kan. 114, 150 Pac. 523. The first case is an appeal from the judgment of the district court resulting from the second trial, which occurred after the case had been remanded for retrial. The second is an application for a peremptory writ of mandamus to compel the trial court to observe the directions in the mandate of this court, the appellant alleging that the trial court had not taken the steps as ordered, and had not conducted the new trial in accordance with the directions of this court. In the original appeal the judgment of the district court was affirmed in part, and in part it was reversed, and the case remanded with directions. In the mandate to the district court, which was accompanied by copies of the opinions of this court, it was recited that it had been ordered and adjudged by the Supreme Court that:

"The judgment of the district court be affirmed as to the plaintiff; otherwise it is set aside, with directions to grant to the trust company the relief asked against McCue, and to award to the receiver (for the benefit of the creditors) damages against the trust company in such sum as that company shall be found to have suffered from the conversion referred to."

In the mandate there were further directions as to the apportionment and payment of costs. When the mandate reached the district court, it was spread upon the records, and an order of sale issued for the sale of the property to satisfy Lynn's judgment. The sale occurred and was confirmed on September 27, 1915. Afterwards some additional pleadings were filed in the case, and a second trial was had on October 25, 1915, before a jury, which returned a general verdict in favor of the receiver, with 14 special findings of fact upon the issues submitted to it. One of the findings was set aside by the court on the motion of the trust company. The motion of the trust company for judgment upon the special findings was denied, the court holding that there were underlying liens against the mortgaged railroad property prior and superior to the lien of the mortgage securing the bonds of the railroad company in excess of the sum of the verdict recovered by the receiver, and therefore refused to give the receiver an affirmative judgment against the trust company, and further holding that, as the trust company was not, in its pleadings, asking an affirmative judgment against the receiver, it could recover nothing in this action. Some orders were made as to the payment of costs and the cancellation of notes, mortgages, and indebtedness. Although a motion for a new trial was made by the trust company and overruled on October 29, 1915, no appeal was taken from the rulings and decree of the court until August, 1916. When the appeal was taken the trust company made the application for the writ of mandamus, asking that the district court be compelled to reconvene and enter a judgment in favor of the company as the Supreme Court had directed,

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giving it a lien for $400,000 upon the Haskell county lands as prayed for in the answers which it had filed in the original case.

The appeal was not taken within the six months prescribed by the statute. Laws 1913, c. 241. No appeal was taken until August 12, 1916, more than two months after the time allowed for an appeal had expired. It is contended that the trial court disobeyed the mandate of this court as to one branch of the case; that it had no power to do what was done, and therefore its judgment was absolutely void. The limitation on appeal, it is argued, has no application to a void judgment, a nullity, which is open to attack at any time. A consideration of the first opinion and the one delivered on the rehearing shows that the judgment was rendered in a complicated, equitable suit. There were quite a number of parties in the case between whom there was a complexity of controversies, and the judgment required the balancing of equities and the adjustment of numerous rights. The opinions and mandate directing the future action of the trial court in the case were open to interpretation. That court had the power to interpret the meaning of the judgment and orders of this court, and if the scope of the inquiry was unduly extended and an unwarranted order or judgment rendered, the appellant could have moved to set such order or judgment aside, and if this was denied, the ruling could have been corrected on an appeal taken within the statutory time. While it is the clear duty of the trial court, upon a remand of the case with directions, to implicitly follow the directions and give effect to the decision of the court, yet when the directions are not final and specific, but are subject to interpretation, the action of the court in interpreting them, however erroneous, cannot be regarded as absolutely void. Its action was no more than error. In Weishaar v. Haenky, 75 Kan. 848, 849, 90 Pac. 1134, it was said:

"When the record containing the mandate of this court reversing the judgment of the district court a second time for want of sufficient facts was brought to its attention by a motion for judgment, a judicial question was presented which the court had jurisdiction to decide. It had the same jurisdiction to allow that it had to deny the motion. Even if it decided wrong, that fact did not oust it of jurisdiction."

See, also, Manley v. Park, 62 Kan. 553, 562, 64 Pac. 28; Clevenger v. Figley, 68 Kan. 699, 75 Pac. 1001; In re Wallace, 75 Kan. 432, 89 Pac. 687.

In cases of this character the trial court is not without discretion, nor is it governed by an inflexible rule. In Conroy v. Perry, 26 Kan. 472, 473, it was said:

"It is true that the mandate issued from this court directed a judgment upon the findings in favor of defendant, but we have heretofore held that such mandate does not compel a mere technical, blind, and literal following thereof. It means simply that upon the facts as thus stated, such a judgment ought to be entered, leaving full discretion to the district court to act upon any new facts presented, and to act thereon as justice and equity may require."

In Hargis v. Robinson, 70 Kan. 589, 592, 79 Pac. 119, 120, the same view was taken, where it was said:

"Where the direction in a mandate of the reviewing court is specific and final, ordinarily the trial court must carry it into effect. However, a blind, technical, and literal compliance with the mandate, without regard to new facts or to justice and equity, is not required."

See, also, Kansas Pacific Ry. Co. v. Amrine, Treasurer, etc., 10 Kan. 318; Duffitt & Ramsey v. Crozier, Judge, 30 Kan. 150, 1 Pac. 69; McDonald v. Swisher, 60 Kan. 610, 57 Pac. 507.

When the mandate was spread on the record and the question of carrying out the orders and judgment of this court was presented to the trial court, it acquired jurisdiction of the case, with full power to determine the meaning and scope of the decision given on the appeal and to try the remaining issues in accordance with the rules laid down in the opinions of this court and the directions given in its mandate. An interpretation was placed on the rules and directions of this court, which, as we have seen, were open to interpretation. The case was tried through to the end by the parties as cases are ordinarily tried; and, if the rules were not properly applied and the directions given were not followed in the subsequent proceedings, the errors of the court might have been corrected upon an appeal. The errors, however, are not available after the time for appeal has expired, and the extraordinary remedy of mandamus cannot be employed for the correction of such errors.

The appeal taken out of time will be dismissed, and the application for the peremptory writ of mandamus will be denied. All the Justices concurring except DAWSON, J., who did not sit.

(99 Kan. 327)

BULLINGTON v. PATTERSON et al.
(No. 20461.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

MORTGAGES ⇐86(3)—FORECLOSURE—ACTIONS—SUFFICIENCY OF EVIDENCE.

In a suit to foreclose a purchase-money mortgage, defendants set up a counterclaim for damages by reason of alleged misrepresentations by plaintiff as to the true boundary lines of the real estate. The evidence, findings, and conclusions of law are examined, and it is *held:*

(a) The findings are sustained by sufficient evidence.

(b) There was no error in the holding of the trial court that certain surveys made by surveyors, and other evidence offered for the purpose of showing the exact location of the boundary lines of the property were unsatisfactory.

(c) On the findings, a judgment against defendants will not be disturbed.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1364; Dec. Dig. ⇐86(3).]

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Appeal from District Court, Cowley County.

Action by Levi B. Bullington against Adelia M. Patterson and another. From a judgment for plaintiff, defendants appeal. Affirmed.

J. E. Torrance and O. W. Torrance, both of Winfield, and W. H. England, of Ponca City, Okl., for appellants. S. A. Smith, of Winfield, for appellee.

PORTER, J. In a suit to foreclose a mortgage there was judgment for the plaintiff, from which the defendants appeal.

The real estate consists of a hotel property in the city of Dexter, and formerly belonged to the plaintiff. On the 16th of August, 1912, he sold and conveyed it by warranty deed to the defendants, and the mortgage was given to secure a balance of $400 on the purchase price. The defendants filed a cross-petition, and asked for $1,500 damages alleged to have been sustained by reason of misrepresentations by the plaintiff in reference to the true boundary lines of the property, and claimed he represented that the hotel building was entirely on the lot in question; that they knew nothing about the boundary lines, and relied wholly upon his representations; that in fact the entire west side of the building stood 6 feet and 4 inches over on an adjoining lot on the west, owned by another party, that a portion of the east side and southeast corner of it was cut off by the right of way of the Missouri Pacific Railway, and the north side or end of the hotel was out in the public street. The court made the following findings of fact:

"First. The court finds that on and prior to the 16th day of August, 1912, the plaintiff was the owner of lot 11 in block 2, in Enright's addition to the city of Dexter, Cowley county, Kan., and on said date sold and conveyed said property to the defendant Adelia M. Patterson by deed of general warranty, and that on the same day and as a part of the purchase price of the premises, the defendants executed and delivered the notes and mortgage sued on in this action, and that there remains due and unpaid on said notes the sum of $400, with interest thereon from August 16, 1912, at the rate of 8 per cent. per annum.

"Second. That said lot 11 was and is of the dimensions of 50 by 150 feet, and fronts what is known as Valley street in the city of Dexter for the frontage of 50 feet, and that said lot was and still is occupied by a frame hotel building of which the main part is two stories high. There was and is a one-story lean-to addition on the west of the main building, which addition was used as the kitchen of the hotel. The hotel building then did, and still does, stand practically flush on the north end of the lot with the street line as the same was then and is now used and marked by sidewalks, fences, and other improvements on this and adjoining property, and that then and now a cement sidewalk extended east and west along the north line of this lot and immediately along the north side of the hotel building, and that about 1 foot or less west of the northwest corner of the lean-to addition such cement walk was joined by an older brick walk extending along the north side of the adjoining lot 12 in the same line with the cement walk and extending towards the center of town, and that at the time there was a partial row of trees and, perhaps, some fencing, marking the apparent lot line between lots 11 and 12, corresponding practically with the said junction of the two sidewalks, and running on a north and south line some inches, or not to exceed 1 foot west of the lean-to addition to the hotel.

"Third. That the defendants are wife and husband, and at the time of their purchase of the property, they were neither of them familiar with the boundaries or lines of said lot 11, except as the same were indicated by the objects aforesaid, and in showing the property to the defendant J. O. Patterson, who was acting for his wife, the plaintiff informed him that the west line was at the said line of trees, and the defendants believed such statement, and relied thereon in purchasing the property.

"Fourth. Enright's addition to the city of Dexter was laid out and platted more than 25 years ago, and there are none of the original stakes and monuments left indicating any of the corners or lines of the addition, or blocks, lots, streets, or alleys, therein, which can now be found. The evidence which was introduced tending to show the exact location of the boundary lines of lot 11, as originally platted, is unsatisfactory to the court, for the reason that the survey of the witness Merry was not sufficiently thorough to carry conviction of its accuracy, and the survey of the witness Bradley depends entirely upon the accuracy of the true point of intersection of a quarter section line with the easterly line of an earlier addition, which runs in a slanting northeasterly direction, and not at right angles with the quarter section line. The easterly line of the earlier addition seems fairly well established, but the location of the quarter section line is based entirely upon more or less ancient lines of fences and hedges, and not on any established corners, unless it be one stone to the east, and the location of the intersection was determined by sighting from this stone by an intermediate fence or hedge line only, and as the accuracy of the Bradley survey is therefore dependent on corners located merely by old improvements, it fails to be more convincing as to the true location of the east line of lot 11 than the old boundary marks erected by the owners at a time when there is reason to believe the original marks may have been in existence. The facts that the evidence shows that measurements on the recorded plat of the Enright addition were impossible and necessarily incorrect adds to the dissatisfaction of the court with the defendants' evidence of the true location of the lot line.

"Fifth. The plaintiff had owned lot 11 for more than 25 years, during all of which time he honestly believed that the line which he pointed out to the defendants as the west line of lot 11 was correct. This line had been recognized by both parties, the plaintiff and the then owner of said lot 12, as the true boundary line, and the owner of lot 12, whose heirs still own the property, adopted the boundary line more than 25 years ago by erecting a fence thereon, and the brick sidewalk up to the line, and plaintiff set out trees on said line, with the knowledge and acquiescence of the owner of lot 12, and the boundary thus located by the owners was ever since acquiesced in and recognized as the true boundary up to August 16, 1912, except that one of the heirs of the original owner of lot 12 some 8 or 10 years ago expressed to the plaintiff his doubt of the correct location, and it was then agreed that a surveyor should be called, but that was never done. One or two persons, who did not pretend to the plaintiff to have any actual knowledge on the subject, had expressed their opinion to the plaintiff that his building was too far west and extended over on lot 12, but to these parties the plaintiff always contended that he

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knew the location of the line, and that it was at the place where he pointed it out to the defendants, and at the time the plaintiff sold the property to the defendants and pointed out to them the west line of the lot, he was acting in good faith upon the honest belief that he knew the location of the boundary line, and at that time he had no valid reason to suspect he was mistaken in that regard.

"Sixth. Defendants have never been disturbed in their possession of any of the land which was pointed out to them, and which they have occupied, as lot 11, and no demand for possession has ever been made of them, nor any legal proceedings brought against them."

As conclusion of law, the court held from these facts that the plaintiff was not liable to defendants upon the cross-petition, and gave plaintiff judgment for the foreclosure of the mortgage.

The first claim is that the court erred in finding that the separate surveys made by surveyors Merry and Bradley were inaccurate and unreliable. The surveyors were witnesses, and were closely questioned by the court in explanation of their surveys. It would have been impossible for the court to have found that both surveys were accurate and reliable, because they did not agree. One showed that the hotel building was over on lot 12 about 6½ feet, and that the corner of lot 11 was on the Missouri Pacific right of way. The other surveyor testified and his survey showed that the building was over on lot 12 3 feet 7 inches, and that the north end projected into the street 7 feet 5 inches; and this witness said nothing at all about the Missouri Pacific right of way. The witness Merry, when asked where he began running the line with the compass and chain, said that he used a chain, but no compass; that he started at the "stock pen," and not where the survey started when Enright's addition was laid out. This same witness was asked how near the hotel building came to the north line of lot 11, and answered that it came out flush with the property line.

Surveyor Bradley testified that Enright's addition is not "based on any government corner or line," and that the streets of the old town of Dexter run north 33 degrees east of north, and that the opposite streets run at right angles with that; that the country around there was surveyed on a variation which ran from 11½ to 12 degrees east of north, and that he had no means of knowing whether the surveyor who laid out the original townsite or Enright's addition followed the government's variation. A careful examination of the testimony of these witnesses convinces us that the court was justified in rejecting both surveys. Besides several other surveys were in evidence.

Meade, the owner of lot 12 lying west of the lot in controversy, built a fence between the two lots, and this line was recognized for a period of 25 years or more by the owners of the two lots as the line of their property. Plaintiff testified that 16 or 17 years before the time of the trial he had set out some trees along the fence, that all of these died except one, but that he subsequently set out another row along the fence. After Meade's death his widow built a brick sidewalk along the north line of lot 12 beginning at the end of the fence. Bullington erected his hotel, the west side of the building being about 18 inches east of the fence. He afterwards built a cement sidewalk, connecting up with Meade's brick sidewalk. The Missouri Pacific Railway Company built the north end of their depot platform flush with the street and in line with the brick and cement sidewalks above mentioned, and other property owners on the same side of the street improved their property substantially along the same line. Surveyor Bradley testified that the sidewalks run practically in line with the north side of the hotel, and fairly true up to the depot platform.

"A boundary line, long recognized and acquiesced in, is generally better evidence of where the real line should be than any survey made after the original monuments have disappeared." Tarpenning v. Cannon, 28 Kan. 665.

The defendants argue that no title could have been obtained by adverse possession as against the owner of lot 12, because plaintiff believed that the lines were where he represented to the defendants, and therefore it is clear that he never intended to claim any part of lot 12. Cases are cited which recognize the doctrine that the character of the possession depends upon the intent with which it is taken and held. It is true, the court finds that the plaintiff believed the line he pointed out to the defendants as the west line of lot 11 was correct, but this is merely a finding that the plaintiff acted in good faith. The owners of lot 12 are not parties to this litigation, and we do not understand the court to have decided that plaintiff, when he sold the property to the defendants, had acquired a title to part of lot 12 by prescription. For this reason many of the propositions of law urged by the defendants need not be considered because they have no application here.

It is sufficient answer to defendants' contention that plaintiff could obtain no title to a portion of a public street by adverse possession to say that there is no finding of the court that any part of the building was in the street. The finding is that the building "stands flush with the street." From all that appears in the evidence there is no probability that the public will ever interfere with the defendants' right to maintain the building where it is, so far as the street is concerned. The burden was on the defendants to establish, not only that the representations were relied upon, but that they were false. The evidence failed to satisfy the court that the defendants were entitled to the relief prayed for. There was certainly much conflict in the evidence, and we feel bound by the decision of the trial court on the facts,

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and are convinced that the judgment should be, and it is, affirmed. All the Justices concurring.

(99 Kan. 271)

FRANKLIN v. FAIRBANKS. (No. 20417.)*

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. ADOPTION ⊜18—INHERITANCE BY ADOPTED CHILD.

The statutory rule followed that an adopted child has the same rights of person and property as natural children or heirs at law of the person adopting her. Gen. St. 1909, § 5066.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 33, 34; Dec. Dig. ⊜18.]

2. ADOPTION ⊜23 — INHERITANCE FROM ADOPTED CHILD.

Where a person dies leaving a life estate to his sole heir, an adopted daughter, and the remainder to her issue if she should have issue, he dies conditionally intestate as to the remainder, and upon the death of the daughter without issue, the remainder descends to those who claim through the daughter, and not to his collateral kindred.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. § 42; Dec. Dig. ⊜23.]

Appeal from District Court, Pottawatomie County.

Action by Paul R. Franklin against A. M. Fairbanks. From a judgment for plaintiff, defendant appeals. Reversed.

W. F. Challis and Brookens & Francis, all of Westmoreland, for appellant. Woodburn & Woodburn, of Holton, for appellee.

DAWSON, J. Samuel F. Campbell of Pottawatomie county died on November 4, 1904, without a wife and with no children except an adopted daughter, Debbie G. Campbell. He left a will bequeathing $100 to each of his two sisters, and to his only brother he left his rifle. It further provided:

"Fourth I give and bequeath all of the remainder of my estate both real and personal of what soever nature to my Adopted Daughter Debbie G. Campbell during her natural life and then to her heirs if any survive her if no heirs survive her then to some Prodisan orfans Home."

This adopted daughter died in October, 1912, at the age of 16 years, without husband or children.

A tract of land which belonged to Samuel F. Campbell in his lifetime is the subject of this lawsuit. The plaintiff claims title and part ownership through a deed and a contract of purchase from the heirs of Samuel's brother. The defendant claims title under a deed executed to him by the administrator of Debbie G. Campbell's estate. The litigants agree that the contingent grant to some Prostestant orphan's home is void for uncertainty of beneficiary. They likewise agree:

"Seventh. By the use of the word 'heirs' in the fourth numbered item or paragraph of the will of S. F. Campbell, the testator therein meant 'issue.' * * *

"In addition to the foregoing facts it is further agreed that the proceedings in the probate court of Jackson county, Kansas, in the estate of Debbie Campbell, leading up to the administrator's deed to the defendant, A. M. Fairbanks, are regular, if in fact Debbie G. Campbell's estate had any interest in the property which could be conveyed."

The district court rendered judgment for plaintiff, and defendant appeals.

[1, 2] Since it is agreed that the uncertain grant to some Protestant orphans' home is void, and that the word "heirs" in the fourth clause of the will means "issue," we have then a bequest of a life estate to Debbie G. Campbell, and, subject to the contingency of Debbie's having issue, an intestacy as to the remainder of S. F. Campbell's estate. What happens if Debbie has no issue? It goes to his heirs. Who are his heirs? His only daughter—an adopted daughter, of course, but none the less his daughter. Gray v. Holmes, 57 Kan. 217, 45 Pac. 596, 33 L. R. A. 207; Riley v. Day, 88 Kan. 503, 129 Pac. 524, 44 L. R. A. (N. S.) 296. Under the will his daughter took a life estate. Upon her failure of issue the conditional intestacy of Samuel became absolute, and the remainder of the estate passed to those who may claim under Debbie, the nearest, sole, and direct heir at law of Samuel. While Debbie died without issue, Samuel did not. He left Debbie in his own direct line (Gen. St. 1909, § 5066), and his collateral kindred have no claim to this property as against the grantee of Debbie's administrator. This necessitates a reversal of the judgment. All the Justices concurring.

(99 Kan. 404)

CLINE et al. v. WETTSTEIN et al. (No. 21023.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS ⊜50—MEETING OF SCHOOL DISTRICT—DISCRETION.

The granting of a petition calling a special meeting of a school district rests in the discretion of the district board. State v. School District, 80 Kan. 667, 103 Pac. 136.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 113–125; Dec. Dig. ⊜50.]

2. SCHOOLS AND SCHOOL DISTRICTS ⊜68—SCHOOLHOUSES—ERECTION.

On March 4, 1916, a school district six miles long and four miles wide having a schoolhouse situated at the geographical center of the district voted bonds in the sum of $2,000 to build a schoolhouse. After the board had let the contract for the erection of the new building, purchased the lumber, and had torn down the old building, this proceeding was commenced to compel the board to erect two schoolhouses. *Held*, on the facts stated in the opinion, petitioners are not entitled to relief, and the writ is denied.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 170–173; Dec. Dig. ⊜68.]

⊜For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied January 13, 1917.

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Original petition by Olin G. Cline and others for writ of mandamus against W. F. Wettstein and others, composing the School Board of District No. 24, Stevens County, to compel the construction and maintenance of two schoolhouses. Writ denied.

F. S. Macy, of Liberal, E. W. Davis, of Kansas City, and Clyde R. Commons and G. W. Sawyer, both of Liberal, for plaintiffs. E. C. Warfel and V. H. Grinstead, both of Liberal, for defendants.

PORTER, J. This is an original proceeding in mandamus to compel the respondents, the school board of district No. 24, Stevens county, Kan., to construct and erect two schoolhouses in the district, and to maintain two schools for the ensuing year.

The petitioners are residents and qualified electors of the district. The alternative writ alleges that on the 4th day of March, 1916, a special election was held at which the district voted bonds in the sum of $2,000 for the purpose of erecting "schoolhouses"; that at the annual meeting held April 14, 1916, no action was taken in reference to the erection "of new schoolhouses for which said bonds were voted," and no action was taken in regard to the disposition of the old schoolhouse which was situated on land not owned by the district. It is then alleged that thereafter, upon a petition signed by ten resident taxpayers and legal voters of the district, the board called a special meeting to be held on the 22d day of May, 1916, for the following purposes:

"First, building two school buildings in the district; second, to locate the sites for said school buildings; third, for the purpose of reconsidering the levy for school purposes for the year 1916; fourth, to vote upon the proposition of disposing of the said old school building."

It is alleged that at the meeting of May 22d a motion was duly made and seconded that the district build two schoolhouses with the proceeds of the bonds theretofore issued, that the motion was put to vote, and out of 58, which was the total number of legal voters in the district, there were 30 votes in favor of the motion and 21 votes against it, and that without any action being taken upon the other propositions for which the meeting was called the meeting adjourned. The writ then alleges that a petition signed by a majority of the legal voters and taxpayers of the district was presented to the district board asking for a special meeting of the district, to be held June 20, 1916, for the purpose of—

"correcting minutes of last special meeting, and: (1) Locating the site for new school building; (2) raising the levy for school purposes for the year 1916 to $860; (3) to vote on the proposition of disposing of old school building."

It is not alleged that the district board called this meeting; it is alleged that the notice was posted by the district clerk and the meeting held, at which it was lawfully determined that the sites for the two schoolhouses be located and the schoolhouses built as follows: One schoolhouse to be built one mile and a half south of the old schoolhouse on land (describing it); one schoolhouse to be built two miles north of the old schoolhouse on land (describing it).

It is alleged that the respondents have torn down and destroyed the only school building in the district, and that the district does not own or control a school building. The alternative writ was issued September 5, 1916, when the action was commenced, and directed the respondents to answer and show cause why the peremptory writ should not issue requiring them to construct two schoolhouses as provided for at the special meeting of June 20, 1916.

The respondent's answer pleads quite fully the facts relied upon as a defense. This opinion may be shortened by referring to these facts later in connection with the evidence, which is comprised in depositions taken by the respondents. After the main witnesses on behalf of respondents had testified, all the petitioners were called as witnesses, but they refused to testify, two of them stating that they expected to testify before this court when the case was set for hearing. The case has been submitted on the pleadings and the evidence taken by the respondents.

School district No. 24 in Stevens county is six miles north and south and four miles east and west. The Seward county line bounds the district on the east and the Kansas-Oklahoma state line is the southern boundary. In 1908 a schoolhouse was built at the geographical center of the district upon land owned by F. B. Shinkle and under an agreement by which he was to convey the site to the district by warranty deed. Ever since the building was erected the school has been maintained at this place until the building was torn down as hereinafter stated. On June 7, 1916, Mr. Shinkle conveyed the title to the land to the district by a deed which the district accepted and filed for record.

On March 4, 1916, at a special election, the district voted bonds in the sum of $2,000, not, as petitioners allege, for the purpose of erecting "schoolhouses," but for the purpose of erecting "schoolhouse" in the district. The controversy over the question of the two schoolhouses developed later. The bonds were issued and sold to the state school fund. At the annual meeting of the district, which was held April 14, 1916, no action was taken in regard to the disposition of the old schoolhouse. The meeting voted for an eight months' term of school and for a levy that would produce $525. The treasurer reported $150 on hand. There was a discussion with reference to having two schools in the district, but no record was kept of this discussion in the minutes. Mr. Brightup, clerk of the board, who is one of the petitioners in this action, opposed having more than one

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school, and explained to the meeting that it took $525 to run one school the previous year, and he placed the figures on the blackboard showing it would take $1,200 to run two schools, and informed the meeting that the assessed valuation of the district (which is $191,811 for the year 1916) was not enough to justify two schools without voting an excessive tax, and that the district paid from $65 to $75 per month for a teacher. The meeting then adjourned. A petition was presented later for a special meeting to be held May 22d. The evidence shows that it was not presented to the board, but was presented to the individual members. No meeting was called by the board, but Mr. Brightup, the clerk, posted the notices, and the meeting was held and attended by a majority of the legal voters of the district. The notice stated that the purposes for which the meeting would be held were: (1) Building two schoolhouses in said district; (2) to select a site for them; (3) to reconsider the levy for school purposes; (4) to vote on the proposition of disposing of the old school building.

The evidence shows without any dispute that Mr. Wettstein, a member of the board, who is one of the respondents, presided at the meeting, and, before putting a motion which had been made for two schoolhouses, he stated that he supposed every one understood that the adoption of the motion meant a change in the site, and that in order to do this it would require a majority of the legal voters in the district. There was some discussion, and an examination of the school laws with reference to the changing of the school site, but the vote was taken with the understanding that it would require a majority of the voters in the district. There were 30 votes in favor of two schoolhouses and 21 votes against, and the chairman declared the motion lost. A motion was made to adjourn the meeting, and it carried. The evidence shows that the minutes of the meeting as first written up by the clerk showed that the motion to have two schoolhouses was lost.

Thereafter, on June 7, 1916, the school board procured a deed from the owner of the land conveying the premises to the district and on the same day entered into a written contract for a new schoolhouse. They tore down the old building, contracted for the purchase of lumber, and had some of the sand hauled for the construction of the new building when they were enjoined from further proceeding by the district court of Stevens county in a suit brought by some of the petitioners in this action. On July 8, 1916, the district court dissolved the injunction. Thereafter some of the petitioners served written notice upon the contractor and upon the lumber company notifying them not to proceed with the contract, and not to furnish any material therefor, threatening litigation if the notice was disregarded.

The petition asking the board to call a special meeting for June 20, 1916, was not, as the writ alleges, signed by a majority of the legal voters of the district, nor was it presented, except to the individual members of the board. At the time it was presented to Mr. Wettstein it contained 12 names. The meeting was not called by the board, but the clerk prepared and posted notices of the meeting, and a meeting was held which was attended by a majority of the voters of the district. The June meeting seems to have been called upon the theory that at the special meeting of May 22d the motion that two schoolhouses be built had in fact carried, and the first business transacted at the meeting June 20th was the adoption of a motion that the minutes of the preceding meeting should not be approved, but that they should be corrected to read that the motion for the erection of two schoolhouses had carried instead of lost. There were 30 votes in favor of the erection of one schoolhouse a mile and a half south of the old site, and about 20 in favor of locating one two miles north of the old school.

The facts set forth as grounds for the peremptory writ are not borne out by the evidence, while every material fact pleaded in defense is sustained. If the application for the alternative writ had stated the facts as they existed, needless to say the writ would not have issued. Instead of there being but 58 legal voters in the district, there were 64; so that, if it were conceded that the special meeting of May 22d was called by the board (and the evidence fails to show that it was), the proposition to erect two school buildings did not carry, as it received but 30 votes. Besides, there was no objection to nor appeal from the ruling of the chairman declaring the motion lost, and because it was understood to have failed, the other propositions were not presented nor voted upon; moreover, the vote for two schoolhouses was submitted with the understanding of those present that its adoption meant a change of site. The school laws provide that, where the school building has a value of not less than $400, the site cannot be changed except by at least a two-thirds vote; if the value is less than that sum, a majority vote is sufficient. Laws 1903, c. 428, § 1. The value of the building must first be determined by three appraisers appointed by the county commissioners. Laws 1903, c. 428, § 2. In this case the value of the old building has never been determined; it was torn down for the purpose of erecting the new building for which the bonds had been voted, and the pleadings as well as the evidence are silent as to its former value. The board did not take down the old building until June 12th, after the special meeting of May 22d, and the material was placed under cover with the intention of using it in constructing the new building.

[1, 2] The meeting of June 20th was not called by the board. The school laws pro-

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vide that "special meetings may be called by the district board or upon a petition signed by ten legal voters of the district." Laws 1911, c. 283, § 1. The word "may" in this statute has been construed as permissive and not mandatory upon the board. State v. School District, 80 Kan. 667, 103 Pac. 136. Some of the remarks of Mr. Chief Justice Johnston in the opinion in that case apply with so much force to the situation here that we quote:

"Can it have been intended that after a tax has been voted, contracts made, and a teacher employed, ten taxpayers who failed to attend or who were outvoted at the annual meeting can on request require another meeting to be called and another test of strength taken on one or more of these propositions? If at the annual meeting directions were given to put on a new roof or to make other repairs on a schoolhouse, after the contract has been let may a resident builder who failed to get the job procure nine others to join him in a petition and have the questions reopened and the contracts, partially executed, annulled? If questions which provoke controversy, like the selection of a site, could be reopened whenever ten disappointed taxpayers might ask for another vote, dissension and disorder would prevail in many districts much of the time."

If the meeting held June 20th had been legally called, and the number of legal voters in the district had been 58 instead of 64, the petitioners concede that sites were not chosen for two school buildings. There were 30 votes at this meeting for building one schoolhouse a mile and a half south of the old school, but the proposition to locate a building in the north end of the county had only 21 votes. It is also conceded that the district has never acquired and has never taken any steps to acquire title to the lands upon which we are asked to compel the board to erect buildings.

At the hearing and in the briefs the petitioners have placed much stress upon the conditions which exist in the district and the disadvantages imposed upon some of the patrons who live near the extreme ends of the district, and we are asked to make some kind of an order which will relieve the situation. The area of the district is, of course, too great to furnish equal privileges to all the school patrons, but these conditions exist because the neighborhood is sparsely settled, and the assessed valuation of the property therein is not sufficient to justify a division of the district. The statute provides:

"That new districts shall not be formed with an assessed valuation of less than $100,000, and territory shall not be detached from any school district the assessed valuation of property of which is less than $100,000, or the valuation of property of which would thereby be reduced below $100,000. Laws 1911, c. 268, § 7.

The location of the district in the corner of the county doubtless makes it difficult to send part of the pupils to adjacent districts. Besides, there are but 31 children of school age in the district. The claim of the petitioners that the respondents have destroyed the old building, and that there is no school building in the district, does not appeal to us with much force in view of the undisputed facts. In March the district voted bonds to build a new schoolhouse. After the special meeting of May 22d in which a proposition to build two schoolhouses had been considered and voted down, the board was proceeding to carry out the expressed will of the voters of the district, and, having first procured a deed to the site which belonged to the district, and where the voters at the special election expected the new building to be erected, entered into a written contract for the construction of the new building for which the bonds had been voted. The respondents tore down the old building, made a contract for the purchase of lumber, and had hauled the sand and were proceeding to erect the new building when some of the petitioners and other patrons of the district enjoined them from proceeding with the construction. When the court dissolved the injunction the lumber dealer and contractor refused to go ahead with their contracts because the petitioners had given written notice to them threatening litigation if the contracts were carried out. The respondents say in their answer, and the evidence shows, that except for the action of the petitioners, the new building would have been completed in ample time for the opening of the fall term of school.

The respondents say in their answer and testify that they are willing to provide transportation for the school children in the district who reside more than 2½ miles from the school, in accordance with the provisions of the law. Laws 1911, c. 273, § 1.

The writ will be denied. All the Justices concurring.

(99 Kan. 248)

COMMERCIAL STATE BANK v. BAKER et al. (No. 20,356.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES ⇐172(4)—RIGHTS OF PARTIES—ACTION FOR POSSESSION—PLEADING AND PROOF.

In a replevin action brought by a second mortgagee against the mortgagor and against the holders of a prior mortgage who are in possession of the property, the plaintiff, without having pleaded payment or satisfaction of the prior mortgage, may offer proof of payment or satisfaction, or of any fact which tends to defeat the priority of the first mortgage; and the fact that he has pleaded in his petition that the first mortgage was fully paid will not prevent him from offering proof of satisfaction otherwise than by the payment of money.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 307, 314; Dec. Dig. ⇐172(4).]

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2. CHATTEL MORTGAGES ⟸172(4)—RIGHTS OF PARTIES—ACTION FOR POSSESSION—CROSS-PETITION.

In such an action, where the defendant mortgagor files a cross-petition against his codefendants, claiming that the first mortgage has been paid and that he is the owner of the property, subject only to the lien of the plaintiff, he may set up, as against his codefendants, a claim for unliquidated damages arising out of transactions connected with their possession of the property in controversy.

[Ed. Note.—For other cases, see Chattel Mortgage, Cent. Dig. §§ 307, 314; Dec. Dig. ⟸172(4).]

Appeal from District Court, Woodson County.

Action by the Commercial State Bank against Arthur Baker and others. From a judgment for plaintiff, defendant Baker and another appeal. Affirmed.

J. C. Culver, of Yates Center, S. A. Gard, and G. R. Gard, both of Iola, for appellants. Lamb & Hogueland and George R. Stephenson, all of Yates Center, for appellee.

PORTER, J. This was a replevin action by the plaintiff bank to recover possession of a drilling machine used for drilling oil and gas wells. The petition set forth the special ownership of the bank, based upon two chattel mortgages executed by Ben Hight, the owner of the machine, who was made a defendant. The mortgages recited that they were taken subject to a prior chattel mortgage of $600 held by defendants Baker and Tilden, the petition alleging that the prior mortgage had been fully paid, and that whatever rights Baker and Tilden claimed in the property were subject and inferior to the rights of plaintiff. Baker and Tilden answered by a general denial. The defendant Ben Hight filed an answer and cross-petition, in which he admitted the claims of plaintiff and alleged that the prior mortgage had been fully paid; also that he owned the property subject only to the liens of the plaintiff. He alleged that the value of the property at the time plaintiff demanded possession from Baker and Tilden was $1,500, and he asked for judgment against his codefendants for the value of his interest in the property after satisfaction of plaintiff's claim. The jury returned a verdict for the plaintiff, and found the value of its special interest in the property to be $416.87. Special questions submitted by the court and by defendant Hight were also returned. The plaintiff was given judgment in accordance with the findings. Hight was given judgment against Baker and Tilden for the value of his interest in the property, which the jury found to be $411.19. From both judgments Baker and Tilden appeal.

In September, 1913, Baker and Tilden entered into a written contract with Ben Hight, the owner of the drilling machine, by which he was to drill a well for them to a depth of 1,200 feet, and he was to be paid $1 per foot on the completion of the well; they were to furnish water for drilling purposes. A few days later they loaned him $600, secured by a chattel mortgage on the drilling machine. The mortgages under which the plaintiff claims were executed subsequently for loans made by the bank to Hight. After drilling the well 620 feet Hight threw up the contract, claiming that he was unable to proceed by reason of the delay of Baker and Tilden in furnishing water. He testified that he went to Oklahoma where Baker and Tilden were, explained the situation, and offered to let them use the drill and tools to complete the well, and asked them to credit him with $1 a foot for the depth the well had been drilled and apply it on the mortgage, but that they refused to give him credit on the mortgage. They immediately took possession of the drilling machine and tools, and the jury find that they sold the property under the mortgage for $1,100, and that the fair and reasonable value of the property at that time was $1,408.

The principal contention of Baker and Tilden is that, instead of offering proof of payment of the $600 mortgage, the entire testimony consisted of proof of damages claimed by Hight on account of the breach of the contract to furnish water for drilling purposes, and that there was no evidence of any settlement between them and Hight, or of any recognition by them of a counterclaim or set-off in his favor. Over the objection of defendants Baker and Tilden the court permitted the plaintiff to offer evidence to show numerous delays in furnishing water, and evidence to prove a claim for unliquidated damages due to Hight by reason of such delays. The court also submitted the issue of unliquidated damages to the jury, and instructed that if the jury found that Baker and Tilden failed to furnish water in sufficient quantities, and that by reason thereof and from no fault of his own Hight was rendered unable financially or without great loss to himself to prosecute the work, he was justified in ceasing work, and would be entitled to recover $620 for the drilling done, and in addition thereto such damages as the evidence showed he sustained. The court also submitted to the jury the issue whether it was understood between Hight and Baker and Tilden at the time the note and chattel mortgage were executed that the indebtedness should be paid out of the consideration for the drilling of the well. No special questions were asked or submitted respecting this issue, except that the jury found, in answer to a question submitted by Hight, that at the time Hight abandoned the contract he requested Tilden "to apply the money then owing for drilling the well, on the $600 note and mortgage." The plaintiff, as well as defendant Hight, insist that, notwithstanding the written contract for drilling

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the well provided that the $1 per foot should be due and payable on the completion of the well, it became at once due and payable by reason of the breach of the contract by Baker and Tilden. Upon the evidence and findings it is impossible to discover whether the jury found for the plaintiff upon this theory or upon the theory that the first mortgage was satisfied by a claim for damages arising from the breach of the contract. By the general verdict we must assume the jury found that the appellants had breached the contract, and in that case defendant Hight was entitled to have the payment for so much of the work as was completed applied in satisfaction of the mortgage.

[1] The contention of appellants is that a plea of payment cannot be supported by evidence of a claim or set-off for unliquidated damages, that the word "payment" in its legal sense means a delivery by the debtor to the creditor of money or something accepted by the creditor as payment of the debt. It was not necessary, however, for the plaintiff to allege payment. Without any plea of payment, under the liberal rules that have always been applied to replevin actions under the Code, plaintiff might have offered evidence tending to show satisfaction in any lawful manner of the prior mortgage debt, or any facts that would advance the junior mortgages to a priority. Actions in replevin under the Code have always been regarded as constituting a class by themselves so far as the scope of the issues made by the pleadings is concerned. In most of the cases the question has been: What may be proved by the defendant under a general denial? It has been repeatedly held that he may prove every fact which goes to show that plaintiff should not recover against him. Colean v. Johnson, 82 Kan. 655, 109 Pac. 403, 20 Ann. Cas. 296, and cases cited in opinion. We know of no reason why this same rule should not apply to a petition which states a cause of action in replevin. Without filing a reply the plaintiff may rebut the effect of any proof offered by the defendant. Street v. Morgan, 64 Kan. 85, 67 Pac. 448. In Miller v. Thayer, 96 Kan. 278, 280, 150 Pac. 537, 538, which was a replevin action, it was said:

"If for any reason the indebtedness evidenced by the note does not exist, the plaintiff is not entitled to the possession of the property in controversy under his chattel mortgage. Whatever defeats the note may be set up as a defense to defeat the plaintiff in this action. In order that the dispute concerning the transaction may be settled, it is necessary that the claims of both the plaintiff and the defendant be adjudicated. Both parties ask that the right to the possession of the property be determined. It is proper that this be done. This cannot be done without determining the matters presented in the answer. There are no practical, insurmountable difficulties in the way of determining, in this action, all the rights of these parties growing out of the transaction which has become the subject of this lawsuit."

[2] In the present case Hight's cause of action on his cross-petition, respecting the very property in controversy, could only be determined by an inquiry as to his right to set-off against the first mortgage, held by his codefendants, a claim for unliquidated damages; and the plaintiff had a vital interest in that issue because the priority of its own mortgage lien was directly involved.

There was a sharp conflict in the evidence upon the issue whether appellants had failed in any respect to furnish an adequate supply of water for drilling purposes; but the jury determined that issue against appellants, and the trial court approved the verdict. The appellants also offered evidence tending to justify their refusal to credit their mortgage with the amount claimed to be due on the 620 feet the well had been drilled when Hight abandoned the contract. Their evidence seems to show, without substantial contradiction, that they knew of a large amount of claims for labor and material which had not been paid by Hight, and which they subsequently paid to prevent liens and attachments being filed against the property. We find no error, however, in overruling the objection to the introduction of testimony, because the petition, as well as the cross-petition, stated a cause of action; and there was no error in the admission of testimony or the instructions submitting the issue as to unliquidated damages.

It follows that the judgment will be affirmed. All the Justices concurring.

(99 Kan. 263)

J. B. RHODES LUMBER CO. v. MORRIS et al. (No. 20412.)*

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

MECHANICS' LIENS ⟨@=277(3), 281(4)—ENFORCEMENT—ISSUES AND PROOF—SUFFICIENCY OF EVIDENCE.

In an action to foreclose a mechanic's lien on a silo, the answer denied nothing, but alleged the substitution of material different from and inferior to that specified in the contract and that by reason thereof the silo burst, spoiling part of the contents. The jury found that the substitution of different material was by agreement of the parties, and allowed defendants damages for the amount of silage found to have been spoiled, and gave judgment to the plaintiff for the difference. *Held*, that the findings and verdict are supported by sufficient evidence, and that the trial court rightly restricted defendant's proof to the only defense pleaded.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 548, 549, 571; Dec. Dig. @=277(3), 281(4).]

Appeal from District Court, Morris County.

Action by the J. B. Rhodes Lumber Company against Victoria Morris and others. From the judgment, defendants appeal. Affirmed.

@=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied January 13, 1917.

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Edwin Anderson, of Council Grove, and Frans E. Lindquist, of Kansas City, Mo., for appellants. Nicholson & Pirtle, of Council Grove, for appellee.

PORTER, J. On August 11, 1916, the Wooden Hoop Silo Company made a contract to build a silo for J. P. Morris, for which he agreed to pay $225. After the completion of the silo, he refused to pay the purchase price, and the silo company filed a mechanic's lien. Subsequently it assigned the lien and claim to the appellee. On January 1, 1914, J. P. Morris died intestate, and this action to foreclose the lien was brought against the administrator and heirs of his estate. An answer was filed which did not contain a general denial. It admitted the material statements of the petition, and in addition set up as a defense that the silo was not constructed according to the terms of the contract; that instead of No. 1, four-inch flooring specified in the contract, defective car siding and also insufficient wooden hoops were used. It alleged that by reason of these defects the silo burst after it had been filled, and that 20 tons of silage, worth $8 per ton, spoiled. The answer alleged that by reason of the faulty construction of the silo, and on account of certain expenses incurred in attempt to repair the same, the defendant's damages exceeded the amount sued for. The reply alleged that car siding was substituted for four-inch flooring by agreement with the purchaser and for the reason that he did not desire to wait until the flooring specified in the contract could be obtained, and that the broken hoops were immediately replaced by wire cables with his consent. It denied the other allegations of the answer. The jury returned special findings and a verdict in plaintiff's favor for $210.74. The findings show that defendants were allowed for 6 tons of silage spoiled, which the jury valued at $6 per ton.

The findings, which are well supported by the evidence, sustain all the contentions of the plaintiff. Several quite technical objections are raised, but no substantial reason is suggested why the judgment should not be affirmed. The answer denied nothing. The sole defense was predicated upon the substitution of material different from and inferior to that specified in the contract. At the trial it was too late for defendants to question whether the silo company was a corporation. Whether the plaintiff, in arranging for the substitution of a different class of lumber from that specified in the contract, was acting under express authority from the silo company, was not material, because, as the evidence and findings show, Dr. Morris, the agent of his father, the purchaser, consented to the substitution, and the evidence shows a sufficient consideration for the agreement. The lumber company was at least a subcontractor and supplied the lumber on the contract of the silo company. The trial court rightly restricted defendant's proof to the defense pleaded, and properly refused to admit evidence of the condition of the silo at the time of the trial, or to submit that question to the jury.

The special findings show the jury were not misled by the fact that the court in one instruction used the word "and" where the word "or" would have been appropriate.

The judgment is affirmed. All the Justices concurring.

(99 Kan. 222)

DANIELSON v. DANIELSON. (No. 20259.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

DIVORCE ⟸253—DISTRIBUTION OF PROPERTY —SUFFICIENCY OF EVIDENCE.

The evidence considered, and *held*, that the judgment refusing a divorce and making a division of property will not be disturbed.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 716, 717; Dec. Dig. ⟸253.]

Appeal from District Court, Cloud County.

Action by William Danielson against Bettie Danielson. From the judgment, the plaintiff appeals. Affirmed.

Pulsifer & Hunt, of Concordia, for appellant. Sturges & Sturges, of Concordia, for appellee.

BURCH, J. The action was one for divorce. Divorce was denied, but a division of property was made. The plaintiff appeals.

The court has experienced considerable difficulty in reaching a conclusion respecting the propriety of the action of the district court in denying the plaintiff a divorce. The evidence will not be discussed in detail. That in favor of the plaintiff established grounds for divorce recognized by the law of this state. With the policy of the law the courts have nothing to do. The defense was not very vigorous. It consisted chiefly of half denials, explanations, palliations, and weak counter charges. The plaintiff separated from the defendant and went to the city of Clyde, where he engaged in business. There can be no doubt that two letters written by the defendant to her husband, after she found their matrimonial ship on the rocks, came from her heart and represented her true self. They admitted fault, expressed sorrow, and begged pardon for ugly words, pleaded that she was but human clay, told of the emptiness of her home and her life, implored forgiveness, and expressed a longing desire for his return. The distressed wife's yearning cry for her husband to come home is indeed a moving thing. But there is sufficient in the record to indicate that, had he returned, it would not have been long until his wife's unfortunate dispo-

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sition would have reasserted itself, and the same infelicitous condition of affairs, which had grown worse in later years, would have again confronted them. Perhaps the defendant is helpless against her own unhappy temperament, and the cause may be largely pathological. It may be that the plaintiff feels, deep down in his inner consciousness, that his wife really loves him, and it may be he was more wearied and exasperated than wounded by her conduct. For a long time at least it was borne with much serenity. There are no findings of fact, and this court can do little more than speculate with reference to what determined the judgment. The evidence was chiefly oral. The court saw and heard the parties themselves, and applying the rules of appellate procedure, which are sound in principle and wholesome in result, this court is unable to say that the judgment is wholly without substantial foundation.

The division of property is quite as unsatisfactory as the order refusing a divorce. The defendant was charged, until further order, with the maintenance of the two children of the marriage, Ethel and Reynold, who were, respectively, 13 and 10 years old at the time of the trial in April, 1915. The property divided was contributed and accumulated by both parties. It consists of a farm of 160 acres, a farm of 80 acres, a residence in Concordia, an interest in a clothing store in the city of Clyde, notes to the amount of $575, household goods, and an automobile. The two farms are covered by a mortgage for $2,500, and the plaintiff owes personal debts to the amount of $1,370. The residence in Concordia was valued at $3,000 and was given to the defendant. The plaintiff's interest in the store at Clyde was valued at $4,000, and was awarded to him. The household goods were given to the defendant, and the automobile to the plaintiff, without valuation. The farm of 160 acres was given to the defendant, charged with $1,300 of the mortgage, and the farm of 80 acres was given to the plaintiff, charged with the remainder of the mortgage. The plaintiff produced a real estate agent as a witness who valued the larger farm at from $13,500 to $13,700, and the smaller farm at from $6,500 to $6,800. Another witness for the plaintiff valued the larger farm at $13,500 and the smaller farm at $6,750. The defendant's brother and another witness in her behalf valued the larger farm at $15,000 and the smaller farm at $5,000. In the briefs each side recommends to this court the evidence of the other side. The plaintiff testified that the 240 acres of land were worth from $70 to $80 per acre. He was not asked to value the farms separately.

Taking the figures most favorable to the defendant, the net share apportioned to each party was as follows:

The defendant received:		
Residence		$ 3,000
Farm		13,500
Total		$16,500
Less mortgage		1,300
Net value		$15,200
The plaintiff received:		
Clothing store interest		$ 4,000
Farm		6,800
Notes		575
Total		$11,375
Less: Mortgage	$1,200	
Debts	1,370	2,570
Net value		$ 8,805

On the evidence for the defendant, the account stands as follows:

The defendant received:		
Residence		$ 3,000
Farm		15,000
Total		$18,000
Less mortgage		1,300
Net value		$16,700
The plaintiff received:		
Clothing store interest		$4,000
Farm		5,000
Notes		575
Total		$9,575
Less: Mortgage	$1,200	
Debts	1,370	2,570
Net value		$7,005

The plaintiff testified that the land is worth from $70 to $80 per acre. If the farms are of equal value, and are worth $75 per acre, the account stands as follows:

The defendant received:		
Residence		$ 3,000
Farm		12,000
Total		$15,000
Less mortgage		1,300
Net value		$13,700
The plaintiff received:		
Clothing store interest		$ 4,000
Farm		6,000
Notes		575
Total		$10,575
Less: Mortgage	$1,200	
Debts	1,370	2,570
Net value		$8,005

Averaging these results, the defendant received more than $15,000 and the plaintiff less than $8,000. What values the court deemed to be established by the evidence cannot be known.

Years ago the defendant received from her relatives 80 acres of land. Afterwards half of the tract was sold for $900, and still later the remainder was sold for $2,850. The funds derived from these sales were used and invested as common assets of the husband and wife. In the year 1909 the residence in Concordia was purchased for $2,800 and title was taken in the wife's name.

The plaintiff's net income from his clothing store in Clyde was not shown, and the average net income from the two farms was

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not shown. The plaintiff's physician testified as follows:

"Have treated Mrs. Danielson professionally. I saw her this morning. She did not sleep any last night, and was extremely nervous. I treated her in the latter part of 1913. She was extremely nervous. That might be inherited, or it might be brought on from other causes. The majority of women after childbirth are nervous. She had some inflammation of the right ovary, and was lacerated some. She probably took treatment off and on for about six weeks. I have seen her occasionally since then. I think I treated her in February, 1915. Have probably seen her a dozen times within the last eight months or a year. In 1913 she was suffering from neurasthenia. I found her in the condition the majority of women are who have borne children. Her condition was no worse than the ordinary woman of that age. She improved under treatment. There was no more the matter with her mind than you would find in any neurasthenic patient."

The maintenance of the two children will be a financial burden on the defendant, but they cannot be regarded as unqualified liabilities. The order respecting their maintenance may be changed at any time. The plaintiff carries life insurance for their benefit to the amount of $2,500. The court's purpose at the conclusion of the trial was to give the defendant a life estate in the larger farm, with the remainder in fee to the two children. Discovering that this could not be done, judgment was rendered as indicated; but the defendant immediately deeded the farm awarded her to the children, reserving a life estate to herself.

The statute reads as follows:

"When the parties appear to be in equal wrong, the court may in its discretion refuse to grant a divorce, and in any such case or in any other case where a divorce is refused, the court may for good cause shown make such order as may be proper for the custody, maintenance and education of the children, and for the control and equitable division and disposition of the property of the parties, or either of them, as may be proper, equitable and just, having due regard to the time and manner of acquiring such property, whether the title thereto be in either or both of said parties, and in such case the order of the court shall vest in the parties a fee-simple title to the property so set apart or decreed to them, and each party shall have the right to convey, devise and dispose of the same without the consent of the other." Civ. Code, § 668 (Gen. St. 1909, § 6263).

A division of property under a statute of this character depends on the peculiar circumstances of the case. Some of the things to be considered, in addition to those specified in the statute, are the age, health, earning capacity, and future prospects of each party. The question here is not simply whether or not the district court was too liberal in its allowance to the defendant, but whether or not the division was so manifestly inequitable and unjust that this court should interfere. All the facts considered, the court concludes to let the division of property stand.

The judgment of the district court is affirmed. All the Justices concurring.

(99 Kan. 351)

COOK v. COOK et al. (No. 20482.) *

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. EJECTMENT ⟸90(1)—WITNESSES ⟸159(7)—ADMISSIBILITY—TRANSACTIONS WITH DECEASED PERSONS.

In ejectment the defendants (husband and wife) claimed under an oral gift from the plaintiff (the husband's father), followed by possession and improvements. *Held*, that the rejection of evidence that the plaintiff's wife, who had since died, had approved the gift, was not error, because, if offered to show title derived from her, it was incompetent under the statute (Laws 1911, c. 229, § 1) relating to transactions with persons since deceased, and otherwise it was immaterial.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 254, 261; Dec. Dig. ⟸90(1); Witnesses, Cent. Dig. § 674; Dec. Dig. ⟸159(7).]

2. GIFTS ⟸49(4)—LAND—EVIDENCE.

In such an action, it is held that too great a burden was not placed upon the defendants by an instruction that a gift of land cannot be inferred from slight circumstances, but must be proved by evidence of such a clear nature and quality as to satisfy the minds of the jury.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 95; Dec. Dig. ⟸49(4).]

3. EJECTMENT ⟸110 — ACTIONS — INSTRUCTIONS.

In such an action, it being admitted that the son as lessee had executed a lease from his father, no error was committed in refusing a requested instruction to the effect that the defendants were not thereby estopped to deny the plaintiff's title, if they had taken possession under the gift and made lasting and valuable improvements, where the jury were told that if the plaintiff gave them the land, and they took possession under the gift and made lasting and valuable improvements, they were entitled to recover notwithstanding the execution of the lease, although as a reason it was stated that in such circumstances the lease would have been invalid for want of the wife's signature.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 319–326; Dec. Dig. ⟸110.]

Appeal from District Court, Lyon County.

Action by W. S. Cook against W. O. Cook and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Dennis Madden, of Emporia, for appellants. Samuel & Hartley, of Emporia, for appellee.

MASON, J. On May 7, 1915, W. S. Cook brought ejectment against his son W. O. Cook, and his son's wife, Nora Cook, for the possession of a farm. He recovered a judgment, and the defendants appeal.

The evidence showed that prior to 1902 the father owned the land; that in that year he gave possession to the son, who had ever since retained it. The son testified that he took possession under an oral gift, and made lasting and valuable improvements; that his father told him if he did all right he would probably make him a deed some time; that he would pay the taxes as long as he lived, and would make a deed a little later on. The

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father denied the gift, and asserted that his son had been merely a tenant on shares. He produced several leases to that effect, saying that one had been executed each year, but that some of them had not been preserved. He also contended that the only improvements were of a slight and temporary character, and were made partly at his expense. The son denied that a lease was executed at the time he took possession, or for that year. He admitted executing several leases, and explained them by saying that he signed them to keep peace in the family. The errors assigned relate to the rejection of evidence and to the giving and refusal of instructions.

[1] 1. The son's wife testified that before they were married the plaintiff had promised to deed the farm to her husband and herself; that after the marriage and before they moved to the farm he said they were to have it and $500 to stock it up. She offered to testify that after the plaintiff had told her "to go down there, and he would deed them the land," his wife, who had since died, said that:

"That suited her because the land belonged to her. That her money went in to buy it, and she wanted him to do that."

This testimony was ruled out. If it was offered on the theory of showing that the defendants had derived title from the plaintiff's wife, the ruling was correct under the statutory provision which forbids any one to testify in his own behalf to a transaction with a person since deceased, "where either party to the action claims to have acquired title, directly or indirectly from such deceased person." Laws 1911, c. 229, § 1. If offered for any other purpose, its exclusion cannot be regarded as vitally important. The witness had testified directly to the promise made by her husband's father. Her statement that the mother was present and expressed her approval added nothing to the force of the testimony, beyond perhaps such corroboration as might be deemed to result from the statement of collateral details, unimportant in themselves.

The son testified that in December, 1906, he had told his mother, in his father's presence, that his father had given him notice to leave the premises on the first of the next March. He was asked what had occurred at the time of the conversation, and answered that he had told her he had been given a written notice to leave. This answer was stricken out on an objection by the plaintiff. The defendants then offered to show that the mother had said she wanted her son to occupy the farm, and to give his father a written lease, so as to keep peace in the family, and that this was one of the reasons for his signing the lease. This offer was not rejected, but the judge said: "That won't respond to your question at all. Ask the question along that line." Further questions were then asked and answered, but the following question and answer were stricken out on the plaintiff's objection that they were within the statutory rule referred to:

"Q. What was agreed to between you? A. Of course, she told me not to move; that I didn't have to."

What has already been said of the rejected offer applies as well to the evidence stricken out—if the statement of the mother was intended to establish a claim to the property derived through her, it was incompetent; if it was offered for any other purpose, it was not sufficiently material to furnish a basis for reversal.

[2] 2. Complaint is made of the giving of an instruction the material part of which was in these words:

"While less positive proof is required to establish a parol gift of land from father to son than between persons not so related, you are not warranted in inferring a gift from slight circumstances. The proof must be by a preponderance of the evidence, and must be of such a clear nature and quality as satisfies your mind that the gift was actually made."

The portions of the instruction objected to are those declaring that a gift is not to be inferred from slight circumstances, and that the proof on the subject must be of such a clear nature and quality as to satisfy the mind. The statute of frauds requires the transfer of the title to real estate to be accomplished by a written instrument. Gen. Stat. 1909, § 3837. Where an oral gift is enforced because it has been followed by the making of such improvements that to deny enforcement would be unjust and inequitable, the proof is required to be made by something more than a mere preponderance of the evidence. Note, 9 L. R. A. (N. S.) 508. It is said that "the gift must be shown by clear and convincing proof" (Flanigan v. Waters, 57 Kan. 18, 21, 45 Pac. 56, 57); that even as between parent and child "the evidence thereof must be positive and unambiguous and the terms clearly defined" (29 Cyc. 1658). We do not think the instruction complained of placed too great a burden on the defendants.

[3] 3. The defendants also complain of the refusal to give instructions requested to the effect that the execution of the leases by the son did not estop them to deny the plaintiff's title, if they took possession of the land under the gift; and that if the gift was made, and they took possession under it, and made valuable and lasting improvements, they should recover, notwithstanding the leases. For the leases to have operated as an estoppel it was necessary that the defendants should have either obtained possession or retained it by virtue of them. Ireton v. Ireton, 59 Kan. 92, 52 Pac. 74. But the instructions given were sufficient to protect the interest of the defendants in this regard. The fact that the case was submitted to the jury for their decision implied that the defendants were not necessarily estopped by the leases, for their execution was admitted, and,

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if that in itself had amounted to an estoppel, nothing would have been left to try. But explicit instructions were also given to the effect that if the plaintiff gave the defendants the land, and they took possession under the gift and made lasting and valuable improvements, they were entitled to a verdict, notwithstanding the subsequent execution of a lease by the son. It is true, the court stated, as a reason why a lease would not work an estoppel in such circumstances, that the place would have become their homestead, and the wife's signature would have been necessary to its validity. But the reason stated for the rule by which the jury were to be guided, or the omission to state some other sufficient reason, could not prejudice the defendants, so long as the findings of fact necessary to a verdict were correctly enumerated. The charge required a verdict for the defendants if the jury believed (1) that the plaintiff had given them the land, (2) that they had taken possession under the gift, and (3) had made valuable and lasting improvements. The verdict for the plaintiff therefore implied a finding against the defendants on at least one of the matters indicated, and therefore justified the judgment that was rendered, since a concurrence of the three was necessary to a different result.

The judgment is affirmed. All the Justices concurring.

(99 Kan. 279)

LOOMIS v. NATIONAL SUPPLY CO. OF KANSAS et al. (No. 20422.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. JUDICIAL SALES ⟸59 — REDEMPTION — EQUITABLE RELIEF.

Where land has been sold at judicial sale, and an attempt in good faith is made to redeem within proper time by payment of the required amount to the clerk, who accepts a less sum than that due, by reason of computing interest at 6 per cent., instead of at the contract rate of 7 per cent. (he and the redemptioner, through a mistake as to the law, supposing that to be sufficient), the court has the power, in furtherance of justice, to permit the redemption to be completed after the expiration of the statutory period, by the payment of such additional sum as will bring the total up to the amount of the purchase price, with interest at 7 per cent., computed to the date of the final payment.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 115–117; Dec. Dig. ⟸59.]

2. JUDICIAL SALES ⟸59—RIGHTS AND TITLE OF PURCHASERS—BONA FIDE PURCHASERS—NOTICE.

Where, within the period allowed by the statute for redemption, an attempt to redeem is made, and by reason of an error in computation or in the rate of interest the clerk accepts a less sum than the amount due, and the sheriff executes a deed notwithstanding such payment, a buyer from the grantee in such deed is charged by the clerk's entry of such payment with notice of the redemptioner's rights.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 115–117; Dec. Dig. ⟸59.]

Appeal from District Court, Miami County.

Action by Charles A. Loomis against the National Supply Company of Kansas and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. N. Banks, of Independence, and Charles T. Meuser, of Paola, for appellants. E. J. Sheldon, of Paola, and Charles A. Loomis, of Kansas City, Mo., for appellee.

MASON, J. A real estate mortgage was foreclosed, and the property was sold at sheriff's sale, on June 16, 1913, for $5,800, subject to redemption under the statute within 18 months. On December 11, 1914, the representative of the holder of the right to redeem deposited with the clerk of the court, for the purpose of effecting redemption, the sum of $6,302.66, in addition to the accrued costs. This deposit was less than the required amount, because the interest was computed at 6 per cent., instead of 7, which was the rate named in the mortgage, and also because a mistake of several dollars was made in the computation on that basis. On December 30, 1914, a further sum of $100.64 was deposited with the clerk in an effort to complete the required amount on the 7 per cent. basis. This additional deposit was made 2 weeks after the expiration of 18 months from the day of sale, and was about $21 less than enough to make the total deposit equal to the principal and interest up to that time. On January 2, 1915, the sheriff executed a deed to the purchaser, the National Supply Company, and on January 15, 1915, an additional sheriff's deed was executed. On January 9, 1915, the supply company executed a warranty deed to the property to E. J. Lambert, who on February 12, 1915, conveyed a half interest to Charles R. Clapp, trustee. Later Charles A. Loomis acquired the interest of the former holder of the right of redemption, and brought an action to cancel the sheriff's deeds and subsequent conveyances, on the ground that an effort to redeem had been made in good faith within the time allowed by the statute, and that the circumstances were such that the failure to deposit the correct amount should not be deemed to have worked a forfeiture of the right. Judgment was rendered for the plaintiff; the court, however, requiring him to pay $25 additional to make up for the prior shortage. The defendants appeal.

[1] 1. In Stewart v. Park College, 68 Kan. 465, 75 Pac. 491, it was held that unsuccessful attempts to meet the holder of the certificate of sale, for the purpose of paying him the redemption money, did not amount to an effort to comply with the statute, and were not sufficient to prevent the loss of the

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right to redeem with the expiration of the 18 months. While the mode of redemption is fixed by the statute, in exceptional cases the courts have relieved parties from strict compliance with the statutory rule, even to the extent of enlarging the time limit. Quinton v. Adams, 87 Kan. 112, 123 Pac. 740. Here the attempt to redeem was made by one of the receivers of the owner of the right of redemption. He asked the clerk of the court to let him know the amount required to redeem. The clerk indicated that he was in doubt whether the interest should be figured at 6 or 7 per cent., but after consideration and inquiry said he understood it should be 6 per cent., and made the computation on that basis, stating the amount to the receiver, who paid it. The interests should have been figured at the contract rate of 7 per cent. Clark v. Nichols, 79 Kan. 612, 100 Pac. 626. In behalf of the defendants it is argued that the mistake made was one of law, that the receiver had no right to rely upon the judgment of the clerk in the matter, and was therefore guilty of such negligence as to prevent a court of equity from relieving him from the consequences of his error. It is true that the receiver was not entitled to rely absolutely on the statement of the clerk, and might, in the exercise of a sufficient degree of diligence, have informed himself from the record of the exact amount required to redeem. But "the statute very properly provides for redemption by payment to the clerk of the court, who acts as an officer of the law, and not as the agent of any party in interest," and in applying to him for information as to the necessary amount, and in making payment thereof, the receiver gave abundant evidence of a purpose in good faith to do whatever the law required to effect a valid redemption.

Conceding that the highest degree of diligence was not shown, and that the mistake made resulted from a misunderstanding of the statute, a court of equity might well, in the interest of justice, give relief against so severe a penalty as the forfeiture of all interest in the property, especially in view of the facts that the holder of the certificate of purchase suffered no possible injury beyond a slight delay in receiving the money, and that a readiness to make good the shortage was shown as soon as attention was called to the matter. The deficiency in the second payment, resulting from miscalculation, was upon the same grounds not a bar to an order allowing the redemption. It is suggested that the final payment of $25 was slightly less than it should have been, but this does not appear to have been brought to the attention of the trial court. We think the conclusions stated are sound on principle, because they are necessary to prevent a strict adherence to the naked letter of the statute being unnecessarily made the means of doing a serious injustice. They also find support in decisions elsewhere. In Moore v. Bishop, 49 S. W. 957, 20 Ky. Law Rep. 1622, a redemption was allowed upon the payment of $9 additional after the time limit had expired; the sum previously deposited with the clerk having through some mistake lacked that much of the required amount. In Wakefield v. Rotherham et al., 67 Iowa, 444, 25 N. W. 697, the redemptioner paid within due time the amount which the clerk told him was necessary, but which by the clerk's error in computation was $6 less than it should have been. He was allowed to complete the redemption after the expiration of the statutory period. There the county was the holder of the certificate of purchase, but that circumstance does not appear to have affected the decision, the grounds of which appear from this excerpt from the opinion:

"It is certainly true that plaintiff could redeem the land from the sale only by paying to the clerk the amount at which the county bought it in, with 10 per cent. interest thereon from the date of the sale to the date of the redemption; and it will be conceded that it was his business to determine what that amount was, and that the clerk was not charged with the duty of ascertaining or determining it, in the sense that his determination of it would be conclusive of the rights of the parties. It does not follow, however, that plaintiff is not entitled to relief against the mistake which occurred in the computation of the amount. The payment was required to be made to the clerk, and he is the custodian of the record of the sale. This record would ordinarily have to be examined in determining the amount which must be paid to effect a redemption. Plaintiff went to the clerk's office for the purpose of ascertaining this amount and of paying it to the clerk. In accepting the statement of the clerk as to the amount, he did simply what the majority of ordinarily prudent men would have done under like circumstances. He was guilty of no negligence in the matter. He paid the amount which he honestly believed was sufficient to make the redemption. His intention was to redeem the property, and he left the office believing that he had effected a redemption, and he knew nothing to the contrary until after the expiration of the year within which, by the provisions of the statute, the right to redeem might be exercised. The right of redemption is a valuable one, and, although statutory, it is favored by the law, and to hold that it was defeated by a trivial mistake like the one in question would be to ignore the spirit of the statute which created it. We think the district court rightly held that under the facts of the case the redemption might be completed after the expiration of the year allowed by statute." 67 Iowa, 447, 25 N. W. 698.

That decision has the greater force from the fact that it was rendered before the enactment of the Kansas redemption law (Gen. St. 1909, § 6070 et seq.), which was modeled upon that of Iowa. The following cases, although not directly in point, have some tendency in the same direction: Kofoed v. Gordon, 122 Cal. 314, 54 Pac. 1115; Stephenson v. Kilpatrick, 166 Mo. 262, 65 S. W. 773; Kopper v. Dyer, 59 Vt. 477, 9 Atl. 4, 59 Am. Rep. 742.

[2] 2. The contention is made that Lambert is protected as an innocent purchaser of the land. If a complete redemption had been effected by a deposit of the proper sum with

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the clerk, the sheriff could not, by making a deed to the purchaser, vest him with the power of conveying a good title to a third person. A subsequent grantee would be charged with notice of the redemption. Here a redemption had been attempted, but not fully carried out. It was partial and incomplete, but it was treated by the clerk as effective, and his record showed what had been done, and was sufficient to charge buyers of the land with the claims of the redemptioner.

The judgment is affirmed. All the Justices concurring.

(99 Kan. 216)

BOARD OF COM'RS OF CLOUD COUNTY v. OTT et al. (No. 20217.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by Editorial Staff.)

1. REGISTERS OF DEEDS ⊂⊃3—COMPENSATION.
Gen. St. 1909, § 3670, providing for payment of fees to the register of deeds, provided that according to population the register should receive fixed sums per annum, paying into the treasury one-half of the fees in excess of such sums and being entitled, in event that fees should amount to less than $500, to a sum sufficient to increase his compensation to the fixed amount. In the middle of the year the act of 1913 (Laws 1913, c. 197) took effect, giving the registers a regular salary and requiring all fees to be turned into the treasury. *Held*, that until the new statute took effect the register is entitled to compensation at the rate fixed, plus one-half of the excess fees, and could not retain all of such fees on the theory that the total sum payable for a year might be charged and collected for services rendered during the first portion of his incumbency.

[Ed. Note.—For other cases, see Registers of Deeds, Cent. Dig. § 8; Dec. Dig. ⊂⊃3.]

2. CONSTITUTIONAL LAW ⊂⊃102(1)—VESTED RIGHTS—FEES.
In such case, the right of the register to all of the fees collected could not be upheld on the theory that until the act of 1913 took effect the fees were his property, and his right could not be impaired by subsequent legislation; the statute relating to fees limiting his right to retain them.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 225; Dec. Dig. ⊂⊃102(1).]

3. STATUTES ⊂⊃283(2)—ENACTMENT.
Fee and Salary Act of 1913 (Laws 1913, c. 197), originally known as House Bill No. 578, was passed by the House on February 15th, and was messaged to the Senate on February 18th. On March 4th it was returned to the House for correction and on the 10th of that month was passed by the Senate, with amendments. The House refused to concur in the Senate amendments, and the differences were adjusted by conference committees. *Held*, that as the bill was regularly enrolled, certified, and approved by the Governor, the presumption of regular passage overcomes any failure of the record to show that the Senate considered, amended and passed the bill after it was recalled by the House and returned.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 382; Dec. Dig. ⊂⊃283(2).]

Appeal from District Court, Cloud County.

On rehearing. Rehearing denied, and former opinion affirmed.

For former opinion, see 157 Pac. 1170.

Sturges & Sturges, of Concordia, Tomlinson & Shukers, of Independence, and Charles D. Welch, of Coffeyville, for appellants. Charles D. Ise, of Coffeyville, S. N. Hawkes, of Topeka, and M. V. B. Van De Mark, of Concordia, for appellee.

BURCH, J. A rehearing was granted to allow several county officers other than the defendant, whose interests would be affected by the decision, to be heard. After listening to oral arguments presented at the rehearing and considering new and supplemental briefs which have been filed, the court has concluded to adhere to its former decision.

[1] The statute involved reads as follows:

"The register of deeds of the several counties of the state shall charge and collect the following fees for his services:

"[Schedule.]

"Provided, that all the fees enumerated in this section shall be due and payable before the register of deeds shall be required to do the work: Provided further, that the register of deeds in counties having the following population may retain all fees collected as hereinafter specified:

In counties having a population of more than 5,000 and not more than 10,000, per annum	$ 900
More than 10,000 and not more than 15,000, per annum	1,000
More than 15,000 and not more than 20,000, per annum	1,100
* * * * * * *	
More than 55,000, per annum	3,000

"And if in any one year the fees charged shall be more than the sums above specified in their respective counties the said registers of deeds shall pay to the county treasurer of their respective counties one-half of such excess, when collected, taking duplicate receipts therefor, one of which they shall file with the county clerk, and such money shall become part of the general fund of the county: Provided, that in the counties where the fees charged amount to less than five hundred dollars per annum, the county commissioners shall pay him a sum sufficient to make up said amount."

Gen. Stat. 1909, § 3670.

It is said that fees are charged, collected, and retained for services performed; that the language is, the register "may retain all fees collected"; that one-half the amount above a specified sum is to be paid into the treasury and no more; and that no one but the register has any interest in fees collected until he has received the specified sum. In the present case, the compensation allowed before division of fees with the county takes place would amount to slightly more than $3 per day if computed on that basis. It is conceivable that the total sum of $1,100 might be charged and collected for services rendered in the first month, or week, or even day of a register's term of office. It is argued that if he should then die or resign, he would be entitled to the entire sum, because the required services had been performed, and the contingency on which divi-

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sion with the county depends had not occurred. Decisions of various state and federal courts are cited as sustaining these views.

The court does not read the statute in the way suggested. The register is authorized to charge and collect specified fees for his services, but the statute does not say that he does this as his compensation for those services. Compensation to the register is provided for later. Five cents was not specified as compensation to the register for impressing a filing stamp on a document tendered for filing. The purpose was to make the register's office self-sustaining, and the schedule of fees merely fixes the sums which patrons of the office shall pay in advance for the performance of acts which they occasion. In that portion of the statute which relates to the register's compensation, the provision is that he may retain all fees collected "as hereinafter specified." The specification is, in this instance, "per annum, $1,100," that is, $1,100 by the year, or annually. Considered as a whole, the statute creates a fund out of which official compensation is payable, by charging patrons of the office small fees. Official compensation is expressly rated by the year. On the basis of previous experience, it was assumed that fees charged would take care of the annual salaries up to the limits stated, except in some of the smaller counties. Should the fees in those counties not amount to $500 per annum," a salary of that amount is guaranteed. But if the fees charged "in any one year" should be more than sufficient to pay the per annum compensation, the excess is to be divided, one-half to the county, and one-half to the register for the extra burden of additional work.

The reductio ad absurdum employed by the defendant in his argument may be turned against him. Very clearly the purpose was to cover into the treasury one-half of all fees charged by the register of deeds "in any one year" above the stated per annum amount. If the defendant's interpretation of the statute be correct, not only might the county be deprived of this excess, computed at the end of the year, but by death or resignation of the register each one of several incumbents might take out of the fees charged in a single year a sum equal to the total per annum compensation affixed to the office.

The decisions cited in support of the defendant's contention are not conclusive and need not be reviewed. They involved statutes giving officials receiving public moneys percentages of the sums handled as commissions or compensatory fees, with maximum limitations on the amount retainable in any one year. In each instance the commission allowed was in fact compensation to the officer for his service and responsibility in collecting and handling public funds. The leading case, the United States v. Dickson, 15 Pet. 141, 160, 10 L. Ed. 689, is typical. The statute involved provided:

" 'That instead of the compensation now allowed by law to the receivers of the public moneys for the lands of the United States, they shall receive an annual salary of five hundred dollars each, and a commission of one per cent. on the moneys received, as a compensation for clerk hire, receiving, safe-keeping, and transmitting such moneys to the Treasury of the United States: Provided always, that the whole amount which any receiver of public moneys shall receive, under the provisions of this act, shall not exceed, for any one year, the sum of three thousand dollars.' "

It was held that the commission allowed was the reasonable compensation established by Congress for the expenditures and the responsibility incident to receiving, safekeeping, and transmitting public moneys, and that any officer who incurred the expense and responsibility of handling a given sum of money was entitled to the commission upon it. In the opinion it was said:

"The words are, 'and a commission of one per cent. on the moneys received, as a compensation for clerk hire, receiving, safe-keeping, and transmitting such moneys of the United States; provided always, that the whole amount which any receiver of public moneys shall receive, under the provisions of this act, shall not exceed, for any one year, the sum of three thousand dollars.' The commission is on the moneys received by any one officer, not by one or more officers, during any one year of his service; nor during any one calendar year, for the services of one or more officers in that year. It is his compensation for clerk hire, paid by him, and for his responsibilities in receiving, keeping, and transmitting the public moneys, and not for his services and responsibility in connection with other officers. The commission is a compensation attached to the particular officer for his yearly service, and not to the office itself for a fiscal year. If the intention of the Legislature had been what the argument for the United States supposes the language of the proviso would have been different; it would have been: Provided that the United States shall not, in any one calendar year, pay more than one per centum upon all the moneys received during that year; and that the commission for any one year to whomsoever paid, shall not, in the whole, exceed the sum of $2,500. 15 Pet. 163, 10 L. Ed. 689. * * * The enacting clause gives to each receiver a commission of 1 per cent. upon all the public moneys received by him. This was precisely in conformity to the antecedent laws. The proviso limits that percentage to an amount not exceeding $2,500 for any one year. Until, then, the percentage of the particular receiver has reached that amount, in whatever period of the year it may arrive, the proviso, according to its very terms, has no operation; and when that maximum is reached, the percentage ceases, whether any more public moneys are received by that officer or not." 15 Pet. 165, 10 L. Ed. 689.

The statute of this state contains a limitation quite like that which, as the court suggested, was not contained in the act of Congress. If the fees charged in any one year shall be more than the per annum sum specified, the register shall pay into the treasury one-half the excess; that is, there shall not be taken from register's fees charged in any county in any one year, for compensation to the register, more than the sum specified, and one-half the excess above that sum.

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[2] It is said that the fees collected by the defendant before the act of 1913 took effect were his property, and that his right to them could not be affected by subsequent legislation. This assertion begs the question to be decided, and is made because the defendant fixes his attention upon the words "may retain all fees collected," and ignores the next succeeding words, "as hereinafter specified," and the specification following. If, as the court holds, the defendant was merely entitled to compensation for his services in a per annum amount, to be retained out of a fund consisting of fees charged, he had no property in any specific fee charged.

[3] Finally, it is said that the fee and salary act, of which the quoted section forms a part, is void because it was not regularly passed. The legislative records show that the bill, which was known as House Bill No. 578, passed the House on February 15, 1913, and was messaged to the Senate on February 18, 1913. On March 4th, the bill was returned to the House, at its request, for correction. On March 10th the Senate passed the bill, with amendments. On the same day the House refused to concur in the Senate amendments, and the differences between the two houses were subsequently adjusted by conference committees. The legislative record does not anywhere state in terms that the bill was returned to the Senate after the House recalled it and before the Senate acted on it. The recorded fact that the Senate considered, amended, and passed, not something else, but House Bill No. 578, is good evidence that the bill was before the Senate during those deliberations. If this were not true, the presumption of regular passage arising from the enrollment, certification, and gubernatorial approval of the bill overcomes the mere silence of the legislative journals.

The former judgment of affirmance is adhered to. All the Justices concurring.

(99 Kan. 295)

PRIEST v. BANKERS' LIFE ASS'N OF DES MOINES, IOWA. (No. 20435.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. INSURANCE ⊂⊃310(2) — CANCELLATION — NOTICE—SUFFICIENCY.

The notice contemplated by the act to prevent cancellation or forfeiture of life insurance policies without notice (Laws 1913, ch. 212) is notice of an intention to forfeit under an accrued right to forfeit, resulting from default in payment of premium within the time limited therefor, and notice given before the time has expired within which payment may rightfully be made that forfeiture will be enforced if payment be not made, does not satisfy the requirement of the statute.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 904; Dec. Dig. ⊂⊃310(2).]

2. INSURANCE ⊂⊃302—CANCELLATION—STATUTORY PROVISIONS — PROSPECTIVE OPERATION.

The act is prospective in its operation, and does not affect forfeiture or cancellation of policies issued before the act took effect.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. ⊂⊃302.]

Appeal from District Court, Cloud County.

Action by James M. Priest, by his next friend, Mary F. Priest, against the Bankers' Life Association of Des Moines, Iowa. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

M. V. B. Van De Mark, of Concordia, and I. M. Earle, of Des Moines, Iowa, for appellant. Charles L. Hunt and Park B. Pulsifer, both of Concordia, for appellee.

BURCH, J. The action was one to recover on a mutual benefit certificate issued by the Bankers' Life Association of Des Moines, Iowa, to William R. Priest. A demurrer was sustained to the answer, and the defendant appeals.

The by-laws of the association are a part of the contract. They provide for assessments due on the 1st day of January, April, July, and October of each year, with a "grace" period of one month within which to pay. Assessments are levied by resolution of the board of directors, and notices of assessments are mailed to members in the month preceding the calendar month in which the payment is due. Failure to pay an assessment within the required time forfeits membership and all right to share in the funds of the association. Lapsed certificates of membership may be reinstated, at the option of the association, on written application therefor. No right to reinstatement exists unless a variety of conditions be met, among them being good health, sound constitution, temperate habits, and unobjectionable occupation and residence, on the part of the applicant.

[1] On June 23, 1914, the association sent to the insured notice of assessment call No. 125, reading as follows:

"This is to notify you that a levy has been made upon the assessment membership of this company for 15 per cent. based pro rata on the amount of the guarantee fund of such membership, for the purpose of providing benefit fund.

Your portion of the benefit fund is.....	$13.80
This call embraces the expense dues for six months for the contingent fund....	4.60
Total	$18.40

"When more than one certificate is included herein an equal proportion of the above total is payable on each.

"This sum is due July 1, 1914, and payable only to this company at its home office or to a depository bank. One month's grace is allowed so that payment may be made on or before August 1, 1914. If not made by that date, your membership and insurance will thereby cease without action by the company."

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The assessment was not paid on or before August 1, 1914. On September 18, 1914, the insured was reinstated. The reinstatement was procured through representations made in the application for reinstatement. The insured died on November 9, 1914. The answer avoided the effect of reinstatement by alleging that the representations contained in the application for reinstatement were not true, and predicated nonliability on lapse of membership for failure to pay the assessment within the time limited. The demurrer to the answer was sustained on the ground that notice of intention to forfeit membership had not been given, as required by chapter 212 of the Laws of 1913. If this notice was essential and was not given, reinstatement and the representations inducing reinstatement were not material. The statute reads as follows:

"An act to prevent the cancellation or forfeiture of life insurance policies, without notice.

"Be it enacted by the Legislature of the State of Kansas:

"Section 1. It shall be unlawful for any life insurance company other than fraternal doing business in the state of Kansas to forfeit or cancel any life insurance policy on account of the nonpayment of any premium thereon, without first giving notice in writing to the holder of any such policy of its intention to forfeit or cancel the same.

"Sec. 2. Before any such cancellation or forfeiture can be made for the nonpayment of any such premium the insurance company shall notify the holder of any such policy that the premium thereon, stating the amount thereof, is due and unpaid, and of its intention to forfeit or cancel the same, and such policy holder shall have the right, at any time within thirty days after such notice has been duly deposited in the post office, postage prepaid, and addressed to such policy holder to the address last known by such company, in which to pay such premium; and any attempt on the part of such insurance company to cancel or forfeit any such policy without the notice herein provided for shall be null and void. The affidavit of any responsible officer, clerk or agent of the corporation, authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be prima facie evidence that such notice has been duly given."

The defendant says the notice which was given complied with the statute. The court regards the statute as providing for notice of an intention to forfeit under an accrued right to forfeit, and not for notice given before the time for payment has expired that forfeiture will be enforced if payment be not made. The notice of June 23d did not and could not state that the assessment, which was not due until July 1st, and which could be paid as late as August 1st, was both due and unpaid, as the statute requires.

The defendant says the statute of this state "is based on the New York statute and is practically the same," and cites two decisions of the New York Court of Appeals to the effect that notice containing the necessary information, given before the premium is payable, is sufficient. Conway v. P. M. L. Ins. Co., 140 N. Y. 79, 35 N. E. 420; O'Brien v. Union Central Life Ins. Co., 207 N. Y. 180, 100 N. E. 702. The New York act of 1876 regulating forfeiture of life insurance policies provided that forfeiture should not be permitted unless a notice stating the amount of premium due and the place where it might be paid were mailed to the insured not less than 30 days nor more than 60 days before the payment became due according to the terms of the policy. Chapter 341, Laws of New York 1876. The next year the statute of 1876 was amended. The amended statute provided that power to forfeit could not be exercised except under the following conditions: "Whenever any premium or interest due upon any such policy shall remain unpaid when due," notice shall be given to the insured, stating the amount due, the place where payable, and the person to whom payable, and stating that unless the premium or interest then due shall be paid within 30 days, the policy will become forfeited and void. The statute further provided that payment within the 30 days limited therefor should satisfy the requirements of the policy, and then proceeded as follows:

"Provided, however, that a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for." Chapter 321, Laws of New York 1877.

Very clearly two kinds of notice are here recognized: One, the advance notice stating when premium will fall due, with a forfeiture warning, and the other, a forfeiture notice given after default arising from nonpayment of premium within the contract time. The Conway Case was decided under the act of 1877. Advance notice of the fifth year's premium on the policy sued on was given. The notice contained the forfeiture reminder. Instead of paying the premium, the policy holder gave his note for the amount. The note was not paid, and the policy was canceled without the giving of another notice. The court said:

"The notice provided to be given by the statute as a condition of its right to declare a policy lapsed for nonpayment of an annual premium was not necessary, inasmuch as it had duly given the notice before the premium became due, which the statute has provided for." Conway v. P. M. L. Ins. Co., 140 N. Y. 79, 86, 35 N. E. 420, 422.

Afterwards the Legislature of the state of New York went back to notice, with forfeiture warning, given before the time when premium is payable. Section 92 of the Consolidated Insurance Laws of New York contains the following provisions:

"Nor shall any such policy be forfeited, or lapsed, by reason of nonpayment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, within one year from the

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failure to pay such premium, interest or installment, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it shall be paid and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured, * * * at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment or portion thereof, then due, shall be paid to the corporation, or to the duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice." 3 Consol. L. of N. Y. 1909, p. 1740.

The O'Brien Case was decided under this statute. The facts were similar to those of the Conway Case. Notice was given containing the forfeiture warning, the premium was not paid in cash, notes were given, the notes were not paid, and forfeiture was declared without further notice. The court said:

"Notice is not required under the statute, prior to notes becoming due which are given for a premium, when the statutory notice has been given as required thereby prior to the premium becoming due." O'Brien v. Union Central Life Ins. Co., 207 N. Y. 180, 189, 100 N. E. 702, 705.

The result of the foregoing is that the Kansas statute "is based on the New York statute" only in the sense that the same general legislative subject is dealt with, and New York acted first. The Kansas statute is radically different from the New York statute in its earliest and latest forms. The Kansas statute resembles the first part of the New York act of 1877, but that act dispensed with notice after default if notice were given before premium was payable. The decisions cited emphasize the distinction between the two kinds of notice. The notice which the defendant gave was notice of an assessment, which called attention to the penalty for nonpayment. The statute of Kansas does not recognize it as a notice of intention to forfeit, and without statutory authority it cannot be substituted for a forfeiture notice to be given after default.

[2] Assuming the statute to be as the court interprets it, the defendant says it does not apply to the policy sued on because the policy was issued before the statute took effect, and if the statute were to apply, the statute would be void, as impairing the obligation of the contract. With this contention the court agrees. The subject was carefully considered when the court had before it the case of Lightner v. Insurance Co., 97 Kan. 97, 154 Pac. 227.

The New York statute in its various forms expressly applies to "any policy hereafter issued or renewed." The Kansas statute reads, "any life insurance policy." The plaintiff argues that the New York statute was undoubtedly before the draughtsman of the Kansas statute, and that omission of express limitation to policies subsequently issued is significant of an intention to give the unqualified terms of the act their literal meaning. If the statute as the Legislature conceived it would impair the obligation of contracts already in force, an express limitation to policies subsequently issued was quite unnecessary. The statute could apply to none but policies subsequently issued, and the Legislature will not be accused of designing a void act.

The plaintiff says the law is confined to regulation of future forfeitures of existing contracts, and, properly considered, affects nothing but remedy. Numerous fortifying decisions are cited which need not be reviewed at length. The rules of law are not in dispute; the question being, How shall the statute be classified? Does it affect nothing but remedy, or does it impair obligation? After the contract right of forfeiture is complete, and obligation to pay the policy is at an end, the right is taken away, and the obligation is extended until the obligor gives a notice, and for 30 days thereafter. Should the insured die before notice given, or within the 30-day period, the policy is as secure against forfeiture as it was while premium was still payable according to its terms. Should the insured live and pay the unpaid premium within the statutory time, the obligation of the policy is unconditionally restored. In this case a forced reinstatement of lapsed membership would result, and a reinstatement stripped of all the safeguards reserved for the insurer's benefit in the by-laws forming a part of the contract. If the answer be true, the insured could not have secured reinstatement. If the statute be valid and govern the rights of the parties, it accomplishes for the insured what he could not accomplish except by fraud.

The conclusion reached in the Lightner Case, that the statute makes a radical change in the terms of the contract, a change materially affecting the rights and obligations of the parties, is adhered to.

The plaintiff says the obligation of the contract was not affected because the defendant could have given the statutory notice after the premium became due on July 1st, so that the statutory period of 30 days within which payment could be made would have coincided with the contract period of one month. This is a fortuity which could not occur with respect to April assessments. Beyond this, however, the notice required is not notice of a contingent intention to forfeit which may possibly be entertained in the

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future. It is notice of an actual intention to forfeit because premium has not been paid. Such an intention cannot exist until cause for forfeiture arises. Causes for forfeiture cannot arise during the time within which payment may rightfully be made. That time must expire and the premium be unpaid. In the present instance the assessment was "due" on July 1st, but it could be paid at any time on or before August 1st, without delinquency. The word "nonpayment" in the first and second sections of the statute, and the word "unpaid" in the second section, imply default in payment, and the statutory notice could not be given before August 2d.

The judgment of the district court is reversed, and the cause is remanded, with direction to overrule the demurrer to the answer. All the Justices concurring.

(99 Kan. 389)

CARGILL COMMISSION CO. v. MOWERY. (No. 20810.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. SALES ⇐32 — CONTRACTS BY CORRESPONDENCE.

The correspondence between the parties examined, and *held*, that the telegrams of June 29, 1915, constituted a contract by which the defendant is bound.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 59; Dec. Dig. ⇐32.]

2. CUSTOMS AND USAGES ⇐15(1)—EVIDENCE —ADMISSIBILITY.

Ordinarily custom and usage are admissible merely to explain or elucidate something uncertain or ambiguous contained in a contract.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 30, 31, 33; Dec. Dig. ⇐15(1); Evidence, Cent. Dig. § 1946.]

3. PLEADING ⇐343—TRIAL ⇐139(1)—JUDGMENT ON PLEADINGS—RIGHT TO—JURY QUESTION—DEMURRER TO EVIDENCE.

Plaintiff was entitled to judgment on the pleadings, and, the petition being supported by competent evidence, the demurrer to such evidence was erroneously sustained.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1048–1051; Dec. Dig. ⇐343; Trial, Cent. Dig. §§ 332, 333, 338–341; Dec. Dig. ⇐139(1).

4. SALES ⇐418(7)—BREACH—ACTION.

Upon failure of the seller to fulfill a contract covering 30,000 to 35,000 bushels of grain, the buyer may purchase in the open market at the best prices possible on the seller's account up to the minimum amount, the delivery of which amount by the seller would have been a compliance with his contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1188; Dec. Dig. ⇐418(7).]

5. SALES ⇐36—CONTRACTS—VALIDITY—MISTAKE.

When one of the parties to a contract involving a sale of grain by mistake uses a code word indicating a greater amount than he intended, and before the knowledge of such mistake comes to the other party the latter has acted upon the contract, such contract is binding according to the terms actually used by the parties thereto.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 63, 64; Dec. Dig. ⇐36.]

Appeal from District Court, Reno County.

Action by the Cargill Commission Company, a corporation, against E. A. Mowery. From an order denying its motion for judgment on the pleadings, and an order sustaining a demurrer to its evidence, plaintiff appeals. Reversed and remanded, with directions to render judgment for plaintiff.

Campbell & Campbell, of Wichita, for appellant. C. M. Williams and D. C. Martindell, both of Hutchinson, for appellee.

WEST, J. [1] The plaintiff appeals from an order denying its motion for judgment on the pleadings, and from an order sustaining a demurrer to its evidence. It is conceded that telegrams in code passed between the parties in the following order:

"June 29, 1915. Can you offer No. 3 hard wheat, think can pay $1.30, basis Minneapolis, five days shipment. Cargill Comm. Co."

"Offer 30,000 No. 3 hard wheat, $1.32 Minneapolis, five days shipment, bringing $1.30 Kansas City. Hutchinson Grain Company."

"Bought No. 3 hard wheat early at $1.31 think can work 30,000 same price. Market is lower, answer quick. Cargill Comm. Co."

"Book the 30,000 to 35,000 bushels No. 3 hard wheat $1.31 Minneapolis, wire if booked."

"We book 30,000 to 35,000 No. 3 hard wheat $1.31 basis Minneapolis, five days shipment."

On the same day defendant wrote:

"We herewith confirm sale to you by exchange of wires of 3,000 to 3,500 bus. No. 3 or better wheat (hard) at $1.31 bu., basis del. Minn., Minn., shipments 5 days, weights dest. grades dest. No. 3 to apply at 1c scale. Terms: Sight draft with bill of lading attached unless otherwise stated."

Also the following:

"We enclose confirmation covering sale to you today of 3,000 to 3,500 bus. No. 3 or better wheat of Kansas hard. We thank you very much for this trade, will be glad to hear from you again," etc.

On the same day the plaintiff wrote:

"Through exchange of wires today, we take pleasure in confirming purchase from you of 30 to 35 M bus. No. 3 hard wheat at $1.31, basis delivered Minneapolis, shipment 5 days, Minneapolis State weights and grades to govern in settlement, and usual switching charge. Very glad to have this trade with you, and trust we will have future trades with you, and that your grain will come forward without any delay. Our wheat market closed a trifle higher at $1.21¾, $1.02⅝ for our September. On this basis good No. 3 hard would be worth $1.30 to 30¼."

Inclosed in this letter was a stereotyped form of confirmation as follows:

"Contract Minneapolis, Minn. 2/29/1915. Hutchinson Grain Company, Hutchinson, Kansas. We confirm purchase from you June 29, 1915, by wire of ——— cars, thirty to thirty-five thousand bushels of 3 hd. or better, Minneapolis inspection and Minneapolis weights to be final at $1.31 per bushel delivered free on board cars at. Mpls. and switched, to be shipped at convenience of the seller, between June 29, 1915, and July 5, 1915, inclusive, from ——— by ———

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R. R. via —— and to be billed as follows: Mill in transit for Chicago either C. G. W. or R. I. (immaterial provisions). Wire us immediately if any error or omission in this contract. Failure to do so constitutes your acceptance of all the terms hereof. Accepted: —— Seller. Cargill Commission Co., Per A. F. Owen, Buyer."

On July 1st the following telegram was sent:

"Your letter and confirmation of trades 29th received and wrong. We bought as per wires abstain to abstained. [Signed] Cargill." (Code words for thirty thousand to thirty-five thousand.)

To which the following went in reply:

"Message received our confirmation of 29th covers all wheat sold you on this date. Error in our code word. Thirty hundred to thirty-five hundred all wheat we had to offer. Error apparent as would be impossible to buy thirty thousand old wheat here for five days shipment. [Signed] Hutchinson Grain Co."

The following was also sent:

"Not our error. We sold abstain to abstained as message read. Look to you for the wheat or give us orders, we will buy what we can for your account."

On July 1st the defendant wired the plaintiff:

"Don't buy any wheat for our account. Our confirmation covers all wheat sold you."

And the plaintiff wrote defendant:

"We certainly were surprised this a. m. when we received your message which read: 'Your letter and confirmation of trades twenty-ninth received and wrong. We bought as per wires abstain to abstained.' We immediately wired you by day letter, 'Message received. Our confirmation of twenty-ninth covers all wheat sold you on this date. Error in code word, thirty hundred to thirty-five hundred all wheat we had to offer. Error apparent, as would be impossible to buy thirty thousand old wheat here for five days shipment.' Later in the day, we received your confirmation confirming 30,000 to 35,000 bus. of wheat, and we are returning same to you, as we did not sell this amount of wheat. This was a clerical error, and we are unable to furnish anything like this much wheat as stated in our day letter. We are very sorry that this has happened, and trust that we may be able to get this matter straightened out satisfactorily."

On July 2d the following letter was sent:

"Cargill Commission Co., Minneapolis, Minn. Gentlemen: We are in receipt of your various messages, one last evening and one this morning. We wired you this p. m.: 'Don't buy any wheat for our account; our confirmation covers all wheat sold you.' Now we will ship you from 3,000 to 3,500 bushels wheat on our contract of the 29th which is all we sold you, as per our letter of yesterday, which explains our stand in this matter. We inclose one invoice covering car of wheat No. 34393 D. L. W., which is billed to notify you Minneapolis, Minn. Please apply this car on Cont. 822, date 6—29—'15. Yours truly, [Signed] Hutchinson Grain Co."

After setting up most of this correspondence the petition alleged a known custom and usage of the grain trade that when a contract is made for the purchase of a minimum to a maximum amount of grain the seller can fill his contract by shipping either at his option, but that upon the seller's failure or refusal to ship the grain covered by his contract and upon notice thereof the purchaser may and must at once buy in the open market and may buy sufficient grain to cover either the minimum or maximum, charging to the seller the difference between the contract price and the price paid, together with costs and charges, and alleging that such purchases were made and claiming damages in the sum of $3,020.96. The answer sets up a custom that when grain is bought by telegraph the purchaser immediately writes a confirmation, likewise the seller, and that it is generally understood and is the custom among grain dealers that no contract is complete without such letters of confirmation, they constituting a part of the contract and being the contract between the parties; that the defendant made a mistake in the amount of grain he intended the plaintiff to book by use of the wrong code word, and that the plaintiff knew the defendant could not have procured the quantity of grain covered by the telegram, and that the language used in the telegram was a mistake as to the amount intended to be sold. This custom was denied by the reply, and the alleged knowledge of the impossibility to procure the maximum amount of wheat was also denied, and it was averred that the defendant shipped the wheat on the contract after receipt of plaintiff's confirmation, and thereby accepted the terms of such confirmation, and is bound thereby. A known custom that the telegrams and not the confirmations governed was also alleged in the reply.

Mr. Owen testified that he was familiar with the general usages and customs of the grain business among grain men, and that it is a general custom when the seller defaults in the contract to allow the purchaser to buy in either the maximum or the minimum as he may see fit; that if the seller refuses to fill his contract the purchaser must buy in immediately the same day or as soon as he can to cover the specified time of sale. Mr. Beyer testified that he was familiar with the customs of the grain business—

"and there is a usage and custom to the effect that at the very moment that the buyer finds out that there is a default, that there is a difference between them on the contract and the seller will not ship, he must immediately buy in for his account the amount that is short at the market price; must buy in at once upon knowledge of default."

Mr. Shepardson testified that the purpose of sending confirmations is simply to confirm a sale previously consummated, to check errors if there should be any.

"Where one party makes an offer by telegraph to sell grain at a certain price and another party accepts by telegraph, the contract is completed before the receipt of written confirmation; the wires make the contracts; the contract is made at once after the wire is received accepting the previous order at offering made. If a sale is made by exchange of wires and a confirmation is later sent which differs from the confirmation, the confirmation has nothing to do with the making of the contract. It certainly is not a trade custom that a sale of grain is not finally closed until a confirmation is sent and received. If a buyer of grain by wire had to wait until he was notified by the seller that he had received a con-

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firmation and that it was all right, all of which might take two or three or more days, he could not do business at all. In our business we have to know, not within a few days, but within a few minutes, whether we have made a purchase or a sale, so that we can at once either buy or sell, as the occasion demands, before the market fluctuates."

In the testimony of Mr. Hinchman on file it was testified that:

"In almost all instances, after a deal is made by an exchange of telegrams, the parties then mail to each other written confirmations, which are what the words imply, simply words to confirm or verify the previous wires."

It is said in the reply brief that this deposition contains a further statement by Mr. Hinchman to the effect that the contract is completed by the exchange of wires; the confirmation having nothing to do with the contract which is complete the minute the wire offer is accepted by wire.

The answer contained no denial, except that of any indebtedness to the plaintiff.

If a known and recognized custom of the grain business authorized the purchase up to the maximum so that when the contract was made the parties thereto must be presumed to have so intended, then evidence of such contract should have been received.

As already seen, the petition as well as the reply was supported by evidence, and hence the demurrer was erroneously sustained.

The plaintiff, however, relies largely on the assignment of error that the court erred in denying its motion for judgment on the pleadings.

Assuming for the moment that the telegrams of June 29th evidenced a complete contract, then upon advice that the defendant refused to recognize it save as to 3,000 or 3,500 bushels, the plaintiff having already sold 35,000 bushels on receipt of defendant's telegram of acceptance, was bound so to act as to mitigate the damages; and if the known custom of the trade also required it, then the plaintiff was doubly justified in buying in the open market at the best prices possible what the defendant refused to ship in compliance with the contract.

Regardless of custom and usage parties may and frequently do contract by telegraph, and such contracts may be as binding as if in the most solemn form of writing. Some point is sought to be made because the defendant referred to the contract of June 29th as if this amounted to a recognition that the contract was completed on that date, and also because certain minor provisions as to the time and manner of shipment did not appear until in the letters of confirmation as if that were some evidence that the contract were not yet completed, and also that in the stereotyped form of letter referred to reference was made to correcting any error or omission in the contract, and it is urged that this shows an intention on the part of the plaintiff to deem that the confirmations and not the telegrams constitute the contract. The entire correspondence, however, both by wire and by letter, reveals plainly enough that when the defendant used the word "contract" he meant a contract for 3,000 to 3,500 bushels; that when the minor provisions as to time and manner of shipment were mentioned in the letters it was with no thought of changing or making a new contract. The stereotyped form of confirmation begins with the statement:

"We confirm purchase from you June 29, 1915, by wire of blank cars, thirty to thirty-five thousand bushels. * * *"

Then after the provisions as to shipment and billing comes the suggestion to wire any error or omission. This letter form in connection with the other correspondence does not in our opinion indicate any intention on the part of the plaintiff to depart from the position that the contract was completed on June 29th.

The telegrams themselves consist of a bid for 30,000 to 35,000 bushels, a direction to book that amount, and a reply that it had been booked. Had the correspondence ended here no question could arise as to its meaning or obligation. When the additional fact appears that pursuant thereto the plaintiff at once sold 35,000 bushels of wheat in reliance upon this contract, the final and binding character of the deal is accentuated. When the news of the defendant's position and intention reached the plaintiff the sale of the 35,000 bushels had already been made. Had the contract contained in the messages of June 29th been in the form of a written agreement signed by the parties, and the plaintiff relying thereon had acted as it did, the defendant could not then have been heard to say at the expense of the plaintiff that he had made a mistake in the number of bushels he wrote into the contract, and therefore was not bound.

[2-5] Had the mistake been discovered and made known to the plaintiff before acting on the contract the error could have been corrected, but it was not the plaintiff's mistake nor was it the plaintiff's fault that the defendant used the wrong word in the contract, and did not make this known until the plaintiff had obligated itself to furnish the amount of wheat which the written contract or written evidence of the contract—the telegrams—between the parties called for. It is no answer to say that a known custom of the grain trade makes the letters of confirmation of the telegrams and not the telegrams themselves the contract, for this would be to exalt the manner of transacting business above the legal obligations thereof. In Strong v. Ringle, 96 Kan. 573, 152 Pac. 631, the confirmation of the purchase by telephone was received before the grain was shipped. Custom required objection, if any, to be made on its receipt. There was a dispute as to what was said over the telephone. It was held that the letter of confirmation should have governed. While an expression in Robinson v. U. S., 80 U. S.

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(13 Wall.) 363, 20 L. Ed. 653, was quoted to the effect that parties contracting on a special matter concerning which known usages prevail by implication incorporate them into the agreement if nothing is said to the contrary, it was stated, however, that:

"The custom of grain dealers is not invoked here to make a contract between the parties or to contradict any contract they did make. There was a contract, and the question is, What were its terms?" 96 Kan. 575, 152 Pac. 632.

"The general function of usage and custom is definition, explanation, elucidation. Whenever the matter is clear there is no function to be performed." 96 Kan. 576, 152 Pac. 632.

The contract evidenced by these telegrams is free from uncertainty or ambiguity, and hence under the rule of Strong v. Ringle and McSherry v. Blanchfield, 68 Kan. 310, 75 Pac. 121, there was no room for usage or custom to operate.

We find nothing in the telegrams and letters taken together to destroy the contractual force and effect of the telegrams acted on as they were by the plaintiff. What we do find is a claim of mistake by one of the contracting parties in the choice of a word used by him, knowledge of which claim reached the other party by a letter written June 29th, and by a telegram sent July 1st.

The very fact that knowing the usages and exigencies of the grain business the parties made and accepted the offer by wire indicates an intention to act quickly and not a purpose to await the slow course of the mails to determine what, if anything, their telegraphic communications had meant.

"As a written contract is the highest evidence of the terms of an agreement between the parties to it, it is the duty of every contracting party to learn and know its contents before he signs and delivers it. He owes this duty to the other party to the contract, because the latter may, and probably will, pay his money and shape his action in reliance upon the agreement. * * * Hence the courts do not permit one to avoid a contract into which he has entered on the ground that he did not attend to its terms, that he did not read the document which he signed, that he supposed it was different in its terms, or that it was a mere form." 9 Cyc. 388.

"A mistake of one of the parties only in the expression of his agreement or as to the subject-matter, not known to the other, does not affect its binding force, and is no ground for its rescission even in equity, unless it is such a mistake as to show that there is a complete difference in substance between what is supposed to be and what is taken, so as to constitute a failure of consideration." Page 394.

"Where a purchaser or seller of any property, real or personal, buys or sells upon a mistaken idea of its nature, quality, or value, this mistake of one, unless induced by the other, does not affect the binding force of the agreement." Page 395.

It was held in Griffin v. O'Neil, 48 Kan. 117, 29 Pac. 143, that an owner of cattle who contracts to sell them for a given price and gives a bill of sale and receives the consideration cannot be heard to say that he made a mistake in calculating the price of the cattle.

"If he made a mistake in his figures, and Mr. Griffin had no knowledge of the mistake, but relied upon the price stated, Mr. O'Neil is responsible and must suffer." 48 Kan. 119, 29 Pac. 144.

"If an offer made by one telegram is accepted by another, it cannot afterward be withdrawn by a third telegram which was forwarded before the second was actually received, but which did not reach its addressee until after the second telegram had come to the hands of the person making and afterward seeking to withdraw the offer." 6 R. C. L. 615.

"It has been declared that if, in the expression of the intention of one of the parties to an alleged contract, there is error, and that error is unknown to and unsuspected by the other party, that which so expressed by the one party and agreed to by the other is a valid and binding contract, which the party not in error may enforce. In other words, a party to a contract cannot avoid it on the ground that he made a mistake where there has been no misrepresentation, and there is no ambiguity in the terms of the contract, and the other contractor has no notice of such mistake, and acts in perfect good faith." 6 R. C. L. 623.

"A mistake of one party only, not known to the other, is generally no ground for avoiding the contract. The test is to determine whether or not the mistake is as to the substance of the whole consideration, and going to the very root of the matter, and not only to some point, although material, which does not affect the substance of the whole consideration. If the mistake is as to the former, then there is in reality a failure of consideration, which is a defense to the contract. If it is the latter, the contract is valid. Unless there is a mutual mistake, or the presence of undue influence or fraud, there is usually little or no ground for avoiding the contract for mistake." 1 M. A. L. 401.

It is argued that the acceptance of the 3,000 to 3,500 bushels after being advised of defendant's intention was an acquiescence therein. On the contrary this acceptance was merely that of a part performance and obviated the necessity of buying in that amount of grain to meet the contract of sale which the plaintiff had made on receipt of the defendant's telegram accepting its offer.

A contract to sell or deliver 30,000 to 35,000 bushels could certainly be fulfilled by the sale or delivery of any number of bushels from 30,000 to 35,000, so that if the defendant had furnished the minimum number of bushels the plaintiff could not have complained. We see nothing ambiguous or uncertain about such a contract so as to admit the alleged custom authorizing the purchaser to buy in on the seller's account the maximum number of bushels, for such a contract clearly means 30,000 or such greater number of bushels, up to 35,000, as the seller chooses to furnish. If the purchaser desires to bind the seller to a greater number than the minimum he may so frame the contract; and not having done so he must remain content with the requirements it contains.

Under the pleadings the plaintiff is entitled to recover up to the minimum amount purchased, and it was error to refuse judgment thereon.

The order sustaining the demurrer to the evidence of plaintiff is reversed, and the

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cause is remanded, with directions to render judgment for the plaintiff in accordance herewith. All the Justices concurring.

(99 Kan. 368)

PARKS et ux. v. MONROE et ux.
(No. 20600.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. SPECIFIC PERFORMANCE ⟸105(1)—ACTIONS —RIGHT TO MAINTAIN.

Where one of the parties to a contract for the exchange of real property repudiates the contract before the time fixed for its performance, and notifies the other party of such repudiation, the latter party may immediately commence an action for specific performance, or, in the event that specific performance cannot be had, for the recovery of the damages sustained.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 325; Dec. Dig. ⟸ 105(1).]

2. PLEADING ⟸226 — AMENDED PETITION — EFFECT OF.

A judgment by which a demurrer to a petition is sustained, and from which no appeal is taken, does not control the judgment on the hearing of a demurrer lodged against an amended petition afterward filed by leave of court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 569; Dec. Dig. ⟸226.]

Appeal from District Court, Mitchell County.

Action by Geo. B. Parks and wife against H. W. Monroe and wife. From judgment sustaining demurrer to the amended petition, plaintiffs appeal. Reversed and remanded, with directions.

Lutz & Jordan, of Beloit, and J. W. Tucker, of Cawker City, for appellants. Smith & Else, of Cawker City, for appellees.

MARSHALL, J. The plaintiffs appeal from a judgment sustaining a demurrer to their amended petition.

The amended petition sets out a valid written contract between plaintiff George B. Parks and defendant H. W. Monroe, for the exchange of lands. The contract, dated April 8, 1915, provided that defendant H. W. Monroe should deed to plaintiff Geo. B. Parks certain lands in Mitchell county, Kan.; that Parks should deed to Monroe certain lands in Howell county, Mo.; that Parks should assume a $7,500 mortgage on the Kansas land and pay to Monroe the sum of $2,400; that the deeds should be delivered and the $2,400 be paid on November 20, 1915; that Monroe should occupy the Kansas land until that time, and should pay, as rent to Parks, certain named shares of the crops to be grown thereon; that each party should furnish an abstract "down to date," and should "make a perfect title to the land he conveys"; that Monroe should have until April 15, 1915, to inspect the Missouri land, and, if it should be found as described in the contract, all papers necessary to comply therewith should at once be executed.

The amended petition alleges that Monroe inspected the Missouri land and found it as described, and alleges that the Missouri land is, in fact, as described in the contract. The amended petition further alleges:

"And said defendants have orally informed and notified plaintiffs that they will not execute said deed or furnish said abstract, and they do not intend to and will not pay plaintiffs any rents whatsoever for said premises, and have stated that so far as they, the said defendants, are concerned said contract is at an end. * * * The plaintiffs have duly performed all of the conditions of said contract on their part to be performed up to this time and are now standing willing, ready and able to complete the performance of said contract on their part, and now offer to bring said deed and abstract to said Missouri land and said $2,400 into court to be delivered to the defendants upon their executing and delivering to the plaintiffs a sufficient deed and abstract for said Mitchell county lands and upon their paying said rents to said plaintiffs as provided in said contract. * * * That if an exchange of said properties as contemplated by said written agreement is not effected the said plaintiffs will be damaged in the sum of $2,000."

The amended petition also alleges that the plaintiffs, Geo. B. Parks and Sena M. Parks, are husband and wife, and that the defendants, H. W. Monroe and Effie Monroe, are husband and wife.

The plaintiffs ask for specific performance of the contract, or, if that cannot be given, for damages in the sum of $2,000. The original petition was filed July 1, 1915.

[1] 1. Does the amended petition state a cause of action? The defendants urge that the action was prematurely brought for the reason that it was commenced before the time fixed for the delivery of the deeds and the payment of the $2,400. In 36 Cyc. 771, the rule governing this proposition is stated as follows:

"An action by the vendor before the time fixed for payment is premature; and where conveyance is not to be made until payment, the vendee usually cannot maintain his bill until payment is due; but where the vendor has repudiated the contract, the purchaser is entitled to sue at once, although the time fixed for complete performance has not arrived."

In Miller v. Jones, 68 W. Va. 526, 71 S. E. 248, 36 L. R. A. (N. S.) 408, the court said:

"A party to a contract, enforceable in equity, may sue to establish his rights thereunder as soon as the other contracting party has repudiated it, notwithstanding the time for full performance may not have arrived."

This principle is supported by Bear v. Fletcher, 252 Ill. 206, 96 N. E. 997, Belanewsky v. Gallaher, 55 Misc. Rep. 150, 105 N. Y. Supp. 77, and 3 Elliott on Contracts, § 2341.

When a contract is repudiated by one of the parties thereto, the other party has a right to take such steps as he may deem necessary to protect himself against loss or damage because of such repudiation. The law imposes on him the duty of acting promptly, and if he does not so act, he can neither have specific performance nor collect damages, but will be held to have ac-

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quiesced in the repudiation of the contract. Fowler v. Marshall, 29 Kan. 665; 36 Cyc. 728. When defendant Monroe repudiated his contract with plaintiff Parks, the latter had a right immediately to commence an action to compel specific performance of the contract, or, in the event that specific performance could not be had, to recover the damages sustained by reason of such repudiation.

The action was not prematurely brought, and the amended petition, therefore, states a cause of action. The demurrer to the amended petition should have been overruled.

[2] 2. A demurrer was sustained to the original petition. The plaintiffs were then granted leave to file an amended petition. A demurrer was lodged against the amended petition. That demurrer is the one that is now before this court. The defendants contend that because the judgment on the demurrer to the original petition was not appealed from, that judgment is binding and conclusive and prevents a review of the judgment sustaining the demurrer to the amended petition. This contention is without merit. The judgment on the demurrer to the original petition is not before this court, and is not subject to review. The judgment appealed from is the one sustaining the demurrer to the amended petition. The judgment on the original petition did not bind the trial court on the hearing of the demurrer to the amended petition, and does not bind this court.

The judgment is reversed. The cause is remanded, with directions to the trial court to overrule the demurrer to the amended petition. All the Justices concurring.

(99 Kan. 273)

KEIL v. EVANS. (No. 20420.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. PLEADING ⟸236(5)—TRIAL ⟸252(8)—ACTIONS—AMENDMENTS.

The refusal of the court to instruct the jury upon a ground of contributory negligence not pleaded in the answer of the defendant and which was only incidentally brought out on the cross-examination of the plaintiff and not specifically brought to the attention of the court until the instruction was requested, and also the refusal of the defendant's application to amend the answer so as to set forth the new issue, cannot be regarded as an abuse of discretion on the part of the trial court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. ⟸236(5); Trial, Cent. Dig. § 603; Dec. Dig. ⟸252(8).]

2. MUNICIPAL CORPORATIONS ⟸706(5)—STREETS—ACTIONS FOR INJURIES—EVIDENCE.

The evidence herein is deemed to be sufficient to support the findings of the jury that the injury sustained by the plaintiff when the bicycle he was riding collided with the defendant's automobile at the intersection of two streets was due to the negligence of the defendant, and not to the contributory negligence of the plaintiff.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. ⟸706(5).]

Appeal from District Court, Sedgwick County.

Action by William Keil, by W. E. Keil, his next friend, against C. M. Evans. From a judgment for plaintiff, defendant appeals. Affirmed.

Chester I. Long, A. M. Cowan, and James G. Martin, all of Wichita, for appellant. H. C. Castor, P. D. Gardiner, and T. E. Elcock, all of Wichita, for appellee.

JOHNSTON, C. J. This action was brought by William Keil, a minor, against C. M. Evans to recover damages for personal injuries.

The plaintiff, while riding his bicycle, was injured in a collision with defendant's automobile at the intersection of Murdock avenue and North Main street in the city of Wichita. Just before the accident, plaintiff and defendant were each approaching the intersection; the plaintiff from the north on Main street, and the defendant from the east on Murdock avenue. Along the center of North Main street are two street car tracks about five feet apart. As the plaintiff was about to cross Murdock avenue, his view eastward was obstructed by a street car on his left which had stopped at the north side of Murdock avenue, and on account of passengers boarding the car he passed close to the west curb of North Main street. He was traveling at the rate of 6 miles per hour and had reached a place about 10 feet from the north line of Murdock avenue and 15 or 20 feet west of the tracks when he first saw the defendant's automobile, which had then reached a point just east of the car tracks and a little north of the center of Murdock avenue. As the defendant approached Main street he slackened his speed somewhat and, observing that the street car was standing still, he passed in front of it in a slightly curved course, first southwesterly, then northwesterly, traveling at the rate of 12 miles per hour. Plaintiff tried to stop his bicycle when he saw the approaching automobile, but the brake did not work well and although he undertook to clear the defendant's automobile, which was then a few feet away, he was unable to turn far enough to avoid striking it. The collision occurred just after the defendant passed over the west track, and as a result the plaintiff was thrown to the pavement, receiving an injury to his skull. Each party alleged violations by the other of certain traffic regulations of the city of Wichita. The particular acts of negligence charged against the defendant were that he drove in a negligent, reckless manner, at an unlawful

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rate of speed without sounding a horn or giving warning of any kind. The answer of the defendant denied negligence and charged that plaintiff was lacking in care in riding his bicycle too near to the street car and that if he had been following the traffic rules he would have been in a position to have seen the automobile in time to have avoided the collision, and, further, that he had failed to keep a lookout for vehicles as ordinary prudence required. The jury returned a general verdict awarding plaintiff damages in the sum of $500 and also special findings to the effect that the defendant was negligent in running at an excessive rate of speed, namely, 12 miles per hour, and in not giving sufficient warning of his approach. On the question of care exercised by the plaintiff, the jury found that he saw the automobile when it was from 25 to 30 feet distant, that he was riding at the rate of 6 miles per hour, and that after observing the automobile he slackened his speed, tried to stop his bicycle, and turned to the left in an attempt to avoid a collision.

[1] Complaint is made of the refusal of the court to give an instruction as to the negligence of plaintiff in riding a bicycle when the coaster brake on it was out of repair. It is not contended that the plaintiff was required to have his bicycle equipped with the latest and best appliances, but it is insisted that the coaster brake being defective prevented the plaintiff from back-pedaling and left him no way of stopping the bicycle unless the rider put his feet on the ground, and the plaintiff, being a small boy, could not reach the ground. An instruction on this subject was requested after the evidence had been closed, and it was refused by the court because the defendant had not pleaded the use of the defective brake as a ground of contributory negligence. He had alleged specific acts of negligence by the plaintiff, but no mention was made of using the bicycle with the defective brake. It appears that in the cross-examination of plaintiff he was asked if he had a coaster brake on his bicycle, and he replied that he had one, but that it was not working well and had been in poor condition for two months, and also that he had been aware of its condition. The instruction asked was objectionable, in that it stated that if plaintiff was riding his bicycle with a defective coaster brake, and the bicycle was not under control by reason of the defect, the plaintiff was guilty of contributory negligence. It left out of consideration the age of the boy, his knowledge of the condition of the brake, and the excitement or fear that might have been produced by the peril in which he was suddenly placed. One who acts in an emergency or in the face of imminent danger when there is little chance for deliberation is not held to the exercise of the utmost caution nor to the strict accountability required under more favorable circumstances. It is enough if he acts in good faith as a person of ordinary prudence would do under like circumstances. McCallion v. Railway Co., 74 Kan. 785, 88 Pac. 50. However, as the issue was not raised by the pleadings the defendant was not entitled to have the issue submitted to the jury. Upon the refusal of the instruction, application was made by the defendant to amend his answer so as to allege the use of the bicycle with a defective coaster brake as a ground of contributory negligence. It can hardly be said that the parties tried the case as if that issue was submitted for determination. The testimony, as we have seen, only came out incidentally on the cross-examination of the plaintiff, and the matter was not brought to the attention of the court until the request for an instruction on the subject had been refused. The introduction of a new issue at that stage of the proceedings and under the circumstances stated was a matter for the discretion of the court, and it is reasonably clear that the refusal cannot be regarded as an abuse of discretion. It may be said in this connection that the court did give a general instruction to the effect that, if plaintiff was guilty of negligence contributing to his injury, he could not recover even if the negligence of the defendant was well established.

Complaint is made of instructions 13, 20, and 22, which referred to the rule that one placed in a dangerous position through the negligence of another without time to deliberate as to the safest course to pursue in order to avoid danger to himself is not held to the strict accountability required of one situated in more favorable circumstances, and that his action is not defeated if he does not adopt the most prudent course. It is said that the instruction as framed relieved the plaintiff from the duty to use ordinary care to extricate himself from the impending danger. The instructions taken together, however, make it clear that defendant and the jury must have understood that the plaintiff was held to the exercise of ordinary care under the circumstances, and that if he failed in that respect no recovery could be had. The language of the instructions criticized could not, we think, have misled the jury.

[2] No substantial error is found in any part of the instructions, and we find no difficulty in holding that the evidence was sufficient to support the findings and verdict of the jury.

The judgment is affirmed. All the Justices concurring.

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(99 Kan. 267)

CITY OF DUNLAP v. WATERS. (No. 20404.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. EVIDENCE ⟸158(15)—BEST AND SECONDARY EVIDENCE.

The city purchased real estate occupied by a Young Men's Christian Association as tenant of the former owner. The secretary of the Y. M. C. A., who was also a member of the city council, testified that the Y. M. C. A. leased the property from the city, that he presented the matter to the council for the Y. M. C. A., and that the council made a record of it. The terms of the tenancy were not material or in dispute. *Held*, the fact of attornment and of tenancy under the new owner could be proved in this way, without production of the record of the city council's proceedings.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 492, 504; Dec. Dig. ⟸158(15).]

2. APPEAL AND ERROR ⟸1050(4)—REVIEW—HARMLESS ERROR.

If a fact material to a judgment be established by secondary evidence, erroneously admitted over objection, the judgment will not be reversed on appeal, and all the fruits of the trial sacrificed, merely because the best evidence was not produced, when the best evidence consists of a record open to inspection by the defeated party, and no showing was made to the district court at the hearing of the motion for a new trial, and no claim is made in this court, that the record, if produced, would contradict the secondary evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4156; Dec. Dig. ⟸1050(4).]

3. TAXATION ⟸769—TAX DEEDS—DEFECTIVE DEEDS.

The remedy of a person receiving a tax deed which omits necessary recitals is to apply to the county clerk for a corrected deed. Should such application not be made before judgment is rendered quieting title against the tax deed, it is not a valid objection to the judgment that the remedy is lost.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1533-1536; Dec. Dig. ⟸769.]

Appeal from District Court, Morris County.

Action by the City of Dunlap against Minnie E. Waters. From a judgment for plaintiff, defendant appeals. Affirmed.

Dennis Madden, of Emporia, for appellant. J. M. Miller and Harry E. Snyder, both of Council Grove, for appellee.

BURCH, J. The action in the district court was one in statutory form to quiet the title to real estate. The plaintiff prevailed, and the defendant appeals.

[1, 2] The defendant claimed title under a tax deed defective on its face and was scrambling for possession. The plaintiff claimed title under deeds from the heirs of Frank Sargent, the owner at the time of the tax sale, and claimed possession through its tenant, the Young Men's Christian Association, which was placed in possession by Sargent. The question was whether or not the Y. M. C. A. was the plaintiff's tenant. The secretary of the Y. M. C. A. was a member of the city council. He testified as follows:

"Now, do you say the Y. M. C. A. leased it from the city?
"Yes, sir.
"When?
"I couldn't say.
"Do you know that of your own knowledge?
"I do.
"Did you negotiate the leasing?
"I was present at the time, and presented the matter for the Y. M. C. A.
"Before the council?
"Yes, sir; before the council.
"They made a record of that?
"Yes, sir."

The mayor of the city also testified that the city made arrangements with the Y. M. C. A. to occupy and use the building on the property in controversy. The record of the proceedings of the city council was not introduced in evidence, and motions were made to strike out the testimony referred to as not the best evidence.

The best evidence rule is an ancient one and is well founded. It is to be applied, however, with discrimination. Ordinarily the official action of the governing body of a municipal corporation should be proved by the record, and the terms of written instruments should be proved by the production of the writings. If, however, the precise terms of a record or of a written instrument are not material to the fact under investigation, the production of the record or of the writing may be dispensed with in many cases. Thus in 2 Wigmore on Evidence, § 1246, it was said:

"(6) The mere fact that a person is owner of property, whether real or personal, is a distinct thing from the terms of the document or documents by which he has become owner, although instances may be supposed in which the relation of ownership involves so directly the terms of a specific deed that the rule of production applies. (7) The fact that a person occupies the relation of tenant, as to a piece of land or its owner, is a distinct fact; for he may have become tenant by parol or by writing, and the tenancy is the result of the transaction, and is not the transaction itself. Nevertheless, so far as the terms of a written tenancy are drawn into question, the rule of production begins to be applicable."

Likewise in 17 Cyc. 486, it was said:

"Where the relation of landlord and tenant exists by virtue of a written lease or other instrument, and the existence and terms of the tenancy lie at the foundation of the cause or are directly in issue, the written instrument constitutes the best evidence, and parol or other secondary evidence is excluded under the best evidence rules. But in other cases it is generally held that, where the fact to be established is simply the existence of the tenancy as distinct from its terms, the best evidence rule does not apply, and, although there may be a lease or other written instrument defining the terms of the tenancy, the fact of the tenancy may be proved by parol without the necessity of producing the writing."

In this instance the fact to be proved was attornment. The Y. M. C. A. held possession as a tenant of the owner, Sargent. After his death his heirs conveyed to the plaintiff, and the question was whether or not the Y. M. C. A. then acknowledged the plaintiff as its landlord. Any act of the tenant rec-

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ognizing the plaintiff as the source of its continued right to possession, or as the owner to whom the obligations of a tenant were due, was sufficient to constitute attornment, and after attornment the possession of the tenant was the possession of the new owner. 24 Cyc. 891. Such recognition was properly provable in this instance by parol.

Following the suggestion closing the quotation from Wigmore on Evidence, it may be asked: How could it be definitely known that the city responded favorably to the Y. M. C. A.'s application and "teased" to it, as the witnesses said, without the contents of the record being before the court? The question brings up the subject of the production of documents collateral to the issue, which is discussed by Dean Wigmore as follows:

"In the great majority of instances where the terms of a document are not in actual dispute, it is inconvenient and pedantic to insist on the production of the instrument itself and to forbid all testimonial allusion, however casual, to its terms. * * * But in any case the misfortune of inconsistent precedents and the disadvantage of an obscure definition can be obviated by applying strictly that salutary doctrine of judicial discretion. Let the trial judge determine absolutely, and without review, the application of the principle to each case. Whether a document is 'collateral' is practically a question whether it is important enough under all the circumstances to need production; and the judge presiding over the trial is fittest to determine this question finally." 2 Wigmore on Evidence, § 1253.

Conceding the case to be one requiring proof by the best evidence, the record, which was not produced, the defendant is not entitled to a new trial. The record was not a private instrument which the defendant had no opportunity to read. It was a public record of the proceedings of the city council. If the characterization given those proceedings by the witnesses was not correct, a telephone communication with the city clerk would have revealed the fact. No proof was offered at the hearing on the motion for a new trial that the proceedings of the city council were different from what the plaintiff claimed them to be, and no suggestion is made in the brief that the record, if produced, would contradict the secondary evidence in substance or legal effect. The relation of landlord and tenant between the city and the Y. M. C. A. was clearly proved, but a rule of evidence was not observed. The defendant's proposal is to reverse the judgment and retry the case, not that a different result may be reached, but that the procedure may be formally correct. In this court prejudice to substantial rights is not presumed to result from a wrong ruling, but must be made to appear affirmatively. Morrow v. Inge, 89 Kan. 481, 131 Pac. 1184; Bank v. Robinson, 93 Kan. 464, 144 Pac. 1019, Ann. Cas. 1916D, 286; Morris v. Blazer, 96 Kan. 466, 152 Pac. 767.

[3] The defendant's tax deed was defective for failure to recite an assignment to the defendant of the tax sale certificate on which it was based. The defendant says the judgment cuts off her right to demand and receive a tax deed containing proper recitals. This is the defendant's own fault. She accepted the deed which the county clerk issued and placed it on record. She did not establish by any proof that she was entitled to a better deed, but if she were, the court could not aid her. It could not give her another deed, or reform the one issued. Her remedy was to apply to the county clerk for a corrected deed. Baker v. Lane, 82 Kan. 715, 109 Pac. 182, 28 L. R. A. (N. S.) 405. It rested with her to make this application or not, as she chose. She chose to stand on the deed issued to her, which the plaintiff had the right to attack.

The judgment of the district court is affirmed. All the Justices concurring.

(99 Kan. 253)

CASE v. YOAKUM. (No. 20359.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

JUDGMENT ⟸199(1)—ACTIONS—ISSUES AND PROOF.

The petition alleged that a certain runway over which the plaintiff was carrying heavy lumber was insufficient, that all the boards were old, weather-worn, rotten, and weak, and not properly fastened at the ends, and were not fit or proper boards for the purpose for which they were being used, and that the walk or one of the boards therein broke, and the plaintiff was precipitated to the cellar. The jury returned a verdict for the plaintiff, but found as the sole ground of negligence that the walk was too narrow. *Held*, that a judgment for the defendant in this finding must be sustained.

[Ed. Note.—For other cases, see Judgment, Cent.Dig. §§ 367, 374, 375; Dec.Dig. ⟸199(1).]

Appeal from District Court, Leavenworth County.

Action by James C. Case against Robert B. Yoakum. From judgment for plaintiff, defendant appeals. Affirmed.

Benjamin F. Endres, of Leavenworth, for appellant. Floyd E. Harper, of Leavenworth, and B. R. Hogin, of Kansas City, Mo., for appellee.

WEST, J. The plaintiff sued to recover for injuries caused by a fall from a runway in a building under process of construction by the defendant. It was alleged that in order to reach the inside of the building a runway or board walk was constructed by defendant over the opening or cellar at the rear of the building, consisting of two or three boards from 6 to 8 feet long, one of which was 2 inches thick and 6 inches wide, one either 2 by 10 or 2 by 12 laid flat and lengthwise over the opening, and between the two was laid a piece of planking called flooring 1 inch thick and 6 inches wide; that while carrying a 24-foot plank over this runway, one of the boards therein broke, and

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the plaintiff was precipitated to the cellar—"that said board walk or runway was at said time wholly insufficient to support a man of the size of plaintiff while carrying a board or joist such as plaintiff was carrying at the time, and weighing 150 pounds more or less; that all of said boards were old, weather-worn, rotten, and weak; that they were not properly fastened at the ends, and were not fit or proper boards for the purposes for which they were being used at said time and place."

In his opening statement counsel for plaintiff said:

"The evidence will show * * * when all of a sudden one of the boards on the runway broke and Mr. Case was precipitated to the cellar below onto some piping that was in the cellar."

The defendant, in his opening statement, said the evidence for the defendant would go to show the condition of the runway, the manner in which it was used, and the material of which it was constructed, and that the court would instruct that, unless the jury should believe from the evidence that the defendant was negligent in the way the runway was constructed and the material that was used there, they should find for the defendant. Plaintiff, among other things, testified:

"As I was going there, there was three boards down on the runway that I had to walk over; one was 2 by 10 or 2 by 8, and the other was 2 by 6 or 2 by 8, and I do not know what the other was, but as I got in the center of that runway, that plank broke with me, and I fell into the cellar and cut my head here, and broke three of my ribs and skinned my face."

He could not state which board broke, but said that when he got in the center he just realized that he was going down, and had a remembrance as he was going down he heard the boards breaking.

"Q. You are positive one of those boards broke and let you through there? A. Yes, sir. One of those boards broke; I could not say for sure which one it is."

Another witness testified that when he reached the cellar he saw the piece of flooring broken, down by the plaintiff.

"* * * After the accident, I looked up from the alley and I could see two boards in the runway; they were 2 inches thick. All I could see after he fell were two boards, and I saw a broken board down there where he was in the cellar. It was flooring that was laying right below Mr. Case, and it was broke. * * * It was 4 inches wide and 1 inch thick."

There was also testimony that the boards were a good deal worn, and that after the accident a 2 by 12 inch board was added; that the runway was made about 12 inches wider and was nailed to the floor. The jury were instructed, if they believed from the evidence that the runway was defective and that the construction thereof was insufficient, or that one of the boards was defective or insufficient for the use being made of it at the time, and by reason thereof it broke and occasioned the injury, that under certain conditions mentioned the plaintiff was entitled to recover. A general verdict was returned for $787.50 in favor of the plaintiff, and seven special questions were answered, which have no significance except upon the possible question of contributory negligence in the general strength and use of the runway. The eighth question was:

"State fully, clearly, and specifically the negligence of which defendant was guilty, and upon which you rendered a verdict in favor of plaintiff. Answer: The runway too narrow."

Defendant did not file a motion for new trial, but for judgment notwithstanding the general verdict, which was granted, and the plaintiff appeals.

The only question involved is whether or not this answer was so clear and specific a restriction of the negligence of the defendant to the mere width of the runway as to justify the action of the trial court. It is urged that narrowness may well be an insufficiency, and that under the allegations it was quite consistent for the jury to find that for a man carrying a board weighing 150 pounds the runway was, by reason of its meager width, insufficient.

One witness testified that there were only two boards in the runway, each 2 inches thick, and that a piece of flooring was used as a brace from the floor to a doorframe 2 or 3 feet from the runway, against which brace a man would be apt to fall if he fell off the east side of the runway, and that when witness got down cellar, this brace was there, broken. The answer would indicate that the jury took this view of the case, and concluded that by reason of the narrowness of the walk, consisting of only two boards, the plaintiff fell therefrom against the brace, breaking it and carrying it down with him. The case was brought and presented on the theory that the walk, or some part thereof broke and gave way, not that by reason of its narrowness the plaintiff fell therefrom.

When the finding taken in connection with another, as in the case of Springer v. Railway Co., 95 Kan. 408, 148 Pac. 611, amounts to a statement of one of the conditions bringing about the injury, and other conditions are shown by the evidence and found by the jury, such finding does not necessarily conflict with the general verdict. In Tecza v. Sulzberger & Sons Co., 92 Kan. 97, 140 Pac. 105, the jury rested the negligence on insufficient light, and it was held that while the plaintiff did not, in so many words, say that his fall was caused by the want of light, it was deemed that there was room for the inference that a better light would have enabled him to secure a better footing; but even there the petition alleged various forms of negligence, including insufficient light, and it was held that the answer of the jury excluded other forms than the one mentioned therein.

When the finding clearly excludes all other elements than the one specified therein, the unvarying rule is that this element alone may be considered as proved, and that all others alleged are deemed to be left unsupported. Railway v. Roth, 80 Kan. 752, 104

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Pac. 849; Plummer v. Railway Co., 86 Kan. 744, 121 Pac. 906; Adams v. Railway Co., 93 Kan. 475, 144 Pac. 999; Pullin v. Railway Co., 96 Kan. 165, 150 Pac. 604 (syl. 2, p. 173). See, also, Martin v. City of Columbus, 96 Kan. 803, 153 Pac. 518; Keck v. Jones, 97 Kan. 470, 155 Pac. 950. In Roberts v. Railway Co., 98 Kan. 705, 706, 161 Pac. 590, it was said:

"It is contended, however, that as other grounds of negligence were alleged by the plaintiff and a general verdict was returned in his favor, we should presume that these were established and furnish a basis for the verdict. The contrary of this contention is the rule. Such a finding in effect acquits the defendant of every charge of negligence stated in the petition or mentioned in the evidence, except the one specifically designated in the finding."

The judgment is affirmed. All the Justices concurring.

(99 Kan. 302)

W. W. KIMBALL CO. v. BOARD OF COM'RS OF SHAWNEE COUNTY et al. (No. 20446.)*

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

TAXATION ⟸98 — PERSONAL PROPERTY — SITUS.

A piano company, incorporated under the laws of Illinois with its home office at Chicago, maintained a branch office at Topeka, where pianos were sold and sale notes taken therefor, retaining title in the company until paid. These notes were transmitted to the home office, copies being returned to the register of deeds for filing, and the originals were retained at Chicago, only being sent here for payment and remittance, practically all the payments being made here and credited and remitted to the home office; no part thereof being retained for the use of the local office. Returns for assessment were made on the local bank account and average stock on hand. *Held*, that such notes were not taxable here to the company, the situs for taxation being the domicile of the owner.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 196–198, 200; Dec. Dig. ⟸98.]

Appeal from District Court, Shawnee County.

Action by the W. W. Kimball Company against the Board of County Commissioners of Shawnee County and others. Judgment for defendants, and plaintiff appeals. Reversed.

Charles Curtis and Otis E. Hungate, both of Topeka, for appellant. W. E. Atchison and J. L. Hunt, both of Topeka, for appellees.

WEST, J. The plaintiff procured a temporary injunction against the defendants, restraining them from levying a certain tax warrant, and from a judgment vacating such injunction and for costs this appeal is taken. The plaintiff is a piano company, an Illinois corporation, with its office and headquarters at Chicago, and had a branch of its selling business at Topeka in charge of a manager, a portion of its instruments being sold on credit by installments, the purchaser executing a conditional sale contract, in which he promises to make payment at the Chicago office, the seller to retain title until the payments are made. The usual course of business was to forward the originals to the home office, where they were retained, copies being returned to the register of deeds for filing. Some of the customers sent their payments to Chicago, but it was admitted that practically all made them at the local office, where credit was given on the books; the cash being sent to Chicago. It was testified that neither the sale contracts nor the payments made on them were permitted to be used in the business at Topeka, and that the proceeds of local cash sales were kept distinct and separate from those received on these contracts. The taxation of $1,500 worth of these contracts gave rise to this controversy, the plaintiff claiming that they had no taxable situs in Shawnee county. The court made no findings of fact, but there was testimony in support of the plaintiff's claims, as already indicated. It was also brought out that as each payment matures a notice is mailed to the customer from the Chicago office, with a notation that the payments may be made, if desired, at the Topeka store, to which the note is sent, thus giving the customer the option to pay here, although the contracts are, by their terms, payable at Chicago; that all the proceeds are sent to Chicago, and no part thereof retained for use here; that whenever money is needed, it is remitted from the Chicago office, although usually the local offices are supposed to be self-supporting. In a large number of cases the instruments were bought on monthly payments, which were made at the local office, and by those in charge remitted to the home office.

The defendants contend that the plaintiff maintained a store and stock of goods in Topeka; that notes for deferred payments on pianos sold, while on their faces payable in Chicago, were almost invariably paid here, and that the important question is whether or not a foreign corporation may establish a store here, carry a stock and avoid taxation upon its credits arising out of its business, thus gaining a preference over local enterprises. Admitting that only property in its jurisdiction may be taxed by the state, they argue that the business situs of the notes was in Topeka, where they had, for the purposes of collection, the protection of Kansas laws. The general provision of the Corporation Act (section 1724 of the General Statutes of 1909) that foreign corporations doing business here are under like restrictions and obligations as domestic corporations is invoked, and also section 9223 of the General Statutes of 1909, which requires property of merchants to be listed where their business is usually done, which coun-

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied January 16, 1917.

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sel concede means only property employed in such business, and not all the property owned by such merchants. Returns for taxation were voluntarily made on the local bank account and average stock on hand, so that, as suggested by plaintiff, the pianos for which the contracts in question were given were taxed in this jurisdiction.

It cannot be said, and it is not claimed, that these notes were in Kansas on the 1st of March, or that they ever remained here for any length of time. There is no showing that they were used in business here or otherwise than for collection and remittance to the home office. Counsel for the defendant put the matter thus:

"Do the statutes authorize their taxation; and are they subject to the taxing jurisdiction of the state? This last question means: Is it equitable that the credits should be taxed here and not elsewhere?"

Section 9214 of the General Statutes of 1909 provides:

"That all property in this state, real and personal, not expressly exempt therefrom, shall be subject to taxation in the manner prescribed by this act."

Section 9215 reads:

"The term 'personal property' shall include * * * all other assets of every company, incorporated or unincorporated, and every share or interest in such * * * assets, by whatever name the same may be designated."

Section 9221:

"Money collected by any agent for any * * * corporation which is to be transmitted immediately to such * * * corporation shall not be listed by such agent; but such agent shall if required by the assessor state under oath the amount of money in his hands and to whom the same is to be transmitted."

In Wilcox v. Ellis, 14 Kan. 588, 19 Am. Rep. 107, a resident of Butler county who had contracted to sell certain land in Illinois had taken notes therefor which were deposited with certain bankers in that state, and it was held that he was not taxable here upon these notes. In the opinion it was said:

"Then what is there in Kansas to be taxed? Certainly no tangible property; and not even any intangible property that needs any protection from our laws. Everything is and has been in Illinois. * * * Nothing pertaining to the notes, or to the debt which they evidence, has ever been in Kansas except that the owner of the notes resides in Kansas."

Prominence was given to the fact that the owner of the notes still owned the land and was liable for the taxes thereon, and the injustice of requiring him to pay the additional tax on the notes whenever within the jurisdiction of this state was considered. In Fisher v. Com'rs of Rush Co., 19 Kan. 414, a citizen of Rush county, who had sold certain real estate in Iowa and received promissory notes in part consideration secured by mortgage thereon, both made payable in Iowa and left there for collection, and had never been in Kansas, was held not liable here for taxes thereon. The correlative terms of taxation and protection were given force in the decision, and it was pointed out that personalty does not always follow the owner if the business transacted or the situs of the notes be not in the state where the owner resides. In Gibbins v. Adamson, 5 Kan. App. 90, 48 Pac. 871, it was found that the plaintiff was the owner of a mortgage on lands in Jackson county, securing a note for $6,000, but, having given his own note for $2,800 to a resident of Missouri, had indorsed the $6,000 note and assigned the mortgage to him as collateral security, and they were thereafter continuously held in Missouri until after March 1, 1887; that, March 24, 1887, the mortgage note having been paid to the plaintiff, the mortgage was released by the Missouri holder, and it was held that the plaintiff was properly chargeable with taxes thereon, his domicile being deemed the taxable situs. This was affirmed by this court. Gibbins v. Adamson, 58 Kan. 818, 51 Pac. 1101. It was held in Kingman Co. v. Leonard, 57 Kan. 531, 535, 46 Pac. 960, 961 (34 L. R. A. 810, 57 Am. St. Rep. 347), that judgments rendered by the courts of this state in favor of and owned by citizens of other states are not taxable here. It was said to be quite well settled that choses in action belonging to a nonresident in the hands of a managing agent within the state are taxable; also that:

"Some weight at least should be given to the rule that credits are generally regarded as residing with the creditor. The case of Fisher v. Com'rs of Rush Co., 19 Kan. 414, is an extreme one, and has been criticized."

In Mecartney v. Caskey, 66 Kan. 412, 414, 71 Pac. 832, 833, tax sales certificates issued by a county treasurer of this state on sales of real estate for delinquent taxes, owned by a nonresident, were held not subject to taxation in this state. The plaintiff, a resident of California, employed an agent to bid for real estate at tax sales, and the certificates were sometimes kept in California and sometimes at the agent's office in Kansas. It was there said:

"If the owner be a nonresident the certificate has no situs in this state."

Kingman Co. v. Leonard was followed as controlling authority, and attention was called to the criticism therein of Fisher v. Com'rs of Rush Co. In Johnson County v. Hewitt, 76 Kan. 816, 93 Pac. 181, 14 L. R. A. (N. S.) 493, promissory notes, belonging to a nonresident of Kansas, given by a resident of Missouri and secured by trust deeds of real estate in Missouri, which had never been brought into this state, but which were left, for safe-keeping only, in a bank vault in Missouri, were held to constitute personal property with its location at the residence of owner. It was pointed out (76 Kan. 821, 93 Pac. 181, 14 L. R. A. [N. S.] 493) that the statute places tax sale certificates, judgments, notes, bonds, and mortgages, and all evidences of debt secured by a lien on real estate in the same category, and distinguishes them from tangible personal property.

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Kingman County v. Leonard and Mecartney v. Caskey were cited. It was said that the doctrine that the note is only the evidence of the debt constituting the owner's tangible property is thoroughly established. As to the intimation that such property might acquire a situs here for the purpose of taxation, it was declared:

"Notes, mortgages, tax sale certificates and the like might be brought into the state for something more than a temporary purpose, be devoted to some business use here, and thus become incorporated with the property of this state for revenue purposes. Such a situs has aptly been termed a 'business situs'" (citing authorities). 76 Kan. 822, 93 Pac. 184, 14 L. R. A. (N. S.) 493.

That to establish an independent business situs generally, the element of the separation from the domicile of the owner and fairly permanent attachment to some foreign locality should appear, together with some business use of them or some power of managing, controlling, or dealing with them in a business way.

"A merely transitory presence in a foreign state or a naked custody for safe-keeping is not enough." 76 Kan. 823, 93 Pac. 184, 14 L. R. A. (N. S.) 493.

Also that probably the weight of authority would not now sustain the holding in Fisher v. Com'rs of Rush Co. that the property had a business situs in Iowa because it was left there for collection.

"Although much confusion still exists, legal thought upon the subject of the taxation of intangible property has been considerably clarified since the opinions in the Wilcox and the Fisher Cases were written, and many of the arguments there advanced would now be regarded as unsatisfactory." 76 Kan. 825, 93 Pac. 185, 14 L. R. A. (N. S.) 493.

In the recent case of Freedom Township v. Douglas, 160 Pac. 1147, holding valid chapter 276 of the Laws of 1905 prescribing where the property of certain insurance companies shall be listed for taxation, it was stated that:

"It is entirely competent for the Legislature, except as limited by the Constitution, to fix the situs of property, tangible and intangible, for the purposes of taxation. 37 Cyc. 947. In the absence of specific legislation, debts evidenced by notes and mortgages are ordinarily taxed at the domicile of the owner."

If the equities of the correlative doctrine of taxation and protection are to be considered, then so long as the notes in controversy remained in Illinois, the residence of the owner, they were under the protection of the Illinois laws. Their transmission here for payment and remittance cannot reasonably be said, as a matter of law, to localize them for taxation, the Legislature never having evinced such a purpose.

Attention is called to the case of Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 31 Sup. Ct. 550, 55 L. Ed. 762, L. R. A. 1915C, 903, holding certain choses in action owned by an insurance company doing business in Louisiana taxable there. But in that case the Legislature had enacted, among other things, that:

"No nonresident, either by himself or through any agent shall transact business here without paying to the state a corresponding tax with that exacted of its own citizens; and all bills receivable, obligations or credits arising from the business done in this state are hereby declared assessable within this state, and at the business domicile of said nonresident, his agent or representative."

The effect of the decision was that the Legislature had power thus to localize for the purpose of taxation the situs of the credits there involved. But here we find no expression of legislative intention to fix a local situs, and, whether important or not, no equitable pressure requiring such localization.

The situation presented is one which, under the general rule, permits and calls for the operation of the maxim that personal property follows the domicile of the owner.

The judgment is reversed. All the Justices concurring.

(99 Kan. 359)

STEINBORN v. STEINBORN et al.

(No. 20486.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. DESCENT AND DISTRIBUTION ⟸83—RIGHTS OF HEIRS—ACTIONS—PLEADING.

A will by its literal terms left a tract of land owned by the testatrix undisposed of. After administration and final settlement certain of the heirs contracted with the others to pay them certain sums of money as soon as the former should obtain a clear title to the land, the latter to pay one-half the cost of getting a clear title. Pursuant to this contract a suit was brought to correct the will according to the testatrix's alleged intention and so as to devise the land to the plaintiffs in such suit—the defendants here. The plaintiff herein made no defense to such suit, and the defendants took a decree as prayed for, and have ever since been in possession of the land claiming title thereto, which the plaintiff herein concedes, and about two years before this action was begun paid $100 on his claim. *Held*, that the amended petition alleging the foregoing facts stated a cause of action, and the demurrer thereto was wrongfully sustained.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 337-345; Dec. Dig. ⟸83.]

2. ESTOPPEL ⟸78(1)—CONTRACT—DECREE.

Whether or not the court in the suit to correct the will rightfully decreed such correction, it had jurisdiction to decide the issues tendered by the plaintiffs therein, and having chosen this means of perfecting their title and accepted the benefits of the decree they cannot now be heard to assert its invalidity as against the plaintiff's claim for the remainder of the amount which they contracted to pay him.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 204, 210; Dec. Dig. ⟸78(1).]

Appeal from District Court, Clay County.

Action by David Steinborn against John Steinborn and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

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W. T. Roche, of Clay Center, for appellant. C. Vincent Jones, of Clay Center, for appellees.

WEST, J. In 1899 Anna Steinborn made a will by which she gave certain small bequests to some of her children and undertook to devise to Louisa, August, and John certain real estate. The will was probated in 1902, the estate was fully administered, and final settlement was made in 1904. It appears that literally construed the will covered certain land not owned by the testatrix and omitted about 99 acres which she did own, so if the instrument be so taken the latter amount of land was left undisposed of by the will and descended to her heirs. In 1905 Louisa, August, and John entered into a contract with the other children, David, Charlie, and Anna, by the terms of which the latter were to be paid $2,195—$795 to David, $700 to Charlie, and $700 to Anna; such payments to be made as soon as the promisors should obtain a clear title to the land; the promisees to pay one-half the cost of getting such clear title; the first parties to have the choice of paying these sums in cash or in bankable notes at 6 per cent. The amended petition of the plaintiff, David Steinborn, set out the foregoing facts and a copy of the contract, and alleged that Louisa, John, and August instituted an action in the district court in which the plaintiff and his brother and sister were the defendants, in which they made default and which resulted in quieting the title to the land in the plaintiffs in that action, and that such proceedings did divest the plaintiff of his interest in the land and vest it in the plaintiffs therein, that they had failed to pay his $795 less his portion of the court costs, except $100 paid in the spring of 1914, that ever since the making of such contract the plaintiffs therein have been in possession claiming ownership of the land, and plaintiff asks judgment and a lien for the balance of the $795, with interest.

The suit known as case No. 5031 set up a mistake in the description in the will and asked for its correction in accordance with the intention of the testator, the petition therefor being verified by August Steinborn, and the decree was entered March 14, 1906, in accordance with the prayer of the petition. The abstract states that in the trial of this case all of the papers and proceedings in case No. 5031 were considered by the district court as sufficiently pleaded and were examined and considered on the demurrer. The court sustained a demurrer to the amended petition, and from this ruling the plaintiff appeals.

[1, 2] It seems that at the succeeding term leave was asked to redocket the case for further orders, which was denied, and an attempt is made to dismiss the appeal on account thereof; but as the appeal seems to have covered all adverse rulings, it will not be dismissed.

On the part of the defendants it is urged that the court had no jurisdiction to change the will after it had been probated, and that its attempt to do so and the decree were and are without legal force and effect, and hence their title has not been perfected, and the amount promised the plaintiff has never become due or payable. Plaintiff responds that the result of the former suit was in effect to quiet the title to the land against the plaintiff in favor of the defendants who have ever since been in possession claiming ownership, and treating the matter as the quieting of their title, and hence they cannot be heard to assert its invalidity or ineffectuality.

Much discussion is had as to the distinction between correcting and changing a will which need not be considered for the reason that the case turns on another matter.

The court had jurisdiction of case No. 5031, and whether or not it properly changed the will so as to vest the plaintiffs therein with the title they desired, the decree undertook so to do and has never been appealed from, and the beneficiaries thereof cannot be heard now to assert its invalidity as a defense to their obligation to the heirs against whom such decree was taken.

The contract to pay as soon as clear title to the land should be obtained, the alleged recognition of this obligation by the payment of $100 thereon two years before this action was brought, with the defendant's alleged claim of full title, conceded by the plaintiffs, and their continued possession of the land under such claim, in the absence of for the plaintiff for the amount unpaid on his claim.

The judgment sustaining the demurrer to the amended petition is reversed, and the cause is remanded for further proceedings in accordance herewith. All the Justices concurring.

(99 Kan. 233)

JOHNSON v. THOMAS et al. (No. 20346.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

WATERS AND WATER COURSES ⇐126(2)—FLOWAGE—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE.

The evidence examined, and *held* sufficient to sustain the judgment.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 139, 142; Dec. Dig. ⇐126(2).]

Appeal from District Court, Shawnee County.

Action by Reiley Johnson against Fred Thomas, in which Martha S. Wilson was made a party defendant. From a judgment for defendant Thomas, plaintiff and defendant Wilson appeal. Affirmed.

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Hugh T. Fisher and M. O. Lock, both of Topeka, for appellants. Hazen & Gaw, of Topeka, for appellee.

BURCH, J. The action was commenced by Johnson to recover damages from Thomas. The charge was that Thomas maintained a dike extending east and west on the north side of his land, and cut an opening in a dike maintained by Johnson on the east side of the Thomas land, whereby accumulated surface water was cast in volume on Johnson's land. Thomas answered, claiming the land on which the Johnson dike was located, and consequently the right to demolish that dike. He also claimed damages for injury to his land resulting from the erection of that dike. Martha S. Wilson owned a narrow tract of land lying between the Johnson and Thomas farms, was interested in the maintenance of the dike, and claimed title to the land on which it rested. She was made a party. At the conclusion of a trial before the court, judgment was rendered denying damages either to Johnson or to Thomas, and quieting Thomas' title to a strip of land eight feet wide on which the Johnson dike rested. Johnson and Martha S. Wilson appeal.

The errors assigned are that the court denied the motions of Johnson and Martha S. Wilson for a new trial. The only ground of the motions to which the argument of the appellants can apply is that the judgment is contrary to the evidence and contrary to law. Special findings of fact, with conclusions of law separately stated, were not requested or returned, and the case is argued here much as it must have been in the district court. The evidence is quite voluminous, and is conflicting, or open to conflicting interpretations, on every material point.

The first question, in order of importance, related to the location of the boundary line between the Thomas and Wilson tracts. Thomas claimed the line was eight feet east of a hedge which extended north and south on the east side of his land. The next question was whether or not Thomas had lost his right to the eight-foot strip of ground between the hedge and the boundary because of adverse possession by Martha S. Wilson and her predecessors in title. This court is not concerned with any of the various things to be taken into account in determining the weight of the evidence. Its sole concern is with the subject whether or not substantial evidence appears sustaining Thomas' claim respecting boundary, and sustaining Thomas' title under the rules of law relating to acquisition of title by adverse possession. The appellants do not attempt to segregate all the evidence favorable to Thomas, give that evidence its full probative force, and then discuss its legal effect. They propound a theory of the case, or perhaps two theories, favorable to themselves, and then seek to sustain those theories by marshaling all the evidence in the record which can be utilized for that purpose, and by discounting all the evidence which stands in their way. The court does not propose to recite or to debate the evidence. Accepting that which was favorable to Thomas, the judgment of the district court was abundantly sustained.

With Thomas' right to the land on which the Johnson dike stood, and consequent right to abate the dike, disposed of, the remaining question was whether or not the east and west dike on the north side of the Thomas land caused water to be accumulated and cast in volume across the Wilson land and upon the Johnson land, to Johnson's injury. The petition alleged that the surface water on the Thomas land drained toward the north, the dike on the north obstructed its natural flow, it was diverted towards the east, and it debouched on Johnson's land. The answer alleged that the Thomas land drained toward the east, and that the dike wrongfully erected by Johnson obstructed the natural flow of the water and caused it to accumulate on the Thomas land. This made an issue of fact with respect to what course water on the Thomas land would take under the influence of gravity. By a system of drainage consisting of township, road, and private ditches and drains, substantially all water was excluded from the Thomas land except that which fell upon it. Sometimes, however, heavy rains would cause a road drain at the west of the Thomas land to overflow, and some water would reach the Thomas land from that source. Thomas testified that his land all slopes toward the east. Just a little of his land slopes toward the north, "but the fall is all east," and water falling on his land runs east. He further testified that water overflowing from the road drain would go east. He has no ground on which water stands. There is a slope to it, and water naturally runs down to a low place on Johnson's land which has been there for years. The dike built by Johnson backed water on Thomas' land and held it there. D. F. Ramer, who displayed familiarity with the situation, testified that the Thomas land drains "a little to the east, just the same as all the others." The county surveyor testified that the only drainage of the land is towards the east, that is, in an easterly direction; that water falling on the 40-acre tract north of the Thomas dike would run toward the southeast, more east than south; that water falling on the Thomas land south of his dike would run east, and a little north; and that the Johnson and Wilson tracts lie east of the Thomas land and are lower than the Thomas land.

The testimony just recited is clearly sufficient to sustain the judgment. Conceding that some portion of the water on the Thomas land would flow a little north in its general easterly course, and so be restrained by the Thomas dike, there was no evidence

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from which the court could estimate or apportion the quantity or determine the effect on Johnson's land.

The judgment of the district court is affirmed. All the Justices concurring.

(99 Kan. 236)

ELY v. WICHITA NATURAL GAS CO.
BELL BROS. & McDONALD v. SAME.

(Nos. 20350, 20351.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. MINES AND MINERALS ⟸83 — OIL AND GAS LEASES—TITLE TO GAS.

A contract by which a pipe line company agreed to accept the minimum of 5,000,000 cubic feet of gas from the owners of a number of gas leases and producing wells, paying each month at the rate of 3½ cents per thousand, *held* to have been executory; the title to the gas passing only as delivery was made.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 212, 214, 215; Dec. Dig. ⟸83.]

2. MINES AND MINERALS ⟸83 — OIL AND GAS LEASES—ACCEPTANCE OF GAS—"MERCHANTABLE."

In a contract by which a company owning a pipe line for the distribution and sale of natural gas, to cities and towns and factories, agreed to accept and pay for a stated daily minimum of gas, a provision that the gas was to be "merchantable" is held to imply its conformity to an ordinary and reasonable standard of quality; and the fact that the gas tendered under such a contract contained only from 500 to 550 British thermal units per cubic foot, while the gas handled by the company which was obtained from other sources contained about 1,000, is *held* to compel the conclusion as a matter of law that it was not "merchantable" in the sense in which that term was employed in the contract.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 212, 214, 215; Dec. Dig. ⟸83.

For other definitions, see Words and Phrases, First and Second Series, Merchantable.]

Appeal from District Court, Neosho County.

Actions by Seth Ely against the Wichita Natural Gas Company, and by Bell Bros. & McDonald against the same defendant. From judgments for plaintiffs, defendant appeals. Reversed and remanded, with directions to render judgments for defendant.

Brennan, Kane & McCoy, of Bartlesville, Okl., A. C. Malloy, of Hutchinson, and J. J. Jones, of Chanute, for appellant. Hugh P. Farrelly and Thomas R. Evans, both of Chanute, for appellees.

MASON, J. The Wichita Natural Gas Company is a corporation owning a pipe line extending from Cushing, Okl., on the south, to Hutchinson on the west and Iola on the east, through which it supplies a number of cities and towns and factories with natural gas. On May 24, 1913, it entered into a written contract with Bell Bros. & McDonald and Williams & O'Dell, by which on certain conditions it agreed to pay at the rate of 3½ cents per thousand feet for dry and merchantable gas to be furnished to it by them, the minimum amount to be 5,000,000 cubic feet daily. The company paid for all the gas it used, but beginning with the month of November, 1914, it did not use the full amount of the prescribed minimum. On April 7, 1914, two actions were brought against the company upon the contract, one by Seth Ely, who by assignment had succeeded to the rights of Williams & O'Dell, and the other by Bell Bros. & McDonald, the purpose of which was to charge it with liability at the rate of $175 a day (that being the daily charge for 5,000,000 feet, at 3½ cents per thousand), less what it had paid for the months of November and December, 1913, and January and February, 1914; the division between the plaintiffs not being in dispute. By supplemental petitions similar claims were made for each month up to and including January, 1915. The company defended upon the ground that its refusal to accept and pay for as much gas as the contract called for was justifiable because it was due to the fact that the gas furnished was of low grade, unmerchantable, and unsuited to its purpose. The plaintiffs recovered judgments aggregating $54,600.74, and the defendant appeals.

[1] 1. The actions were brought on the theory, which the trial court sustained, that the contract referred to was an executed contract, that the title to the gas had passed to the defendant, and that the plaintiffs were therefore entitled to recover the agreed purchase price. The defendant maintains that the contract was executory, that the title to the gas passed only as it was delivered and accepted, and that even if its defense based on the quality of the gas is not established, its liability is limited to such damages as the plaintiffs have suffered by reason of its failure to perform its agreement to take and pay for a fixed amount of gas. This phase of the controversy must be determined largely from the language of the contract, which reads as follows:

"This contract and memorandum of agreement made and entered into this 24th day of May, 1913, by and between Bell Bros. & McDonald, a copartnership, of Robinson, Illinois, party of the first part, and Williams & O'Dell, a copartnership, of Evanston, Illinois, party of the second part, and the Wichita Natural Gas Company, a corporation, hereinafter called the vendee, party of the third part, witnesseth:

"That whereas, party of the first part owns and controls certain leases and gas production in township thirty-three (33) north, range ten (10) east, Chautauqua county, Kansas (known as Summit township, which adjoins that in which Sedan is situated), and proposes to acquire other leases and develop gas production in said township, and desire a market for gas so owned and produced; and

"Whereas, party of the second part now owns and controls certain gas leases and gas produc-

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tion in the same said township thirty-three (33) north, range ten (10) east, Chautauqua county, Kansas (known as Summit township), and proposes to acquire further leases and develop additional production of gas in the same territory, and desires a market for its present production and the production it may acquire as aforesaid; and

"Whereas, said Wichita Natural Gas Company, party of the third part, owns and controls certain pipe lines for the transmission of natural gas and desires to purchase gas for distribution:

"Now, therefore, this agreement witnesseth that the parties hereto, for and in consideration of the covenants and agreements hereinafter set forth and contained as well as of the mutuality hereof, have covenanted, promised and agreed to and with each other as follows:

"First. Parties of the first and second part agree to secure all necessary rights of way for a pipe line to be built by the vendee, as hereinafter set out, connecting the said vendee's present pipe line to the territory where the leases and production of the parties of the first and second part are located, as above set out, and to secure for the said vendee sufficient land for the location of a pump station at such places as the vendee shall designate, the actual cost of the said rights of way and land so secured is to be borne by the vendee. Said parties of the first and second part shall at all times acquaint the vendee of the cost and expense necessary and occasioned in the securing of said rights of way and land.

"Second. The vendee agrees to begin the laying and construction of a six-inch pipe line and gas pumping station upon the right of way and land indicated in the foregoing paragraph, together with necessary field lines, or the equivalent of a six-inch diameter as a main trunk or gathering line, with branches of smaller size, to the wells of the parties of the first and second parts, within the territory above described. It is understood that the plant is to be so constructed as to have a capacity to handle a minimum of five million (5,000,000) cubic feet daily of two (2) pound gas, based on an intake pressure at the compressor station of one hundred (100) pounds. The station and plant to be of ample proportions to deliver the said minimum quantity of gas against such pressure as may be existing in the main pipe line of the said Wichita Natural Gas Company.

"Third. Party of the first part agrees to sell unto the vendee, and to deliver into its pipe line system, through orifice meters, as hereinafter set out, all the gas produced or acquired within the above-mentioned territory, subject to the limitations as to quantity as hereinafter set out; and party vendee agrees to pay for such dry and merchantable gas so furnished, three and one-half (3½) cents per thousand cubic feet of two-pound gas.

"Fourth. Party of the second part agrees to sell unto the vendee, and to deliver into its pipe line system, through orifice meters, as hereinafter set out, all the gas produced or acquired within the above-mentioned territory, subject to the limitations as to quantity as hereinafter set out; and party vendee agrees to pay for such dry and merchantable gas so furnished, three and one-half (3½) cents per thousand cubic feet of two-pound gas.

"Fifth. The vendee agrees that the total amount of gas purchased from both first and second parties shall be a minimum amount of five million (5,000,000) cubic feet daily, providing, the said parties of the first and second part keep their open flow capacity six (6) times or more in volume the quantity which the said vendee is drawing from the parties of the first and second parts; that is to say, for example, that the parties of the first and second parts are to have a combined open flow of thirty million (30,000,000) cubic feet before the vendee is obligated to take five million (5,000,000) cubic feet daily. It is distinctly understood and agreed that the vendee shall take gas from the party of the first part and the party of the second part in such proportion as the open flow capacity of each party is to the total required open capacity; that is to say, for example, if each of the parties, first and second part, has fifteen million (15,000,000) cubic feet open flow capacity of the wells, then the vendee is to take one-half (½) of the five million (5,000,000) cubic feet minimum from each party, and thus, as the open flow capacity of the party of the first part and party of the second part varies, so will vary the difference of the amount of gas taken by the vendee from the parties of the first and second parts.

"Provided, the gas production of the parties of the first and second parts hereto is capable of delivering its said proportion into the pipe lines of the vendee against the intake pressure whatever it may be.

"It is further agreed that in the event either the party of the first part or the party of the second part cannot furnish its proportion of open flow capacity, then the vendee shall have the right to take the balance from the other party, and in case both parties of the first and second parts cannot furnish the minimum of thirty million (30,000,000) cubic feet open flow and five million (5,000,000) cubic feet of gas per day, then the vendee shall have the right to purchase gas within the said territory from an outside party, or parties.

"Sixth. The vendee shall maintain and keep in proper repair such orifice meters, of a suitable size and of such a type, as vendee shall select and approve, which said meters shall be placed at such places and in such manner as vendee shall deem proper and necessary.

"Seventh. That as often as once a day, after said vendee begins taking gas under this contract, it shall cause all meters to be carefully and accurately read by some competent and duly accredited agent or employé, and during the term of this contract, shall keep, at its office, an accurate, correct and permanent record of said readings, and shall forward, by United States mail to party of the first part and party of the second part, on or before the second day of each week, a correct statement of the amount of gas taken by or delivered to it during the preceding week from the party so informed, and the said parties of the first part and second part shall have access to said records at all times during business hours, for the purpose of ascertaining the amount of gas which has been or is being taken and delivered under this contract.

"Each and every successive reading of any meter shall be final and conclusive upon both parties, unless objections, in writing, are made by one of the parties hereto and served upon the vendee, at its office in Bartlesville, Oklahoma, within ten days after the reading complained of was taken, stating specifically the particulars of such objections and identifying the meter against which complaint is lodged, in which case the reading of the meter so objected to shall not be conclusive, but shall remain open for readjustment from the testing of such meter.

"It is further agreed that the meters so furnished and used shall be kept in such good working order and efficiency that they will register within three (3) per cent. of the actual amount of gas passed through them. In case a meter shall be found defective, or ceases to register, until the same can be repaired or replaced, the quantity of gas delivered shall be ascertained by the average of another meter, or by the amount delivered for the same service during a succeeding corresponding period. In the event of the party of the first or second part's dissatisfaction with the accuracy of the meter, the vendee will, upon written application at its

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office, have, within fifteen days, the same tested in place, or, if necessary, removed to the shop and tested. In the event party of the first or second parts complain of the meter, and cause a test to be made as above mentioned, and same shall be found to be within three per cent. correct, then the party complaining shall pay the cost and expense of having the test made.

"Eighth. All bills for gas delivered hereunder shall be due on the twentieth (20th) day of the month following that in which the gas was furnished, and all payments of such bills shall be made, either by check of the vendee, or by draft, on or before the twenty-fifth (25th) day of the month following that in which the gas is delivered.

"Ninth. The vendee shall not be liable to the party of the first part, or the party of the second part, or to any person whomsoever, for any damage, injury or loss arising, or resulting from said gas, or the use thereof, before it passes through the meters herein provided for.

"Tenth. In consideration of the purchase of the gas as herein provided for, party of the first part agrees for itself, and party of the second part agrees for itself, not to sell any gas produced within this said mentioned territory to any other person or party than the vendee named herein; and the said vendee agrees not to purchase gas from any other person or party than the party of the first part, and the party of the second part, unless they fail to deliver the said minimum of five million (5,000,000) cubic feet daily capacity.

"Eleventh. It is understood and agreed that this contract shall be binding upon the parties hereto, their heirs, successors and assigns for as long as the field covered as above set out will produce gas in quantities and under conditions that render it profitable to both parties to produce and transport it.

"Twelfth. Parties of the first and second part acknowledge that the transportation of gas over long distance, and the operation of compressor plants, are subject to accident, interruption, labor troubles, and other difficulties, and the said vendee, by this contract, only obligates itself to carry out the terms thereof in so far as it can reasonably do, subject always to strikes, accidents and casualties beyond its control.

"Thirteenth. Parties of the first part and second part in further consideration of the covenants and stipulations herein contained, agree to proceed without delay to further drilling operations, in a bona fide effort to increase, at as early a date as possible, the open flow production of gas to thirty million (30,000,000) cubic feet per day.

"Fourteenth. Vendee agrees that upon the signing and delivery of this agreement by all the parties thereto, that it will proceed to the construction of its pipe lines and the laying of the gas line as proposed herein, by placing orders for material and using all due diligence necessary to a speedy installation of the plant as hereinbefore set out.

"Fifteenth. It is agreed that time is and shall be of the essence of this contract."

The trial court in its findings of fact describes the contract as one "selling" certain gas. The document itself speaks of the parties of the first and second part as agreeing "to sell" and deliver the gas. (Third and fourth paragraphs.) But language used by the parties to designate the transaction is not conclusive. 35 Cyc. 276. It seems quite clear, however, that the contract did not contemplate an immediate passing of the title to any of the gas. The agreement of the company that the amount purchased should be a minimum of 5,000,000 cubic feet was conditioned upon an extent of production that might never have been reached. When the contract was signed the plaintiffs had four producing wells. When gas was turned into the defendant's line, in October, 1913, they had 17 or 18, producing 65,000,000 feet, open flow. The plaintiffs contend that by providing a number of wells sufficient to produce the flow (30,000,000 cubic feet) necessary under the contract to entitle them to require the company to take the 5,000,000 feet daily minimum, they had in effect reduced the gas to possession—converted it into personal property ready for delivery—and that the situation was brought within the rule by which under a contract for the sale of goods not in existence but to be produced by the seller, the title is ordinarily deemed to pass as soon as the contract comes to relate to specific ascertained goods. Stewart v. Produce Co., 88 Kan. 521, 129 Pac. 181, 50 L. R. A. (N. S.) 111, Ann. Cas. 1914B, 701. The rule referred to is not absolute, being merely a guide to assist in ascertaining the real intention of the parties, which is the controlling element. Note to case last cited, 50 L. R. A. (N. S.) 111. We do not think the bringing in of any number of wells, whatever their production, can be regarded as reducing to possession all the gas within a designated area, or as converting it into personalty, or into specific ascertained property. The quantity cannot be definitely determined, and there is always the possibility of its escaping or being diverted through wells drilled on other land. See citations collected in Kansas Natural Gas Co. v. Haskell (C. C.) 172 Fed. 545, 563; Kansas Natural Gas Co. v. Neosho County, 75 Kan. 335, 89 Pac. 750; Thornton's Law Relating to Oil and Gas, §§ 21, 22.

Decisions are cited in behalf of the plaintiffs to support the proposition that oil and gas become personal property "when discovered and reduced to possession either in the wells or in pipes or tanks." None of them, however, extends the principle to gas in place, although an outlet through wells has been provided. In typical instances the language of the court was:

"Petroleum oil is a mineral, and while in the earth it is part of the realty, and should it move from place to place by percolation or otherwise, it forms part of that tract of land in which it tarries for the time being, and if it moves to the next adjoining tract, it becomes part and parcel of that tract; and it forms part of some tract, until it reaches a well and is raised to the surface, and then for the first time it becomes the subject of distinct ownership separate from the realty, and becomes personal property, the property of the person into whose well it came. And this is so whether the oil moves, percolates, or exists in pools or deposits. In either event, it is property of, and belongs to, the person who reaches it by means of a well, and severs it from the realty and converts it into personalty." Kelley v. Ohio Oil Co., 57 Ohio St. 317, 328, 49 N. E. 399, 401 (39 L. R. A. 765, 63 Am. St. Rep. 751).

"The peculiar wandering character of gas and oil precludes ownership in their natural state,

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and hence they are not the subjects of sale and conveyances until they have been reduced to possession and placed under control by being diverted from their natural paths into artificial receptacles." New American Oil, etc., Co. v. Troyer, 166 Ind. 402, 411, 76 N. E. 253, 255.

Other features of the contract tend to sustain the view that it was executory—that the plaintiffs undertook to sell gas to the defendant as it was furnished, rather than to transfer title in the mass. The preamble recited that they proposed to acquire other leases than those they then held, and to develop additional production, and that they desired a market for their present and future production. They were not limited in their operation to what they already possessed. If they at any time had found themselves unable to furnish 5,000,000 cubic feet of gas from their then holdings the contract clearly authorized them to deliver to the defendant gas obtained under new leases.

The provision of the contract (tenth paragraph) that the plaintiffs should not sell gas from the territory described to any one but the defendant, whether valid or otherwise, carried no implication that the title had already passed from them. They could contract not to sell property which they owned, just as they could contract to sell it. Indeed, if they no longer had title their agreement that they would not make a sale elsewhere was entirely superfluous.

It would serve little purpose to undertake a review of cases arising under contracts relating to the sale of different kinds of products or merchandise. Their analogy to the present case in most instances is incomplete. As there was no way of ascertaining the quantity of gas underlying the tracts covered by the plaintiffs' leases, or tapped by their wells, or of segregating or measuring any part of it except as it should be stored in pipes or tanks, we think the title passed only as delivery was made and measurement had, and the contract remained executory except as to the gas actually delivered. This conclusion of course interposes no obstacle to a recovery by the plaintiffs of any damages they may have suffered by the defendant's breach of the contract, a remedy just as adequate as that sought in these actions, although involving a more complicated inquiry for its enforcement.

[2] 2. The trial court made a number of findings of fact, among which were the following, which bear upon the issue whether the quality of the gas was such that the defendant was justified in refusing to accept and pay for it, in other words, whether the gas was "merchantable" within the meaning of that word as used in the contract:

"The gas produced by plaintiffs in the Sedan field and which was sold to defendant was dry gas and contained from 500 to 550 B. T. U.'s (British thermal units) per cubic foot.

"The balance of the gas purchased by defendant to supply its customers or produced by itself for like purposes contained about 1,000 B. T. U.'s per cubic foot.

"The gas produced by plaintiffs burned satisfactorily and made good heat and light when not mixed with other gas.

"The gas produced by plaintiffs, when run into pipe lines along with gas containing 1,000 B. T. U.'s, resulted in a variable gas that did not burn satisfactorily or give good light or heat, but would frequently go entirely out after being lighted.

"The two grades of gas did not mix thoroughly when run into the pipe line together, owing to the variation in pressure maintained in the line, so that part of the time the high grade gas was going through the mixers of consumers and part of the time the low grade was going through, and the change from one kind to the other, each requiring a different air adjustment of the mixers, caused the fires to go out.

"Natural gas possessing 500 B. T. U.'s per cubic foot has a commercial value in Sedan, Kan., and vicinity, and is reasonably fit for use as fuel and light.

"At the time of entering into the contract referred to in finding No. 1, none of the parties knew anything about the variation of gas in southern Kansas and Oklahoma in heat units, nor was anything known about it by any of the parties at the time of the assignment of Williams & O'Dell to Seth Ely.

"It was known to Bell Bros. & McDonald, and Williams & O'Dell at the time of making the contract referred to in finding No. 1, and to the assignee of Williams & O'Dell, Seth Ely, ever since acquiring an interest in the contract, that defendant was purchasing the gas from them for sale and distribution to gas consumers in Kansas, through a system of pipe lines.

"There was no express or implied warranty in the contract in question that the gas sold to defendant would mix with a gas of a different number of heat units so as to give a satisfactory result to consumers of the Wichita Natural Gas Company, although, as a matter of fact, such gas would mix under a constant pressure in the pipe line so as to give a satisfactory result to consumers.

"The Public Utilities Commission made an order that no gas of less than 800 B. T. U.'s should be sold to consumers in Kansas (except by permission of the commission)."

While no finding was made to that effect, it is agreed that the enforcement of the order of the Utilities Commission referred to was enjoined by the district court of Shawnee county, in an action brought by Seth Ely, and that no appeal was taken from the judgment in that case. The trial court in the present cases stated as conclusions of law that the order of the Utilities Commission, forbidding the sale without its consent of gas containing less than 800 British thermal units, was void, being in excess of its authority, and that the gas produced by the plaintiff was merchantable within the meaning of the contract. The authority of the Utilities Commission to regulate the sale of natural gas of a low heat producing quality need not be considered. The order that was made must be disregarded at least as to the plaintiff Ely, since its enforcement against him has been enjoined. The question to be determined is whether under the findings the gas furnished by the plaintiffs met the requirement as to merchantability. The contract is to be interpreted in the light of the

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fact that all parties knew the use that was to be made of the gas—that it was to be distributed through a system of pipe lines for sale at distant places—and must be deemed to have entered into the agreement in contemplation of that use. Evidence was given in behalf of the defendant that it received many well-founded complaints, which it attributed to conditions resulting from the quality of the gas furnished by the plaintiffs. The substantial acceptance of the trial court of this portion of the testimony is shown by the finding that this gas, when run into pipe lines with that of a higher heat producing quality resulted in a variable gas which did not burn satisfactorily, but would frequently go entirely out after being lighted. The findings that this happened because the two grades of gas were not thoroughly mixed, that this was due to the variation in pressure maintained in the line, and that the maintenance of a constant pressure would result in a mixture that would avoid difficulty, imply that the court held it to be incumbent upon the defendant, in a reasonable effort to market the gas obtained from the plaintiff, with that procured from other sources, to bring about a complete mixture of the two grades of gas by subjecting them to a constant pressure. No finding was made as to the amount of trouble or expense this would occasion, and in support of the judgment the plaintiffs are entitled to the most favorable construction the evidence will bear on this point. But apart from any question of the obligation of the defendant to make any special provision to enable it to handle this particular gas, the matter is affected by another consideration. We do not think gas can be said to be "merchantable" within the meaning of this contract, merely because it will burn, and is capable of producing light and heat, and can be sold and used for that purpose. The term quoted usually carries an implication of quality—that the article to which it is applied conforms to ordinary and reasonable standards—that it is substantially of the average grade or value of similar goods sold in the same market. "Where it is provided that the articles sold shall be 'merchantable,' the articles must be of a quality such as is generally sold in the market and suitable for the purpose for which they are intended, although not of the best quality." 35 Cyc. 219. Webster's definition is: "Fit for market; such as is usually sold in market, or such as will bring the ordinary price." Black's Law Dictionary gives: "Fit for sale; vendible in market; of a quality such as will bring the ordinary market price." "In mercantile contracts, the term denotes the stableness of the goods, and signifies ordinary quality or medium quality of goodness, salability," etc. 27 Cyc. 481, note 41. It has been held to mean "such as could be sold in the market at the usual and ordinary price." Walton & James v. Black, 5 Houst. (Del.) 149. To the same effect see Liston v. Chapman & Dewey Land Co., 77 Ark. 116, 91 S. W. 27; Atkins Bros. Co. v. Grain Co., 119 Mo. App. 119, 95 S. W. 949.

We think the word must in the present case be construed as relating to the grade of the gas, and as requiring such a quality as could be sold at the ordinary price, without abatement for its failure to measure up to the general standard. The gas procured by the defendant from other sources contained about 1,000 British thermal units; that furnished by the plaintiffs but 500 or 550. The latter therefore had but little over half the heat-producing value of the gas ordinarily used for the same purposes. Regardless of any order of the Utilities Commission the defendant could not fairly and rightfully sell such gas to its customers for the same price charged for the ordinary gas, which was of nearly twice its value to the user. The defendant was contracting for gas that reasonably and substantially corresponded in grade with that generally handled in the territory in which it operated. The parties cannot be regarded as having contemplated that the defendant was to be put to the necessity of either selling this product to its customers at a less price than it charged for ordinary gas, or of mixing it in with all its other supply, thereby producing a homogeneous mixture of intermediate value to be sold at a reduction corresponding to the infusion of inferior gas, or at the original flat rate, which would be unfair to the consumer. We cannot regard the defendant as having assumed an obligation that bound him to either of these lines of conduct. Nor are the rights of the parties affected by the fact that the general knowledge of the tests by which the heat-producing quality of a gas is determined in British thermal units has been developed since the contract was entered into. The defendant agreed to take and pay for merchantable gas—gas of approximately average quality. If that offered was actually of inferior grade the circumstance that the means for discovering the fact were not presently at hand could not prevent its taking advantage of later information on the subject. The findings that the gas produced by the plaintiffs contained not more than 550 British thermal units per cubic foot, while that from other sources contained about 1,000, compels the conclusion as a matter of law that it was not merchantable within the meaning of the contract, and the defendant cannot be held liable for refusing to take and pay for it.

The judgment is therefore reversed, and the cause remanded, with directions to render judgment for the defendant. All the Justices concurring.

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(99 Kan. 309)

ROYER v. WESTERN SILO CO. (No. 20447.)*

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. PLEADING ⟸394—PROOF—VARIANCE.
Where the petition declares on both an oral and a written contract concerning the same matter, and the evidence proves an oral contract, there is no fatal variance between the petition and the proof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1325–1332; Dec. Dig. ⟸394.]

2. CONTRACTS ⟸176(2)—CONSTRUCTION—INTENT OF PARTIES.
Where an ambiguous expression is used in a written contract, it is proper to show by evidence what the parties understood and intended by the expression, and to submit to the jury, with proper instructions, the interpretation of the expression as used in the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 768; Dec. Dig. ⟸176(2); Trial, Cent. Dig. § 326.]

3. PRINCIPAL AND AGENT ⟸123(8)—AUTHORITY—EVIDENCE.
There was sufficient evidence in this case to show that the defendant's agent had authority to contract orally with the plaintiff for compensation for the plaintiff's services.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 427; Dec. Dig. ⟸123(8).]

4. VERDICT—EVIDENCE—SUFFICIENCY.
The evidence in this case was sufficient to support the verdict of the jury.

Appeal from District Court, Harvey County.

Action by R. W. Royer against the Western Silo Company, a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

Guy A. Miller, of Des Moines, Iowa, and W. H. vonder Heiden, and Ashton E. Morgan, both of Newton, for appellant. Branine & Hart, of Newton, for appellee.

MARSHALL, J. The defendant appeals from a judgment against it for $2,715.33. A former opinion in this case is found in 92 Kan. 333, 140 Pac. 872, where this court said:

"No provision is made in the contract for any commission for the sale of only 42 silos thereunder, but it cannot reasonably be presumed that the agent was to receive nothing for such sales. The contract is evidently incomplete, and oral evidence is admissible to show the agreement between the parties." Syl.

It was also there held that the contract was ambiguous as to freight charges, that the ambiguity should have been removed by parol evidence, and that the provisions of the contract should then have been considered together as in other cases.

[1] 1. The defendant contends that:

"There is a fatal variance between the plaintiff's petition and his proof. He plead an oral contract, and by his own testimony denied any oral contract. He cannot recover on any contract except the ones alleged and proved."

The present appeal is from a judgment rendered on an amended petition. This amended petition sets out a written contract, which was referred to in the former opinion, and also sets up an oral contract between the plaintiff and W. L. Hestwood, the defendant's agent, by which oral contract it was understood and agreed that the plaintiff should receive a commission of 25 and 5 per cent. on the list price of the first 50 silos sold. There was evidence tending to prove the allegations of the amended petition concerning the understanding and agreement between the plaintiff and the defendant's agent, W. L. Hestwood, although there was other evidence contradictory thereto. The evidence was sufficient to justify the jury in finding that the plaintiff and Hestwood had such an agreement and understanding. By the general verdict, the jury did so find, and that finding is conclusive in this court. Backus v. Clark, 1 Kan. 303, 83 Am. Dec. 437; Horine v. Hammond, 94 Kan. 579, 583, 146 Pac. 1144, and numerous other cases decided by this court. There was no fatal variance between the plaintiff's petition and his proof.

[2] 2. The defendant contends that it was the duty of the court to construe the contract so far as freight charges were concerned, and contends that it was error to instruct the jury to consider the testimony of the parties as to their understanding of that part of the contract relating to freight charges.

"Where a written contract is unambiguous in its terms, its interpretation or construction is a matter of law for the court." Warner v. Thompson, 35 Kan. 27, syl. par. 1, 10 Pac. 110.

See, also, Getto v. Binkert, 55 Kan. 617, 40 Pac. 925; Rettinger v. Dannelly, 91 Kan. 61, 136 Pac. 942.

In Cosper v. Nesbit, 45 Kan. 457, 460, 25 Pac. 866, 867, this court said:

"It is claimed that the court erred in submitting to the jury the question of what the parties understood and meant by the expression. In general, it is the province of the court to construe written contracts, but where peculiar expressions are used, it may be left to the jury to determine by the aid of extrinsic circumstances and facts what sense was intended by the parties. Where the language of a contract contains an expression which is ambiguous, or one used in a peculiar sense, evidence may be properly received to show what the parties understood and intended by it. The practical interpretation of such an expression of the parties is entitled to great, if not controlling, influence."

See, also, Seymour v. Armstrong, 62 Kan. 720, 724, 64 Pac. 612; Behen v. Street Railway Co., 85 Kan. 491, 118 Pac. 73, Ann. Cas. 1913A, 328; Frazier v. Railway Co., 97 Kan. 285, 288, 154 Pac. 1022; 9 Cyc. 591.

Evidence to explain the ambiguity in the contract was admissible. There was no error in submitting to the jury, with proper instructions, the interpretation of the contract under that evidence.

[3] 3. The defendant contends that there was no evidence to show that the agent, Hestwood, had authority to bind the defendant to pay 25 and 5 per cent. in case less than 50 silos were sold, and contends that there was no evidence to show that Hestwood had

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied January 13, 1917.

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authority to bind the defendant by an oral contract. The evidence tended to show that Hestwood was a salesman for the defendant, and was working for it at the time the contract was made; that Hestwood signed the written contract; that he had been in the employ of the defendant eight years; and that at the time the contract was written, part of Hestwood's work was to write contracts with agents. This evidence tended to show that Hestwood had authority to make contracts; that these contracts should fix the compensation to be paid to agents, and include all other terms that were necessary to express the agreement between the defendant and its agents. Hestwood undertook to do this. He made no provision in the written contract for the commission which should be paid if less than 50 silos were sold, and wrote the contract so that it was ambiguous concerning who should pay the freight. Hestwood had authority to make this contract. The dispute has been over the meaning of its terms and, where the terms were not expressed, over what those terms should have been.

[4] 4. The defendant insists that its motion to direct a verdict in the defendant's favor should have been sustained, for the reason that the evidence was not sufficient to warrant submitting the case to the jury, and insists that the verdict is not supported by the evidence. These contentions are not good. There was evidence tending to support all the allegations of the amended petition, and on that evidence the case was rightly submitted to the jury. The evidence was sufficient to sustain the verdict.

The judgment is affirmed. All the Justices concurring.

(99 Kan. 286)

HAMLIN et al. v. NACE et al. (No. 20429.)*

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. PRINCIPAL AND AGENT ⟸123(10)—AUTHORITY OF AGENT—EVIDENCE.

One who negotiates a mortgage loan or an extension of such loan, and at whose office the interest and principal are to be paid when due, is not, as of course, the agent of the mortgagees to receive such payments, but such agency may be established by proof of the course of dealing between such person and the mortgagees.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 429; Dec. Dig. ⟸ 123(10).]

2. PRINCIPAL AND AGENT ⟸123(10) — AUTHORITY OF AGENT.

Where a loan from two mortgagees is negotiated through a loan broker, and the principal and interest are payable at the broker's office, and the money loaned is remitted to him to be paid to the borrower, and the broker divides his commission with one of the mortgagees, and where the mortgagees are accustomed not to forward the coupon notes or principal notes to the designated place of payment—the broker's office—but to retain them until he collects the payments of interest and principal thereon and remits the money to them, and where it is shown that this is the customary course of business, not only as to this loan, but also on a number of similar loans made through the same broker on behalf of the same mortgagees, and that they transacted all such business in that locality in this manner, such evidence is sufficient to warrant the conclusion that the broker was the authorized or ostensible agent of the mortgagees to receive partial payments on the principal of the mortgage debt payable at interest-paying periods.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 429; Dec. Dig. ⟸ 123(10).]

Appeal from District Court, Douglas County.

Action by Frank G. Hamlin and Mary D. Wright, executors, against F. H. Nace and Clara B. Nace. Judgment for defendants, and plaintiffs appeal. Affirmed.

Hamlin & Hamlin, of Canandaigua, N. Y., and M. A. Gorrill, of Lawrence, for appellants. J. H. Mitchell and S. D. Bishop, both of Lawrence, for appellees.

DAWSON, J. This case turns on the question which arises on the default of a loan agent at whose office payments of interest and principal on a mortgage are to be made, when such agent fails to transmit to a mortgagee the moneys paid to him by a mortgagor for the reduction of the mortgage indebtedness.

In 1904 William Nace mortgaged his farm to the plaintiffs residents of New York, to secure a loan of $2,000 payable in five years. The loan was procured through Wm. T. Sinclair, who was for many years a loan agent in Lawrence. The interest was regularly paid to Sinclair, who remitted to plaintiffs, and they in turn forwarded the interest coupons thus paid to him for surrender to the debtor. Later Nace conveyed the farm to his son F. H. Nace, the defendant, and when the debt became due an extension agreement was made between plaintiffs and defendant through negotiations conducted by Wm. T. Sinclair. The extension agreement provided for optional payments of multiples of $100 at any interest-paying periods, principal and interest "to be paid, when due, at the office of Wm. T. Sinclair, Lawrence." The plaintiffs were the trustees of a New York estate, and the loan was made and extended on its account. One of these trustees was a member of a firm of lawyers who attended to the business of the estate, and he and his law firm conducted the correspondence with Sinclair pertaining to the Nace loan. Nace paid $50 to Sinclair for securing the extension, and Sinclair divided this sum with the New York lawyers who were the attorneys for the trustees, and one of whom was himself a trustee.

F. H. Nace made two payments of $500 each on the principal of the debt. These sums were received by Sinclair, but he failed

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to remit to the plaintiffs. As later interest payments became due Nace paid according to his reduced indebtedness, and Sinclair added a sufficient sum to take up the coupons according to their original tenor, thus concealing from plaintiffs the fact that the defendant had repeatedly exercised his option to make payments upon the principal debt. Eventually Sinclair died, and the plaintiffs brought foreclosure proceedings; and this appeal is brought to determine the correctness of the judgment of the district court which held that the defendant Nace was entitled to credit for the two payments of $500 each which he paid to Sinclair.

It is urged that evidence touching other business dealings between plaintiffs and Sinclair was improperly admitted. Since the vital issue in the case was the question whether Sinclair was the agent of plaintiffs or of defendant in the matter of receiving and transmitting the defendant's payments of interest and principal, we think that evidence showing the scope and nature of Sinclair's agency was admissible. 1 Wigmore on Evidence, §§ 94, 366, 377; 31 Cyc. 1219. The competent evidence showed beyond cavil that Sinclair was the general agent of plaintiffs for its business in Douglas county, Kan. He made many loans for plaintiffs, prepared the papers, abstracts, recommended the security, and collected the interest and principal. He divided his commissions with the law firm of one of the plaintiff trustees. One of the plaintiffs testified:

That the plaintiffs had a number of loans in Kansas, and that their business was transacted through Sinclair. "Q. Were payments on these several mortgages to which I have called your attention made by the mortgagor to the trustees? A. There were payments made of interest and of some principal. Q. And were any of those payments made directly or personally to yourself or Mrs. Wright? A. No. Q. And were these payments made through William T. Sinclair? A. Yes. * * * Q. Were the coupon notes forwarded to Sinclair before these payments were received by you, or after? A. After. Q. Are you sure? A. Yes; I never sent coupons on for collection. Q. When you forwarded the money that this mortgage was given to secure, how was that forwarded? A. By draft. Q. By New York draft payable to whom? A. I do not remember; I think Sinclair. * * * Q. They were not sent to Sinclair himself for collection? A. No."

[1, 2] A mass of correspondence between plaintiffs and Sinclair touching the Nace loan, the division of the commission (under the guise of payment to one of the plaintiffs for examining the abstract), was introduced. The correspondence related also to other and similar loans and remittances of principal as well as interest, and it must be held that this evidence was competent as showing the general course of business dealings between Sinclair and the plaintiffs, and it clearly established that Sinclair was plaintiffs' general agent in this business. That some slight inferences to the contrary might possibly be drawn from the correspondence and from the evidence in general is unavailing, since the special findings conclude that phase of the controversy. Wilson v. Haun, 97 Kan. 445, 447, 155 Pac. 798. While the authorities are many which hold that a place of payment or designated depositary for the payment of interest and principal of a debt does not imply that payment there is an absolute satisfaction of the debt unless such depositary or the person in charge of such place of payment is in possession of the securities (Goodyear v. Williams, 73 Kan. 192, 85 Pac. 300), yet other circumstances may be proved which will clearly show the person in charge of the place of payment to be the creditor's agent; and in this case the plaintiff's own testimony proved that they never forwarded the coupons or securities to the place of payment and never surrendered these evidences of indebtedness and securities until the money was transmitted to them by Sinclair. Such was their course of dealing. How, then, could the rule urged by plaintiffs apply to this case when Nace was to pay at the office of Sinclair and plaintiffs regularly withheld the coupons and securities until they had received the cash from Sinclair? Shane v. Palmer, 43 Kan. 481, 482, 23 Pac. 594; Fowle v. Outcalt, 64 Kan. 353, syl. par. 2, 358, 359, 67 Pac. 889; Hansford v. Meserve, 97 Kan. 450, 53 Pac. 835; Harrison Nat. Bank v. Austin, 65 Neb. 632, 91 N. W. 540, 59 L. R. A. 294, 101 Am. St. Rep. 639; Campbell v. Gowans, 35 Utah, 268, 100 Pac. 397, 23 L. R. A. (N. S.) 414, 19 Ann. Cas. 660. See, also, Quinn v. Dresbach, 75 Cal. 159, 16 Pac. 762, 7 Am. St. Rep. 138; Thompson et al. v. Elliott, 73 Ill. 221; May v. Trust Co., 138 Mo. 275, 39 S. W. 782.

We have carefully examined Goodyear v. Williams, 73 Kan. 192, 85 Pac. 300, for its possible bearing in this case. The second section of the syllabus reads:

"Where a debtor delivers money to a third person for the purpose of paying a promissory note which is not due, and such person does not have the note in his possession, the presumption is that the person receiving the money does so, not as the agent of the creditor, but as agent for the debtor. This presumption can only be overcome and the converse established by evidence to the contrary."

In this case the burden of proving that Sinclair was plaintiff's agent when he received the payments made by Nace was successfully borne by the defendant, as found by the trial court upon sufficient and competent evidence, and this compels an affirmance of the judgment. All the Justices concurring.

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(99 Kan. 265)

STATE ex rel. BEALS, Co. Atty., v. CITY OF STAFFORD et al. (No. 20416.)*

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. COURTS ⟸116(4)—CORRECTION OF RECORDS —EXPIRATION OF TERM.

After the expiration of the term at which a judgment was rendered, and after that judgment has been affirmed in the Supreme Court, the trial court, on personal knowledge of what took place at the time the judgment was rendered, has power to correct the journal entry so as to make it correctly recite the judgment that was actually rendered.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 372; Dec. Dig. ⟸116(4).]

2. APPEAL AND ERROR ⟸1099(1) — AFFIRMANCE—CONCLUSIVENESS.

Where, after a judgment has been affirmed by this court on appeal, the journal entry of that judgment is corrected so as to make the journal entry recite the judgment that was rendered, all questions that could have been presented on that appeal are concluded, even though the corrected journal entry recites a judgment different from that set out in the original journal entry.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370, 4374; Dec. Dig. ⟸1099(1).]

3. PERSONAL JUDGMENT.

Quære: Can the state recover personal judgment against those who wrongfully obtain money from a municipal corporation where none of the money belongs to the state?

Appeal from District Court, Stafford County.

Action by the State, on the relation of Ray H. Beals, County Attorney, against the City of Stafford and others. Judgment for plaintiff, and defendants appeal. Affirmed.

C. M. Williams, of Hutchinson, for appellants. Ray H. Beals, of St. John, for appellee.

MARSHALL, J. The defendants appeal from an order denying their motion to vacate and set aside a journal entry of judgment.

An opinion was rendered in this case in State ex rel. v. City of Stafford, 92 Kan. 343, 140 Pac. 868. At that time the case was presented to this court on a single question—that there was no evidence to support the finding of the trial court that $2,200 of the amount paid to the Larabee Light & Power Company was for the surrender of its franchise. This court held that there was sufficient evidence to support that finding and affirmed the judgment.

The city of Stafford voted to issue bonds for the purpose of constructing an electric light plant. Defendant Larabee Light & Power Company, under a franchise, operated an electric light plant in the city. This action was commenced in the name of the state by the county attorney of Stafford county to cancel and rescind a purchase by the city of the electric light plant of the Larabee Light & Power Company, and to order the defendants to repay to the city treasurer $14,000, the amount that had been paid by the city to the Larabee Light & Power Company for the property purchased, and to recover judgment against the defendants and each of them for $14,000 in the event that the defendants were unable to repay that sum to the city. The journal entry of judgment was signed by Neeley & Malloy, attorneys for plaintiff, and by F. L. Martin and C. M. Williams, attorneys for defendants. That journal entry was not submitted to, nor approved by, the county attorney or the judge. After reciting the appearance of the parties by their attorneys and the findings of the court, the journal entry contained the following:

"The injunction applied for in this case will be denied and the purchase of said plant by the city of Stafford to the amount of $11,800 will be approved, but the sum of $2,200 paid for the surrender of the so-called exclusive franchise and good will is not approved, and the judgment of $1,205.33, or any portion of it, out of the city light fund, to pay the engineer for estimating the cost of the Larabee Flour Mills Company plant, is not approved, and it is ordered and adjudged by the court that the defendants restore to the electric light fund the sum of $2,200 paid for the good will and surrender of the Larabee Flour Mill franchise and any sum paid out of the said electric light fund to the expert engineer for his report, and judgment against the defendants for costs, to which order, judgment, and decree of the court the defendants and each of them and all of them except, and exceptions allowed."

On the 1st day of April, 1915, after the decision of this court on the former appeal had been rendered, and the mandate recorded in the district court, a corrected journal entry was filed by order of the court. This journal entry, after reciting the appearance of the parties and the findings of the court, just as they were recited in the former journal entry, is as follows:

"Wherefore it is by the court considered, ordered, and adjudged that the plaintiff have and recover of and from the defendants, the Larabee Light & Power Company, the Larabee Flour Mills Company, a corporation, H. F. Tolls, F. S. Larabee, G. A. Mikesell, S. C. Turner, E. R. Brown, A. H. Watson, J. A. Tubbs, Charles Thompson, the said judgment of $2,200, together with the costs of this action, taxed at $———. Wherefore let execution issue. It is further considered, ordered, and adjudged that on the satisfaction of payment of said judgment that the money released therefrom shall be paid by the clerk of said court to the city treasurer of the city of Stafford, Kan., and be by him restored to the electric light fund of said city."

In May, 1915, the defendants filed a motion asking that the last journal entry be set aside and vacated, for the following reasons:

"First, because a journal entry of judgment, signed by the attorneys for plaintiff and defendants and approved by them, had already been filed in said cause, an appeal taken from the judgment embodied therein to the Supreme Court of the state of Kansas, by the Supreme Court affirmed, and the mandate of said Supreme Court spread upon the records of Stafford county, Kan.

"Second, because the court had no authority and no jurisdiction to render a personal judgment against the defendants in the above-entitled

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cause, as set out in said journal entry filed April 1, 1915.

"Third, because the court had no authority to change, modify, or alter the judgment previously rendered in said cause.

"Fourth, because said journal entry filed April 1, 1915, has the effect of changing and modifying and altering the judgment heretofore rendered in said cause, and the court was without authority or jurisdiction to alter, amend, or modify the same."

This appeal is taken from the order overruling that motion.

[1] 1. The defendants contend that the court had no power to correct the journal entry of judgment in the manner in which it was corrected. This question is presented by the defendants from one point of view and by the plaintiff from another. The defendants argue that the court had no power to correct the journal entry of judgment so as to show a judgment different from that actually rendered on the trial. If a different judgment was rendered this argument is good, under Martindale v. Battey, 73 Kan. 92, 84 Pac. 527; Chapman v. Irrigation Co., 75 Kan. 765, 90 Pac. 284; and Eisenbise v. Eisenbise, 98 Kan. 108, 157 Pac. 416. The plaintiff contends that the court had the right to correct the journal entry so as to make it record the judgment that was actually rendered. It is therefore necessary to determine what the court did. This can best be done by referring to the language of the written opinion filed when the journal entry was corrected. The trial court there said:

"Counsel say that the appeal to the Supreme Court was taken from the judgment as announced in the journal entry which was filed in October, 1912. Whether the journal entry had been filed at the time of the appeal or not I do not know. In fact, I never knew that the journal entry had been filed in the case at all until my attention was called to the same probably a year ago; and upon an examination of it it clearly appeared that the provisions therein contained did not conform to the conclusion reached by the trial court. Independent of this, however, this entry cannot be called a journal entry in the case. All members of the bar who practice in the Twentieth judicial district are supposedly familiar with the rules of this court. Rule 4 provides as follows: 'Attorneys obtaining an order or judgment shall, without delay, furnish the clerk with a form for a journal entry therein, which shall be first submitted to the opposing counsel before approved by the court.'

"Ray H. Beals was attorney of record for the plaintiff. His name does not appear upon the document; neither does the name of the court appear upon the document approving the same in any form. The rule just stated by every implication requires the approval of the trial judge before journal entries are filed and recorded. That portion of that document does not speak the truth. It does not represent the orders and judgment of the court; is not a judgment against anybody for $2,200; is not such an order as could be satisfied by execution."

This language shows that what the court did was to make the journal entry recite the judgment rendered at the time of the trial. There is no question about the power of the court to correct the journal entry so as to make it speak the truth and set out the judgment that was rendered, even though the judgment as first recorded had been before the Supreme Court for review. Investment Co. v. Walsh, 70 Kan. 899, 79 Pac. 688. In Christisen v. Bartlett, 73 Kan. 401, 84 Pac. 530, 85 Pac. 594, this court said:

"A district court has the power to correct the entry of a judgment, so as to cause it to speak the truth, after the expiration of the term at which it was rendered, and upon the personal knowledge of the judge of what took place in court at the time of its rendition." Syl. par. 1.

See, also, Chemical Co. v. Morrison, 76 Kan. 799, 92 Pac. 1114; Calhoun v. Anderson, 78 Kan. 746, 98 Pac. 274; In re Hornung, 81 Kan. 180, 105 Pac. 23; State v. Linderholm, 90 Kan. 489, 135 Pac. 564; Eisenbise v. Eisenbise, 98 Kan. 108, 109, 157 Pac. 416; Hart v. Hart, 98 Kan. 745, 161 Pac. 585, and Stone v. Pugh, 99 Kan. 38, 160 Pac. 988, decided in November, 1916.

The correction of the journal entry was not error.

[2] 2. The former opinion in this case affirmed the judgment as it was rendered, and affirmed all matters that could then have been presented to this court for review. All matters that were then embraced in the judgment were settled finally and completely. In Crockett v. Gray, 31 Kan. 346, 2 Pac. 809, this language was used:

"Where a case is decided by this court, on proceedings in error from the district court, that decision becomes the law of the case, for all subsequent proceedings; and this rule covers not merely the points expressly considered and decided, but all questions necessarily involved in the decision." Syl. par. 3.

This principle is firmly fixed in the jurisprudence of this state by the decisions of this court. Headley v. Challiss, 15 Kan. 602; State v. Scott County, 61 Kan. 390, 392, 59 Pac. 1055; Wheelock v. Myers, 64 Kan. 47, 52, 67 Pac. 632; Lorimer v. Fairchild, 68 Kan. 328, 342, 75 Pac. 124; Harwi v. Klippert, 73 Kan. 783, 85 Pac. 784; Railway Co. v. Stone, 80 Kan. 7, 9, 101 Pac. 666; Estes v. Zinc Co., 97 Kan. 774, 778, 156 Pac. 758; Hutchings v. Railway Co., 98 Kan. 225, 158 Pac. 62.

The correction of the journal entry was not the rendition of a new judgment, nor the correction or amendment of, nor an addition to, the judgment as first rendered. The correction of the journal entry made the record speak the truth concerning the judgment that was actually rendered at the time of the trial. That part of the judgment which was made to appear of record for the first time in the corrected journal entry was a part of the judgment as rendered at the trial, and could have been presented to this court on the first appeal.

It may be argued that the defendants did not know that a personal judgment had been rendered against them. If it were established by the record that at the time of the hearing of the former appeal the defendants had not had the opportunity to learn that a personal judgment had been rendered against

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them, a very different question would be presented. When the journal entry was corrected, the trial court had direct knowledge of what took place at the time the original judgment was rendered, and decided that in fact a personal judgment had been rendered. This implies that the judge formed in his own mind a decision that a personal judgment should be rendered, and that such mental operation was given expression in such a way as to advise those present of the essential character of the judgment. The determination of the court concerning what took place at the time the judgment was rendered is necessarily final; and the parties to the action are charged with knowledge of what was actually done, as determined at the time of correcting the journal entry. The defendants cannot be permitted to say that they did not know until the correction of the journal entry what the nature of that judgment was.

The claims of the defendants that the judgment for $2,200 was not within the issues, and that the court had no authority or jurisdiction to render a personal judgment against them, could have been presented to this court on the first appeal, and therefore the former decision of this court is conclusive on these matters. This conclusion is supported to some extent by Alexander v. Clarkson, 96 Kan. 174, 150 Pac. 576, where the detailed terms of the judgment were not known until nearly six months after it was rendered. There this court said:

"On the 19th day of September, 1913, the court rendered final judgment as recommended by the referee and ordered 'that a decree be prepared to take effect as of this 19th day of September, 1913, in accordance with the terms of the report of the referee heretofore made and approved.' Nothing remained to be done except to approve a journal entry, which was not done until March 6, 1914, at which time the order approving the journal entry recited that the judgment 'be and it is hereby made and entered as of September 19, 1913.' No motion for a new trial was filed until the 7th day of March, 1914. Held, that the motion was filed too late." Syl. par. 1.

See, also, McElroy v. Whitney, 24 Idaho, 210, 133 Pac. 118, Malmgren v. Phinney, 65 Minn. 25, 67 N. W. 649, and Chambers v. Jacobia, 103 Wis. 37, 79 N. W. 227.

[3] 3. If the personal judgment against the defendants were before us for review, we might be constrained, on the strength of the authorities cited below, to hold that such a judgment could not be rendered in this action. People of the State of N. Y. v. Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178; People of the State of N. Y. v. Fields, 58 N. Y. 491; Ayers et al. v. Lawrence et al., 59 N. Y. 192, 195; People v. N. Y. & Manhattan Beach Ry. Co., 84 N. Y. 565, 568; People v. O'Brien et al., 111 N. Y. 1, 33, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684; People v. Lowe et al., 117 N. Y. 175, 191, 22 N. E. 1016; People v. Belknap, 58 Hun, 241, 242, 12 N. Y. Supp. 143; People of the State of New York v. Starkweather, 40 N. Y. Super. Ct. 453, 459; People v. Fields, 50 How. Prac. (N. Y.) 481; Attorney General v. Moliter, 26 Mich. 444; Attorney General v. Potter, 26 Mich. 452; Attorney General v. City of Detroit, 107 Mich. 92, 64 N. W. 1057; State v. Rubey, 77 Mo. 610; State ex rel. Cunningham v. Wilson, 77 Mo. 633; Cole County v. Dallmeyer, 101 Mo. 57, 65, 13 S. W. 687; State ex rel. v. Wright, 67 Kan. 847, 73 Pac. 50.

The judgment denying the defendant's motion to set aside the corrected journal entry is affirmed. All the Justices concurring.

(99 Kan. 381)

LOGAN v. EMPIRE DISTRICT ELECTRIC CO. (No. 20424.)*

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. ELECTRICITY ⟸19(4) — ACTIONS — EVIDENCE—ADMISSIBILITY.

The defendant maintained across a public road a system of poles and wires, including two telephone wires and a ground wire which were 19 feet above the roadway, and two high-tension wires, uninsulated, which carried 33,000 volts, and which were suspended 23 feet 3 inches above the roadway. Plaintiff was assisting in moving a frame store building along the road, and while attempting to raise the telephone wires or the ground wire over the roof of the building, he came in contact with one of the high-tension wires and received serious injuries. *Held*, for the purpose of showing that defendant should have anticipated the use of the highway for such purpose, evidence was admissible to show the extent to which the highway had been used for moving of buildings, machinery, and other structures higher than the wires in question, not only before, but after, defendant's wires were placed there.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. ⟸19(4).]

2. ELECTRICITY ⟸19(5) — ACTIONS — EVIDENCE.

The evidence justified a finding that before the wires were erected there had been, and thereafter continued to be such a use of the highway for moving buildings, machinery, and other structures as would bring notice to the defendant that its high-tension wires were a menace to human life, unless precautions were taken to prevent their interference with such use.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. ⟸19(5).]

3. ELECTRICITY ⟸14(2)—ACTIONS — ANTICIPATION OF INJURIES.

It was the duty of the defendant to anticipate the moving of buildings of greater height than the wires and to take precautions to protect persons liable to be on such structures from danger of coming in contact with its wires. Winegarner v. Edison, 83 Kan. 67, 109 Pac. 778, 28 L. R. A. (N. S.) 677.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 7; Dec. Dig. ⟸14(2).]

4. ELECTRICITY ⟸15(2)—INJURIES—DEFENSES.

There was no error in excluding testimony offered to show a rule of defendant that upon notice to it, defendant would render assistance to persons desiring to move such structures under its wires, for the reason that the defendant, by the adoption of such a rule could

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⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied January 13, 1917.

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not limit the right to use the highway for lawful purposes.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 8; Dec. Dig. ⟸15(2).]

5. ELECTRICITY ⟸14(2)—INJURIES—DEFENSES.
The fact that the undisputed evidence showed the impracticability of insulating wires carrying more than 6,000 volts will not preclude plaintiff's right to recover on the other ground of negligence charged, viz. a failure to place the wires high enough to avoid interference with the lawful use of the highway.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 7; Dec. Dig. ⟸14(2).]

6. EVIDENCE ⟸195—MODELS—DISCRETION OF COURT.
On the facts stated in the opinion there was no abuse of discretion in refusing to admit in evidence a model or reproduction of the system of defendant's poles and wires.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 680; Dec. Dig. ⟸195.]

7. ELECTRICITY ⟸19(13) — ACTIONS — EVIDENCE—INSTRUCTIONS.
On the facts stated in the opinion, there was no error in refusing to give an instruction, to the effect that there was no evidence of wanton negligence; nor in refusing an instruction that the word "wanton" means "reckless, wicked, willful."

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. ⟸19(13).]

8. DAMAGES ⟸132(3)—PERSONAL INJURIES—MEASURE.
On the facts stated in the opinion, a judgment for $15,000 cannot be regarded as so excessive as to show prejudice and passion on the part of the jury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 374; Dec. Dig. ⟸132(3).]

Porter, Burch, and Dawson, JJ., dissenting in part.

Appeal from District Court, Cherokee County.

Action by Manny Logan against the Empire District Electric Company. From judgment for plaintiff, defendant appeals. Affirmed.

Maurice McNeill, of Kansas City, Mo., C. A. McNeill, of Columbus, and Walden & Andrews, of Joplin, Mo., for appellant. A. E. Spencer, of Joplin, Mo., and Sapp & Wilson, of Galena, for appellee.

PORTER, J. The action was to recover damages for injuries sustained in coming in contact with heavily charged and uninsulated wires which defendant maintained across a public highway. Plaintiff recovered judgment, and defendant appeals.

Upon the facts, the case is quite similar to the Wade Case, against the same defendant, 98 Kan. 366, 158 Pac. 28. Wade was killed by coming in contact with high voltage wires of the defendant, while he was engaged in attempting to lift them over the top of a derrick which he was assisting in moving along a public road. His widow recovered a judgment which was affirmed.

The plaintiff in the present case was assisting in moving a frame store building along a public road across which defendant maintained its line of poles and wires. Two telephone wires and a ground wire, which were 19 feet above the road, were suspended from one cross-arm; from another cross-arm were suspended two 33,000 volts wires, which were 23 feet 2 inches above the roadway. The store building was moved on trucks, which brought the highest part of the structure to a height of 21 feet 3 inches. Plaintiff was on the roof of the building, attempting to raise the telephone wire or the ground wire, and in some manner came too near one of the heavily charged wires just above the one he was handling, and received the shock which caused his injuries. The wires, carrying a voltage of 33,000, were uninsulated.

The principles of law which, for the most part, control this case were quite fully considered in the Wade Case, supra, and it will be only necessary to review a number of alleged trial errors.

[1-3] It is complained that the court erred in not sustaining a motion for judgment on the findings, because it is insisted the plaintiff recovered upon a theory that ordinary travel on the highway in question included the moving of houses which were higher than defendant's wires. In this connection also it is insisted that much irrelevant testimony was admitted about moving houses and other structures, and particularly the moving of them along this highway previous to the time defendant erected its wires. In answer to special questions which defendant submitted, the jury found that defendant's wires were erected in 1909, that since that time three houses and one store building which were high enough for the wires to interfere with had been moved along there. The accident to plaintiff occurred in 1915. Defendant places too narrow a construction upon plaintiff's theory as to the use of the highway. The plaintiff's evidence as to the use of the highway was not confined to houses, nor to store buildings; it embraced any and all kinds of structures customarily moved along public roads, such as buildings, derricks, and other machinery high enough for these wires to interfere with them. The testimony in respect thereto was, of course, not confined to the time since defendant placed its wires across the road. It would hardly do to say that had the accident happened only a month after defendant first placed its wires there, no inquiry could be made as to the ordinary use of the road prior thereto for the purpose of charging defendant with notice of such use. The finding that only one store building had been moved is of no more importance than if the jury had found that only one store building painted the same color as the building in question had been moved. The finding that three houses and only one store building high enough to interfere with the wires had been moved along that road since 1909, when defendant's wires were first placed there, covers but a part of the facts in evidence, and only a part of the circumstances relied upon

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by plaintiff, to show that defendant should have anticipated the use of the highway for the purpose of moving such structures.

It is argued, however, that all the evidence shows conclusively that the moving of a building such as the one in question was not a common ordinary use of the highway. "Common, ordinary use" is a relative expression, the value of which can only be determined by comparisons. In a day's travel along the country roads one may meet hundreds of vehicles drawn by horses, and see thousands of automobiles, without meeting or seeing a traction engine; but, if one meet a traction engine on a public road, it would be a mistake to assume that such engine was not making an ordinary use of the highway, or that it was not entitled to the same rights as other vehicles. A traction engine on the streets of Topeka is, comparatively speaking, an unusual sight, yet sometimes traction engines are seen on the streets, and however rarely this happens, their use of the public streets is a common and ordinary one. The court properly instructed the jury that:

"In determining the duty and liability of the defendant the term 'travel' is not to be given a narrow and restricted meaning, but should be held to embrace such a legitimate use of the road as may be made by persons having occasion to pass over them while engaged in any of the duties of life in that section or community."

There was evidence which justified a finding that before the wires were erected there had been, and thereafterwards continued to be, such a common use of the highway in moving buildings, machines, and other structures, as would bring notice to the defendant that these high voltage wires were a menace to human life, unless precautions were taken to insulate the wires or place them in such position that they would not interfere with the lawful use of the highway.

It may be conceded that there is a difference as regards houses. They are not constructed primarily for the purpose of being moved, while heavy machinery and traction engines are. The use of streets and highways for moving houses is so far extraordinary as to authorize municipalities having control of the highways to provide regulations for such use, prescribing, as ordinances in many cities do, the hours streets may be used for that purpose, and that owners of overhead wires shall first be notified and given an opportunity to raise their wires, and providing for payment of compensation to the owners for the injury or inconvenience suffered. These regulations are upheld, also, because of the inconvenience that might otherwise be suffered by the public through the interference with the business carried on by means of overhead wires. Where no public authority has undertaken to prescribe rules and regulations for the use of country roads in moving houses, we are aware of no reason why such use is not a lawful one.

A number of cases are cited by defendant which hold that the moving of houses on public streets is an extraordinary use of the highway, and that where such use will injure or destroy overhead wires which are lawfully maintained in the streets, injunction will lie at the suit of the owners of the wires to prevent interference therewith. Equity, in most cases, would find little difficulty in molding its decree so as to permit the structure to be moved at a time and under such conditions as to safeguard the rights of the mover, the convenience of the public, and the rights of the owners of the wires. Presumably the decisions are cited because the opinions contain declarations to the effect that the moving of a house on roads or streets is an extraordinary use, and the rights of the mover merely temporary and private as opposed to the rights of a public utility company using the streets by virtue of a city franchise. Frontier Telephone Co. v. Hepp, 66 Misc. Rep. 265, 121 N. Y. Supp. 460. It is sufficient to say that this court in Winegarner v. Edison, 83 Kan. 67, 109 Pac. 778 (approved in Wade v. Electric Co., 98 Kan. 366, 158 Pac. 28), held it to be the duty of an electric light company having its high-tension wires suspended across a street in a city to anticipate the moving of a building of greater height than the wires in that case were, and to take precautions to protect persons liable to be on such building and liable to be brought in contact with such wires.

[4] There is a contention that it was error to exclude testimony offered to show a rule of defendant that upon notice to it, the company would render assistance to persons desiring to move such structures under its wires. There would have been no error in admitting the testimony, but the defendant, by the adoption of such a rule, could not limit the right to use the highway for a lawful purpose.

[5, 6] One of plaintiff's witnesses testified that it is impracticable to insulate wires which carry more than 6,000 voltage, and we are asked, in view of the general knowledge of that fact, to take judicial notice thereof and to hold that the court should have sustained a demurrer to the evidence. But failure to insulate the wires was not the only negligence charged. It was charged that the wires were not placed high enough; and if it be true that it is wholly impracticable to insulate wires carrying more than 6,000 volts, there was all the more reason why the defendant should have placed its wires higher or put them underground. The same witness, who qualified as an expert with years of experience in the construction of high-tension cross-country wires, testified as follows:

"We are never allowed to go below 25 feet and from that on up to 35 and 40 and up as high as 65 feet; we have never been allowed to go below 25 feet with anything of high tension."

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He further testified that it was customary to construct high-tension wires with a raise where they crossed roads, and after crossing to "drop down."

There is a complaint of the refusal to allow defendant to introduce a model made to show the arrangement of defendant's poles and wires. The accident happened across the line in Missouri beyond the jurisdiction of the court, and for this reason the court was not asked to send the jury to the place of the accident. In almost every one of a large number of cases cited the court had admitted the model or photograph, and this was held not to be error. In one case cited (De Forge v. New York, etc., Railroad, 178 Mass. 59, 59 N. E. 669, 86 Am. St. Rep. 464), which was an action to recover for personal injuries, it was held error to refuse to admit in evidence an X-ray picture, showing plaintiff's physical condition. The weight of authority holds that the admission of models and photographs rests largely in the trial court's discretion. A reproduction of the poles and wires in this case was constructed and set up in a room adjoining the courtroom. The judge of the court examined the model, and came to the conclusion that it ought not to be admitted in evidence, and sustained plaintiff's objection. The defendant contends that the model would have served to enable the jury to understand the testimony, and that its purpose was to show the relative position of the wires, the crossarms, brackets, insulators, and other parts of the construction of defendant's lines where they crossed the highway. All these matters could be and were explained by the evidence of witnesses; and, while the admission of the model would not have been error, we think it cannot be said that there was an abuse of discretion in refusing to admit it.

[7] In stating the issues the court instructed that the petition charged the defendant with wanton negligence. The court refused to give an instruction requested by the defendant, to the effect that there was no evidence of wanton negligence, and also refused a requested instruction that the word "wanton means reckless, wicked, willful." It is insisted this was error. There is no question of punitive damages in the case; none was asked, and none was allowed. If the plaintiff was not guilty of contributory negligence, then the question whether the negligence of the defendant should be characterized as gross and wanton or merely ordinary negligence could not affect plaintiff's right to recover. See Jacobs v. Railway Co., 97 Kan. 247, 253, 154 Pac. 1023, L. R. A. 1916D, 783. The court instructed that plaintiff could not recover at all if his own negligence contributed to his injuries; and the jury have absolved him from the charge of contributory negligence. For some purposes, the court in a number of cases has recognized the degrees of negligence, slight, ordinary, and gross or wanton; but in a case like the present one, where the only question is the measure of due care, the distinctions have been ignored. Railway Co. v. Walters, 78 Kan. 39, 96 Pac. 346; Jones v. Railway Co., 98 Kan. 133, 135, 157 Pac. 399. There was no error, therefore, in refusing to give the instructions requested.

[8] The jury awarded plaintiff damages in the sum of $15,000. It is urged that the amount is excessive, and shows prejudice and passion on the part of the jury. At the time of his injury, plaintiff was 22 years of age, and his usual wages were from $2 to $2.50 a day. The argument is that after allowing $1,000 for damages in addition to loss of earning power, the amount remaining, if invested at 6 per cent., would produce a sum far in excess of plaintiff's probable earnings in the future. If this were the only consideration, the amount would seem excessive; but the nature and extent of plaintiff's physical injuries as shown by the evidence must be taken into consideration. The effect of the electric current rendered him unconscious for 10 days. A piece of his skull, which the testimony shows was 4 inches in length and nearly 2 inches wide, had to be chiseled out, which necessitated six operations, a silver plate being inserted in place of the portion removed. There were burns and scars on his body, and one hand was partially paralyzed; there was evidence that his injuries left him, to a large extent, in a helpless condition physically. How much the jury allowed for his pain and suffering does not appear, but it is clear that the evidence would sustain the allowance of a substantial sum for these alone. Under all the facts and circumstances, this court cannot say that the trial court should have granted a new trial on account of the amount of the verdict, or that it is excessive.

Other claims relate to the exclusion of testimony which was not produced at the hearing of the motion for a new trial under section 307 of the Code. The nature of the testimony, so far as disclosed by the record, satisfies us that there was no error in excluding it.

The judgment is affirmed.

PORTER, J. (dissenting). I think the amount of the judgment is excessive, and that it should be reduced to $10,000. For these reasons, I dissent from paragraph 8 of the syllabus and corresponding portions of the opinion.

I am authorized to say that Mr. Justice BURCH and Mr. Justice DAWSON concur in this dissent.

(99 Kan. 283)

SHEEHY v. LEMONS. (No. 20426.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

TAXATION ⇐708(6)—JUDGMENT FOR SALE—COLLATERAL ATTACK—PROCESS.

The grantee of the purchaser at a tax foreclosure sale under section 9521 of the General

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Statutes of 1909 brought this action to eject the fee owner, who sought to attack the foreclosure decree on the ground that, although a resident of this state, she was not served with summons and made no appearance. A proper affidavit for publication was made, and, although the defendant was then a resident of the state, such affidavit and the subsequent publication gave the court jurisdiction, so that its decree foreclosing the tax lien was not void and could not be successfully attacked at this time in this action.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1296, 1406, 1640; Dec. Dig. ⇐ 708(6).]

Appeal from District Court, Miami County.

Action by James F. Sheehy against Kate Lemons. From judgment for defendant, plaintiff appeals. Reversed.

Charles T. Meuser, of Paola, for appellant. Lane & Lane, of Paola, for appellee.

WEST, J. An action was begun to foreclose a tax lien on the land in controversy. Summons was issued to the defendant and returned not served, for the reason that the person named therein could not be found in the county. A proper affidavit was made, and service by publication followed. Foreclosure was had and the land was sold. This action was brought to eject the defendant, who answered that at the time the foreclosure action was brought and at all times thereafter she was a resident of Wyandotte county, Kan., and that such residence could have been easily ascertained, as she had relatives living in Miami county, that no summons was served upon her, and that she was not in court either personally or by attorney at any time during pendency of the action. The answer was supported by her testimony, the court ruled in her favor, and the plaintiff appeals.

The question involved is whether or not the defendant could for the reason suggested attack collaterally the judgment rendered in the foreclosure case. It is claimed that because no actual service was made upon the defendant the court was without jurisdiction to foreclose the lien; that the judgment was void, and she had a right in this action to avail herself of its invalidity. It seems to be conceded that the defendant should have been served personally, but it is argued that, not having opened up the judgment by a direct attack, she could not do so indirectly or collaterally. The statute (section 9521, Gen. Stat. 1909) provides that:

"If the defendants or either of them are nonresidents, service may be made by publication, when there is filed with the clerk an affidavit that such defendants to be served are nonresidents of the state, or that the plaintiff with due diligence is unable to make personal service of summons upon said defendant or defendants."

It is urged that, as the defendant was a resident, service by publication gave the court no jurisdiction. It has been held that under a similar statute the judgment could not be attacked collaterally for any supposed irregularity which did not affect the jurisdiction of the court. Pritchard v. Madren, 31 Kan. 38, 2 Pac. 691; English v. Woodman, 40 Kan. 412, 20 Pac. 262; McGregor v. Morrow, 40 Kan. 730, 21 Pac. 157.

In Williams v. Kiowa County, 74 Kan. 693, 696, 88 Pac. 70, it was said that the proceeding under the present statute is judicial and follows the course of civil proceedings generally. In Atchison County v. Challiss, 65 Kan. 179, 181, 69 Pac. 173, 174, in the course of the opinion it was said:

"Nor could service by publication be obtained, because such constructive service is only provided in case of nonresidents of the state."

But the question now presented did not arise in that case. Under the authority of Blair v. Blair, 96 Kan. 757, 153 Pac. 544, and cases cited, the affidavit and notice by publication gave the court jurisdiction, although as a matter of fact the plaintiff may have been a resident of Kansas, and, having jurisdiction, the judgment of the trial court in that case cannot be held to be void. In Davis v. Land Co., 76 Kan. 27, 30, 90 Pac. 766, 767, this court refused to follow the decision of another court that a "false affidavit cannot confer jurisdiction." See, also, Ogden v. Walters, 12 Kan. *283, *295; Caldwell v. Bigger, 76 Kan. 49, 90 Pac. 1095; Duphorne v. Moore, 82 Kan. 159, 107 Pac. 791; Morris v. Robbins, 83 Kan. 335, 111 Pac. 470; Bell v. Bell, 97 Kan. 616, 156 Pac. 778.

Whatever rights the defendant may have had or may still have under section 83 of the Civil Code (Gen. St. 1909, § 5676), it is impossible to escape the conclusion that, in this action brought by the grantee of the purchaser at the foreclosure sale, she cannot for the mere reason that she was not personally served in the foreclosure action successfully attack the judgment therein.

The judgment is reversed. All the Justices concurring.

(99 Kan. 355)

McCLUNG et al. v. SNOOK et al. (No. 20483.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

PRINCIPAL AND AGENT ⇐137(1)—AUTHORITY OF AGENT—ESTOPPEL TO DENY.

The owners of the legal title to real estate made an agreement to execute and deliver a deed to the purchaser with the name of the grantee left blank, but tendered a deed with the purchaser's name written in as grantee. Upon his objection, they authorized his agent to erase the name written in and insert the name of his grantee, which was done. After the purchaser had conveyed the property to innocent purchasers, the grantors were estopped to deny the validity of their deed on the ground that the authority of an agent to make a change before delivering it must be in writing.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 492, 494; Dec. Dig. ⇐137(1).]

Appeal from District Court, Wyandotte County.

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Action by A. H. McClung and others against H. C. Snook and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

T. A. Witten, of Kansas City, Mo., and Junius W. Jenkins, of Kansas City, Kan., for appellants. Sutton & Sutton, of Kansas City, Kan., for appellees.

PORTER, J. The action in the court below was to set aside and cancel a deed which the plaintiffs, who are husband and wife, delivered to H. C. Snook, conveying to him a lot in Kansas City in exchange for other property. The plaintiffs claimed that in consideration for the deed, Snook agreed to convey to them the title to certain real estate in Oklahoma; that the deed he delivered to them conveyed no title to the Oklahoma land as he well knew, and that they received no consideration for their deed; that afterwards defendant Honnell filed for record the deed they had executed to Snook, but with Honnell's name written therein as grantee instead of the name of Snook, and that subsequently Honnell conveyed the property described therein to the other defendants. Plaintiffs offered to quitclaim to Snook any interest they might have acquired in the Oklahoma land, and asked for cancellation of their deed on the ground of fraud.

The defendant Honnell filed a separate answer, containing a general denial and alleging that he had no knowledge concerning the transaction in relation to the land in Oklahoma, and further alleging an oral agreement between plaintiffs and Snook that their deed should be executed and delivered in blank as to the grantee, with power and authority in Snook to fill in the name of any grantee to whom he might desire to transfer the property, and that when the plaintiff's deed was tendered to Snook with the latter's name as grantee therein, the plaintiff C. L. McClung, acting for himself and wife, agreed that Snook's name might be stricken out in order to make the deed conform to the agreement.

The answer denied notice either of the fraud alleged against Snook or that plaintiffs had or claimed any interest in the property. The material facts found by the trial court are, in substance, these: The deed in question was delivered December 20, 1913; the trade was made in accordance with a contract between the plaintiffs and Snook, in which C. L. McClung acted for himself and his wife, and J. P. Johnson acted as the agent of Snook. There was an oral agreement that Snook was to deliver to the McClungs a deed from a third party conveying the Oklahoma land, with the name of the grantee left blank, and was to receive from them a deed to the Kansas City property, which was to be in blank as to the grantee. When the parties met to deliver the deeds, C. L. McClung appeared for his wife, in whom the title to the property in Kansas City stood, and J. P. Johnson represented Snook, who was not present. Johnson for Snook tendered to McClung a deed to the Oklahoma property without the name of any grantee therein, which McClung accepted, and McClung tendered to Johnson for Snook a deed from the plaintiffs to the Kansas City property with the name of H. C. Snook written in as grantee. When Johnson objected to the name of Snook as grantee and called attention to the prior agreement, McClung assented, and thereupon delivered the deed with the understanding that Johnson was to erase the name of Snook as grantee and insert another grantee therein, and C. L. McClung was duly authorized to act for his wife. Subsequently defendants Honnell and Snook made an exchange of properties, and Snook delivered to Honnell the McClung deed after Johnson had erased the name of Snook as grantee and the name of Honnell had been inserted in its place. The court found that at the time Honnell accepted the McClung deed from Snook, he had no knowledge of any failure of consideration, no knowledge of any fraud or claim thereof, and dealt with Snook in entire good faith, paying full value for the lot conveyed to him; that the other defendants had no knowledge of any failure of consideration or any claim of fraud, and they purchased the lot from Honnell and paid full value therefor. The exchange of properties between plaintiffs and Snook occurred December 20, 1913; four days later McClung recorded the Oklahoma deed, and made no claim of fraud against any of the defendants until April 30, 1914, when this action was brought. The property was not conveyed by Honnell to defendants Haase & Haase until March 4, 1914. The court further found that the plaintiffs acquired good title to 10 acres of the land in Oklahoma, but did not acquire any title to 30 acres of the tract they were to receive, and that when McClung and Snook exchanged their deeds on December 20, 1913, nothing remained to be done by either, and that the exchange of deeds was intended to be in full satisfaction of the written and verbal contracts for the exchange of properties. As conclusions of law the court found that the facts were not sufficient to warrrant a rescission of the contract of exchange or the cancellation of the plaintiff's deed, and rendered judgment against the plaintiffs for costs.

The plaintiffs rely upon the fifth paragraph of the syllabus of the original opinion in Ayres v. Probasco, 14 Kan. *175, to sustain their contention that the authority of an agent to make a change in a deed before delivering it is void unless in writing. Mr. Justice Brewer dissented from the statement of law declared in that paragraph of the syllabus, and on a rehearing of the case, the court held the paragraph and corresponding parts of the opinion to be dictum. See com-

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ment thereon in Bank v. Fleming, 63 Kan. 139, 65 Pac. 213. The facts in the Ayres Case are quite different from the facts presented here. The mortgage in that case was blank except for the signatures and acknowledgment of the husband and wife. It was afterwards filled in as to grantee, description of land and consideration, contrary to the wife's intention. Here, the alteration in the instrument, instead of being contrary to the intention of the parties, was in strict compliance with their original agreement. The deed with Honnell's name as grantee was recorded four days afterward; plaintiffs had notice of its contents from the record, and made no objection until four months later.

Some importance is sought to be attached to the fact that the answer alleges that C. L. McClung "was thereunto duly authorized, and then and there consented orally that defendant Snook might erase his name as grantee and fill in the name of any person," whereas the proof shows that his agent, Johnson, actually made the erasure. It was done by Johnson for Snook in the latter's presence, and the effect was the same as if Snook's hand held the pen.

So far as the name of the grantee was concerned, the deed as finally delivered was completed in accordance with the agreement of the parties; it was duly acknowledged and entitled to record, and the plaintiffs are estopped to deny that the grantee acquired title. Bank v. Fleming, supra. The court's findings are well supported by the evidence, and its conclusions of law necessarily follow.

The judgment is affirmed. All the Justices concurring.

(99 Kan. 277)

SEXSON v. GLADHART. (No. 20421.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⇐662(1)—RECORD—CONCLUSIVENESS.

A motion to dismiss an appeal to the district court for want of jurisdiction was heard in May, 1914; oral and documentary evidence being produced. No journal entry of the proceeding, or of any ruling on the motion made at the time, is disclosed. The record does show that at a subsequent term of court, held in May, 1915, the court decided the question presented by the motion, held that it had jurisdiction of the appeal, and continued the cause. The parties dispute about what occurred. On one side it is said the motion to dismiss was sustained and the appeal was dismissed in May, 1914. On the other side it is said the motion was sustained, but the ruling was vacated on the same day, and leave was given to file briefs. *Held*, the record is conclusive, and does not sustain the claim that the court was without jurisdiction to rule on the motion in May, 1915.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2850; Dec. Dig. ⇐662(1).]

Appeal from District Court, Wallace County.

Action by John Sexson against A. B. Gladhart. From a judgment for plaintiff, defendant appeals. Affirmed.

A. D. Gilkeson, of Hays, for appellant. W. E. Ward, of Sharon Springs, for appellee.

BURCH, J. The question presented by this appeal is whether or not the district court took up the case and overruled a motion to dismiss after having sustained the motion and dismissed the case at a previous term.

The case originated before a justice of the peace, and was taken to the district court by appeal. A motion was there made to quash the original service and to dismiss the appeal for want of jurisdiction. The motion was heard on May 19, 1914; oral and documentary evidence being produced. No journal entry of this proceeding, or of any ruling on the motion made at that time, is abstracted. On May 19, 1915, the court took up the question of jurisdiction presented by the motion to dismiss, found that a general appeal had been taken from the judgment of the justice of the peace, and held that such general appeal gave the district court jurisdiction. On the face of the record, which is conclusive in this court, the district court had not lost whatever jurisdiction it had in May, 1914, and had jurisdiction to make the order which was made at the term occurring a year later.

There is a dispute about what actually occurred. On one side it is said that the motion to dismiss was sustained in May, 1914, and that nothing further was done in the case until the court of its own motion entered the order of May, 1915. On the other side it is said that the motion to dismiss was sustained at the close of the hearing on May 19, 1914, but that on the same day the order of dismissal was vacated, and leave was given to brief the question of jurisdiction. At the November, 1914, term, no briefs having been filed, the case was again passed until the term occurring in May, 1915. This explanation is supported by the following entry made by the judge of the district court on the trial docket on the day the motion to dismiss was heard:

"6:30 p. m. Vacate ruling sustained; motion and leave given at plaintiff's request to brief question whether appeal waives lack of jurisdiction below."

The judgment of the district court is affirmed. All the Justices concurring.

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(99 Kan. 371)

HUNT v. GIBSON. (No. 20795.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. ELECTIONS ⊂⊃316—CORRUPT PRACTICES—BRIBERY—WHAT CONSTITUTES.

Conversations occurring before an election between a candidate for office and persons qualified to vote at the election considered, and *held* to have the effect of bribery by means of promises to appoint the electors to office in case the candidate were successful at the election.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 343; Dec. Dig. ⊂⊃316.]

2. ELECTIONS ⊂⊃230—BRIBERY—COUNT OF VOTES.

The candidate referred to received the certificate of election. His opponent brings this action of quo warranto to determine his right to the office. *Held*, the votes of the electors referred to, which were cast in the defendant's favor, cannot be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 202; Dec. Dig. ⊂⊃230.]

3. ELECTIONS ⊂⊃230—BRIBERY—COUNT OF VOTES.

The promises referred to were communicated to third persons, who voted for the defendant because of such promises. *Held*, the votes of such persons cannot be counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 202; Dec. Dig. ⊂⊃230.]

4. ELECTIONS ⊂⊃237—BALLOTS—CORRUPT PRACTICES.

Deducting the void votes from the total number received by the defendant, the plaintiff had a majority of those cast at the election. *Held*, that plaintiff was elected, and is entitled to the office and its privileges and emoluments.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 210–215; Dec. Dig. ⊂⊃237.]

Original proceeding in quo warranto by C. N. Hunt against O. S. Gibson. Judgment for the plaintiff.

Ed J. Fleming, W. L. Cunningham, and H. S. Hines, all of Arkansas City, for plaintiff. Albert Faulconer, C. W. Wright, and L. C. Brown, all of Arkansas City, for defendant.

BURCH, J. The action was one of quo warranto to try the title to the office of mayor of the city of Arkansas City.

The plaintiff and the defendant were opposing candidates at the election held in April, 1916. The defendant received the certificate of election. The petition charged that a sufficient number of votes to change the result should not be counted for the defendant, for reasons which were stated. The court appointed Hon. T. A. Noftzger, of Wichita, as commissioner to take the testimony and report findings of fact and conclusions of law. The commissioner's report follows:

"Findings of Fact.

"First. Arkansas City, a city of the second class, had adopted the commission form of government. A mayor was to be elected for the city in April, 1916, and for the purpose of selecting a candidate, a primary election was duly held, at which the plaintiff and defendant, who were both eligible to hold the office, were chosen for candidates for mayor.

"Second. The returns, from the city election duly and regularly held on April 4, 1916, duly and legally made, showed that the defendant received 1,250 votes and the plaintiff 1,240 votes. The defendant received his certificate of election, duly qualified as mayor, assumed the duties of the office on April 17, 1916, and has ever since performed them, and has been receiving the salary pertaining to the office which is one thousand dollars a year, payable monthly.

"Third. The city of Arkansas City has never had an ordinance providing for election contests.

"Fourth. G. W. Branine was a legal and qualified elector of Arkansas City on April 4, 1916, and entitled to vote for mayor at the election held on that day. The defendant made such representations to him that under the circumstances he believed, and was entitled to believe, the defendant would appoint him police judge of Arkansas City if the defendant should be elected mayor, and on this account Branine worked and voted for the defendant at the election. (Abstract, pages 15, 16, 157–164, 166–168, 182, 183, 194, 195, 204, 213, 214, 218, and 219.)

"Fifth. Mose Branine and Roy Branine, who are sons of G. W. Branine, and Mrs. Mose Branine and Mrs. Roy Branine, who are daughters-in-law of G. W. Branine, were legal and qualified electors of Arkansas City on April 4, 1916, and were entitled to vote for mayor at the election held on that day and they voted for the defendant for mayor because they were informed and believed that G. W. Branine had been promised the office of police judge by the defendant, and if it had not been for the belief that this promise had been made, and carried out, they would not have voted for the defendant. (Abstract, pages 15–19.)

"Sixth. C. F. Betts, Sr., who was a legal and qualified elector of Arkansas City on April 4, 1916, and entitled to vote for mayor at the election held on that day, voted for the defendant because the defendant promised to appoint him chief of police of Arkansas City if the defendant should be elected mayor. (Abstract, pages 49–102, 143, 144, 151–166, 170, 171, 174–182, 192–194, 200–203, 212, 213, and 219.)

"Seventh. Mrs. C. F. Betts, Sr., was the wife, C. F. Betts, Jr., was the son, and Mrs. C. F. Betts, Jr., was the daughter-in-law of C. F. Betts, Sr. They were legal and qualified electors of Arkansas City on April 4, 1916, and entitled to vote for mayor at the election held on that day, and they voted for the defendant by reason of the promise which the defendant had made to C. F. Betts, Sr., to appoint the latter chief of police of Arkansas City if the defendant should be elected. (Abstract, pages 82–94, 98, 99, 177.)

"Eighth. C. C. Patterson was a legal and qualified elector of Arkansas City on April 4, 1916, and entitled to vote for mayor at the election held on that day, and voted for the defendant because he was informed and believed that the defendant would appoint C. F. Betts, Sr., chief of police, and because he was a friend of C. F. Betts, Sr., and desired to assist him in his obtaining this office. (Abstract, pages 99–101.)

"Ninth. Elmer Wright was a legal and qualified elector of Arkansas City on April 4, 1916, and was entitled to vote for mayor at the election held on that day, and was a friend and supporter of the defendant. He did not intend to be present and would not have been present at the election held at Arkansas City April 4, 1916, if the defendant had not promised to appoint him to an office if the defend-

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ant should be elected mayor. By reason of this promise on the part of the defendant Elmer Wright, who intended to be away from Arkansas City at the time of the election, remained and attended the election and voted for the defendant. (Abstract, pages 102–110, 188–190, 204, and 205.)

"Tenth. Ora J. Wilkinson was a legal and qualified elector of Arkansas City on April 4, 1916, and entitled to vote for mayor at the election held on that day and voted for the defendant at the request of Elmer Wright because he was under obligations to Elmer Wright and was informed and believed that the election of the defendant would be to Wright's interest. (Abstract, pages 110 and 111.)

"Eleventh. W. F. Richards and Mrs. W. F. Richards, his wife, who were legal and qualified electors of Arkansas City on April 4, 1916, and entitled to vote for mayor at the election held on that day, voted for the defendant because the latter had promised them that he would retain one Willis White in office as police judge of Arkansas City. (Abstract, pages 116–120, 205, and 206.)

"Twelfth. The plaintiff has not proven by a preponderance of the evidence that the vote of any other person other than those above named was influenced in favor of the defendant by any promise made directly or indirectly by the defendant.

"Conclusions of Law.

"First. The votes of G. W. Branine and C. F. Betts, Sr., must be deducted from the votes received by the defendant as shown by the returns because these votes were directly the result of illegal promises.

"Second. The votes of Mose Branine, Roy Branine, Mrs. Mose Branine, Mrs. Roy Branine, Mrs. C. F. Betts, Sr., C. F. Betts, Jr., and Mrs. C. F. Betts, Jr., should be deducted from the votes cast for the defendant. These votes were procured indirectly by legal or illegal promises made by the defendant, and these voters all had a direct interest in the promises.

"Third. The vote of C. C. Patterson should be deducted from the votes cast for the defendant because it was directly procured by reason of an illegal promise made to C. F. Betts, Sr. The defendant is not entitled legally to any benefit derived directly from that promise.

"Fourth. The vote of Elmer Wright should be deducted from the votes cast for the defendant because he would not have voted for the defendant if it had not been for an illegal promise.

"Fifth. The vote of Ora J. Wilkinson should not be deducted from the votes received by the defendant because while he believed that Elmer Wright would be benefited by the election of the defendant, he did not cast his vote on account of the knowledge of any illegal promise made by the defendant nor really because of any illegal promise made by the defendant merely to procure the attendance of Elmer Wright at the election. The latter was in favor of the election of Gibson at all times and no promise that Gibson had made influenced his vote. He did not procure Wilkinson to vote for the defendant on account of any illegal promise.

"Sixth. The votes of W. F. Richards and his wife should not be deducted from the votes cast for the defendant because it was not illegal for the defendant to promise them that he would retain Willis White in office as police judge of Arkansas City, as they had no particular interest in Willis White except as a friend or that interest which might arise out of their desire to have a good police judge. It was not improper for the defendant to state his views on that question which was one of the legitimate questions involved in the campaign for mayor.

"Seventh. I find, therefore, that eleven (11) votes should be deducted from the votes cast for the defendant, and the plaintiff adjudged elected mayor of Arkansas City. He is entitled to the office and its salary."

[1] Each party challenges the findings of fact and conclusions of law adverse to him If those which are adverse to the defendant be approved, they determine the case. Being challenged, the commissioner's findings are advisory only. In the solution of doubtful questions of fact, some weight may be given them because the commissioner had the advantage of personal observation of the witnesses while they were undergoing examination. With this exception, the court considers the evidence as though it had been taken by deposition.

The fourth finding of fact is challenged, and the challenge raises the question of what was said in a conversation between the defendant and G. W. Branine, in which the appointment of Branine as police judge in case the defendant were elected was discussed. In the course of Branine's testimony, different versions of the conversation may be found, some much stronger than others against the defendant. Portions of Branine's cross-examination, considered alone, would indicate that the substance of the defendant's statement was, "If I am elected, why, you come and see me." Other evidence corroborates this view. There was circumstantial evidence tending to show that no promise whatever was made, and the defendant gave an account of the conversation which not only exculpated himself, but negatived use of any of the various expressions attributed to him. To debate the question at length would unduly extend this opinion, and would serve no beneficial purpose. The court is satisfied that Branine favored the plaintiff's candidacy, and made the fact clear to the defendant; that Branine solicited a promise of appointment as police judge in the event the defendant was elected; and that in this instance, as in other instances disclosed by the evidence, the defendant undertook to secure votes and work for his election by the use of equivocal language, which would satisfy the person desiring appointment and secure the results which the defendant desired, but which would leave a margin for denying any "engagement," "contract," or "agreement." Branine's first recital of what the defendant said probably included a conclusion with respect to the effect of what was said. At the outset of his cross-examination, he was startled, and for some time was disturbed, by being bluntly confronted with the proposition that he had sold his vote. The substance of the conversation is of course all that is material, and the court believes the defendant responded to Branine's solicitation in terms approximately summarized in the following version of the conversation:

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"Q. Did Mr. Gibson in that conversation use this language in substance, 'If I am elected I will give you the office of police judge?'
"A. Well, he said—I asked him for it.
"Q. Yes, and what did he say?
"A. He said, 'If you will work for me and vote for me, that's all right; and if I am elected mayor, why, you come and see me.'"

The ninth finding of fact is challenged. The court accepts the following testimony of Elmer Wright as substantially accurate and substantially true:

"A. Well, I would have to say that I judge about a week, yes, about a week, before election, he heard I was going away, and he said, 'Mr. Wright, I learn you are going away,' and I said, 'Yes.' He said, 'Mr. Wright, you are one of the best workers I got; I can't afford to have you go away. You understand now, the law don't allow me to make any promises; that's the only reason why I can't give you a job right now; understand,' he says, 'I want you to stay and work for me.'
"Q. Did you say whether you would stay or not?
"A. I believe he said, 'I want you to promise me and say that you will stay until after this election, for it's going to be a close fight and I need your support.'
"Q. And did you stay?
"A. I did.
"Q. You had intended going away?
"A. I had.
"Q. And did you vote for Mr. Gibson in that election for mayor?
"A. I did. * * *
"Q. When you were talking to him about going away, did you tell him why you were going?
"A. I did.
"Q. Then he said you were one of his best workers?
"A. Yes.
"Q. What else was said there?
"A. I was one of his best workers and he couldn't afford to have me go, and 'You understand,' he said, 'The law don't allow me to make promises; understand me, Elmer, is the only reason why I can't promise you a job right now.'
"Q. You understood by that that he would get you some position or place, if he was successful, and you stayed and worked for him?
"A. Well, it left that impression.
"Q. You felt that way about it?
"A. I did.
"Q. And relied upon it?
"A. Yes.
"Q. And by reason of that you stayed, when otherwise you would have gone away?
"A. Yes. * * *
"Q. Was there anything said there about his having any jobs or appointments to make?
"A. He did.
"Q. What did he say about that?
"A. He said in the conversation—don't know whether it came before or after—he said he would have several good jobs after election."

In this instance the defendant was the moving party. He sought the voter and procured the voter to change his plans, remain in Arkansas City, and vote and work for the defendant, by assurances of appointment to office, not a whit less clear and definite to the understanding because of the protest that the law permitted no promise to be made.

Other findings of fact adverse to the defendant are sustained by the weight of the evidence.

Section 6 of article 5 of the Constitution reads as follows:

"Every person who shall have given or offered a bribe to procure his election shall be disqualified from holding office during the term for which he may have been elected." Gen. Stat. 1909, § 175.

The Crimes Act contains the following provisions:

"If any person shall directly or indirectly give or procure to be given, or engage to give, any money, gift or reward, or any office, place or employment, upon any engagement, contract or agreement that the person to whom or to whose use, or on whose behalf such gift or promise shall be made, shall by himself or any other, procure, or endeavor to procure, the election of any person to any office, at any election by the electors, or any public body, under the Constitution or laws of this state, the person so offending shall on conviction be adjudged guilty of bribery, and punished by imprisonment and hard labor for a term not exceeding five years." Gen. Stat. 1909, § 2688.
"If any person, by himself or any person employed by him, shall, by gift or reward, office or employment, or by any promise, agreement or security therefor, corrupt or procure or attempt to corrupt or procure any person who shall have or claim to have a right to vote at any election, to give or forbear to give his vote at such election, the person so offending shall on conviction be adjudged guilty of bribery, and punished as in the next preceding section is prescribed." Supra, § 2689.

The Corrupt Practices Act contains the following provision:

"Any person who shall directly or indirectly give or procure to be given or promise to give any money, gift or reward, or any office, place or employment, upon any engagement, contract, agreement or understanding that the person to whom or for whose benefit such gift or promise shall be made shall, by himself or any other person, procure or endeavor to procure or work for the election of any person to any public office at any election, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the penitentiary for not more than two years, or both." Gen. Stat. 1909, § 3283.

[2-4] Other statutory provisions deal in similar manner with other branches of the same general subject, and there can be no doubt respecting the public policy of this state with reference to the giving or promising of money, property, office, employment, or other reward or thing of value, to influence electors in the exercise of their franchise. The books are full of homilies which have been delivered by the courts on this subject. It is not necessary to indite a new one. This court has already expressed itself, and it will be sufficient for present purposes to bring forward some extracts from the opinion, prepared by Mr. Justice Brewer, in the case of State v. Elting, 29 Kan. 397:

"That a purchased vote given for an individual candidate for office is not to be counted is conceded. So also that a candidate for office who purchases a vote therefor is not to have the office is also beyond question. * * * As a consequence of these rules it has been held that a candidate for an office to which is attached a fixed salary, who offers to the elec-

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tors to discharge, if elected, the duties of such office at less than the stated salary, is not entitled to have counted for him any votes given in consideration of such promise. [Citing cases.] * * * In the case from [State v. Purdy] 36 Wis. 213, supra, the court, after referring to a number of authorities, uses this language:

"'The doctrine which we think is established by the foregoing authorities, and which we believe to be sound in principle, is, that a vote given for a candidate for a public office in consideration of his promise, in case he shall be elected, to donate a sum of money or other valuable thing to a third party, whether such party be an individual, a county, or any other corporation, is void.'

"We have no doubt of the correctness of this doctrine; and in view of the fact that the great danger which now lies in the path of free institutions is the use of money in elections, the scope of this healthful doctrine should in no manner be limited or abridged by the courts. The purity of the ballot box should be insisted upon at all times and in all places. Only in that way can be upheld and maintained the integrity, and therefore the permanence, of popular government. 29 Kan. 399. * * *

"When a candidate gives an elector personally money or property, there is a direct attempt to influence his vote by pecuniary considerations. The expectation is that such vote will be controlled, not by the elector's judgment of the fitness of the candidate for the office, but by the pecuniary benefit he has received. In other words, it is money and not judgment which directs the ballot; and so the election turns not on considerations of fitness or public good, but of private gain. Let such be tolerated, and elections will be simply the measure of the size of the candidates' purses. In the closing and degenerate days of Rome's august empire, preceding its immediate downfall, the imperial purple was sold at public auction to the highest bidder. Equally base and equally significant of present decay and impending downfall would be the toleration of the private purchase of electoral votes. That which is wrong when done directly is equally wrong when done indirectly. Salaries are paid by taxation, and when a candidate offers to take less than the stated salary, he offers to reduce pro tanto the amount of taxes which each individual must pay. If the candidate went to each elector and offered to pay one dollar of his taxes, that clearly would be direct bribery; and when he offers to take such a salary as will reduce the tax upon each taxpayer one dollar, he is indirectly making the same offer of pecuniary gain to the voter; so that those cases rest upon the simple proposition that the election of a candidate for office cannot be secured by personal bribery offered directly or indirectly to the voter. 29 Kan. 400. * * *

"A further question may arise when the offer of the candidate carries with it no pecuniary benefit to the voter. As, for instance, should a candidate for a county office offer to give if elected a portion of his salary for the erection of a public fountain; or, if a candidate for a state office should offer if elected to endow a chair in some college; here it may be said that the voter is in no way influenced by considerations of personal gain. He receives no money in hand, his taxes will not be reduced, and he may in no manner be pecuniarily benefited by the donation. This presents a case going still beyond those which have been decided, and yet very probably the same decision should control such a case, and for this reason: Wrong considerations are thrown into the scale to influence the vote of the elector. The theory of popular government is that the most worthy shall hold the offices. Personal fitness—and in that is included moral character, intellectual ability, social standing, habits of life, and political convictions—is the single test which the law will recognize. That which throws other considerations into the scale, and to that extent tends to weaken the power of personal fitness, should not be tolerated. It tends to turn away the thought of the voter from the one question which should be paramount in his mind when he deposits his ballot. It is in spirit at least, bribery, more insidious, and therefore more dangerous, than the grosser form of directly offering money to the voter." 29 Kan. 401.

Applying the principles enunciated in the foregoing discussion to the facts of the present case, the votes of Branine, Wright, and Betts, Sr. (finding No. 6), were void. If the consideration had been money, and the subject lay within the field of lawful contract, each of those voters could recover from the defendant in an action on an express "engagement," "contract," or "agreement." Beyond this, however, the court will not palter with forms of expression devised to avoid disqualification to hold office or penal consequence, but which attain unlawful ends. Conceding that no engagement, in the strict contract sense of the term, was entered into, because the defendant employed oblique phrases, he did in fact corrupt the minds of those voters to the same extent and by appealing to the same motives as if he had outspokenly and unreservedly bound himself. The method which he chose is merely a refinement on the old, coarse form of plain promise, and accomplished bribery in the sense in which the term is used in proceedings of this character.

The votes of the persons named in the fifth, seventh, and eighth findings cannot be counted for the defendant. The law would be very impotent if it failed to follow corruption as far as it contaminates, and to deprive the instigator of every benefit accruing to him because of it.

The votes of C. C. Patterson (finding No. 8) and Elmer Wright (finding No. 9) were not challenged in the original petition. The evidence relating to those votes was taken by the commissioner in connection with the other evidence. Afterwards the court permitted the petition to be amended to include charges that those votes, and some others not referred to in the original petition, were void and should not be counted for the defendant. The order permitting the amendment reserved for future determination its effect on the evidence already taken. The defendant objects to consideration of the charges contained in the amendment and seems to regard the amendment as not yet sanctioned. The amendment was specifically allowed. The reservation applied merely to such legal questions arising on the evidence as were properly determinable only at the final hearing, and was made in order that allowance of the amendment should not be taken as an indication of how such questions might be decided. The issue respecting Wright's vote was fully

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tried, and the issue respecting Patterson's vote appears to have been fully tried. The amendment was allowed on August 3, 1916. The commissioner's findings were not filed until November 2d. No application was made to him or to this court for permission to take additional evidence, and no showing of prejudice resulting from the amendment has been tendered. Therefore the objection to consideration of the amendment is overruled.

The court finds for the plaintiff. The judgment is that he is the duly elected mayor of Arkansas City and is entitled to exercise the rights and privileges and to enjoy the emoluments of such office; that the defendant be ousted from the office and the plaintiff be placed in possession thereof; that the plaintiff recover from the defendant the salary of the office appropriated by the defendant while acting as mayor, in the sum of $———; and that the plaintiff recover his costs. All the Justices concurring.

(99 Kan. 335)

GRIESA et al. v. THOMAS. (No. 20463.)*

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. SALES ⟸365—REMEDIES OF SELLER—FINDINGS AND JUDGMENT.

Special findings of fact concerning a contract for the purchase of speciosa catalpa seedlings examined, and *held*, that plaintiffs' motion for judgment thereon was properly denied.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1077; Dec. Dig. ⟸365.]

2. APPEAL AND ERROR ⟸1068(4)—REVIEW—HARMLESS ERROR—INSTRUCTIONS—DAMAGES.

It is needless to examine a trial court's instructions to the jury touching the measure of damages for breach of contract, when a defense of misrepresentation and fraud in procuring the contract is successfully maintained, and no damages are recoverable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4228; Dec. Dig. ⟸1068(4); Trial, Cent. Dig. § 558.]

3. EVIDENCE ⟸434(11) — PAROL EVIDENCE AFFECTING WRITINGS—INVALIDATING CONTRACT.

Where one of the defenses to a written contract for the purchase of catalpa seedlings was that the defendant did not have a fair opportunity to read the contract, it was not error to permit oral testimony that the vendor had assured the vendee that the latter would have the privilege of countermanding the order, where the jury were carefully instructed that the terms of the written contract were binding on the defendant unless the jury found that he did not have a fair opportunity to read it before he signed it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2013, 2014; Dec. Dig. ⟸434(11).]

4. EVIDENCE ⟸434(8)—PAROL EVIDENCE AFFECTING WRITINGS — INVALIDATING CONTRACT.

The ordinary rule that a written contract speaks for itself and that parol evidence to show the oral statements, representations, and negotiations of the parties which led up to the contract, is inadmissible, has no application to written contracts procured by the fraudulent representations of one of the parties and which were relied upon by the other.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2012; Dec. Dig. ⟸434(8).]

5. FRAUD ⟸11(2)—ELEMENTS—REPRESENTATIONS AS TO VALUE.

The rule that representations as to the market value of an article or commodity are mere expressions of opinion and not statements of fact is limited in its application to familiar articles and commodities of commerce whose market value is easily ascertainable, and does not apply to sales of articles or commodities whose market value is difficult of determination, especially when such articles or commodities are offered for sale by a vendor who is familiar with their true worth and real market value to the vendee who is entirely ignorant thereof and who buys in reliance on the vendor's positive statements concerning the market value.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 13; Dec. Dig. ⟸11(2).]

6. SALES ⟸364(4)—REMEDIES OF SELLER—ACTIONS FOR PRICE—INSTRUCTIONS.

Instructions covering the question whether representations as to market value were positive statements of fact or mere expressions of opinion examined and approved.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1068; Dec. Dig. ⟸364(4).]

Appeal from District Court, Harvey County.

Action by W. S. Griesa and another, partners, etc., against David Thomas. From a judgment for defendant, plaintiffs appeal. Affirmed.

Gorrill & Asher, of Lawrence, and von der Heiden & Morgan, of Newton, for appellants. Branine & Hart, of Newton, for appellee.

DAWSON, J. The plaintiffs sued the defendant for the contract price of certain catalpa seedlings. The contract was in the form of a printed and written order and signed by the defendant. In the body of the text in prominent capitals, and above the defendant's signature, were the words:

"I AGREE THAT THIS ORDER IS NOT SUBJECT TO COUNTERMAND."

On the margin in plain type, it was printed:

"Our Agents are not authorized to vary from the printed terms hereof. Read the notice at the bottom of this blank."

At the bottom of the blank, following the schedule of trees and seedlings ordered, was the following:

"The signer is notified that agents are not authorized to promise to plant stock, collect pay for orders in advance, to promise time or privilege of countermanding.

"Read terms of Contract.

"POSITIVELY NO COUNTERMANDS ACCEPTED OR CONDITIONAL ORDERS TAKEN."

The seedling stock was shipped to defendant. He refused to accept, and, as the stock was perishable, it was advertised and sold by plaintiffs at auction for a nominal sum, and the plaintiffs' action is for the differ-

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied January 13, 1917.

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ence between the contract price and the sum realized by the sale plus necessary and pertinent expenses.

The defendant's answer alleged that prior to signing the order it was expressly agreed between him and plaintiffs' general agent that the order would be subject to countermand and cancellation by notifying the plaintiffs at any time before the trees were actually shipped, and that defendant relied wholly upon plaintiffs' agent to write and prepare the order, and that he had no opportunity to read the order, and that defendant signed the order relying wholly upon these statements of plaintiffs' agent and upon the agreement between him and the agent. The answer also alleged:

"(4) That about the time of the signing of said order and prior thereto and subsequent thereto said plaintiff and its agent were engaged in a general plan and scheme to cheat and defraud parties throughout the state of Kansas by false and fraudulent representations, and as a part of such plan said agent made false and fraudulent representations that the prices for which said plaintiff was offering these for sale was an exceedingly low price and was much lower than such trees could be bought or purchased for at any nursery or any market in the United States, and plaintiff's agent pretended to have a letter direct from plaintiff, which he purported to read from, to the effect that said agent was not authorized to sell such trees after the end of that week for less than seven cents each, and that when plaintiff advanced its price that said trees would be two cents cheaper than like or similar trees could be bought or purchased at any nursery or at any place in the United States. That yearling speciosa catalpas would in three years develop into fence posts, and in five years to telephone poles, and in seven years to telegraph poles and railroad ties. That it would be necessary for said defendant to order 5,000 in order to get 1,000, inasmuch as plaintiff did not have sufficient catalpas with which to fill all orders. That plaintiff did no jobbing business and that they procured catalpa seed and raised all the stock at or near the city of Lawrence. That plaintiff's agent had just purchased a half section of land in Ford county, Kan., and that he intended to and was going to plant the whole of same in catalpa trees.

"(5) That all of said statements and representations were false, and in fact the regular market price of yearling speciosa catalpas such as plaintiff's agent was selling and such as plaintiff shipped was from $5 to $8 per thousand, and that plaintiff had a large stock and could fill defendant's order for 5,000 trees. That it would take said catalpas 6 to 8 years to mature to fence posts and 15 years to mature to telephone poles and 18 to 20 years to mature to railroad ties or telegraph poles, and that plaintiff did not grow all its trees at or near Lawrence, Kan., and that plaintiff's agent did not have or purchase the half section of land in Ford county, Kan., for the purpose of planting catalpa trees, and that said letter that said agent claimed to have and read from was false and fraudulent and fictitious and, after selling said trees to said defendant, said agent continued to sell trees at the same price, and that said agent read from said letter for the purpose of inducing defendant to purchase said trees then and there.

"(6) That said defendant has never had or grown any catalpas and was not familiar with the length of time it would take same to mature as aforesaid, and did not know nor was familiar with the market price or the reasonable price of same, and that he relied implicitly upon such said representations.

"(7) That afterward, when defendant learned that said statements were false and fraudulent, and acting in accordance with said contract, defendant notified said plaintiff not to ship said trees on September 23, 1914, countermanded and canceled said order."

The cause was tried to a jury and a general verdict rendered for defendant. Certain special questions propounded by plaintiff were answered:

"Question 7. * * * State whether or not at the time of signing said order any misrepresentations in regard to said nursery stock were made to said defendant by A. L. Dye? Answer: Yes.

"Question 8. If you answer the last question in the affirmative, then state fully what such misrepresentations were? Answer: As to time it takes to grow fence posts, telephone and telegraph poles."

Also certain questions submitted by defendant:

"No. 1. Did the plaintiffs' agent represent to the defendant that yearling speciosa catalpas could not be bought for less than $20 per thousand? Answer: Yes.

"No. 2. * * * Did the plaintiffs' agent know that speciosa seedlings could be obtained for less than $20 per thousand. Answer: Yes.

"No. 3. * * * Did not the plaintiffs' agent know that speciosa seedlings could be obtained in the market for less than $20 per thousand? Answer: Yes.

"No. 4. Did plaintiffs' agent make false misrepresentations to the defendant as to the value of yearling speciosa catalpas? Answer: Yes.

"No. 5. Did plaintiffs' agent make false representations to defendant as to the length of time speciosa catalpa seedlings would develop into a size so that the same could be cut and used for a fence post, a telephone pole, or telegraph pole? Answer: Yes.

"Q. 6. * * * Did defendant rely upon said false representations in the signing of said order? Answer: Yes.

"Q. 7. Did the defendant have reasonable opportunity to examine or read the order in question? Answer: Yes."

[1] Considering the principal errors assigned in the order of their presentation, it does not seem that the plaintiffs were entitled to judgment on the special finding. True, the question whether defendant had a fair opportunity to sign the order was answered in plaintiffs' favor, but another good and sufficient defense—that of fraud and misrepresentation—was pleaded and apparently proved. It is elementary that a contract entered into through the fraud and misrepresentation of one of the parties and relied on by the other is voidable at the instance of the party defrauded. Hart v. Haynes, 96 Kan. 262, 150 Pac. 530.

[2, 3] Plaintiffs' next complaint relates to the court's instructions touching the measure of damages and of the jury's special finding of market value of catalpa seedlings at Halstead where the defendant resided. Unless some way is disclosed to overcome the findings of fraud and misrepresentation, these alleged errors are inconsequential. So, too, is the error urged as to the admission of oral evidence touching the privilege of

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countermanding the order. Counsel for plaintiffs are entirely correct in their contention that such evidence is ordinarily incompetent, since the plain terms of the contract were to the contrary and they were not subject to oral contradiction, unless indeed another controverted question in the case—defendant's opportunity to read the contract—had been resolved in defendant's favor. But the question whether defendant had a fair opportunity to read the contract was itself an issue, and the trial court could not anticipate the jury's finding concerning it, and therefore it was not improper to admit the oral testimony as to the privilege of countermanding the order, when the court carefully guarded, as it did, the rights of plaintiff in appropriate instructions. 4 Wigmore on Evidence, § 2430. The instruction, in part, reads:

"On the other hand, if you believe that the defendant was not induced to sign said order by reason of the said false and fraudulent statements of plaintiffs' agent preventing the defendant from having a fair opportunity to read the said order, and you believe that defendant did not read or hear said order read before delivering and that said order was accepted by the plaintiffs before the defendant gave notice of countermanding or cancellation of said order, then the order and acceptance would become a binding contract, and the defendant would be bound by all the terms and conditions of said written order, and defendant would have notice of the limitation of the agent's authority as contained in said order and notice of the statement in said order that no countermand would be accepted or conditional orders taken; and under the conditions above stated the defendant could not countermand his order after it had been accepted by the plaintiffs and defendant would be liable, etc."

[4] However dogmatically the rule is stated and reiterated in the decisions and textbooks that parol evidence is inadmissible to show the oral representations, negotiations, and statements of contracting parties, leading up to their bargain, when later their contract is reduced to writing and signed by them, an invariable qualification of that rule is usually appended making an exception in all cases of fraud pleaded and proved. Willard v. Ostrander, 46 Kan. 591, 26 Pac. 1017; McMullen v. Carson, 48 Kan. 263, 29 Pac. 317 (syl. par. 2); 4 Wigmore on Evidence, § 2439.

[5] Nor would it be proper to hold that the representations and statements of the plaintiffs' agent were mere "puffing," or "dealer's talk," or expressions of opinion. The defendant was a farmer having neither knowledge nor experience in the growth of catalpa trees, and he might be expected to give entire credence to the statements of plaintiffs' agent touching the market value and quick-growing qualities of catalpa and to enter into a bargain with him on such representations and only because of his reliance on them. This observation is particularly true touching the agent's representations as to the market price. Since the defendant had no knowledge of speciosa catalpa nor its market price, and its value or market price was not readily ascertainable, the plaintiffs' agent was bound to tell him the truth about this matter within his peculiar knowledge, if he volunteered to tell defendant anything whatever about it.

While the rule is that statements of value or market price of familiar commercial commodities, like grain, wool, and the like, are ordinarily mere matters of opinion (Graffenstein v. Epstein, 23 Kan. 443, 33 Am. Rep. 171; Burns v. Mahannah, 39 Kan. 87, 17 Pac. 319; 12 R. C. L. 281), yet the rule is otherwise where the value or market price is difficult of ascertainment, and where the vendor is familiar with such value and the vendee is not. Where an unfamiliar kind of property is involved and the market value is not easily ascertained, representations as to its market value are usually considered statements of fact and not of opinion; and, where a vendor knowingly and grossly misrepresents the true market value of such a commodity and the purchaser is entirely ignorant of it and is induced to buy in reliance upon the vendor's false statements as to its market value, the vendee may have a cause of action or a defense based thereon. Murray v. Tolman, 162 Ill. 417, 44 N. E. 748; Kilgore v. Bruce, 166 Mass. 136, 44 N. E. 108; Picard v. McCormick, 11 Mich. 68; Maxted v. Fowler, 94 Mich. 106, 109, 53 N. W. 921; Stoll v. Wellborn (N. J. Ch. 1903) 56 Atl. 894; Conlan v. Roemer, 52 N. J. Law, 53, 18 Atl. 858; Bacon v. Frisbie, 15 Hun. 26; 20 Cyc. 52, 53. See, also, note in 35 L. R. A. 426–429.

In Graffenstein v. Epstein, supra, Mr. Justice Brewer, speaking for this court, recognized that the ordinary rule did not apply where the market value was not readily determinable. It was there said:

"So, also, where there are peculiar means of knowledge possessed by one and not open to the other, as where a dealer in precious stones trades with one inexperienced and ignorant of the values of such articles. Acquaintance with such values, or the tests of quality, is not acquired at once, or by the mere asking; it requires training and time * * * and indeed, generally, where the parties cannot, by reasonable care and diligence, place themselves upon equal terms, the law casts a higher obligation to reveal the truth." 23 Kan. 445, 33 Am. Rep. 171.

Again, in Speed v. Hollingsworth, 54 Kan. 436, 441, 442, 38 Pac. 496, 498, this court said:

"We are referred by the attorney of plaintiff below to Graffenstein v. Epstein, 23 Kan. 443 [23 Am. Rep. 171], and Burns v. Mahannah, 39 Kan. 87 [17 Pac. 319], as supporting the judgment rendered. In those cases the misrepresentations concerned the market price of an article of general commerce. The market price was a matter of public knowledge. But in both of those cases it was observed that 'there were no circumstances making it the special duty of the seller to communicate the knowledge he possessed to the purchaser, and none giving him peculiar means of ascertaining the market price of the article sold.' We have no disposition to extend the rule declared in those cases, and prefer to limit them to the facts disclosed therein."

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The rule that positive statements of value are mere "puffing" or the lying talk in which dealers may indulge with impunity in their transactions with ignorant persons is one which is subject to criticism, and is not universally followed. At all events, courts should steadily set their faces against the extension of its application. In a plain case of cheating, swindling, or gross duplicity, the rule of caveat emptor should have no application. Nairn v. Ewalt, 51 Kan. 355, 32 Pac. 1110.

[8] This feature of the case was sufficiently covered by the instructions:

"(10) The jury are instructed that, if you believe from all the evidence that the market price of catalpa trees is a matter of public knowledge or could be ascertained by any one by reasonable effort and inquiry, then any false statements by the plaintiffs' agent as to the market price would not be sufficient to avoid the plaintiffs' contract, provided it was signed with a full opportunity to know its contents. * * * But if you believe from the evidence that the market price of such catalpa trees was not a matter of public knowledge or could not be ascertained by reasonable effort and inquiry, * * * then in that event the defendant would not be bound by said written order, etc.

"(11) The jury are instructed that false representations, in order to constitute a defense to a contract, must be statements as to past or existing facts, and not merely statements of opinion or as to something to happen in the future, and any such statements of opinion or false statements of something to happen in the future are for the purpose only of showing circumstances to be considered by the jury for whatever they think they are worth as to the question of whether or not the plaintiffs' agent made false representations to the defendant upon which defendant relied and which prevented defendant from having a full and fair opportunity to read said order."

Since we have seen that the false representations as to the market value were sufficient to avoid this contract, we need not enter the more debatable inquiry as to whether the false representations as to the quick growing qualities of the catalpa seedlings were likewise statements of fact on which the vendee having no knowledge of catalpa might rely, or whether they were mere expressions of opinion, excusable as "puffing" or "dealer's talk." On the main point already covered it is clear that the plaintiffs cannot prevail.

Counsel for plaintiffs conclude with a pessimistic and gloomy horoscope of the future if business men cannot enforce written contracts according to their terms. But we are bound by the findings of fact. From the time of Cicero until now it has been the law that fraud vitiates contracts—vitiates everything it touches, and through its perpetration no one acquires a right of action. "Nemo ex proprio dolo consequitur actionem." However reputable a business firm the plaintiffs may be, the jury has found that their agent procured the defendant's signature and assent to this contract through fraud and misrepresentation, and, as no prejudicial error is disclosed, the judgment is affirmed. All the Justices concurring.

(99 Kan. 315)

GOOD v. HIGGINS. (No. 20451.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. LIBEL AND SLANDER ⟸124(3)—ACTIONS—INSTRUCTIONS.
Instructions to a jury concerning express and implied malice examined, and *held* sufficiently accurate and plain for the purpose of the cause under consideration.
[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 369; Dec. Dig. ⟸124(3).]

2. LIBEL AND SLANDER ⟸125—VERDICT AND FINDINGS.
In an action for damages for slander, in which eight separate counts were pleaded setting forth different slanderous statements uttered by the defendant, it is *held* not to be reversible error for the trial court to refuse to submit a special question which asked how much damage the jury allowed for each separate slander; and a general verdict for a reasonable sum is sufficient.
[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 374; Dec. Dig. ⟸125.]

3. LIBEL AND SLANDER ⟸121(2)—ACTIONS—EXCESSIVE DAMAGES.
Where two persons are candidates for a public office, and one publicly proclaims the other to be a "thief," an "embezzler," "dishonest," "crooked," and the like, and the jury specially finds that such statements were not made in good faith, a verdict awarding damages in the sum of $1,500 to the slandered person cannot be disturbed as excessive.
[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 354; Dec. Dig. ⟸121(2).]

4. LIBEL AND SLANDER ⟸48(3)—PRIVILEGE—PUBLICATIONS CONCERNING CANDIDATE.
Before such statements concerning a candidate for office can be justified or excused as privileged, it must be shown that they were uttered in good faith, in the sincere belief of their truth, and with good reason to believe that they were true, and that they were uttered in an honest endeavor to lay the facts before the electors as to the real fitness of the candidate who sought their suffrages. Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281, 20 L. R. A. (N. S.) 361, 130 Am. St. Rep. 390.
[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 146; Dec. Dig. ⟸48(3).]

Appeal from District Court, Mitchell County.

Action by Robert Good against J. W. Higgins. Judgment for plaintiff, and defendant appeals. Affirmed.

Smith & Else, of Osborne, and C. M. Higley, of Cawker City, for appellant. Luts & Jordan, of Beloit, and J. W. Tucker, of Cawker City, for appellee.

DAWSON, J. The plaintiff brought this action for damages on account of certain slanderous statements made by defendant against plaintiff while the latter was a candidate at an informal election held in Cawker City to determine the popular choice for postmaster, pursuant to an arrangement be-

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tween Congressman John R. Connelly and the candidates seeking his favor and recommendation for that appointment.

The petition in eight counts alleged, in substance, that prior to that election and while the campaign was progressing, in the presence of various electors, the defendant had willfully and maliciously uttered and published false, scandalous, and defamatory slanders concerning the plaintiff, as follows:

"Robert Good is dishonest." "If Robert Good is as crooked in the post office as he was in the Chautauqua business he won't last six months." "Robert Good simply stole the Chautauqua blind and has been stealing right along, and I can prove it." "Robert Good is an embezzler and I can prove it." "If Good gets the post office and he is as dishonest in handling that business as he was in the Chautauqua business, he will not last long." "Good is a thief and embezzler and he ought to be behind bars." "Why he [plaintiff] has that home up there that he got with money that he stole from the Chautauqua association." "Good is a thief and an embezzler and ought to be in the penitentiary."

The defendant's answer pleaded certain business transactions touching the purchase of a newspaper, the giving of certain notes by defendant and others to borrow money to buy the newspaper; that the paper was bought in the name of certain trustees, and that plaintiff was to have it when he had fully paid the purchase price; that plaintiff had agreed to sell a newspaper owned by him in Jamestown and apply the proceeds on the notes; that he failed to do so but bought a homestead residence instead; that he had falsely represented that he was the owner of the newspaper; that in disregard of his agreement with defendant and others he had made another contract with the former owner of the newspaper for its purchase, fraudulently attempting to supersede the trustees and signers of the notes; that plaintiff, as secretary and manager of the Lincoln Park Chautauqua Association, had induced defendant and others to guarantee the Chautauqua expenses, and had misrepresented its financial condition, and that it had become insolvent under plaintiff's management; and that in 1912 plaintiff conducted another Chautauqua and had induced defendant and others to guarantee the payment of certain of its expenses, and that he had violated his promise to satisfy these in order and that he had diverted the funds to other purposes, and that the defendant and the other guarantors were being called on by creditors to pay upon their guarantee, and that plaintiff had never rendered a complete account of the Chautauqua affairs.

Defendant also pleaded the plaintiff's candidacy for the office of postmaster, and that such statements as he had made concerning plaintiff (not admitting their form or substance as set forth in the petition) were made with full knowledge of the facts, without malice and in good faith, canvassing the worth of character and qualifications of plaintiff for the office of postmaster, and that all he had said concerning plaintiff was true, and justified and privileged, and that:

"Believing and having good reason to believe that the plaintiff was an unfit and improper person to hold the office to which he aspired, he did, without malice, oppose the election of plaintiff as he felt in duty bound to do and did try to dissuade electors from voting for plaintiff and to vote for the successful candidate."

Plaintiff filed an extended reply, making appropriate traverses, and explaining and justifying his conduct in the newspaper deal, the purchase of his residence, his claim of ownership of the newspaper, his record as secretary and manager of the Chautauqua, and its financial affairs.

The cause was tried to a jury and a general verdict for plaintiff was rendered, awarding him $1,500 as damages. Certain special questions were submitted in which the jury were asked to state whether defendant had called the plaintiff "a thief," "embezzler," "crooked," "dishonest," and the like. All of these were answered "Yes."

Other questions were submitted:

"Question 5. If any statements were made by defendant, were they made during the campaign for postmaster? Answer: Yes.

"Question 6. If any such statements were ever made, were they made or uttered in good faith for the purpose of inducing voters to vote for a particular candidate? Answer: No."

From the judgment on the verdict, defendant appeals, assigning error in the instructions, in the court's refusal to submit a special question asked by defendant, and in the excessive verdict.

[1] The court instructed the jury concerning express and implied malice as follows:

"(5) Slander is the malicious defamation of a person with respect to his or her character, trade, profession, or occupation, by words or signs.

"(6) Malice means a wrongful act done intentionally without just cause or excuse.

"(7) The words must be uttered maliciously before a recovery can be had of the speaker.

"(8) While ordinarily the words must have been uttered maliciously and it must so appear before a recovery can be had of the speaker, yet you are instructed that the words falsely imputing to a party the commission of a crime are actionable per se., that is, actionable in themselves, and the law presumes that the party uttering them intended maliciously to injure the person concerning whom they were spoken unless the contrary appears from the evidence, occasion, or manner of speaking them. Such malice so presumed is known as implied malice as distinguished from express malice."

"17. In an action for a slander punitive or exemplary damages can be allowed only when defendant is found to have been actuated by express malice. Express malice is defined in paragraph 6 of these instructions.

"18. * * * But as to whether * * * you award any sum as punitive damages rests in your sound discretion, and you would not be compelled to award any sum as punitive damages, even though you should find that the defendant did maliciously speak the words as alleged in the petition."

It is contended that no distinction is here made between implied malice and express malice, and that this distinction was important because no evidence of actual damages was shown. We think the court's instructions on this point were plain and sufficient.

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Moreover, the record discloses positive evidence touching plaintiff's actual damages. The plaintiff testified that many of the persons in whose hearing the defendant had uttered the slanderous statements concerning plaintiff had reported the defendant's language to him:

"Q. State whether or not these discussions in your place of business were ever had with reference to the effect it had on the publishing of your paper.

"Counsel for Defendant: "Object to the question for the reason it is incompetent, irrelevant, and immaterial, and calls for a conclusion.

"The Court: Objection sustained. * * *

"Q. You may state your feelings when these statements were made to you. * * * A. I felt very much hurt and humiliated. * * * A. My feelings as I stated were particularly a hurt feeling and one of deep humiliation, which made it almost impossible for quite a period of time for me to meet those with whom I had been associated. * * * A. For quite a period of time it affected me very seriously in a mental way and affected my ability to transact business to such an extent that at some times I even left the office and would go away by myself in order to recover my usual state of mind and get control of my nerves."

Damages of the sort testified to by plaintiff are about the only kind of damages that the victim of a slander would ordinarily sustain or would be able to prove; and unless the courts will redress the grievances of a slandered person on this kind of proof, it might as well be judicially declared that slander is not an actionable wrong. The jury found that the slanderous words were not uttered in good faith, and this together with the general verdict seems sufficient to cover the essential of express malice.

[2] Complaint is made of the court's refusal to submit to the jury this question:

"If you find for the plaintiff, state how much, if any, you allow upon each separate cause of action."

Here was no error. While rules of good pleading encourage the separate statement of technically different causes of action, for the convenience of the court, jury, and litigants, so that plaintiff's several allegations may be more readily traversed, admitted, denied, proved, and disproved seriatim, yet in an action for slander it would serve no good purpose to catechise the jury on how much they assessed the defendant for calling the plaintiff a thief, how much for calling him an embezzler, how much for calling him dishonest, etc. See Thompson v. Harris, 64 Kan. 124, 67 Pac. 456, 91 Am. St. Rep. 187. If the defendant be held to the same technical strictness which he invokes, his special question really involved eight questions in one since there were eight causes of action pleaded. Railroad Co. v. Aderhold, 58 Kan. 293, 49 Pac. 83. But it may be conceded without disturbing the result that the jury never did go through the eight specific and separate causes and allow so much on the first, so much on the second, so much on each, and add up the separate items to a total of $1,500 as found by their verdict. Like sensible men they considered all the facts, and in the exercise of their best judgment awarded the plaintiff a sum within the total amount prayed for sufficient in their opinion to compensate him for his grievances. No court would permit a jury to be catechised in a personal injury case on how much they allowed for each sprain, each bruise, each fracture, and the like, and no logical difference is discoverable here to justify a different practice.

[3, 4] Under the error assigned on the excessive verdict, the defendant contends that the statements were privileged because the plaintiff was a candidate for office. To be privileged under that rule (Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281, 20 L. R. A. [N. S.] 361, 130 Am. St. Rep. 390), it should be made to appear that defendant uttered the statements in good faith, believing with good reason that they were true, and that he did so in a sincere effort to advise the electors what manner of man the plaintiff was who sought their suffrages. But the jury has foreclosed the possibility that the statements which he uttered concerning his opponent were made in good faith in a sincere effort to apprize the electors of defendant's fitness for postmaster. Few men would consider an award of $1,500 an adequate compensation for being subjected to such slanders as were uttered against this plaintiff in and about the community in which he resided.

Certainly the verdict is not excessive, and since no substantial error is discernible, the judgment is affirmed. All the Justices concurring.

(22 N. M. 289)

STATE v. DANIELS. (No. 1898.)

(Supreme Court of New Mexico. Sept. 20, 1916. Rehearing Denied Dec. 23, 1916.)

(Syllabus by the Court.)

CRIMINAL LAW ⇐603(2) — CONTINUANCE — PROCEEDINGS TO PROCURE—APPLICATION.

A party seeking a postponement of a trial for any cause should ordinarily apply therefor by written motion, supporting same by affidavit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1349, 1350, 1355; Dec. Dig. ⇐603(2).]

Appeal from District Court, Guadalupe County; D. J. Leahy, Judge.

James Noah Daniels was convicted of manslaughter, and appeals. Affirmed.

The appellant, James Noah Daniels, and his brother, Huey Daniels, were jointly indicted at the September, 1915, term of the district court of Guadalupe county for the murder of John A. Tatum, the indictment alleging that the wound which caused death was inflicted with a bullet from a gun on May 26, 1915; death resulting on the 4th day of June following. The indictment was returned September 28, 1915, and the defendants were evidently arrested on the same

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day, for they were arraigned and entered a plea of not guilty at 1:30 p. m. of that day. The case was set for trial the following Thursday, September 30th, and on that day was tried, with the result that a verdict of guilty of manslaughter was returned against the appellant, and a verdict of not guilty against his codefendant. From a judgment of the trial court sentencing appellant to a term of from seven to ten years in the penitentiary, appellant prayed and was granted this appeal.

F. Faircloth, of Santa Rosa, for appellant.
H. S. Bowman, Asst. Atty. Gen., for the State.

HANNA, J. (after stating the facts as above). The appellant assigns two grounds of error: First, that the court erred in not granting him six days in which to prepare his defense; second, that the court erred in not postponing his trial until his attorney had an opportunity to talk to the witnesses and until they arrived at the place of trial.

An examination of the record discloses that, after the arraignment of the defendants, the cause was set down for trial for Thursday morning, September 30, 1915, without any objection from either defendant, on which date the defendants, accompanied by their attorney, appeared and announced ready for trial. A jury was impaneled, and the cause proceeded to trial without objection or motion for continuance, and the first objections which appear in the record raising the grounds here urged under the assignments of error were raised in the motion for a new trial, where appellant set up that at the time of his arraignment a request was made in open court, by his attorney, for six days' time, or until Monday, October 3, 1915, to prepare for the defense in said cause, which request was denied by the court. It is further set out in the motion for a new trial that, on the day the cause was called for trial, the defendant, by his attorney, advised the court that the witnesses for the defendant lived long distances, and that they had not yet arrived, again requesting that the trial be postponed until he had an opportunity to talk to said witnesses, which request was denied by the court. The motion for new trial was accompanied by two affidavits of appellant, wherein he set up that through counsel he made a request in open court for a postponement of six days to prepare for the defense in the cause, which was denied; and that he had no opportunity of consulting his witnesses between the time of his arrest and arraignment and the time of his trial, and that his witnesses lived at a long distance and did not arrive until the trial of said cause had commenced. The facts set up in the affidavits were verified by his brother and codefendant and one J. W. Brunt.

The trial court entered an order overruling the motion for a new trial, setting out therein that no motion for continuance or postponement was filed in said cause, but that an informal request was made by counsel for the defendant for a postponement for a period of six days, which request was refused for the reason, as stated by the court at the time, that the petit jury would be discharged prior thereto, as there was not sufficient business to retain them so long; the court then advising counsel that he might file a motion for a continuance if he saw fit to do so, whereupon counsel said, in substance, that he preferred a trial at the present term of court. The order of the trial court further recited that the only witnesses who were called upon to testify in behalf of defendant concerning the facts surrounding the homicide were the defendant and his brother, both of whom were present at the time of the request for postponement, and that counsel for defendant had ample time to consult with, and in fact did consult with, both witnesses prior to the time said cause was called for trial. The order of the trial court recited, further, that it was therefore quite apparent that defendant's case was in no wise prejudiced by the late arrival of the other witnesses who testified concerning other matters. It therefore clearly appears that the defendant elected to proceed with the trial of the cause, declining to apply for a continuance and expressing a desire to proceed with the trial at the term of court then in session, and would now seek to speculate upon the denial of his oral request for a postponement of six days which was made at the time of the arraignment of the defendant.

Under the terms of our statute (Code 1915, § 4458), an application for a continuance must be supported by oath unless the facts be within the knowledge of the court, and by section 4462, Code 1915, it would clearly appear that the motion for continuance should be in writing. We are not concerned, however, with the question of the sufficiency of a motion for a continuance because it does not appear that the defendants, or either of them, desired more than a postponement of the cause, and failing to secure such postponement, so far as the record discloses, they were willing to proceed with the trial of the cause without further objection. The court had substantial reasons for refusing the postponement, but evidently would have granted a continuance had the same been applied for. Unquestionably, the accused is entitled to a reasonable time to prepare his defense, but the case of the accused may be set for trial at the same term of court at which he was arrested if he is given sufficient time to employ counsel and prepare for trial. It appears that the witnesses were present in court and with the witnesses for the state were put under the rule. There is an inference to be gained from the order of the trial court that some of the witnesses did not arrive until after the trial had commenced, but the defendants,

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nor either of them, attempted a showing that they were proceeding to trial or compelled so to do in the absence of any material witness.

It has generally been held that:

"When a party seeks a postponement of a trial for any cause, the usual practice is to make a direct application therefor to a court by motion." 6 R. C. L. 562.

And as pointed out in the same section quoted from, the application must be formal in character and in writing, except possibly under special or peculiar circumstances, and supported by affidavit.

With these requirements in mind, it is clearly evident that no error was committed by the district court in denying the oral request of the defendants for a postponement of the cause. Had a formal showing been made, we might be concerned with the question of whether or not the court had exercised sound discretion in refusing the request; but we are not called upon to make such inquiry, because it is apparent from the record that the defendants desired an immediate trial, except for the few days' delay which was sought, and their request for this delay was not seriously urged when it became apparent that a continuance beyond the term would be necessary should the request be granted.

For the reason stated, we find no error in the record, and the judgment of the trial court is affirmed, and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

(49 Utah, 19)

UTAH LAKE IRR. CO. v. JENSEN.

(No. 2862.)

(Supreme Court of Utah. Nov. 23, 1916.)

1. APPEAL AND ERROR ⟸1002—CONFLICTING EVIDENCE.

A finding for appellee will not be disturbed because based on conflicting evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. ⟸ 1002.]

2. EMINENT DOMAIN ⟸221 — DAMAGES — QUESTION FOR JURY.

Whether seepage of waters from a suitable and properly constructed and operated canal will collect in such quantity as to injuriously affect adjoining lands is a question of fact and not of law, and is dependent upon the particular conditions and facts of the case.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 560, 561; Dec. Dig. ⟸ 221.]

3. EMINENT DOMAIN ⟸92—CANALS—DAMAGES.

In action to condemn land for canal purposes, the damages recoverable by a landowner are such as naturally and directly result from the improvement properly constructed and operated.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 236; Dec. Dig. ⟸ 92.]

4. EMINENT DOMAIN ⟸150 — DAMAGES TO LAND—CANAL.

In action to condemn for canal purposes, a strip of land, 22½ to 50 feet in width and 955 feet long, diagonally through a farm of about 25 acres under a high state of cultivation, it appearing that the canal would disarrange the irrigation system and the walls of the farm barn, and that about 8½ acres would be so water-soaked as to be worthless, an award of $210 for the strip taken, and $1,042.50 for injury to lands not taken, was proper.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 402; Dec. Dig. ⟸ 150.]

5. EMINENT DOMAIN ⟸82—DAMAGES—HIGHWAY—EASEMENT.

In proceedings to condemn for canal purposes a strip of land crossing a highway on a farm, the canal to cross the highway underneath the surface, the landowner was entitled to at least some compensation for the land within the highway, since she owned the fee of such land, although burdened with the highway easement.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 215–219; Dec. Dig. ⟸ 82; Highways, Cent. Dig. § 360.]

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Action by the Utah Lake Irrigation Company against Hannah C. Jensen. From the judgment, plaintiff appeals. Affirmed.

Stewart, Stewart & Alexander, of Salt Lake City, for appellant. Smith & McBroom, of Salt Lake City, for respondent.

STRAUP, C. J. The plaintiff, the condemnor, brought this action to condemn for canal purposes a strip of ground, 22½ to 50 feet in width and 955.1 feet long, diagonally through the defendant's lands, an improved farm of about 25 acres, and to assess the damages. The jury awarded the defendant $210 for the strip taken and $1,042.50 for damages to adjoining lands not taken. The controversy chiefly relates to alleged injuries to lands not taken. There is no substantial disagreement between the parties that as to such lands, the defendant was entitled to recovery for all the present and future damages naturally and reasonably incident to a proper construction and operation of the canal, but not as to such as may result from an improper or negligent construction or operation of it. In that connection the plaintiff proposed this request to charge:

"The defendant in this case has attempted to show that the defendant's land will be waterlogged or water-soaked by reason of the construction and operation of the plaintiff's canal. You are instructed to disregard and not consider all such evidence."

It is noticed that the request is not predicated on the theory of a water logged or soaked condition of the land due to a negligent construction or operation of the canal. It rather assumes that such a condition could result only from an improper construction or negligent operation. At least that is what is argued for the request. The court refused it, and charged this:

"In determining whether the remaining land has been damaged by the taking of the land for the right of way and the construction and operation of the canal thereon, and the extent of such damage, you should consider, so far as shown by the evidence, the effect the taking of

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the smaller tract of land in the manner in which it is taken from this farm will have upon the convenient and economical operation, irrigation, and conduct of the farm. You should also consider, so far as shown by the evidence, the question as to whether in the operation of the said canal by the plaintiff in an ordinarily careful and prudent manner, water will escape therefrom where it crosses the defendant's land, and will water-soak and injuriously affect the remaining land situated below the canal; and from all the evidence in the case determine what the depreciation, if any, in the fair market value of the remainder of the land was on February 5, 1914, by reason of the taking of the $^{96}/_{100}$ of an acre and the construction and operation thereon of plaintiff's canal."

[1] It is noticed the charge is predicated on a water-soaked condition of the land, resulting from a careful and prudent operation of the canal. The plaintiff first asserts that there is no evidence to show that any of the land not taken will be water logged or soaked, and hence that the court erred in submitting such a question to the jury. We think there is evidence to support a finding in the defendant's favor on the submitted hypothesis. True, the evidence as to that is in direct and irreconcilable conflict; but the plaintiff accomplishes nothing here by pointing its finger, as it does, to that portion of the evidence most favorable to it and doubling its fists on that against it.

[2, 3] The further contention made is that any substantial damage to adjoining lands from seepage of waters from the canal would so necessarily result from a negligent construction or operation of the canal as not to be recoverable in this action. Whether seepage of waters from a suitable and properly constructed and operated canal will occur in such quantity as to injuriously affect adjoining lands is not a question of law, but of fact, and is dependent upon the particular conditions and facts of the case. That all present and future damages from such source naturally and directly resulting from the improvement properly constructed and operated are recoverable in such an action as this is well settled. 2 Kinney, Irrigation, § 1082; 1 Wiel, Water Rights, p. 669; Denver City Irr. & Water Co. v. Middaugh, 12 Colo. 434, 21 Pac. 566, 13 Am. St. Rep. 234; Middelkamp v. Bessemer Irr. Ditch Co., 46 Colo. 102, 103 Pac. 280, 23 L. R. A. (N. S.) 795.

[4] It is also claimed that the damages awarded for lands injuriously affected are excessive. The defendant gave evidence to show that the whole of her farm is "under a high state of cultivation, and well adapted to raise all kinds of grains, fruits, and vegetables"; that the canal runs diagonally through it, affecting and disarranging the irrigation system on her lands and the walls of her barn or corral; that about 8½ acres will be so water soaked or logged as to render them worthless, and that the improvement otherwise interferes with the use and enjoyment of her property. Her witnesses estimated her damages to be from $2,800 to $5,000. The jury awarded her $210 for the strip taken and $1,042.50 for injury to lands not taken. There thus is evidence to support the verdict.

[5] A public highway in an easterly and westerly direction crosses the defendant's lands. The canal by means of a conduit crosses the highway underneath the surface. The plaintiff requested the court to charge that:

"The defendant is not entitled to recover any damages for the land condemned or taken within the limits of the public highway."

The court refused to give it. Complaint is made of this. The fee to the land occupied by the highway is in the defendant. It is urged that neither the easement nor the defendant's freehold was in any particular affected or damaged, and hence the request ought to have been given. But the defendant's estate by the condemnation was so burdened with another easement as to constitute a taking for which she was entitled to compensation, small though it may be. Coburn v. Ames, 52 Cal. 394, 28 Am. Rep. 634; Ranson v. City of Sault Ste. Marie, 143 Mich. 661, 107 N. W. 439; Kane v. New York El. Ry. Co., 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640; Smith v. Superior Court, 30 Wash. 219, 70 Pac. 484; 37 Cyc. 208.

We, therefore, think the request was properly refused. She certainly would have been entitled to nominal damages, but even those by the request were excluded.

Let the judgment be affirmed, with costs. Such is the order.

FRICK and McCARTY, JJ., concur.

(49 Utah, 24)

In re BEASON'S ESTATE. (No. 2932.)

(Supreme Court of Utah. Nov. 28, 1916.)

1. EXECUTORS AND ADMINISTRATORS ⇐194(5)—ALLOWANCES TO SURVIVING WIFE—SUFFICIENCY OF EVIDENCE.

In a proceeding for an allowance to the surviving wife from the husband's estate, evidence *held* to sustain a finding that she did not voluntarily leave and live apart from him.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 719; Dec. Dig. ⇐194(5).]

2. APPEAL AND ERROR ⇐173(3)—THEORY OF DEFENSE ON APPEAL.

Where an administrator objected to an allowance to deceased's wife solely because she had voluntarily lived apart from her husband, he cannot first raise on appeal the point that she had forfeited her right to the allowance by laches.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1080, 1110, 1111; Dec. Dig. ⇐173(3); Limitation of Actions, Cent. Dig. § 737.]

Appeal from District Court, Weber County; N. J. Harris, Judge.

In the matter of the estate of Charles M. Beason, deceased. Petition by Hattie F. Beason, as surviving wife, for an allowance

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pending the estate's administration. Judgment granting the allowance, and the administrator appeals. Affirmed.

A. G. Horn, of Ogden, for appellant. S. T. Corn and Wade M. Johnson, both of Ogden, for respondent.

STRAUP, C. J. The petitioner, Hattie F. Beason, as the widow of Charles M. Beason, deceased, was granted out of the estate a family allowance of $50 a month for a year, or the sum of $600, pending the administration of the estate. The administrator appeals. He contends: (1) That the petitioner and the deceased for several years prior to his death had not lived together, and that he had not contributed to her support; and (2) that the petitioner, by lapse of time, had forfeited her right to an allowance.

As to the first, the court found that the petitioner "did not live separate and apart from the deceased at the time of his death of her own accord, or without the consent of the deceased," and that their separation was due to the deceased's failure to provide for her. These findings, the administrator asserts, are not supported by, and are contrary to, the evidence.

[1] The parties were married in April, 1907, and lived together at Ogden until in June, 1911. She then became ill and had pneumonia, and, on advice of her physician, went to California and remained there until 1913. She then returned to Ogden, and, after remaining there a short time, went to Denver, and there lived with her married daughter until the death of the deceased, which occurred in July, 1914. She also there was sick and had an operation performed at the hospital. It is not made to appear that she went to California without the consent, or against the objection, of the deceased. To the contrary, it is shown that he had intended, as soon as matters of his own could be straightened up, to go there himself and live with the petitioner. It was shown that he, though able to do so, had not contributed anything to the petitioner's support from 1911 until his death, and that during that time the petitioner was supported by her daughter and from a small inheritance—several hundred dollars—from her mother. It also was shown that the deceased was "a heavy drinker and traveled about a good deal." The petitioner, while in California and in Colorado, wrote to the deceased every two or three weeks, and he at different times wrote to her. On the 1st of January, 1914, while at Denver, she, in response to a letter received from the deceased, wrote him:

"* * * I am glad to know you have some one to keep house for you; how do you like your new daughter-in-law? I have seen by the papers that cattle are bringing a good price now and hope you will benefit by your bargains. You better let some one settle your business for you and not return to this high altitude. I am sure Tom could do as well as yourself. As to myself I have made no plans for myself but I am fully convinced that I must have a home of my own somewhere. I am tired being a wanderer. When I wrote you I would go to you and care for you when you were so ill I meant to do so till you were well again. As for us living together again it is impossible. I mean to be perfectly plain with you and while we can be friends we certainly can be no more. I have made two trials and found out my mistake after years of unhappiness. Now don't think I am writing with any malice. I have outlived all of this and now am just telling you the truth. There certainly should be some consideration for me I think. I did my part at all times, but was not appreciated. Don't blame the girls, they have nothing to do with that. I must do as you said. It is better as it is. I would like to live in California, but what little I have comes from Mabel and she don't want me to go out there alone so I can't bear the thought of going back to Ogden to live. * * * If I had any money I would go to California at once and settle myself. I do think you should give me what I need. Do you expect me to live on as Mrs. Beason and have to support myself? I have managed for three years, but it seems that I am entitled to some consideration, and you are generous enough with others, why not with me? You always seem to think it has been a hardship to do for me. You can write me here," etc.

This letter is pointed to by the administrator as proof of the petitioner's willful refusal to live with the deceased. When looked at alone it may show her declaration not to live with him, but even as to that was not conclusive of such an intention, nor that their living apart was her desire or her seeking. Against it are the declarations of the deceased that he, as soon as he could, intended to go to California and there live with her. And certainly it does not show that their living apart was willful on her part, or without cause, but rather indicates that their living apart was due to the deceased's fault.

We think the findings complained of are sufficiently supported by the evidence.

[2] Now as to the other point. It is claimed that the petitioner, by lapse of time, forfeited her right to an allowance. The deceased died in July, 1914. An administrator was appointed and letters issued to him in August, 1914. The petitioner filed her petition for an allowance in April, 1915, less than a year from either the death of the deceased or the granting of letters of administration. It is claimed that the estate was insolvent, but no such finding was made and no complaint that there is no finding on the subject. To support appellant's contention he cites Zunkel v. Colson, 109 Iowa, 695, 81 N. W. 175. But the statute there limited the allowance to 12 months after the death of the deceased. Our statute (Comp. Laws 1907, § 3846), is dissimilar, and more nearly like the California statute, where it has been held that the widow's delay in demanding her allowance does not forfeit her right thereto. In re Welch, 106 Cal. 427, 39 Pac. 805; In re Lux, 100 Cal. 593, 35 Pac. 341. But there was no such issue tendered. The only objection pleaded by the administrator to the allowance was that the petitioner, without

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cause, of her own accord, and without the consent of the deceased, at the time of his death, and for a long time prior thereto, had lived separate and apart from him. Not having tendered any issue as to delay or forfeiture on such ground, the administrator is not now, here for the first time, in position to urge such a defense.

We are therefore of the opinion that the judgment of the court below should be affirmed, with costs.

Such is the order.

FRICK and McCARTY, JJ., concur.

(49 Utah, 28)

RICHARDS et al. v. SALT LAKE CITY.

(No. 2925.)

(Supreme Court of Utah. Dec. 1, 1916.)

1. MUNICIPAL CORPORATIONS ⟸404(8) — DAMAGES—JURY QUESTION.

Where there was testimony that defendant city in adjusting a street grade took a strip of plaintiffs' land, tore down their fence, and dumped material on their property, *held*, that a directed verdict for defendant was properly refused.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 997; Dec. Dig. ⟸404(8).]

2. EMINENT DOMAIN ⟸307(2) — DAMAGES — JURY QUESTION.

Where defendant city increased the difference in levels between plaintiffs' property and the adjoining street from one to three feet, took a strip of their property and dumped material on their land, the city cannot be said as a matter of law to have merely corrected surface irregularities without injuring plaintiffs' property.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 823; Dec. Dig. ⟸307(2).]

3. EMINENT DOMAIN ⟸101(1)—PUBLIC IMPROVEMENTS — DAMAGES — CONSTITUTIONAL PROVISION.

Under Const. art. 1, § 22, prohibiting the taking or damaging of private property without compensation, a city cannot make an initial grade of a street which damages the plaintiffs' adjoining property without compensating them for it.[1]

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 269; Dec. Dig. ⟸101(1).]

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Action by Daniel B. Richards and Hester T. Cannon Richards against Salt Lake City. Judgment for plaintiffs, and defendant appeals. Affirmed.

H. J. Dininny, City Atty., and Aaron Myers and W. H. Folland, Asst. City Attys., all of Salt Lake City, for appellant. D. B. Richards and Geo. F. Goodwin, both of Salt Lake City, for respondents.

STRAUP, C. J. The plaintiffs brought this action to recover damages alleged to have been caused to their property situate in Salt Lake City on the east side of Thirteenth East street between Eleventh and Twelfth South streets by the defendant grading the street and sidewalk in front of their premises, dumping earth and material upon and taking a strip of their land, destroying their fence, and rendering rights of way inaccessible. The case, tried to a jury, resulted in a judgment in plaintiffs' favor for $502, from which the defendant appeals.

The plaintiffs acquired the property in 1903. It then was without the corporate limits of the city. The street or highway and a dirt sidewalk had been maintained by the county along Thirteenth East street in front of plaintiffs' premises, and had been traveled and used by the public for many years. The property is especially valuable for residence purposes. Upon it the plaintiffs maintain a dwelling, where they live, and other improvements. The county had not established any official grade of the street. It merely improved it and kept it in repair. There thus was no grade other than the natural grade, and such as existed from long usage, travel, and maintenance of the street. In 1907 the corporate limits of the city were extended so as to take the plaintiffs' property within the city limits. The sidewalk in front of plaintiffs' property for a distance of about 150 feet then was from 1 to 2 feet higher than the traveled portion of the street, and for a distance of about 227 feet was from 1 to 2½ feet, for a part of the width of the sidewalk, lower than the traveled portion of the street, and for about 10 feet at the north end along a gulch was about 20 feet lower. Thereafter water mains were laid in the street by the city in conformity with such natural grade. In 1913 the city for the first time established an official grade of the sidewalk and street which in front of plaintiffs' property for a distance of about 150 feet lowered the sidewalk from 1 to 3½ feet, and for 227 feet raised the sidewalk from 1 to 3 feet, and along the gulch raised it 20 feet. The improvement was made in accordance therewith, and in making it the city as claimed by the plaintiffs, for a distance of about 287 feet, extended the sidewalk and encroached upon their property to a width of zero at one end and 9 feet at the other, thus taking from them a triangular strip 9x287 feet, tore down their fence, excavated so near their house as to require a retaining wall, dumped earth and material on their premises, and so raised and lowered the sidewalk as to interfere with their rights of way to and from their property. It is stipulated that evidence was given by the plaintiffs "to sustain the allegations of the complaint." We are therefore no longer concerned with the evidence. Furthermore, the whole of the evidence is not before us.

[1, 2] The chief contention of the city is

[1] Kimball v. Salt Lake City, 32 Utah, 253, 90 Pac. 395, 10 L. R. A. (N. S.) 483, 125 Am. St. Rep. 859; Hempstead v. Salt Lake City, 32 Utah, 261, 90 Pac. 397; Felt v. Salt Lake City, 32 Utah, 275, 90 Pac. 402. Distinguished Coalter v. Salt Lake City, 40 Utah, 293, 120 Pac. 851; Gray v. Salt Lake City, 44 Utah, 204, 138 Pac. 1177, Ann. Cas. 1916D, 1135.

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this: Since no official grade had been established along the street by either the county or the city until the grade of 1913, the city claimed the right to establish a first or an initial grade, and to make the improvement in accordance therewith, as was done, without being responsible for consequential damages, and therefore that it was entitled to a directed verdict in its favor. Manifestly that cannot be so, for, on the plaintiffs' stipulated evidence, and upon a finding in harmony with it, the plaintiffs were entitled to recover for the strip of ground taken by the city, tearing down the fence, and dumping earth and material on their premises. And then we do not think the case within the rule where it may be said, as matter of law, that all the city did was merely to correct surface irregularities and inequalities without injuriously affecting plaintiffs' property. We think such matter was for the jury. The motion to direct a verdict was therefore, on both theories, properly overruled.

[3] The defendant also complains of the court's refusal to give a number of its requests, nine of them. Some of them are argumentative. The substance of others was given. Those chiefly complained of are in line with the city's position on its motion to direct a verdict: That it had the right to fix an initial and official grade and to make the street conform thereto without being liable for any resulting damage, unless the work was done negligently or unnecessarily, and that it would be liable for resulting damages to abutting property only when making improvements under a changed or re-established grade, and that it had the right to make "normal and ordinary improvements for street purposes without paying damages to plaintiffs consequent upon making such improvements." We do not think such a position so broadly taken, is supported by our prior decisions. In Kimball v. Salt Lake City, 32 Utah, 253, 90 Pac. 395, 10 L. R. A (N. S.) 483, 125 Am. St. Rep. 859, Hempstead v. Salt Lake City, 32 Utah, 261, 90 Pac. 397, Felt v. Salt Lake City, 32 Utah, 275, 90 Pac. 402, and Webber v. Salt Lake City, 40 Utah, 221, 120 Pac. 503, 37 L. R. A. (N. S.) 1115, we held that the city was liable for damages to abutting property resulting from changing an established grade and making improvements in accordance with the re-established grade after the abutting property owner had improved his property in conformity with the first-established grade. In Coalter v. Salt Lake City, 40 Utah, 293, 120 Pac. 851, and in Gray v. Salt Lake City, 44 Utah, 204, 138 Pac. 1177, Ann. Cas. 1916D, 1135, we, in effect, held that, when a grade of a street was officially and legally established by a municipality, the abutting property owner was charged with notice thereof, and in making future improvements was required to make them in conformity with such established grade; and, failing to do so, he could not recover for depreciation in value and enjoyment of his improvements placed upon the property after the grade was officially and legally established and before the work in the street in accordance therewith had been done, unless the established grade was either expressly or by implication abandoned, or was no longer recognized by the municipality, or existed for such a length of time without making any improvement in conformity therewith as to indicate an abandonment. The case in hand falls within neither of these and rests on different facts. Here the improvements on the abutting property were made and the property enjoyed before it even was taken within the corporate limits of the city, and no improvements made thereon after the grade was established in 1913. Thus the question is: If, by establishing a grade and by excavating or raising a street and sidewalk in conformity therewith, abutting property is injuriously affected and damaged, may the owner thereof be compensated for such damage? We think this is answered by what is said in Kimball v. Salt Lake City, supra. It is there said:

"It is likewise true that in some states the law is still to the effect that consequential damages are recoverable only where one established grade is changed to another, and that, until the grade is actually established and acted upon, the municipality is not liable for consequential damages. In other words, the city is given the right to depart from the natural or surface grade and establish a different one without liability, if not otherwise liable for negligence or want of care in constructing the improvement. This, however, is not the law under constitutional provisions like ours, which is thoroughly demonstrated by the following, among other cases upon the subject: [Citing numerous cases.]"

This holding was made in virtue of the Constitution, that "private property shall not be taken or damaged for public use without just compensation." Thus, in making street improvements, though in accordance with a first or an initial grade, yet if abutting property is injuriously affected and damaged, the owner, under the Constitution, is entitled to compensation for the same reason that he is entitled to compensation when the injury and damage is occasioned on a changed or re-established grade. Both rest on the same constitutional provision requiring compensation for damage to private property for public use. The basis for compensation is not, Was the property damaged by making street improvements in accordance with an initial and official grade established by the municipality, or in accordance with a changed or re-established grade? but, Was private property taken or damaged for public use? If it was so damaged, then the owner is entitled to compensation, unless he in some way estopped or barred himself, or otherwise forfeited his right thereto. So in making street improvements, though in accordance with a first or an initial grade, yet, if the street or sidewalk, or both, is so far raised or lowered as to injuriously affect abutting prop-

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erty and materially to interfere with its ordinary use and enjoyment, or otherwise is damaged, there is no good reason why, under the Constitution, the owner is not entitled to compensation the same as though the injury and damage were occasioned on a changed or re-established grade. The requests run counter to this, and therefore were properly refused. Had the requests been that the city, without being liable for resulting damage to abutting property owners, had the right to make street improvements which merely corrected surface inequalities and irregularities and rendered the street more safe and convenient for travel, and which were no material injury or damage to abutting property, they very properly could have been given. But they went far beyond this, and to the extent that the abutting property owner was not entitled to compensation, no matter how injuriously his property was affected and damaged, if the improvements made by the city were not negligently or unnecessarily done, and were made to render the street better and more safe and convenient for the traveling public. This, by reason of the constitutional provision, is not in accordance with views heretofore announced by us.

Hence we think the judgment should be affirmed, with costs.

Such is the order.

FRICK and McCARTY, JJ., concur.

(18 Ariz. 345)

DOMINION HOTEL, Inc., v. STATE.

(Cr. No. 407.)

(Supreme Court of Arizona. Dec. 19, 1916.)

1. MASTER AND SERVANT ⟸18—STATUTORY WORKING PERIOD—PROSECUTION—INSTRUCTION.

Where in a prosecution for violating Pen. Code 1913, par. 717, by unlawfully permitting a female person to be employed in a hotel dining room, and perform 8 hours of work in a day, not within a period of 12 hours, it appeared that the employé actually worked at the times and at all times specified for working in the posted notice, the court properly refused to instruct the jury to render a verdict of not guilty if they found that a printed notice of hours of labor not exceeding 8 hours was posted in a conspicuous place in the room where she was employed, and further found that she was not permitted to work at times not designated in the notice as part of the working period; such instruction in effect telling the jury that the period of time in which female employés are permitted to deliver 8 hours' work, in restaurants and like occupations, is fixed by posted notices rather than by statute.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⟸18.]

2. MASTER AND SERVANT ⟸13—STATUTORY WORKING PERIODS—NOTICE.

The notice required by Pen. Code 1913, par. 719, requiring the employer of female help to post a printed notice in a conspicuous place in every room where such females are employed, must require that the 8-hour period fall within a period of 12 hours, otherwise it is invalid as a binding notice.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⟸13.]

Appeal from Superior Court, Gila County; G. W. Shute, Judge.

The Dominion Hotel, Incorporated, was convicted of violating Pen. Code 1913, par. 717, and appeals. Affirmed.

The appellant was informed against, tried, and convicted for the violation of paragraph 717, Penal Code of Arizona 1913, viz.: Having willfully, intentionally, and unlawfully permitted one Agnes Silka, a female person, to be employed in its hotel dining room, and work 8 hours, and to so work 8 hours; said 8 hours of work not being performed within a period of 12 hours. From the judgment of conviction, the defendant appeals.

Alderman & Elliott, of Los Angeles, Cal., and James R. Malott, of Globe, for appellant. Wiley E. Jones, Atty. Gen., G. W. Harben and R. Wm. Kramer, Asst. Attys. Gen., and Norman J. Johnson, Co. Atty., of Globe, for respondent.

CUNNINGHAM, J. The questions of law raised in this case are identical with the questions raised and decided in the case of State v. Dominion Hotel, Inc., 17 Ariz. 267, 151 Pac. 958. In that case the female person employed was Ada Tessner; and the date of the offense was March 2, 1914, while in this case the name of the female employé is Agnes Silka, and the date of the offense is February 28, 1914. In all other respects the informations are identical in language employed.

[1] The questions of law presented in this case will not be again discussed at length. However, on this appeal the further question is argued and may with profit be discussed, because such question was not referred to in the previous case: I have reference to the question raised in several different manners, but will notice the question only as presented by the seventh assignment of error, viz.:

"The court erred in refusing to give the instruction requested by the defendant, which is as follows: 'If you find from the evidence that Agnes Silka was employed upon the 28th day of February, 1914, in the restaurant or dining room of the Dominion Hotel by the defendant Dominion Hotel, Inc., and that a printed notice stating the hours of labor of the said Agnes Silka was posted in a conspicuous place in the room where the said Agnes Silka was employed, and that said hours of labor therein set forth did not exceed 8 hours, and if you further find that the said Agnes Silka was not permitted on said date to work for the defendant at times not designated as a part of the working period in said posted notice, you are instructed to render a verdict of not guilty.'"

Referring to the notice in evidence, it appears that the notice required, on its face, the female employés to commence work at 6 o'clock a. m., and to stop work at 8:30 o'clock p. m., thereby requiring such female

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employés to be employed about the operation of appellant's business at a time not within the permitted hours of their employment; that is, defendant permitted said female employé to work a part of 8 hours in performing a day's work, after a period of 12 hours elapsed from the time of the commencement of such day's work.

The evidence of the witnesses tended to show, without conflict, that this employé actually worked at the times, and at all times, specified for working in the notice; that she commenced and stopped work at the times named in the notice. The instruction in question in effect told the jury that if they believed this evidence, then the law is that the terms of the notice posted control the matter of permitted hours of such employé's employment, and the statute limiting the period of employment to 12 hours is ineffective. In other words, the period of time in which female employés are permitted to deliver 8 hours' work, in restaurants and like occupations, is fixed by the notice posted, and not by the statute.

In the former case, in 17 Ariz. 267, 270, 151 Pac. 958, 959, we said that:

"The offense charged and defined by the statute is that the defendant permitted * * * a female employé to be employed about the operation of its business at a time not within the permitted hours of her employment; that is, defendant permitted said female employé to work a part of 8 hours in performing a day's work after a period of 12 hours elapsed from the time of the commencement of such day's work."

The evidence in this record applicable to the instruction requested including the notice posted, and the testimony of the witnesses, tends to establish that Agnes Silka was required by the statements contained on the face of the posted notice, and did in fact work a part of 8 hours in performing a day's work after a period of 12 hours elapsed from the time of the commencement of such day's work, thereby, without conflict, supporting every essential requirement to establish the offense charged and defined by the statute as determined in 17 Arizona, supra. The requested instruction fails to recognize the nature of the offense charged and the application of the evidence establishing such offense. For that reason the court properly refused the instruction as requested.

Appellant, in support of its contention, quoted, with confidence, the following passages from the opinion in the former case, viz.: "The offense created by the statute is permitting the female employé to work at times not designated as a part of the working period;" and "the fact essential to a conviction must be established that the female employé was permitted to work at a time other than the working times specified in the notice." These passages quoted were used in the former opinion with reference to all of the offenses defined by paragraph 717, supra, including all classes of employment, in arguing the proposition whether the employer-defendant was deprived of the equal protection of the law with railroad restaurant keepers and restaurants located upon railroad rights of way and operated under contract with railroad companies. It was there contended that operators of restaurants, hotels, and eating houses, not falling within the class of railroad restaurants, were deprived of equal protection of the law, for the reason owners of the class to which respondent belonged were not permitted by the statute to cause their female employés, waitresses, to work as a portion of an 8-hour day, after the 12-hour period had elapsed, while owners of railroad restaurants, etc., by reason of the exception in the statute could cause their female waitresses to work an aggregate of 8 hours at any times during the whole 24 hours of the day. In that case the respondent there, the appellant here, assumed that if the statute was valid, the notice posted directing the hours for work by its female waitresses must limit the period for work to 8 hours, and such 8 hours' work must be performed within a period of 12 hours. Respondent's contention, in that case, was based upon such assumption, and this court likewise indulged the same in its references to the notice posted. The court in its opinion says, immediately following the last word quoted:

"The fact that respondent and employers of like occupations are not permitted to apportion more than 12 hours of the day to the performance by female employés of 8 hours' work deprives them of no right of contract protected by the Fourteenth Amendment to the Constitution of the United States and section 4 of article 2 of the state Constitution."

We held in the former case, and this holding is within the clear, plain, unmistakable, terms of the statute, that the offense charged in the information, and defined by the statute, "is that the defendant permitted * * * a female employé to be employed about the operation of its business at a time not within the permitted hours of her employment; that is, defendant permitted said female employé to work a part of 8 hours in performing a day's work after a period of 12 hours elapsed from the time of the commencement of such day's work." We said (17 Ariz. 270, 151 Pac. 959): "These facts admitted the commission of the offense defined in the statute;" that is, the demurrer admitted the facts referred to.

[2] The facts appearing that the female employé performed labor only at the times specified in the posted notice for actual work is not sufficient as a defense, unless the further fact appears that the notice required the day's work to be performed within a period of 12 hours from the time of commencing to the time of stopping, and that the prosecution relied upon paragraph 718, Penal Code, for a conviction under evidence that the female employé was permitted to work at times other than those of the posted notice. Such was not the theory relied upon in this case for a conviction. Had such theory for conviction been relied upon the instruction

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requested would have still failed to present a correct proposition of law, because it fails to take into consideration that the posted notice must require the 8 hours' work period to fall within a period of 12 hours, otherwise, it is invalid as a binding notice when intended to affect the employments here under consideration.

The record contains no error, and the judgment is therefore affirmed.

ROSS, C. J., and FRANKLIN, J., concur.

(18 Ariz. 339)

HARTFORD FIRE INS. CO. v. STEPHENS.
(No. 1520.)

(Supreme Court of Arizona. Dec. 18, 1916.)

1. INSURANCE ⟸230—POLICY—PREREQUISITE TO CANCELLATION.

Under a provision of an insurance policy providing for cancellation and "that when the policy is canceled by the company by giving notice, it shall retain only the pro rata premium," which policy was not governed by Civ. Code 1913, par. 3441, defining cancellation clauses, a return or tender of the unearned premium was a prerequisite to the cancellation of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 509–512; Dec. Dig. ⟸230.]

2. INSURANCE ⟸146(3) — CANCELLATION CLAUSE—CONSTRUCTION.

Any ambiguity in the cancellation clause of an insurance policy will be resolved in favor of the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 295; Dec. Dig. ⟸146(3).]

Appeal from Superior Court, Gila County; G. W. Shute, Judge.

Action by Carlos D. Stephens against the Hartford Fire Insurance Company, a corporation. From judgment for plaintiff, defendant appeals. Affirmed.

Neil M. Allred, of Globe, for appellant. A. C. McKillop, of Globe, for appellee.

ROSS, C. J. [1] The appellee insured his property with the appellant on the 25th day of November, 1912, for the period of one year, at which time he paid the full premium. On the 28th day of June, 1913, the insured building was damaged by fire to the extent of $500. Before the fire, to wit, on the 18th day of June, 1913, the appellant, from its office in San Francisco, notified the appellee by letter, which was received by appellee on the 21st day of June, that in accordance with a clause in the insurance policy "we hereby give you five days' notice of cancellation of this policy." The clause of the policy referred to in the notice of cancellation reads as follows:

"This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If the policy shall be canceled as hereinabove provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of the policy or last renewal, this company retaining the customary short rate, except that when the policy is canceled by the company by giving notice, it shall retain only the pro rata premium."

There is no dispute or controversy as to the facts, the only question being one of law. The learned trial judge determined the question of law in favor of the appellee and gave judgment for the full sum of the damages admitted and sued for. The dispute or controversy is as to the meaning that should be given to the above-quoted clause of the policy, it being the contention of the appellant that after five days from the date appellee received the notice the policy was canceled, and that it was not necessary for it to do any other thing or act than to give the notice in order to effect a cancellation of the policy. Whereas, the appellee contends that the insurer, being the moving party, should not only have given the five days' notice of the cancellation, but should, on or before the expiration of the five days, have returned to the insured the pro rata of the premium then unearned. If the appellant's view of the meaning of the quoted clause is correct, then it did all that the law required it to do, and should have had judgment, but if the appellee's construction of the clause is correct, the appellant, failing to tender or pay the unearned part of the premium on or before the expiration of five days, did not do the things required in order to effect a cancellation, and the contract of insurance was in full force between it and the appellee on the 28th day of June, when the damage by fire occurred.

The policy is what is known as "The New York Standard Policy," and this particular clause of the policy under the same facts that we have here, has many times been before the courts and by them construed. The courts have not agreed as to the meaning of the cancellation clause in the standard form, and it is very difficult to determine upon which side the weight of authority is to be found, although we think more courts of equal eminence and learning have adopted the construction contended for by appellee.

Our statute (paragraph 3441 of the Civil Code), which took effect October 1, 1913, and subsequent to the wrong herein complained of, now defines the cancellation clause in fire insurance policies. That being true, the reasons assigned by the different courts for the one construction or the other would not be profitable to the profession, or any one else, and therefore we shall not undertake to set forth and analyze in extenso the decisions upon either side. Suffice it to say that this form of policy is prescribed by statute in New York, and the courts of that state are the first courts that passed upon and construed the cancellation clause thereof, which is identical with the cancellation clause that we have, and it was therein held that the return of the unearned premium or a tender thereof was a prerequisite to the cancellation of the policy. Nitsch v. American Cent. Ins.

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Co., 152 N. Y. 635, 46 N. E. 1149 (affirming without opinion 83 Hun, 614, 31 N. Y. Supp. 1131).

There has been considerable criticism of this decision, because it is said that the appellate courts assigned no reason for their judgment, but the opinion which was rendered by Judge Bartlett at the trial does assign reasons, which we here give:

"The equivalent of a requirement to refund or tender the unearned premium, as a condition of an effective cancellation by the insurer, may readily be discovered in the standard policy. The whole paragraph on the subject must be read together; and the last clause must not be overlooked. That clause provides that, 'When this policy is canceled by this company, by giving notice, it shall retain only the pro rata premium.' This language plainly imports that the company cannot make the notice effective and at the same time retain the whole premium. The word 'shall,' in the last clause of the paragraph, in reference to the cancellation of the policy, is just as mandatory as the word 'shall' in the first clause. The policy shall be canceled by the company by giving five days' notice, but, when so canceled (that is, at the time the notice takes effect), the company shall retain only the pro rata premium; the latter requirement is as imperative as the former, and can only be complied with by actually returning the unearned premium or offering to return it to the insured. Reading the entire provision as a whole, I am clearly of the opinion that it makes the actual payment or tender of the unearned premium essential to a cancellation of the policy by the company. This construction involves no hardship to the insurer, while that which the court is asked by the defendant to adopt would involve decided hardship to the insured."

See Editor's Note to Davidson v. German Insurance Company of Freeport, 13 L. R. A. (N. S.) 884–886.

The construction given the cancellation clause in the Nitsch Case has since been followed by the courts of that state. Tisdell v. New Hampshire Fire Ins. Co., 155 N. Y. 167, 49 N. E. 664, 40 L. R. A. 765; Buckley v. Insurance Co., 188 N. Y. 399, 81 N. E. 165, 13 L. R. A. (N. S.) 889. In the latter case the court said:

"If the insurance company desires to cancel it must, as we have held in the cases cited, not only give the notice required, but accompany it by the payment or tender of the pro rata amount of the unearned premium; it cannot legally demand of the insured the surrender of the policy and its cancellation until this is done."

In Taylor v. Insurance Company, 25 Okl. 92, 105 Pac. 354, 138 Am. St. Rep. 906, the same contract as we here have was before the court for construction. In that case the court said:

"If the construction contended for by the defendant in error is correct, the clause was intended to read as follows: 'If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that, when this policy is canceled by this company by giving notice (on surrender of this policy), it shall retain only the pro rata premium.' Without the interpolation of the words 'on surrender of this policy' in the last clause, there is an ambiguity, and there is equal reason for the following interpretation: 'If this policy shall be canceled (at any time at the request of the insured), or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that, when this policy is canceled by this company by giving notice, it shall retain only the pro rata premium.' When the policy is canceled by giving 'five days' notice of such cancellation,' the company retaining 'only the pro rata premium,' this cannot be accomplished without a tender, unless the words 'on surrender of the policy' are read into said clause; and if that was the intention, why repeat the words 'by giving notice?' If that contention is correct, it should have been stated as follows: 'This policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that, when this policy is canceled by this company, * * * it shall retain only the pro rata premium.' To say the least, the cancellation clause is ambiguous, and when we consider that the insurer was skilled, not only in the framing, but also the interpretation, of such contracts, and that the insured had no part in the framing thereof, as well as being unskilled in such interpretation, such construction should be adopted as is more favorable to the insured; and especially is this true when the construction contended for by the insurer is not only inequitable, but also unjust."

[2] Considering that these contracts of insurance are prepared by the companies and that the insured has little or nothing to say or do in the formulation of them, being forced to accept what is offered or take nothing, we heartily indorse the rule universally adopted by the courts of resolving any doubt or ambiguity in favor of the insured. That the contract is ambiguous and of doubtful meaning has been decided by the following cases: Peoria M. & F. Ins. Co. v. Botto, 47 Ill. 516–519; Hartford Fire Ins. Co. v. McKenzie, 70 Ill. App. 615–618; Peterson v. Hartford F. I. Co., 87 Ill. App. 567–572; Kinney v. Rochester German Ins. Co., 141 Ill. App. 543–549; Kinney v. Buffalo German Ins. Co., 148 Ill. App. 260; Kinney v. Caledonian Ins. Co., 148 Ill. App. 256; Continental Ins. Co. v. Daniel (Ky.) 78 S. W. 866; Chrisman v. Hartford Fire Ins. Co., 75 Mo. App. 310–315; Taylor v. Insurance Co. of North America, 25 Okl. 92–94, 105 Pac. 354, 138 Am. St. Rep. 906; Hartford F. I. Co. v. Cameron, 18 Tex. Civ. App. 237, 45 S. W. 158; Polemanakos v. Austin Fire Ins. Co. (Tex. Civ. App.) 160 S. W. 1134; Niagara Fire Ins. Co. v. Mitchell (Tex. Civ. App.) 164 S. W. 919. The cases holding to the contrary are almost as numerous: Mangrum & Otter v. Law Union & Rock Ins. Co. (Cal.) 157 Pac. 239; Straker v. Phœnix Ins. Co., 101 Wis. 413, 77 N. W. 752–755; Webb v. Granite State Fire Ins. Co., 164 Mich. 139–142, 129 N. W. 19; Davidson v. German Ins. Co., 74 N. J. Law, 487, 65 Atl. 996, 13 L. R. A. (N. S.) 884, 12 Ann. Cas. 1065; El Paso Reduction Co. v. Hartford Fire Ins. Co. (C. C.) 121 Fed. 937; Schwarz-

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child & Sulzberger Co. v. Phœnix Ins. Co., 124 Fed. 52, 53, 59 C. C. A. 572; Insurance Co. v. Brecheisen, 50 Ohio St. 542–548, 35 N. E. 53; Parsons & Arbaugh v. Northwestern National Insurance Co., 133 Iowa, 532, 110 N. W. 907; Newark Fire Ins. Co. v. Sammons, 11 Ill. App. 230–235.

Although the courts holding that no payment or tender is essential to a cancellation assert with a great deal of confidence that the contract is without ambiguity or doubt, still the fact remains that jurists of great learning, charged with the same solemn duty as they, have come to a different conclusion. It would seem that if the meaning of the contract was so clear, plain, and easily grasped and understood as is asserted by those courts holding that no tender or payment of the unearned premium is necessary, there would be no ground for misunderstanding. The mere fact that courts of equal eminence, learning, and probity disagree as to the construction to be given the contract would seem to import inherent ambiguity and doubt.

The judgment is affirmed.

FRANKLIN and CUNNINGHAM, JJ., concur.

(18 Ariz. 350)

BACA v. STATE. (Cr. 403.)

(Supreme Court of Arizona. Dec. 19, 1916.)

1. CRIMINAL LAW ⇐1106(3), 1130(4) — APPEAL AND ERROR—DISMISSAL OF APPEAL.

Under Pen. Code 1913, §§ 1164–1167, the failure of defendant in a criminal prosecution to file the abstract of record within the time specified by Pen. Code 1913, § 1163, and his failure to file a brief or prosecute the appeal, are insufficient grounds for dismissal of the appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2892, 2970, 3205; Dec. Dig. ⇐1106(3), 1130(4).]

2. INTOXICATING LIQUORS ⇐210 — INDICTMENT AND INFORMATION.

An indictment for attempting to introduce intoxicating liquor into the state of Arizona under Const. art. 23, § 1, must aver the ultimate facts constituting the offense, i. e., the intention of accused to pass such liquors into the state from another state or from a foreign country, a direct act done in furtherance of such intention, and the failure of the attempt due to some intervening cause beyond the control of accused.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 250; Dec. Dig. ⇐210.]

3. INTOXICATING LIQUORS ⇐210—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.

In a prosecution for attempting to introduce intoxicating liquors into the state under Const. art. 23, § 1, an indictment that the defendant did unlawfully and willfully attempt to transport, bring, and carry into the county of Apache, state of Arizona, a quantity of whisky, etc., *held* insufficient to charge the offense of introducing intoxicating liquor into the state.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 250; Dec. Dig. ⇐210.]

4. INTOXICATING LIQUORS ⇐236(1)—INDICTMENT AND INFORMATION—SUFFICIENCY.

In a prosecution for attempting to introduce intoxicating liquors into the state in violation of Const. art. 23, § 1, evidence *held* insufficient to show that defendant, who was apprehended at the state boundary line, committed any act within the state for the purpose of introducing intoxicating liquors into the state.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300–302, 307, 308, 319–322; Dec. Dig. ⇐236(1).]

Appeal from Superior Court, Apache County; George H. Crosby, Jr., Judge.

D. B. Baca was convicted of attempting to import intoxicating liquors into the State of Arizona, and he appeals. Vacated and remanded, with instructions.

George Estes, of El Paso, Tex., for appellant. Wiley E. Jones, Atty. Gen., and R. W. Kramer and Geo. W. Harben, Asst. Attys. Gen., for the State.

CUNNINGHAM, J. The appellant was charged by indictment of the crime of "attempting to import intoxicating liquors into the state of Arizona." The particular circumstances of crime are alleged to have been as follows:

"The said D. B. Baca on or about the 7th day of December, A. D. 1915, and before the finding of this indictment at the county of Apache, state of Arizona, did unlawfully and willfully attempt to transport, bring, and carry into the county of Apache, state of Arizona, a large quantity or amount of alcoholic liquors, to wit, whisky, and that at said time there was in full force and effect a law within the state of Arizona known and designated as the prohibition amendment, which prohibits and forbids the attempt to introduce or import into the state of Arizona of any and all alcoholic liquors or beverages of whatever kind, and that the whisky so attempted to be introduced into the state of Arizona is one of the alcoholic beverages mentioned and covered by said prohibition amendment, contrary to the form, force, and effect of the statute in such cases made and provided," etc.

To this indictment the defendant demurred. The demurrer was overruled. The defendant entered a plea of "not guilty," and upon a trial had was convicted of the charge and sentenced to punishment, from which sentence he appeals.

The Attorney General has moved to dismiss the cause, for the reasons:

First. Because the abstract of record was not filed in this court on March 13, 1916.

Second. Because appellant has failed to file a brief.

Third. Because appellant has failed to prosecute his appeal.

As a prayer to the motion, the Attorney General moves the court to dismiss the appeal. Evidently, the intention of the motion at all times was to dismiss the appeal, and at no time did the Attorney General intend to move a dismissal of the cause.

[1] The grounds assigned and relied upon by the Attorney General for a dismissal of

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the appeal are insufficient to justify the order. Paragraphs 1164–1167, Penal Code 1913.

The indictment, relieved of surplusage, charges that the accused has committed a misdemeanor known as "attempting to import intoxicating liquors into the state of Arizona." The particular circumstances of the offense are alleged to be as follows:

"The said D. B. Baca on or about the 7th day of December, A. D. 1915, and before the filing of this indictment at the county of Apache, state of Arizona, did unlawfully and willfully attempt to transport, bring, and carry into the * * * state of Arizona, a large quantity or amount of alcoholic liquors, to wit, whisky, * * * contrary to the form, force, and effect of the statute. * * *"

The fair construction of this charge ought to permit of disregarding the words "the county of Apache" as surplusage, and thereby avoid conflict with the preceding language of the indictment, and preserve as near as may be the evident meaning of the instrument.

The indictment is intended to be based upon section 1 of article 23, Amendment to the Constitution, reading as follows:

"Every person who * * * attempts to introduce into the state of Arizona any ardent spirits, ale, beer, wine, or intoxicating liquor of any kind, shall be guilty of a misdemeanor and upon conviction shall be" punished, etc.

The clear purpose of this clause of the law is to prevent the liquors mentioned and fairly covered by the provision from becoming a portion of the property of the state, to the end of promoting temperance. So anxious are the people of this state in this regard that they were not satisfied to prohibit, under penalty, the introduction of such liquors into the state, but they have gone further and declared that an attempt to introduce such liquors into the state is a separate crime, independent of the crime of the actual introduction of such liquors into the state.

[2] The offense here under consideration is established when from the facts it is made to appear that the accused entertained the intention to pass any of such liquors into the state of Arizona from another state or from a foreign country to be used for an unlawful purpose, a direct act done by him towards the accomplishment of such intention, and a failure to accomplish such intention, such failure caused by something intervening, over which the accused had no control. Clearly the direct act must reach far enough towards the accomplishment of the desired results to amount to the commencement of the consummation before the interruption. In such circumstances, such facts appearing, directly or by legal inference, the offense condemned is established. These ultimate facts must be made to appear from the allegations contained in the indictment, otherwise the offense is not charged.

[3] The allegation that the defendant did willfully and unlawfully "attempt to transport, bring, and carry" whisky into the state of Arizona, fails to set forth the offense in the language of the law or otherwise, except as a conclusion.

What are the facts from which the pleader concludes that such attempt was made? They nowhere appear in the indictment. It is the duty of the court to determine from the facts alleged in the charge whether a criminal offense has been stated. In the absence of facts, this duty cannot be performed.

Under the allegations of this indictment the court may only adopt the prosecutor's conclusion, viz. that the facts known to the pleader are such as constitute an attempt to introduce whisky into the state of Arizona in violation of law; thereby placing the duty of determining the question upon the prosecuting attorney, and not upon the court, where it belongs. I am of the opinion that the indictment fails to state facts sufficient to constitute a public offense, and that the court erred in ordering the demurrer overruled.

For such error, the judgment should be vacated, and the cause remanded, with instructions to sustain the demurrer and take such further action in the premises as the law permits.

Vacated and remanded, with instructions.

ROSS, C. J. (concurring). Granting that the indictment states a public offense, I think there is a total lack of evidence to sustain it. The evidence is to the effect that on the 7th day of December, 1915, the sheriff of Apache county and one of his deputies discovered the appellant and one Joe Espinoza just over the line in New Mexico driving an automobile with several cases of whisky in it in the direction of the Arizona line. The appellant admitted buying the whisky in New Mexico and a purpose to take it to his home at Springerville, Ariz. He was within 200 yards of the Arizona line when intercepted by the officers, and doubtless would have crossed into Arizona had he not been detected. There is, however, no evidence whatever of any act or thing done by him in Apache county, Ariz., connecting him with the transaction in New Mexico. It is not shown when he left Springerville for New Mexico, nor how he traveled. There is an absence of any evidence showing, or tending to show, that appellant while in Arizona even formed the idea of going to New Mexico and returning to Arizona with a load of intoxicating liquors, much less that he did any act in Arizona referable to such a course of conduct.

The indictment charges that the appellant "did unlawfully and willfully attempt to transport, bring, and carry into the county of Apache, state of Arizona, a large quantity or amount of alcoholic liquors," etc. The evidence shows that he was not in Apache county, but in New Mexico, when the attempt alleged was made.

Beside, as a question of law, I do not

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think the allegations "to transport, bring, and carry" import the same meaning as the word "introduce," contained in the Constitution. Clearly it would be no violation of our Constitution for a public carrier "to transport, bring, and carry" into Apache county, Ariz., intoxicating liquors in a continuous shipment from the state of New Mexico to the state of California. The word "introduce" as used in our Constitution means that the liquors are brought into the state for the purpose of commingling them with the other property of the state. But there is nothing in the indictment showing that the said liquors were attempted to be introduced into the state of Arizona from without the state, unless that meaning be attached to the expression in the indictment, "that the whisky so attempted to be introduced into the state of Arizona." This expression affects to refer to some preceding allegation of the indictment showing the introduction of alcoholic beverages into the state from without. There is, however, no such preceding allegation. The words used in the indictment "to transport, bring, and carry" might be construed as conveying the idea that the liquors were shipped into that county from any other county in the state, which, of course, would not be a crime under any law of the state. The new prohibition amendment, which will take effect upon the proclamation of the Governor of the state, denounces as a crime the shipping of liquors from one part of the state to another; but, until that goes into effect, it is no offense to transport or ship intoxicating liquors from one part of the state to another part of the state, or from one county to another county.

For these reasons, I am of the opinion that the indictment fails to state facts sufficient to constitute a public offense.

FRANKLIN, J. (concurring). The indictment in this case, though not a model of good pleading, is, I think, not calculated to embarrass the defendant in his defense. Its allegations, while somewhat obscure, are so framed that a person of ordinary understanding would know that he is charged with the crime of an attempt to unlawfully introduce intoxicating liquors into the state of Arizona at Apache county. The record does not disclose any surprise or even a suggestion that there was a want of knowledge of the crime which is charged. Under the liberal rules of pleading sanctioned by the Code, the indictment is sufficient as against a general demurrer.

Paragraph 808 provides:

"Whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of such intent, which culminates in the commission of *a* (italics mine) crime, either within or without this state, such person is punishable for such crime in this state in the same manner as if the same had been committed entirely within this state."

The court so instructed the jury. It is to be observed that the language of this statute does not require the principal crime to be consummated, but gives jurisdiction of those cases where there is intent to commit a crime and any act is done within this state in execution or part execution of such intent which culminates in the commission of *a* crime. The Code provides for the punishment of attempts to commit crime. In other words, an attempt to commit a crime is denounced by the Code as a crime to the same extent that the full execution of the ultimate design intended is made a crime. If there be present the intent to commit a crime, the performance of some act immediately and directly tending to its commission, but a failure of consummation on account of some intervening cause, then a crime denounced by the law has been committed, to wit, an unlawful attempt to commit a crime. It is clear to my mind that it is competent for the Legislature to determine what acts within the limits of this state shall be deemed criminal, and to provide for their punishment, and the interpretation of this statute in no wise involves the question of the extraterritorial force of the criminal laws of the state.

[4] In this light, the instruction given by the learned judge under paragraph 808, supra, is a correct exposition of the law, but the case made is not within the purview of the statute because the evidence is utterly silent as to any act whatever done by the defendant in this state in execution or part execution of the crime charged. I therefore concur in a reversal of the judgment.

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(82 Or. 377)

STATE v. BRANSON.

(Supreme Court of Oregon. Dec. 27, 1916.)

1. CRIMINAL LAW ⟸368(1)—EVIDENCE—ADMISSIBILITY.

In a murder case, where it appeared that the footprints of a man and woman and a woman's hair rat were found in the vicinity of the body, evidence that a codefendant, wife of deceased, had been seen by several witnesses near the scene of the crime shortly after a shot had been heard, that deceased was jealous of a supposed intimacy between defendant and his wife to defendant's knowledge, and of subsequent comparison of the hair rat with those used by the wife, was admissible as a narration of the circumstances so closely connected with the issue as to be a part of the res gestæ and tending to show joint action, and was not evidence of declaration and acts of a coconspirator before proof of conspiracy forbidden by L. O. L. § 727, subdiv. 6.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 812; Dec. Dig. ⟸368(1).]

2. HOMICIDE ⟸174(6)—EVIDENCE—ADMISSIBILITY.

Testimony of witness as to a comparison of a hair rat found in the vicinity of the body with those found by them at the house of a codefendant, wife of deceased, was properly permitted when the witnesses testified that the "rats" submitted in court were not the ones compared by them at the home of the codefendant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 364; Dec. Dig. ⟸174(6).]

3. HOMICIDE ⟸169(4)—EVIDENCE—ADMISSIBILITY.

Evidence that defendant had been seen talking to a codefendant, wife of deceased, on numerous occasions in front of her home, when her husband was absent, and that she had been seen standing on the bank of the river 100 yards from the bridge on which defendant was standing, was admissible, as going directly to the conduct of the defendant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 344; Dec. Dig. ⟸169(4).]

4. HOMICIDE ⟸171(2)—EVIDENCE—ADMISSIBILITY.

Evidence of comparison made between woman's tracks found at the scene of the homicide with shoes worn by codefendant, wife of deceased, was properly admitted, where the shoes compared were not in court.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 352 ; Dec. Dig. ⟸171(2).]

5. CRIMINAL LAW ⟸703 — TRIAL — STATEMENTS OF COUNSEL.

The action of the court in permitting the district attorney, in his opening statement to the jury, to announce his intention to prove that defendant and codefendant, wife of deceased, had been seen together under peculiar circumstances, although with the purpose of raising a suspicion of adultery and thereby establishing a motive for the killing, was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1659; Dec. Dig. ⟸703.]

6. WITNESSES ⟸349—CROSS-EXAMINATION—IMPEACHMENT.

Defendant's witness was properly questioned on cross-examination as to a purported conversation in which the witness was supposed to have advised the codefendant, wife of deceased, that she and defendant would be arrested, separated, and each misled into thinking that the other had confessed and advising her and requesting another to remain silent as to such advice.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1135–1139; Dec. Dig. ⟸349.]

7. WITNESSES ⟸398(3)—IMPEACHMENT—REBUTTAL.

Where defendant's witness on cross-examination denied statements advising codefendant, wife of deceased, that she and defendant would be arrested, separated, and misled into believing each had confessed, evidence in rebuttal that such statements were made was admissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1275; Dec. Dig. ⟸398(3).]

8. CRIMINAL LAW ⟸829(1)—APPEAL AND ERROR—REVIEW—INSTRUCTIONS.

The refusal of a requested instruction fully covered by the given instructions was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⟸829(1).]

9. CRIMINAL LAW ⟸814(19) — TRIAL — INSTRUCTIONS.

Where there was no evidence of a conspiracy or common design between defendant and codefendant to murder, a qualification of an instruction on alibi that, if defendants were acting together with a common design to bring about the death of deceased, it would not be necessary for both of them to have been actually present at the crime but each is bound by the act of the other in furtherance of the common design, was error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1979; Dec. Dig. ⟸814(19).]

10. CRIMINAL LAW ⟸1186(4)—REVIEW—REVERSAL.

Although Const. art. 7, § 3, as amended in 1911, provides that, if the Supreme Court shall be of opinion that the judgment of the court appealed from was such as should have been rendered in the case, such judgment should be affirmed, notwithstanding any error committed during the trial in a murder case, where the court erroneously instructed the jury as to conspiracy between codefendants, the appellate court may not determine what influence the elimination of the question of conspiracy would have upon the jury's determination, and judgment must be reversed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. ⟸1186(4).]

Department 1. Appeal from Circuit Court, Yamhill County; Harry H. Belt, Judge.

William Branson was convicted of murder in the second degree, and he appeals. Reversed and remanded for a new trial.

William Branson and Anna Booth were jointly indicted for murder in the second degree charged to have been committed in the killing of William Booth on October 8, 1915. Separate trials having been demanded by the defendants, the defendant Branson was placed upon trial, and from a verdict of guilty as charged and a judgment thereon he prosecutes this appeal.

W. T. Vinton and J. E. Burdett, both of McMinnville (McCain, Vinton & Burdett, of McMinnville, on the brief), for appellant. Geo. M. Brown, Atty. Gen., and R. L. Conner, of McMinnville, for the State.

BENSON, J. The first eight assignments of error are so closely related as to be susceptible of discussion together. To clearly

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comprehend defendant's contentions, it is necessary to make a brief statement of the evidence submitted by the prosecution. William Booth, the victim of the alleged homicide, was the husband of the defendant Anna Booth; their home being in the village of Willamina, upon the east bank of the Willamina River. The defendant Branson, a young man 23 years of age, resided with his parents in the same village. On the afternoon of October 8, 1915, at about 1:30 p. m., some witnesses heard a shot fired near the river at a point on the premises of one Yates, about a mile and a half northwest of Willamina, and near the county road running past the Yates place. At about 3:30 p. m. a young man named Carter discovered the dead body of William Booth lying on the bank of the river with one hand and perhaps other portions of the corpse in the water. He immediately hastened to the village and notified the authorities. An inquest was held, and in the vicinity of the body the footprints of a man and a woman were found in the loose soil. A "woman's hair rat" was also found there.

[1] Upon the trial evidence was admitted, over the objection of the defendant, tending to prove that William Booth was jealous of the supposed intimacy between his wife and the defendant; that this jealousy was well known to Branson; that near 1 o'clock on the afternoon of the homicide witnesses saw Anna Booth walking along the county road in the direction of the spot where the body of William Booth was subsequently found; that a few minutes later the defendant was seen going in the same direction; that they each passed Axel Nelson, who was sitting in his wagon on the highway talking to a woman who stood in her doorway; and that Nelson, within a few minutes after defendant passed, drove on in the same direction to his home some four miles west of Willamina, but did not see either defendant again. Mrs. Yates was permitted, over the objection of defendant, to testify that she heard a shot near the river bank at the foot of her garden; that she went down in that direction to see about it, and when near the gate opening into the highway she saw Anna Booth in the road at a point near where the body of Booth was afterwards discovered. Clay Rowell was permitted to testify that on the afternoon of the homicide he was fixing a fence along the road a short distance west of the place where the killing occurred; that about 1:30 p. m. he heard a shot fired; and that within 15 or 20 minutes thereafter Anna Booth passed him going west. Other witnesses testified to the circumstance of visiting the home of Anna Booth on the morning after the homicide and making a comparison of the "hair rat" found at the scene of the tragedy with others which were at the time in the possession and use of the defendant Anna Booth. Defendant urges that all of the evidence was erroneously admitted for the reason that it violates the statutory rule that evidence of the declaration or act of a conspirator cannot be given against a coconspirator until after proof of a conspiracy. Subdivision 6 of section 727, L. O. L. It will be noticed, however, that the testimony referred to does not involve any declarations of Anna Booth, and merely a narration of circumstances so closely connected with the vital issue upon trial as to be a part of the res gestæ.

In Commonwealth v. Kaiser, 184 Pa. 493, 499, 39 Atl. 299, 300, the court says:

"The commonwealth claimed a conspiracy, but the court held the evidence insufficient to sustain that contention, but admitted evidence of the presence and identification of accomplices. The question of accomplices and what they did is a different one from conspiracy, but the two issues run closely together in the mode of proof and the evidence to establish them."

Again, in Fitzpatrick v. U. S., 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078, we note the following language:

"As there was some evidence tending to show a joint action on the part of the three defendants, any fact having a tendency to connect them with the murder was competent upon the trial of Fitzpatrick. The true distinction is between statements made after the fact, which are competent only against the party making the statement, and facts connecting either party with the crime which are competent as a part of the whole transaction. In the trial of either party it is proper to lay before the jury the entire affair, including the acts and conduct of all the defendants from the time the homicide was first contemplated to the time the transaction was closed. It may have a bearing only against the party doing the act, or it may have a remoter bearing upon the other defendants; but, such as it is, it is competent to be laid before the jury."

In Musser v. State, 157 Ind. 423, 61 N. E. 1, it is said:

"The rule urged by appellant in regard to the declarations and acts of a conspirator made after the object of the conspiracy has been accomplished has no application to such evidence. The evidence was concerning a physical fact, and tended to prove the guilt of Marshall, and when considered in connection with all the other evidence in the case also tended to prove the guilt of appellant. There was no doubt that a homicide had been committed. The question of the guilt or innocence of appellant was to be determined by the jury. There was evidence tending to show that three persons were present at the commission of the crime, and any fact tending to connect any one of them with the crime was competent evidence against the others. That evidence of this character is admissible is well settled."

It would seem that the authorities make a marked distinction between evidence tending to show a conspiracy and that which tends simply to disclose joint action. Upon the latter theory the evidence was properly admitted.

[2] It is also contended that the testimony in regard to the comparison of the "rats" was incompetent because the witnesses did not qualify as experts, and, if not experts, the jury was the proper authority to make the inspection. In reference to this point, it may be said that the witnesses for the state

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testified that the "rats" submitted in court were not the ones compared by them at the home of Anna Booth, and under such circumstances it was proper for the court to permit them to testify as to their former comparison.

[3, 4] It is next urged by defendant that the court erred in permitting witnesses to testify, over his objection, to having seen him on numerous occasions talking to Anna Booth in front of her home when her husband was absent and upon one occasion seeing her standing upon the bank of the river at a point about 100 yards above the bridge and the defendant standing upon the bridge smoking a cigarette. It is not for us to discuss the weight, effect, or value of this evidence, but since it goes, not to the acts of the codefendant, but directly to the conduct of this defendant, there was no error in admitting it. What has been said in reference to the "rats" may well be applied to the evidence in regard to the woman's tracks found at the scene of the homicide and measurements and comparisons thereof with shoes worn by Anna Booth. The evidence was properly admitted.

[5] Complaint is also made that the court committed error in permitting the district attorney, in his opening statement to the jury, to announce his intention to prove that the two defendants were seen together under peculiar circumstances, since its purpose was to raise a suspicion of adultery and thereby establish a motive for the killing. As we have already suggested that the evidence referred to was properly admitted, no error can be based thereon.

[6, 7] The next assignment pertains to the questions and answers whereby it was sought to impeach the testimony of Isabel Branson. Briefly stated, the cross-examination of this witness was directed to a purported conversation alleged to have been held between the witness and Anna Booth on the day before the preliminary examination of both defendants before a committing magistrate in which the witness was supposed to have advised Mrs. Booth that she and the defendant Branson would both be arrested, put into separate cells, and each misled into believing that the other had confessed, and advising her to remain silent, and also requesting Maude Fuqua to keep quiet as to such advice. The witness denied making such statements, and in rebuttal the witness Maude Fuqua testified to their having been made. In the case of State v. Olds, 18 Or. 440, 22 Pac. 940, this court says:

"The state had the right, on the cross-examination, to ask this witness anything that would show his interest in the result of the trial, and anything he did in aid of the defendant about the trial, for the purpose of enabling the jury to properly weigh his evidence, and to intelligently pass upon his credibility."

The same doctrine is quite clearly stated in State v. Finch, 54 Or. 482, 103 Pac. 505, and we conclude that there was no error in admitting the evidence.

[8] We now come to the consideration of the charge to the jury. Among others, the defendant requested the court to instruct the jury as follows:

"If you should infer from proven circumstances alone that adulterous relations existed between the defendant William Branson and Anna Booth, you cannot base upon such inference the further inference of the slaying of William Booth by the defendant William Branson. In other words, inferences can only arise from facts legally proved and not from other inferences."

The court refused the request, and this is assigned as error. All that needs to be said in relation to this assignment is that the substance of the requested instruction is fully covered by the charge which was given, and consequently it was not error to decline a repetition thereof.

[9] We shall next consider the court's instruction upon the subject of an alibi. The defendant requested that the jury be instructed as follows:

"You are instructed that one of the defenses interposed by the defendant in this case is what is known as an alibi; that is, that the defendant was at another place at the time of the commission of the crime. The court instructs you that such defense is as proper and legitimate, if proven, as any other, and all evidence bearing upon that point should be carefully considered by you. If, in view of all the evidence, you have a reasonable doubt as to whether the defendant was in some other place when the crime was committed, then you should give the defendant the benefit of the doubt. Regarding the defense of an alibi, you are instructed that the defendant is not required to prove that defense beyond a reasonable doubt, to entitle him to an acquittal, but is sufficient if the evidence raises a reasonable doubt of his presence at the time and place of the commission of the crime charged."

The court gave the substance thereof, but with vital modifications, in the following form:

"You are instructed that one of the defenses interposed by the defendant in this case is what is known as an alibi; that is, that the defendant Branson was at another place at the time of the commission of the alleged crime. This court instructs you that such defense is as proper and legitimate, if proven, as any other and all evidence bearing upon that point should be carefully considered by you. If, in view of all the evidence, you have a reasonable doubt as to whether the defendant was at some other place when the crime was committed, then you should give the defendant the benefit of that doubt, and find the defendant not guilty, subject, however, to the other instructions which I will give you relative to the law of this case. Regarding the defense of an alibi, you are instructed that the defendant is not required to prove that defense beyond a reasonable doubt to entitle him to acquittal, but it is sufficient if the evidence raises a reasonable doubt of his presence at the time and place of the commission of the crime charged. In this case, however, you should bear in mind the instruction which I have heretofore given you that if the defendant and Anna Booth were acting together with the common design to bring about the death of William Booth, in the manner and as charged in the indictment, it would not be necessary for both of them to have been actually present at the place and at the time of the alleged crime, for, as I have stated to you before, each codefendant is bound by the act of

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the other in the furtherance and execution of the common design."

This is undoubtedly a correct and excellent abstract exposition of law, and, if the record disclosed any evidence of a common design or conspiracy to take the life of William Booth, there would be no doubt whatever of the correctness of the charge. We have searched the record in vain for a scintilla of evidence tending to disclose any conspiracy or common design to perpetrate a homicide. This court, in a long line of decisions beginning with Morris v. Perkins, 6 Or. 350, has held that it is error to submit to a jury questions of fact upon which there is no evidence. That the concluding portions of the instruction quoted is error cannot, therefore, be doubted, and to determine that it was prejudicial to the defendant's interest is manifest from the mere reading.

[10] It has been urged that, even though the instruction is error, the judgment should be affirmed under the authority of section 3 of article 7 of the state Constitution as amended in 1911, (Laws 1911 p. 7) wherein it is provided that:

"If the Supreme Court shall be of opinion, after consideration of * * * the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial."

To answer this suggestion fully would involve such a discussion of the value and effect of the evidence in the case as would, under the circumstances, be improper. We thus confine ourselves to saying that an elimination of the question of conspiracy might well have a direct influence upon a jury's determination of the degree of crime involved in the acts as a crime, and such determination must always remain a function of the jury rather than of the court.

It follows that the judgment must be reversed, and the cause remanded for a new trial.

MOORE, C. J., and HARRIS and McBRIDE, JJ., concur.

(82 Or. 388)

PACIFIC CO. v. CRONAN.

(Supreme Court of Oregon. Dec. 27, 1916.)

1. PLEADING ⊂⊃261 — AMENDMENT DURING TRIAL—VARIANCE.

Where defendant, by evident clerical error, failed to deny material allegations, the rule against amendment changing the cause of action does not prevent amendment to enter the denial, especially where both parties went to trial on the theory that such matters were at issue, and plaintiff's only objections were too general to indicate the defect.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 794-800; Dec. Dig. ⊂⊃261.]

2. PLEADING ⊂⊃236(1)—AMENDMENT DURING TRIAL—VARIANCE.

The allowance or refusal of an amendment is largely a matter of discretion of the court and depends on circumstances of the particular case.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. ⊂⊃236(1).]

3. PLEADING ⊂⊃258(3)—AMENDMENT DURING TRIAL.

Courts should be liberal in granting amendments pending trial, when it is evident that such course will further justice, particularly in the case of the defendant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 771, 772; Dec. Dig. ⊂⊃258(3).]

Department 1. Appeal from Circuit Court, Morrow County; Gilbert W. Phelps, Judge.

Action by the Pacific Company against J. E. Cronan. Judgment for defendant, and plaintiff appeals. Affirmed.

This is an action to recover commission for services in procuring a purchaser for bank stock. The complaint, omitting formal matters, is substantially as follows:

"I. That the Charles E. Walters Company at all times hereinafter mentioned was, is, and has been a corporation organized and existing under the laws of the state of Iowa, and having complied with all the laws of the state of Oregon with reference to nonresident corporation, and at all times was authorized to do business in the state of Oregon.

"II. That on or about the 24th day of October, 1913, in the city of Portland, Multnomah county, Or., the defendant herein orally agreed with the Charles E. Walters Company, a corporation, that if the Charles E. Walters Company would procure a purchaser ready, able, and willing to purchase from J. E. Cronan 202 shares of stock in the Bank of Ione, located at Ione, Or., at the book value of said shares of stock, which was estimated to be $55 per share, that defendant would pay said the Charles E. Walters Company 5 per cent. of the total price for which said shares of stock were sold or at which the said the Charles E. Walters Company procured a purchaser.

"III. That terms as to the time of payment by the purchaser of said shares of stock were to be made by said J. E. Cronan at the time a purchaser was procured.

"IV. That thereafter on, to wit, about the 26th day of October, 1913, the Charles E. Walters Company did procure a purchaser, to wit, one L. M. Meeker, who was ready, able, and willing to purchase said bank stock upon terms fixed by the defendant, and thereupon the Charles E. Walters Company notified the defendant and arranged a meeting between L. M. Meeker and said defendant, which meeting was held on the 26th day of October, 1913, and terms of payment were arranged so that L. M. Meeker agreed to pay unto said J. E. Cronan for said 202 shares of stock the book value thereof plus 5 per cent. upon terms satisfactory to said J. E. Cronan.

"V. That said L. M. Meeker as a purchaser was procured solely through the efforts of the said the Charles E. Walters Company and the meeting between said L. M. Meeker and J. E. Cronan was procured solely by the efforts of said the Charles E. Walters Company.

"VI. That the book value of said shares of stock at all times herein mentioned was at least $55 per share.

"VII. That 5 per cent. of the agreed sale price of said 202 shares of stock fixed between said J. E. Cronan and L. M. Meeker is the sum of $555.50. * * *

"IX. That prior to the commencement of this action, to wit, on the 23d day of April, 1914, the Charles E. Walters Company regularly sold and assigned unto plaintiff all of its right, title, and interest in the matters covered in this

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complaint, and the claim of said the Charles E. Walters Company against the defendant."

The original answer denied all of the above paragraphs, except II and VI. Upon the trial plaintiff introduced testimony tending to support the whole case made by the pleadings, including the allegations made in paragraphs II and VI, and the defendant also went into the whole case and offered testimony tending to show that the original offer to sell was coupled with a condition that the purchase was to include certain real estate owned by defendant and not otherwise. He also denied, in substance, that he and Meeker ever came to an agreement as to terms of payment. The plaintiff objected to testimony offered tending to show that the original offer to sell was on condition that the land of defendant should go with the purchase of the stock. There were several objections of this character made, but they were either general and to the effect that the evidence offered was not within the issues pleaded or merely general without stating the grounds. At no time while the testimony was being offered did counsel for the plaintiff specifically point out or call to the attention of the court the fact that paragraphs II and VI had not been denied. The objections being overruled counsel for the plaintiff moved for a directed verdict, and for the first time specifically called attention to the fact that paragraphs II and VI of the complaint had not been denied. Thereupon counsel for defendant moved the court for leave to amend by denying these paragraphs, and, the amendment being permitted, the motion for judgment on the verdict was overruled, to all of which counsel for plaintiff excepted. The matter then went to the jury and resulted in a verdict and judgment for defendant, from which plaintiff appeals.

Joel D. Pomerene, of Portland (Coy Burnett, of Portland, on the brief), for appellant. Guy C. H. Corliss, of Portland (Sam E. Van Vactor, of Heppner, on the brief), for respondent.

McBRIDE, J. (after stating the facts as above). [1] The court did not err in submitting the case to the jury as the defendant's evidence tended in some degree to show that Meeker and the defendant never came to a final, definite agreement as to the terms of payment. While a defendant cannot amend upon the trial by introducing an entirely new cause of defense, we do not think the rule goes so far as to prohibit the amendment of what, in view of the facts in the case, was an obvious clerical error or oversight. At the time the deposition of the first witness for plaintiff was taken, which was several days before the trial, it must have been apparent to counsel for plaintiff that the defense was proceeding upon the theory that the matter alleged in paragraph II was in issue and that a negation of it was the principal defense relied upon. The plaintiff examined the witness Meeker as to the first dealings between himself and defendant where the offer was made by defendant to sell the stock with the land included and further as to a communication from the Walter's corporation informing him that they had the bank for sale without the land. Upon cross-examination the plaintiff's counsel objected that these matters were not within the issues pleaded, but did not call specific attention to this particular defect as to denials. The deposition of this witness was offered on the trial, and it does not appear that the objections raised at the time the deposition was taken were saved in the circuit court. The plaintiff having gone into the question of the contract fully upon this subject and treated the matter of the substance of the contract as if it were actually in issue was in no position to object to testimony that it was not, in fact, in issue as a matter of technical pleading. Plaintiff evidently was not misled in any respect by the omission as its counsel presented its side of the case precisely as though the allegation were denied, and having done so should not be allowed to change its theory when defendant merely met the testimony introduced by it. The objections made to defendant's testimony, while perhaps technically sufficient, were not calculated to inform the court or opposing counsel of the particular defect in the pleading upon which plaintiff relied. In fact, the real purpose of the objections was shrewdly masked behind generalities, and it was not until counsel by a motion to direct a verdict disclosed the fact that like Ah Sin of poetic memory he had a surreptitious "right bower" in reserve in the shape of an omitted denial that the court and counsel discovered the nature of the objections to the testimony.

[2] The allowance or refusal of an amendment is largely a matter of discretion of the court and must depend upon the peculiar circumstances of each particular case; the general rule being that the ruling of the trial court upon the question will not be disturbed unless there is an abuse of discretion or an absolute disregard of some affirmative statute. It is also universally held that the courts should be liberal in granting such amendments when it is evident that such permission will be in furtherance of justice, and this is particularly the case in respect to defendants. Bliss on Code Pleading (3d Ed.) § 430; 1 Cyc. 518; 31 Cyc. 422. The reason for this discrimination in favor of a defendant is that, while a plaintiff, whose evidence is shut out by reason of a lack of a material allegation, may take a nonsuit and begin again, the defendant has no such remedy, but must lose irretrievably.

[3] We are of the opinion that the plaintiff by proceeding in the introduction of evidence upon the theory that the nature of the contract was in issue was estopped to assert

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that such fact had not been technically put in issue by the pleadings, and that the action of the court in permitting the defendant to meet the evidence so introduced and to amend his answer to conform to the facts proved was not an abuse of discretion, but on the contrary was in furtherance of justice, the ultimate aim of which is to allow every party a fair trial upon the merits. Plaintiff having opened the door for the reception of such evidence cannot complain because the defendant and the court treated his example as good law. Charlton v. Scoville, 68 Hun, 348, 22 N. Y. Supp. 883.

The judgment is affirmed.

MOORE, C. J., and BURNETT and BENSON, JJ., concur.

(82 Or. 334)

PARKER et al. v. KELSEY et al.

(Supreme Court of Oregon. Dec. 19, 1916.)

1. GIFTS ⟸49(4)—EVIDENCE—PAROL GIFT OF LAND.
Evidence in a suit to quiet title *held* sufficient to support a finding that plaintiff's father made a parol gift of the land in question to his daughter during his lifetime.
[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 99; Dec. Dig. ⟸49(4).]

2. GIFTS ⟸25 — PAROL GIFT OF LAND — STATUTES.
Under L. O. L. § 804, providing that interests in land cannot be created or transferred except by operation of law, or by an instrument in writing, a mere parol gift of realty will not of itself pass title.
[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 43–48; Dec. Dig. ⟸25.]

3. ADVERSE POSSESSION ⟸41—REQUISITES—EFFECT.
Continuous adverse possession of land for ten years under a claim of title is sufficient to pass to the possessor the fee-simple estate.
[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 184–206; Dec. Dig. ⟸41.]

4. ADVERSE POSSESSION ⟸70—REQUISITES—PAROL GIFT.
A parol gift of land is sufficient to inaugurate adverse possession.
[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 394–414; Dec. Dig. ⟸70.]

5. ADVERSE POSSESSION ⟸96—EFFECT—EXTENT.
Where plaintiffs claim by adverse possession inaugurated by a parol gift of land, they may obtain title to the portion actually inclosed only.
[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 533–536; Dec. Dig. ⟸96.]

In Banc. Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Suit by Violet Parker and another against Grace Kelsey, widow and executrix of the estate of L. S. Kelsey, and others, to quiet title. From a decree for plaintiff, defendants appeal. Affirmed.

This is a suit to quiet title of the plaintiff Violet Parker to a certain quarter section of realty in Union county. The complaint alleges that she is the owner in fee simple of the land, and that since the year 1900 she and her husband have been in the continuous, exclusive, visible, open, and notorious adverse possession of the tract under assertion of right claiming at all times to own the same as against the whole world. A demurrer to the complaint was overruled, and the defendants who appeared filed an answer denying all the allegations of ownership in the plaintiffs. That pleading also recites, in substance, that Grace Kelsey is the surviving widow, and that Violet Parker together with certain defendants are daughters of L. S. Kelsey, deceased; that he made a will devising all his real property to his own children and those of a deceased daughter subject to a life annuity of $1,500 per annum to his widow; that at the time of his death the decedent was the owner in fee of the land in question; and that they deraign title thereto by virtue of his will. The reply traverses all the new matter of the answer. After hearing the testimony and argument of counsel, the circuit court entered a decree quieting the title of the plaintiff Violet Parker to all the land inclosed by her, being the entire quarter, except perhaps five or six acres lying outside her fences. The defendants appeal.

C. H. Finn, of La Grande, for appellants. Thos. H. Crawford, of La Grande (Crawford & Eakin, of La Grande, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). There is no contention in the testimony but that the plaintiffs, Violet Parker and her husband, have been in continuous possession of the premises since about February or March, 1899; that they have inclosed the same, farmed them either by themselves or by tenants every year; and, finally, that in 1913, shortly before the accidental death of her father, they built a small house and shed thereon. It is agreed, also, that the plaintiffs have paid the taxes on the property every year since 1899. They base the title of Violet Parker on a parol gift of the land made to her by her father in the early spring of 1899, coupled with her entry thereupon in pursuance of the gift, and continuous adverse holding of the same until the present time. The only writing involved is a letter written by L. S. Kelsey to the plaintiff Violet some time in February or March, 1899, and delivered to her by her sister at the direction of the writer. It is here set out:

"Violet—Dear Daughter: If Harry (husband) wants to go farming, I will make you a present of the forty acres of land that I bought of Will Tanner, and if that is not enough, I will rent him some more land, but I think he had better run the post office this summer—as you would have to build a house on the land and

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fix it up. Your Loving F. (Father). L. S. Kelsey."

The plaintiff Violet testified:

"Well, I accepted the land in 1899 when my father gave it to me, and in 1900 I fenced—put a partition fence between his place and mine, his 40 acres joining and mine."

She stated that she and her husband farmed the land, kept up the ditches and fences, and in the spring of 1913 built a house and shed upon it; that she never paid any rent for it, but leased it to others part of the time, and otherwise she and her husband cultivated it themselves, using the crops and the rents for their own purposes; and that her father never claimed the land from her.

Laura Goff, her full sister, testified:

"Why my father always said that it was my sister's land; that he gave it to her, and he would be willing at any time to give a deed, if my stepmother would sign it, but he said she never would talk about signing it. He says, 'The land is hers, and it is hers while I live,' and he says, 'I will fix it when I die, that it will be hers afterwards.' 'Why,' he says, 'she don't need to worry about a deed at all, because,' he said, 'the land will be always hers.'"

Lane Goff, the husband of Laura Goff, deposed that he contemplated buying the tract and inquiring of Kelsey asked if it would be possible for him (Goff) to get the title to the land if he bought it, and he goes on to say (speaking of Kelsey):

"And he said that he could not give any better title than she had (referring to Violet) that his wife refused to give a deed. And he says: 'Well, it is her land and doesn't belong to me.' He says, 'It is her land, and belongs to her while I live, and when I die I will fix it so it will be hers then (meaning Violet).'"

Goff also narrated as a witness that he contemplated running a ditch to his own land situated below the premises in question, and that Kelsey told him he could survey a ditch through on his land, but that when he made the survey he found that a ditch there would not accomplish his purpose. In another interview with Kelsey, as the witness states:

"He says, 'You had better go and see Violet, and see if you can get a right of way through her, and that will put your ditch high enough, so you can get over the hill, or the place you want to get over'—a low place in the hill. And so I did. I went up and saw Mrs. Parker, and arranged with her for a right of way for the ditch, which she gave me, and I drew up a contract, and paid her for the right of way; gave her $50 for the right of way for the ditch."

Ed Carnes applied to Mr. Kelsey to lease the tract in question and another 40 immediately east of the same. Speaking of Kelsey, the witness says:

"And I went to him and I wanted to rent the land, and he says: 'I'll rent you my part of it, and you will have to see Mr. Parker. I give that to my daughter.' He says, 'You can rent it from him, I think.' And I saw Mr. Parker and rented it, and also Mr. Kelsey's."

George Carnes went to Kelsey and tried to buy four acres in the southwest corner of the disputed tract. He imputes this language to Kelsey:

"'Well, I don't know, George.' * * * He studied a little while, and he says, 'No, I can't sell it because I deeded it to Violet Parker.' And he says 'You go to her, and, if she wants to sell four acres, it is all right with me.'"

Grant Dalton owned an irrigation ditch crossing the tract. He says that Mr. Kelsey told him that Mrs. Parker was going to shut the water off if he did not put in the boxes and fix the bridges up on the land. He said that Mrs. Parker owned it, and that she was going to shut the water off if he did not fix the hog gaps and the bridge. H. A. Monday says he sought to buy the land of Kelsey in March or April, 1913, and that the latter replied that he could not sell it to him; that he gave it to Violet when she was married. In 1907 or 1908 Sam Carnes applied to Mr. Kelsey to buy the land, but was informed by him that it belonged to the Parkers. C. Olsen testified that he was employed by the Parkers about 1899 or 1890 in putting in crops on the land; that during the time he was at work Kelsey came to him and told him that he had given that 40-acre tract to his daughter, Mrs. Parker. Chris Peterson applied to Kelsey for leave to conduct an irrigation ditch through the premises, but was referred by him to Mrs. Parker. The testimony for the defendants, who have appeared in the case, comes entirely from the widow and her children by Kelsey's second marriage and the husband of one of her daughters. Charles Hutchinson, the son-in-law, testified, in substance, that some of the daughters by the second marriage reported to Kelsey that Violet had made a claim that she could hold the land by virtue of a tax title, and that after consulting an attorney her father made the statement that she could not hold the land by tax title or any other way; further, that somewhere about 1910 Kelsey said that he himself would put in the claim for water on the land to be adjusted by the water board; and, lastly, that some time in 1912 Kelsey said to his wife: "Dearie, your head was level, when you would not sign that deed." Mrs. Kelsey says that in 1899 she had a conversation with her husband about the land. She goes on to state:

"I asked Mr. Kelsey if he meant to deed the land, and he said, 'Yes.' I said, 'You can't do that, because I won't sign the deed.' He says: 'Oh, yes; we will give them the land.' And I said, 'In justice to them all, you have— '" (Interruption by counsel.) And she continued: "That he would have to give them all 40 acres of ground, and I said, 'If you do that, with the large family we have, you and I will be in the poorhouse.' * * * He said, 'Well we will let them have the use of the land until they get started.' Presumably they never got started."

She reported that, when Mr. Kelsey came home from putting in the claim for the water right before the water board, he said:

"'That shyster was there to put in a claim for that land.' I says, 'Did you allow him to do so?' He says: 'No, I didn't; I told him I would tend to my own water rights.'"

She also said that about the year 1910 her husband said that they (referring to the Parkers) did not own the land; that he

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would take care of the ditch rights, would enlarge the ditch if he wanted to; and that it would be a joke to pay damages through his own land. Again, she makes this statement in answer to a question about what Kelsey said concerning his intentions:

"Well, there was one day we were riding by the premises in question, and he called my attention to the poor crop on the ground, and he said, 'I have a notion to sell the land,' as some one had wanted to buy it of him, and he said 'It is practically cut off from what we already own, as we have sold Luther, and, for all Mr. Parker gets out of it, it doesn't make him much good.' I says, 'There would be a powwow in the Parker family if you speak about selling it,' and he says, 'I guess I will do as I choose. They don't own it yet.' He says, 'If we don't sell it, Violet can take it as her share when it comes to a settlement.'"

Maud Hutchinson, a married daughter, of the second group of children, testified about telling her father that Mrs. Parker had said:

"When Luther gets his breaking done, I'll swing my fence around it and take it in."

And that her father said:

"Violet had better be satisfied with what she is getting out of the land. If she gets too smart, she won't get that."

She says that Mr. Goff told Kelsey that Parker wanted some damages for enlarging the irrigation ditch across the premises, and that her father replied, "You don't have to pay any damages." And he said, "I own the land." Other members of the second set of children narrate their concurring versions of these different occurrences mentioned in the testimony for the defendants. Ethel Forsstrom speaks thus of what her father said:

"Well, when Mr. and Mrs. Parker were first married, his intention was to give them the land, and mother would never sign the deed, and later years I have heard him say he was thankful that she never signed the deed to the land; that, if she had of, he would have trouble getting his ditches through; otherwise the land belonged to him and he could do as he liked."

The fact that Kelsey had two sets of children and a second wife gives a pronounced coloring to the whole transaction and largely explains his statements to his wife and the younger members of the family. The testimony for the plaintiff comes mostly from disinterested witnesses. On the other hand, whatever effect may be given to it, the evidence for the defendants is from sources directly interested in the result. The fact stands undisputed that the plaintiffs have been in continuous possession of the property since 1899; that they have inclosed it, separating it from the lands of Kelsey; that they have paid the taxes on it continuously; that they have cropped it every year, either in person or by their tenants, and have never paid any rent.

[1] The preponderance of the testimony is to the effect that Kelsey did everything he could to effect a gift of the property to his daughter by the first wife except to actually make a conveyance of the same, and this he would have done but for the fact that his wife refused to sign the deed. From her own lips come the expressions of his intention to give the land to the plaintiff Violet. This also is indicated by the statement of Mrs. Forsstrom. The very capable circuit judge who heard and saw the witnesses had far better opportunity to estimate the effect and value of the testimony or their statements than we who have only the paper recital before us. A careful reading of the entire record convinces us that his conclusion on the facts was right.

[2] It is unquestioned that the mere parol gift of realty will not of itself pass title; for it is said in section 804, L. O. L.:

"No estate or interest in real property, other than a lease for a term not exceeding one year, nor any trust or power concerning such property, can be created, transferred, or declared otherwise than by operation of law, or by a conveyance or other instrument in writing, subscribed by the party creating, transferring, or declaring the same, or by his lawful agent, under written authority, and executed with such formalities as are required by law."

[3] On the other hand, it is a rule of property in this state that continuous adverse possession of land for ten years under a claim of title is sufficient to pass to the possessor the fee simple estate. This effect is worked out by "operation of law" in harmony with the language of the statute just quoted. Caufield v. Clark, 17 Or. 473, 21 Pac. 443, 11 Am. St. Rep. 845; Dunnigan v. Wood, 58 Or. 119, 112 Pac. 531; Stout v. Michelbook, 58 Or. 372, 114 Pac. 929; Parker v. Wolf, 69 Or. 446, 138 Pac. 463.

[4] The pivotal point in this case is whether a parol gift of the land is sufficient to inaugurate adverse possession. The rule is stated thus in 2 C. J. p. 150, § 267:

"Possession of land by a donee under a mere parol gift, accompanied with a claim of right, is adverse as against the donor, and if continued without interruption for the statutory period is protected by the statute of limitations and matures into a good title. The statute of frauds does not prevent one from entering and claiming under a parol gift and acquiring title by adverse possession. That such a parol gift conveys no title and operates only as a mere tenancy at will capable of revocation or disaffirmance by the donor at any time before the bar is complete is immaterial; it is evidence of the beginning of an adverse possession by the donee which can be repelled only by showing a subsequent recognition of the donor's superior title, or by the donor reclaiming or reasserting his title. * * *"

The following precedents teach the doctrine enunciated in the text quoted: Lee v. Thompson, 99 Ala. 95, 11 South. 672; New Haven Trust Co. v. Camp, 83 Conn. 360, 76 Atl. 1100; Studstill v. Wilcox, 94 Ga. 690, 20 S. E. 120; Stewart v. Duffy, 116 Ill. 47, 6 N. E. 424; Wilson v. Campbell, 119 Ind. 286, 21 N. E. 893; Albright v. Albright, 153 Iowa, 397, 133 N. W. 737; Delano v. Air, 157 Ky. 369, 163 S. W. 216; Wheeler v. Laird, 147 Mass. 421, 18 N. E. 212; In re St. Louis Register Title, 125 Minn. 484, 147 N. W. 655; Davis v. Davis, 68 Miss. 478, 10 South. 70; Allen v. Mansfield, 108 Mo. 343, 18 S. W. 901;

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Tippenhauer v. Tippenhauer, 158 Ky. 639, 166 S. W. 225.

Although he knew the plaintiffs were claiming title and were exercising notorious acts of ownership over the property, he took no steps whatever to rescind his gift. His statements to his wife and members of his younger family are not shown to have been brought to the attention of the plaintiffs and would not constitute a rescission of the gift. They have a strong flavor of being made to placate the wife and her children and amounted to mere bluff. He never did nor said anything to the plaintiffs indicating any intention to carry into effect what he is reported by the defendants' witnesses to have said on the subject. It is not necessary to constitute adverse possession that it should have begun in an act of hostility against the former owner. By his own doing he may give impulse to that condition. Indeed, when a man of his own free will conveys land to another, he himself starts the condition of adverse claim in favor of the other party.

[5] The decree quieted the title of the plaintiff Violet Parker only to what land was within her inclosure. This was correct, for, without any instrument containing words of present grant indicating the exact termini of the holding, the plaintiffs were without the conventional color of title to support their claim to anything more than that which they actually occupied. Besides this, they have not appealed from the decision of the circuit court. There is no error in the record either of fact or of law.

The decree is affirmed.

(82 Or. 587)

MEYERS v. HOT LAKE SANATORIUM CO. et al.

(Supreme Court of Oregon. Dec. 27, 1916.)

1. APPEAL AND ERROR ⟸330(1)—APPELLANT—ASSIGNEE.

L. O. L. § 27, requiring every action to be prosecuted in the name of the real party in interest, section 38, providing that no action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive, and section 549, providing that any party to a judgment or decree other than one given by confession or for want of an answer may appeal therefrom, when construed in pari materia, do not require a substitution in any case except the death of a party, and under them an assignee, to whom a party has assigned his interest in the property affected by the decree subsequent to its rendition, can appeal from the decree in the name of his assignor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1837–1840; Dec. Dig. ⟸330(1).]

2. APPEAL AND ERROR ⟸193(4)—HARMLESS ERROR—PLEADING—TECHNICAL ERROR.

In a suit to foreclose a trust deed which provided that, after default, the trustee might institute foreclosure proceedings when requested to do so by the holders of at least one-half the outstanding bonds secured thereby, a technical error in the complaint, in stating that a majority of the holders of one-half the outstanding bonds had requested the trustee to act, which error was not made a ground of demurrer and was not called to the lower court's attention so that it might be corrected by amendment, does not require a reversal of the decree rendered after a demurrer had been overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1226; Dec. Dig. ⟸193(4); Pleading, Cent. Dig. § 1360.]

3. APPEAL AND ERROR ⟸193(5) — PRESENTING QUESTIONS BELOW — NECESSITY — OMISSION OF MATERIAL AVERMENT FROM COMPLAINT.

Where the complaint omits a material averment, a decree for complainant will be reversed, though the omission was not called to the lower court's attention by the demurrer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1228, 1229; Dec. Dig. ⟸193(5); Pleading, Cent. Dig. § 1366.]

4. CORPORATIONS ⟸479—TRUST DEED—CONSTRUCTION—RIGHT TO FORECLOSE.

A trust deed, securing corporate bonds, one article of which authorized the trustee to institute foreclosure proceedings when any default in the payment of interest or principal should continue for six months and another article of which provided that in case of default in the payment of interest or any of the principal, the trustee might, at the request of the holder of one-half the outstanding bonds, declare the entire amount of the bonds due, and authorized the holders of a majority of the bonds to compel the trustee to so declare or to waive the exercise of the power, or to annul its exercise and to direct the trustee to dismiss any suit begun by it, authorizes the trustee to institute foreclosure proceedings before the default in the payment of interest had continued six months, if requested to do so by the holders of a majority of the bonds.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872–1874; Dec. Dig. ⟸479.]

In Banc. Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Suit by F. L. Meyers, as trustee, against Hot Lake Sanatorium Company, Boise Cold Storage Company, and others, to foreclose a trust deed. From a judgment of foreclosure, the defendant Boise Cold Storage Company appeals. Affirmed.

This complaint was filed January 7, 1916, to foreclose a deed of real and personal property executed by the defendant the Hot Lake Sanatorium Company, a corporation, to the Eastern Oregon Trust & Savings Bank, a corporation, as trustee, to secure the payment of that defendant's first mortgage bonds in the sum of $250,000, issued March 20, 1906, maturing in 20 years and bearing 6 per cent. interest, payable on the 1st days of March and September annually, and evidenced by coupons attached to the bonds. The complaint alleges the execution of the bonds and deed, makes copies thereof a part of that pleading, and avers that default was made with respect to the installment of interest maturing September 1, 1915; that the plaintiff is the successor in interest of the original trustee; sets forth the facts by which he asserts the right to maintain the

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suit at the time it was instituted; and alleges that each of the defendants, the Hot Lake Home & Sanatorium Company, the Clark-Woodward Drug Company, and the Boise Cold Storage Company, corporations, has or claims some interest in the mortgaged property, but that the right of either is inferior to the plaintiff's lien. The Boise Cold Storage Company demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of suit. The demurrer was overruled, and, that defendant declining further to plead and waiving the time allowed for that purpose, a decree was rendered as prayed for in the complaint, and the Boise Cold Storage Company appeals.

Edward J. Brazell, of Portland (Guy G. Willis, of Portland, on the brief), for appellant. Robert Eakin, Jr., of La Grande (Crawford & Eakin, of La Grande, on the brief), for respondent.

MOORE, C. J. (after stating the facts as above). The plaintiff's counsel move to dismiss the appeal on the ground that the appellant had assigned all its interest in the property affected by the decree before attempting to review that final determination. It appears from the uncontradicted affidavits, filed supplemental to the motion, that the Boise Cold Storage Company secured against the Hot Lake Sanatorium Company a judgment for $1,938.29, exclusive of costs and disbursements, that was assigned to the Phœnix Land Company, a corporation, which thereafter took and perfected an appeal in the name of its assignor.

[1] Our statute, which is the foundation of the right asserted by the appellant's counsel, reads:

"Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in section 29, but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract." L. O. L. § 27.

"No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death, marriage, or other disability of a party, the court may, at any time within one year thereafter, on motion, allow the action to be continued by or against his personal representatives or successors in interest." Id. § 38.

"Any party to a judgment or decree other than a judgment or decree given by confession, or for want of an answer, may appeal therefrom." Id. § 549.

Construing these clauses in pari materia, our court is committed to the doctrine that after an action or suit has been commenced no substitution is required, except in case of the death of a party. Long v. Thompson, 34 Or. 359, 55 Pac. 978; Merriam v. Victory Mining Co., 37 Or. 321, 56 Pac. 75, 58 Pac. 37, 60 Pac. 997; Culver v. Randle, 45 Or. 491, 78 Pac. 394; Burns v. Kennedy, 49 Or. 588, 90 Pac. 1102; Fildew v. Milner, 57 Or. 16, 109 Pac. 1092; Oregon Auto-Dispatch v. Cadwell, 67 Or. 301, 135 Pac. 880; Dundee M. & T. Inv. Co. v. Hughes (C. C.) 89 Fed. 182. We conclude, therefore, that as the Boise Cold Storage Company was made a party to this suit and assigned all its interest in the property affected by the decree herein after it was rendered, the assignee, under the provisions of our statute, was authorized to take and perfect an appeal from such determination in the name of the assignor, and having done so, the motion to dismiss the appeal is denied. The conclusion thus reached is deemed essential to a determination of jurisdiction of the appeal, in order to consider the merits of the cause which relate to the action of the trial court in overruling the demurrer. In order properly to understand the question involved it becomes necessary to call attention to clauses of the trust deed. Article 1 thereof, as far as deemed material, reads:

"Until the said Hot Lake Sanatorium Company shall make default in the payment of the principal or interest of the said bonds or some of them, according to the tenor thereof, or of the coupons thereto annexed, or some one or any of them, at the time or in the manner named for the payment thereof, and such default shall continue for the period of six (6) months, or shall make default or breach in the performance or observance of any condition, obligations or requirements contained in said bonds or this deed of trust or mortgage, the said Hot Lake Sanatorium Company may possess, manage, operate and enjoy all the said property and premises hereby mortgaged and receive, take and use the income, tolls, rents, issues and profits thereof to the same effect as if this deed of trust or mortgage had not been made."

Article 3 declares:

"If, and whenever the said Hot Lake Sanatorium Company, or its successors shall make any default in the payment of the principal or interest of said bonds, or some one or any of them, or of the coupons thereto annexed, or some one or any of them, according to the tenor or effect thereof at the time and in the manner of the payment thereof and such default shall continue for the period of six (6) months * * * it shall be lawful for the trustee * * * by its attorney or agent, to sell and dispose of all and singular said property belonging to the Hot Lake Sanatorium Company and all said real property hereby mortgaged as a whole, by public auction," etc., prescribing the place of sale and the notice requested.

Article 4 provides:

"If the Hot Lake Sanatorium Company, or its successors, shall make default in the payment of any interest or any of said bonds according to the tenor thereof, or make default in the payment of any of the sums of money herein promised to be paid, then and thereupon such trustee shall, if requested by the holder or holders of at least one-half in amount of said bonds then outstanding, declare the principal of all of said bonds to be immediately due and payable and thereupon all said bonds shall be due and payable, provided nevertheless that at any time after such default shall have been made, and have continued as aforesaid, and before the actual payment of the principal, it shall be lawful for the holders of a majority in amount of said bonds then outstanding, to direct the trustee, either forthwith to exercise its power of declaring the principal of said bonds due and payable, or waive the exercise of said power, if unexercised, or to withdraw or annul the exercise thereof, if exercised either absolutely or with

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the consent of the Hot Lake Sanatorium Company, or its successors, and to direct the trustee to dismiss any suit brought against the Hot Lake Sanatorium Company, or to abandon any proceeding for the sale of the property herein described, provided, nevertheless, that no action taken by the trustee, or by the bondholders, under this article shall prejudice or affect the powers or rights of the trustee or of said bondholders, in the event of any subsequent default."

Article 5 asserts:

"It shall be lawful for the trustee to exercise the said power of entry or the said power of sale, or both, or to proceed by suit or suits in equity or at law to enforce the rights of the bondholders in the several cases of default on the part of the Hot Lake Sanatorium Company, or its successors herein specified, in the manner and subject to the qualifications herein expressed upon the request as herein prescribed."

The complaint, inter alia, charges:

"That all of said $250,000 in bonds are outstanding and unpaid, and no part of the interest maturing upon said bonds or any thereof on September 1, 1915, has been paid and that said Hot Lake Sanatorium Company has made default in such payment, and that after such default was made and prior to the commencement of this suit [a majority of] the holders of more than one-half of the amount of said bonds so outstanding requested plaintiff, F. L. Meyers, as such trustee, to declare the principal of all of said bonds immediately due and payable, and to commence suit for the foreclosure of said trust deed and mortgage and the collection of the sums, both principal and interest, due upon all of said bonds, and that accordingly plaintiff, as such trustee, did and does here now declare the principal of all of said bonds immediately due and payable."

[2] The holders of a majority of the outstanding bonds, as provided in article 4 of the trust deed, must have owned or controlled more than $125,000 of such evidence of indebtedness. "A majority of the holders of more than one-half of the amount of said bonds so outstanding," as alleged in the complaint, would be required to have a title or legal right to only a fraction more than $62,500 of such securities. The averment of the complaint hereinbefore quoted is technically defective in stating a cause of suit in this particular. The fault referred to is not mentioned in the brief of appellant's counsel, and, this being so, it must be assumed that the attention of the trial court was never attracted to this imperfection.

[3] At the argument in this court, however, much stress was laid upon the words, "a majority of," as used in the complaint and hereinbefore indicated by brackets, and it is contended the facts so stated are insufficient to constitute a cause of suit, and, this being so, the decree should be reversed in consequence of the error committed in overruling the demurrer. If the primary pleading had omitted a material averment, the rule now insisted upon would undoubtedly be controlling, for in such case no foundation would exist upon which to support a judgment rendered in conformity to the prayer of the complaint. So too, in case of a mere technical defect in a pleading, if it appear that the attention of the court was called by the interposition of a demurrer which distinctly specified the grounds of objection to the complaint, thus affording an opportunity for an amendment, and the demurrer was overruled, a different question would be presented in reviewing the judgment or decree. The assertion of "the law's delay," of which complaint is often made, would be verified by sanctioning such a mode of practice as was evidently pursued at the trial of this cause.

The phrase, "a majority of," as used in the complaint, is unquestionably a mistake, and the technicality may have occurred by oversight of plaintiff's counsel in dictating, or by a stenographer in transcribing the notes. But, however the error may have resulted, it can be corrected by eliminating the words in the brackets referred to, and, having done so, the complaint will then state facts sufficient to authorize an enforcement of the conditions of the trust deed, if such relief was contemplated under the circumstances mentioned. By striking out such phrase, it is not to be supposed that the remaining allegation of the part of the complaint hereinbefore quoted could have been truthfully denied, for if the plaintiff had not been requested, by the holders of more than one-half of the then outstanding bonds, to declare a maturity of such evidences of corporate indebtedness and to foreclose the trust deed, a plea in abatement would undoubtedly have been interposed. The technical defect which was adverted to at the argument in this court will be disregarded.

[4] The remaining question to be considered is whether, under the terms of the trust deed, a suit can be maintained to foreclose the lien at the request of the holders of more than one-half of the outstanding bonds, before the expiration of six months from the default in paying the coupons. A careful reading of the articles of the trust deed, hereinbefore set forth, will show that two remedies are prescribed. After a default of six months in the payment of the interest coupons, the trustee may, on his own motion, proceed by strict foreclosure or for an ordinary foreclosure by a suit instituted for that purpose, to bar the right of the Hot Lake Sanatorium Company in and to the real and personal property mortgaged. It is unnecessary now to consider whether or not a strict foreclosure can be had, since such a remedy has not been invoked. Article 4 reserves to the holders of a majority of the bonds power to set aside any proceedings instituted by the trustee on his own motion, and also to cancel their own previous request, to declare a maturity of the corporate indebtedness, and to commence a suit to foreclose the lien. It is believed a fair construction in pari materia of all the conditions of the trust deed authorized the trustee to maintain a suit to foreclose the lien, immediately upon default of any of the provisions specified, if so requested by

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the holders of a majority of the then outstanding bonds.

This being so, no error was committed in overruling the demurrer and in granting the relief awarded. The decree is therefore affirmed.

(82 Or. 394)

STATE v. BOOTH.

(Supreme Court of Oregon. Dec. 27, 1916.)

1. CRIMINAL LAW ⟸427(2)—EVIDENCE—DECLARATIONS OF CONSPIRATOR—STATUTE.

Under L. O. L. § 727, subd. 6, providing that after proof of a conspiracy the declarations or acts of a conspirator against his coconspirator relating to the conspiracy may be admitted, declarations of an alleged coconspirator, jointly indicted and separately tried, were inadmissible, where no evidence of a conspiracy had been offered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1012; Dec. Dig. ⟸427(2).]

2. CRIMINAL LAW ⟸814(19)—INSTRUCTIONS —CONSPIRACY—EVIDENCE.

In a trial for homicide under a joint indictment with a separate trial, an instruction upon conspiracy to commit crime, though proper as abstract statement of law, was erroneous, where there was no evidence of a conspiracy or common design on the part of the defendants to take the life of the deceased.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1979; Dec. Dig. ⟸814 (19).]

3. HOMICIDE ⟸340(2)—APPEAL — HARMLESS ERROR—INSTRUCTION.

Such instruction was prejudicial to defendant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 716; Dec. Dig. ⟸340(2).]

Department 1. Appeal from Circuit Court, Yamhill County; Harry H. Belt, Judge.

Anna Booth was convicted of murder in the second degree, and she appeals. Reversed, and cause remanded for new trial.

W. T. Vinton and J. E. Burdett, both of McMinnville (McCain, Vinton & Burdett, of McMinnville, on the brief), for appellant. Geo. M. Brown, Atty. Gen., and R. L. Conner, of McMinnville, for the State.

BENSON, J. The facts of this case are sufficiently set out in the opinion of State v. Branson, filed December 27, 1916. The defendants were jointly indicted, and upon separate trials were both convicted of murder in the second degree. The testimony in both cases was substantially the same.

[1] There are several assignments of error, but we deem it necessary to consider only those which have to do with the question of conspiracy. Upon the trial of this defendant the witness Milton Booth was permitted to testify, over the objection of defendant, to a conversation between himself and the codefendant, William Branson, held in July preceding the homicide, in which Branson said, "Bill Booth is very jealous, ain't he?" to which the witness replied: "Yes; and not only that, Billy, but he always was." Whereupon Branson continued, "If Bill Booth wants to shoot he can shoot and be damned," and the witness answered, "Tut, tut, such talk as that," and Branson then said, "Well, I mean it; if Bill Booth wants to waylay, he can waylay; I can waylay, too." The witness replied, "Why, Billy, to talk that way," and Branson repeated, "Well, I mean it." At the close of the state's case, defendant moved to strike out this testimony and withdraw it from the consideration of the jury upon the ground that no evidence of a conspiracy had been offered and that this conversation was inadmissible under the provisions of subdivision 6 of section 727, L. O. L., which reads as follows:

"In conformity with the preceding provisions, evidence may be given on the trial, of the following facts: * * * 6. After proof of a conspiracy, the declaration or act of a conspirator against his coconspirator, and relating to the conspiracy."

This evidence was clearly inadmissible as against this defendant, and the motion to strike should have been allowed.

[2, 3] The court also gave the jury several instructions upon the subject of conspiracy to commit crime, notably the following:

"In this case, however, you should bear in mind the instructions which I have heretofore given you that, if the defendant and William Branson were acting together with the common design to bring about the death of William Booth in the manner and as charged in the indictment, it would not be necessary for both of them to be actually present at the place and time of the alleged crime; for, as I have stated to you before, each codefendant is bound by the act of the other in the furtherance and execution of a common design. Now then, you should determine first, Were they acting together in such common design? If they were not acting together in such design, and Mrs. Booth was not present at the time and place of the alleged killing, then it would necessarily follow that it would be impossible for her to have committed the crime. But if they were acting together in a common design, then it does not make any difference whether she was present or not, if she aided, counseled, and abetted Branson in the commission of the crime."

We have no fault to find with the abstract statement of the law as expressed in this charge, and in a proper case it should be given; but we have made a careful and thorough analysis of all the testimony herein, and have been unable to find a scintilla of evidence tending in any manner to show a conspiracy or common design on the part of the defendants to take the life of William Booth. As was said in State v. Branson, supra, the companion case, it is well settled that it is error to instruct a jury upon abstract questions in regard to which there is no evidence in the record. It needs no argument to show that such instruction was prejudicial to the defendant's interests.

The judgment is reversed, and the cause remanded for a new trial.

MOORE, C. J., and HARRIS and McBRIDE, JJ., concur.

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(82 Or. 397)

GOSNEY v. McALISTER et ux.

(Supreme Court of Oregon. Dec. 27, 1916.)

ARBITRATION AND AWARD ⊂⇒85(2)—ACTION ON AWARD—COMPLAINT—SUFFICIENCY.

A complaint, in an action upon an award of a board of arbitration fixing the amount due plaintiff on the rescission of his release from defendants, husband and wife, disclosing affirmatively that the defendant wife did not sign the lease and that it was the act of the husband alone, and that the agreement to arbitrate was the act of the husband, acquiesced in by the wife, and that an award was made against the husband but not against the wife, stated no cause of action against the defendant wife.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 492–495; Dec. Dig. ⊂⇒85(2).]

In Banc. Appeal from Circuit Court, Crook County; T. E. J. Duffy, Judge.

Action by H. A. Gosney against Andrew McAlister and Jane McAlister, his wife, upon an award of a board of arbitration. Judgment against Andrew McAlister by default and against Jane McAlister on her demurrer to the complaint, and she appeals. Reversed and remanded.

This is an action upon an award of a board of arbitration. The complaint alleges that the defendants are the owners of certain lands in Crook county; that on January 25, 1915, the defendants leased such lands to plaintiff for a period of three years from and after March 1, 1915; that the lease was in writing, signed by Andrew McAlister, and it was "ratified and confirmed by ——— McAlister verbally"; that thereafter and pursuant to the lease plaintiff took possession of the premises with the consent of both defendants; that on March 27, 1915, all of the parties were desirous of rescinding the contract and then entered into a written agreement to settle and determine the terms of such rescission through a board of arbitration; and that such agreement was signed by Andrew McAlister and "acquiesced in by defendant ——— McAlister." Then follow allegations of the organization of and a hearing by them. Their report and award is set out in full as follows:

"We, the undersigned, arbitrators duly and regularly chosen to hear, determine and settle the differences that have arisen between Andrew McAlister and H. A. Gosney over the lease and rescinding of said lease existing between said parties for the McAlister ranch near Laidlaw, Oregon, and to determine and settle the amount of money, if any, either of said parties shall pay to the other, after giving all credits and making all deductions, after hearing the testimony of the parties and their witnesses and after viewing the premises, and after due consideration find: that H. A. Gosney is entitled to be paid the sum of $151.10 by Andrew McAlister, and the expense of the board shall be paid as follows, Andrew McAlister to pay the man selected by him and the expense of the third man to be divided equally by the parties. We further find that the said sum of money shall be paid within 90 days from the date hereof. Dated this 31st day of March, 1915."

It is further alleged that the payments thereunder are refused by defendants, and there follows a prayer for judgment.

Andrew McAlister defaulted, and judgment was entered against him, but Jane McAlister filed a demurrer upon the ground that the complaint does not state facts sufficient to constitute a cause of action as to her. The demurrer being overruled, she declined to plead further, and from the consequent judgment she appeals.

W. B. Daggett, of Redmond, for appellant. H. H. De Armond, of Bend, for respondent.

BENSON, J. (after stating the facts as above). It will be observed that the complaint discloses affirmatively that the defendant Jane McAlister did not sign the lease, and that no one signed it for her, so that no question of ratifying the act of an agent is involved, and as a logical sequence it appears that the written instrument was simply the act of Andrew McAlister leasing his own interest in the land, whatever that may have been, for a term of three years. It further appears that the written agreement to arbitrate was likewise the act of Andrew McAlister acquiesced in by Jane. It is also noted that the report of the board of arbitrators made no award whatever against Jane McAlister, whose name does not appear therein, but determined that Andrew should pay to plaintiff the sum of $151.10, and, since the action is based exclusively upon the award, it is clear that no cause of action is stated as against the defendant Jane McAlister, and the court erred in failing to sustain the demurrer.

The judgment is therefore reversed, and the cause remanded for further proceedings not inconsistent herewith.

(82 Or. 400)

STATE v. KEENEY.

(Supreme Court of Oregon. Dec. 27, 1916.)

1. CRIMINAL LAW ⊂⇒1106(2)—APPEAL—RECORD—TRANSMISSION.

The time fixed by law for the filing of a transcript on appeal cannot be extended by stipulation of the parties without an order of court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2891; Dec. Dig. ⊂⇒1106(2).]

2. CRIMINAL LAW ⊂⇒1106(2)—APPEAL—RECORD—TRANSMISSION.

After the expiration of the statutory time for filing copies of the transcript in a criminal case neither the trial court nor appellate court can extend the time by order nunc pro tunc; the right of appeal being purely statutory.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2891; Dec. Dig. ⊂⇒1106(2).]

In Banc. Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Mordie Keeney was convicted of arson, and appeals. Appeal dismissed.

Littlefield & Maguire, of Portland, for appellant. Walter H. Evans, Dist. Atty., of Portland, for the State.

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HARRIS, J. [1, 2] On October 3, 1916, we dismissed an appeal which the defendant attempted to prosecute; and the opinion is reported in State v. Keeney, 159 Pac. 1165, where the facts are fully stated. Afterwards, on October 17th, defendant, Keeney, filed another transcript predicated on the first notice of appeal which had been filed on December 13, 1915, and the state has again moved for a dismissal. When the first notice of appeal was filed the circuit court granted 90 days for preparing and filing the transcript, and on March 13th the court made a second order extending the time to and including March 21, 1916. The defendant claims that "prior to the said 21st day of March, 1916, an oral stipulation was entered into between" counsel "that appellant should and would have 10 days' additional time within which to file his transcript and tender a bill of exceptions." Even though it be assumed that the time for filing the transcript could be extended by the stipulation of the parties without an order of the court, nevertheless the defendant is in no position to claim any benefit from the stipulation, for the reason that the transcript was not filed until more than 10 days after March 21. The proposed bill of exceptions was not even tendered until April 5, 1916. However, this court has held in Davidson v. Columbia Timber Co., 49 Or. 577, 91 Pac. 441, cited with approval in State v. Douglas, 56 Or. 20, 107 Pac. 957, that the parties cannot by a stipulation effect an extension without an order of the court. The delay was not the fault of the clerk, and as said in State v. Morgan, 65 Or. 314, 316, 132 Pac. 957, 958:

"After the expiration of the time allowed by the statute for filing copies of the documents required, neither the circuit court nor this court has authority to make an order nunc pro tunc extending the time, or to change the statute by granting a different right of appeal than as provided for by the statute."

There is no alternative except to dismiss the appeal; and it is so ordered.

(82 Or. 402)

CLARK v. COOS COUNTY.

(Supreme Court of Oregon. Dec. 27, 1916.)

CONSTITUTIONAL LAW ⇐29—COUNTIES ⇐210—RIGHT TO SUE—INJURIES TO EMPLOYÉS—SELF-EXECUTING PROVISIONS.

Since an injured workman's action for damages under Employers' Liability Act (Laws 1911, p. 16) is a tort action, and a county, under L. O. L. § 358, can be sued on its contracts and not otherwise, he cannot recover, in spite of Const. art. 1, § 10, providing that every man shall have a remedy by due course of law for any injury; such provision, as regards counties, not being self-executing.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 32; Dec. Dig. ⇐29; Counties, Cent. Dig. §§ 339, 340; Dec. Dig. ⇐210.]

Department 1. Appeal from Circuit Court, Coos County; John S. Coke, Judge.

Action by Thomas J. Clark against Coos County. Judgment for plaintiff, and defendant appeals. Reversed.

This is an action in which the plaintiff essays to charge Coos county under chapter 3 of the general laws of Oregon for 1911, generally known as the Employers' Liability Act. He claims that, while he was at work as an employé of the defendant repairing a county road in that county under the supervision of the road supervisor, he was injured by a stone rolling down a hillside and striking him on the shoulder. The essence of his charge is that the defendant county neglected to use every device, care, or precaution that it was practicable to use for the protection of the plaintiff; that a safe device or precaution consisted in the employment of a person to watch for any rock, earth, or débris that might fall or roll down the side of the mountain from above the place where the plaintiff was working, and to give him notice of such falling. The answer denied all responsibility on the part of the defendant and traversed every averment imputing negligence to it. Affirmatively the defendant set up matter tending to show that the plaintiff was the employé of an independent contractor engaged in the prosecution of the work mentioned. All the new matter of the answer was traversed by the reply. At the close of plaintiff's case, defendant moved for a judgment of nonsuit on various grounds, which was denied. When all the testimony was in, the defendant moved for an order directing a verdict in its favor for the reason, among others, that no evidence had been adduced in the trial sufficient to constitute a cause of action against the defendant. This motion was denied, a verdict and judgment resulted in favor of the plaintiff, and the defendant appeals.

L. A. Liljeqvist, of Marshfield, for appellant. A. S. Hammond, of North Bend (E. D. Sperry, of Coquille, and A. H. Derbyshire, of North Bend, on the brief), for respondent.

BURNETT, J. The case at hand is identical in principle and must be governed by the decision in Rapp v. Multnomah County, 77 Or. 607, 152 Pac. 243, which ruled that, where the plaintiff sues under the Employers' Liability Act for personal injuries sustained while an employé of the county, his action is one of tort resting on negligence and will not be heard, as the county can be sued only under section 358, L. O. L., which permits suits against it on its contracts only; and that, where the Legislature failed to include counties in the operation of the Employers' Liability Act, the courts will not apply the statute to actions against them.

At the argument the plaintiff counted strongly on the language of section 10 of article I of the Constitution of the state that:

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"Every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

Against whom the man shall have a remedy is not stated. Neither is any process detailed whereby it may be enforced. Until the legislative department of the government shall provide that the state or its counties may be sued, in an action of this sort, this constitutional provision as to state governmental agencies must be treated as not self-executing. Manifestly this has been the legislative construction of the clause, else we would not have such enactments as section 358, L. O. L., permitting the maintenance of an action against a county upon a contract "and not otherwise," or section 6375, L. O. L., giving a right of action against a county in favor of one injured by a defect in the highway while lawfully traveling thereon, etc. As against a county the courts cannot proceed under the quoted excerpt from the organic act any farther than the legislative power has pointed the way. In short, a county cannot be called to account at the suit of a private party for any default in its governmental functions unless there is a statute allowing it. No enactment has been pointed out sanctioning such procedure.

The judgment of the circuit court must therefore be reversed.

MOORE, C. J., and McBRIDE and BENSON, JJ., concur.

(85 Or. 213)

FARRELL v. DAVIS et al.

(Supreme Court of Oregon. Dec. 27, 1916.)

APPEAL AND ERROR ⟸843(2)—QUESTION FOR REVIEW.

On appeal in suit to recover unpaid stock subscriptions, wherein defendant pleaded a decree of the circuit court allowing his claim against the insolvent corporation, where the decree of the circuit judge in the suit modifying and disregarding the findings of the circuit judge allowing the claim will be reversed and the suit dismissed, as prayed in defendant's answer, it is unnecessary to pass on defendant's claim against the corporation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3331; Dec. Dig. ⟸843 (2).]

Department 2. Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

On application for supplemental opinion. Application denied.

For former opinion, see 161 Pac. 94.

Wood, Montague, Hunt & Cookingham, of Portland, for appellant. Turner Oliver, of La Grande, and Frank S. Grant, of Portland, for respondent.

BEAN, J. Defendant A. E. Davis has applied for a supplemental opinion adjudicating his claim against the assignee of the estate of the Hygienic Mattress Company, an insolvent debtor. It is stated in the application that Mr. Davis filed a claim against the insolvent company for over $6,000, representing the disbursements made by him in behalf of the corporation and overdue salary; that after a full hearing on the merits Judge Cleland of the circuit court allowed the claim in full and entered an order requiring the assignee to list it for payment of dividends. In the present suit against Mr. Davis to recover for unpaid stock subscriptions he pleaded the decree of Judge Cleland rendered April 6, 1908, allowing his claim in the sum of $6,535.42, together with the other defense which is referred to in the original opinion in this case filed November 28, 1916. Upon the hearing of the present suit in the circuit court, as the application recites, Judge Morrow made a finding that Mr. Davis was entitled to a salary of $150 a month for 16 months, or a total of $2,400; hence modifying the findings of Judge Cleland concerning the salary and disregarding the same. According to the original opinion herein, the decree of Judge Morrow will be reversed, and the suit dismissed as prayed for in defendants' answer. It therefore becomes unnecessary in this suit to pass upon the claim of Mr. Davis for salary. The proceedings in the matter of the assignment of the Hygienic Mattress Company were not made a record in the present suit either as an exhibit or otherwise Neither was the claim of Mr. Davis filed as an exhibit, and the record in regard thereto is very meager. We are of the opinion that this application seeks for an expression in advance in regard to the settlement of a claim against the assignee estate which, as the application states, has already been passed upon by Judge Cleland of the circuit court, and from which no appeal has been taken. If it were necessary to further adjudicate the matter in this suit, the record is not sufficient for such an adjustment. There is no further question involved herein which this court can legally decide or upon which it can express an opinion.

The application will therefore be denied.

HARRIS and BENSON, JJ., concur.

(82 Or. 405)

HILLSBORO NAT. BANK v. GARBARINO et ux.

(Supreme Court of Oregon. Dec. 27, 1916.)

1. PLEADING ⟸245(1)—AMENDMENT—"TRIAL"—STATUTE.

Under L. O. L. § 102, providing that the court may before trial and upon terms allow any pleading to be amended by adding any material allegation, and, at any time before the cause is submitted, may allow the pleading to be amended to correct a mistake, etc., or when the amendment does not substantially change the cause of action, or defense, and section 113, defining a "trial" as the judicial examination of the issues between the parties, the allowance of an amendment to the complaint before any demurrer had been filed, and before

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the judicial examination of the issues had begun, was allowed before trial, and hence was admissible, although changing both the cause of suit and the quantum of proof required.

[Ed. Note.—For other cases, see Pleadings, Cent. Dig. § 653; Dec. Dig. ⊂⊃245(1).

For other definitions, see Words and Phrases, First and Second Series, Trial.]

2. PLEADING ⊂⊃253—AMENDMENT—ANSWER.
Where defendant deemed himself injured or misled by an amendment to the complaint before trial, he should have taken leave to change his answer to meet the new situation.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 744–751; Dec. Dig. ⊂⊃253.]

3. PLEADING ⊂⊃229—RIGHT OF AMENDMENT—CONSTRUCTION.
The right of amendment should be liberally construed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 591; Dec. Dig. ⊂⊃229.]

4. EVIDENCE ⊂⊃271(14)—SELF-SERVING DECLARATIONS—VOLUNTARY CONVEYANCE.
In a suit to set aside a debtor's voluntary conveyance to his wife, her declarations to the scrivener who prepared the deed that her husband had wasted considerable money in drinking, that his health was poor, and that she took the conveyance to obviate the expense of administration of his estate were self-serving, and could not alter the effect imputed by law to the conveyance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1088; Dec. Dig. ⊂⊃271(14).]

5. FRAUDULENT CONVEYANCES ⊂⊃278(2)—CONVEYANCE TO WIFE—PRESUMPTION AND BURDEN OF PROOF.
A husband's conveyance to his wife is presumptively fraudulent as against his existing creditors, and the wife has the burden of proving that it was made for a valuable consideration, in good faith, and without intent to defraud such creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 802; Dec. Dig. ⊂⊃278(2).]

6. FRAUDULENT CONVEYANCES ⊂⊃217—REMEDIES OF CREDITORS—INDEBTEDNESS—STATUTE.
L. O. L. § 7397, providing that every conveyance of lands with intent to hinder, delay, or defraud creditors, etc., as against such creditors shall be void, is in favor of all creditors, and not of any particular class of creditors, so that there is no distinction between creditors whose claims are due and those whose claims are not due.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 640; Dec. Dig. ⊂⊃217.]

7. FRAUDULENT CONVEYANCES ⊂⊃287—CONVEYANCE TO WIFE—INDEBTEDNESS—EVIDENCE.
In a judgment creditor's suit to set aside a husband's voluntary conveyance to his wife, she is not estopped to go behind the judgment and inquire whether there was any actual indebtedness, and, estoppels being mutual, the creditor may show that the husband borrowed money from him and had not repaid it.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 835; Dec. Dig. ⊂⊃287.]

Department 1. Appeal from Circuit Court, Washington County; George R. Bagley, Judge.

Suit by the Hillsboro National Bank against Natalio Garbarino and Rosa Garbarino, his wife, in which the latter alone appeared and defended. Decree for plaintiff, and defendant Rosa Garbarino appeals. Affirmed.

This is a suit to set aside a voluntary conveyance made by a debtor husband to his wife. The original complaint declared that on March 6, 1914, the husband was the owner in fee simple and in possession of the realty in question, and on that date was indebted to the plaintiff in a certain sum of money, which he failed to pay, in consequence of which the plaintiff recovered judgment against him in the circuit court September 17, 1914. On this judgment an execution was issued March 27, 1915, and returned wholly unsatisfied on the 29th of the same month. It is said, also, that on March 6, 1914, prior to the entry of judgment in favor of the plaintiff already mentioned, but after the indebtedness upon which it was founded had been incurred, the defendant husband, for the purpose of defrauding the plaintiff and to prevent collection of the indebtedness, conveyed to the wife the realty mentioned by deed recorded March 7, 1914, in the record of deeds; that it was not then, and never since has been, exempt from execution; that the wife knew of the indebtedness of her husband to the plaintiff, and received the transfer of title with intent to defraud and prevent the plaintiff from collecting its demand, or any judgment that might be rendered thereon. The plaintiff also avers that there was no consideration for the conveyance, and that the husband after he made the same had no property available for the satisfaction of the judgment. The wife alone defended. The answer tendered the general issue to every allegation of the complaint except the plaintiff's corporate character and the existence of the marital relation between the defendants. No affirmative defense was offered. When the case was called for hearing and before any testimony was tendered the plaintiff asked and obtained leave of court, over the objection of the defendant, to amend the complaint by changing the date March 6th, wherever the same appeared therein, to March 2d, so as to show that on the earlier, instead of the later, date the defendant husband was the owner of the property, was then indebted to the plaintiff, and made the conveyance as stated, which was recorded on March 11th, instead of March 7th. In permitting the amendment the court stated that the defendant might amend her answer, but, after learning from opposing counsel that it was the contention of the plaintiff that the indebtedness was one existing at the time the conveyance was made, the attorney for the defendant announced that he would proceed and not amend. After hearing the testimony the court made findings of fact, conclusions of law, and a decree accord-

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ing to the prayer of the complaint, and the defendant, who appeared, appeals.

G. E. Murphy, of Portland (Lisle A. Smith, of Portland, on the brief), for appellant. H. T. Bagley, of Hillsboro, for respondent.

BURNETT, J. (after stating the facts as above). [1] The defendant contends that the court had no right to allow the amendment when it did because it changed the character of proof required to maintain the plaintiff's suit in this: That according to the dates in the original complaint the judgment relied upon was rendered after the conveyance, and hence to overturn the transfer it would be incumbent upon the plaintiff to show that it was made for the express purpose of defrauding those from whom the grantor expected afterwards to obtain credit, and that the amendment relieved the plaintiff of this burden, and imposed upon it only the lighter task of showing that the conveyance was purely voluntary, which would render it void as to precedent debts without any showing of an express intent to defraud. She relied upon section 102, L. O. L., reading thus:

"The court may, at any time before trial, in furtherance of justice, and upon such terms as may be proper, allow any pleading or proceeding to be amended by adding the name of a party, or other allegation material to the cause: and in like manner and for like reasons it may, at any time before the cause is submitted, allow such pleading or proceeding to be amended, by striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or when the amendment does not substantially change the cause of action or defense, by conforming the pleading or proceeding to the facts proved."

It will be observed that there are two different periods in litigation in which the court may allow an amendment, one "at any time before the trial," and the other, "at any time before the cause is submitted." In the first stage the court is not restricted in the extent of the amendment to be allowed. In the other, the right is fettered by the condition that the alteration does not substantially change the cause of action. In our judgment the amendment was tendered in the first period. No testimony had been offered, and although the trial began immediately after the amendment was effected, yet it had not commenced at the time the offer to change the pleading was made and allowed. Section 113, L. O. L., declares that:

"A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact."

See, also, 8 Words and Phrases, 7095.

The record does not disclose that any demurrer had been filed; hence there had been no trial of an issue of law. The judicial examination of the issues had not yet begun when the amendment was offered, and hence it was admissible, although it may have changed both the cause of suit and the quantum of proof required.

[2] If the defendant deemed herself injured or misled by the amendment, she should have taken leave to change her answer to meet the new situation.

[3] To give heed to her present contention on that point would be to violate the precedents, to the effect that the right of amendment should be liberally construed.

[4] The evidence clearly shows that the answering defendant knew about the existence of the indebtedness to the plaintiff owing by her husband and the state, and amount of his property, and that she took the conveyance without paying any consideration whatever for the same. Some testimony is offered from the scrivener who prepared the deed, in substance, that she explained to him that her husband had wasted a considerable sum of money in drinking; that his health was poor; that he was not expected to live long; and that she took the conveyance to obviate the expense of the administration of his estate after his death. These, however, are self-serving declarations, and cannot alter the effect which the law imputes to a purely voluntary conveyance made by a husband to a wife.

[5] Owing to the intimate relation existing between the two, the precedents established by this court are to the purport that such conveyance is presumptively fraudulent as against existing creditors. Under such circumstances our own decisions cast upon the defendant the burden of proving that the conveyance was made for a valuable consideration, in good faith, and without intent to defraud those to whom the grantor was obligated for the payment of money. Wright v. Craig, 40 Or. 191, 66 Pac. 807; Davis v. Davis, 20 Or. 78, 25 Pac. 140.

[6] Much reliance is placed by the defendants on the case of Seed v. Jennings, 47 Or. 464, 83 Pac. 872, and particularly upon the language here set down:

"To enable a creditor herein to maintain a suit to set aside a conveyance by the debtor as fraudulent and void, he must show an unsatisfied judgment or an attachment upon a cause of action existing at the time of the conveyance; or on a cause of action arising subsequent thereto, and that in the latter event the conveyance was made with the express intention of defrauding subsequent creditors."

And, further, that:

"To avoid a voluntary deed because fraudulent as to existing creditors, the cause of action must exist at the time the conveyance is made, and this must appear from the record in the action in which the judgment was recovered."

The defense argues from this language that no "cause of action" arises until the creditor has a right to commence proceedings to recover his debt, with the resulting conclusion that unless the creditor's debt is past due when the conveyance is made, the transfer of title, although purely voluntary, cannot be overturned, unless it can be shown that it was made with the express purpose of defrauding subsequent creditors, and, moreover, that unless the judgment roll in

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the action shall itself disclose that the debt was overdue at the date of the conveyance, the creditor is without standing to defeat the transfer. In part the language of section 7397, L. O. L., is this:

"Every conveyance or assignment in writing or otherwise of any estate or interest in lands * * * made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits * * * as against the persons so hindered, delayed, or defrauded, shall be void."

We observe that the term "creditors" is not restricted to those whose demands are overdue. The statute is in favor of all creditors, and not any particular class of them. It is quite as culpable for the debtor to alienate his property with intent to defraud one whose claim is not yet due as thus to seek to injure one whose demand has matured. To distinguish between the two wrongs is not consonant with sound logic.

[7] The language of the opinion in the Seed-Jennings Case respecting the judgment cannot be construed as applicable to the answering defendant here, because she was not a party to the same and is not bound thereby. She is not estopped to go behind the judgment and inquire whether or not there was any actual indebtedness owing from her husband to the plaintiff. Estoppels are mutual, and if she is entitled to enter upon that field of inquiry, the plaintiff may accompany her upon her quest, and resisting her attack upon the judgment may show, as it did in this instance, that the defendant husband in truth had borrowed money from the plaintiff to the amount stated in the pleading, and had not repaid the same. The rule is thus stated in Yeend v. Weeks, 104 Ala. 331, 16 South. 165, 53 Am. St. Rep. 50:

"If then there is no more proof than the judgment itself—in the absence of fraud or collusion, as we have seen—it is evidence of the existence of a debt at the time of its rendition, and only at that time. This is sufficient to entitle the judgment creditor to impeach the fraudulent conveyance as tainted with actual fraud. In such case, the burden of proving the actual fraud would be upon the complainant. If the complainant, however, would use the judgment to the prejudice of a grantee in a deed alleged to be only voluntary and constructively fraudulent, there must be independent, distinct evidence of facts showing the cause of action which authorized the rendition of the judgment, and that it is older than the conveyance."

The subject is learnedly discussed in Eggleston v. Sheldon, 85 Wash. 422, 148 Pac. 575, by Mr. Justice Fullerton, not only permitting, but requiring in such instances, that the plaintiff shall show an actual indebtedness older than the conveyance attacked, where the reliance is upon a purely voluntary transfer of the title. Rightly understood in consideration of its facts, the case of Seed v. Jennings, supra, does not teach the contrary doctrine. There the father of the plaintiff, while the latter was yet a minor, conveyed to him certain real property, being at the time free from debt of any nature and possessed of considerable other holdings. Three years later Jennings commenced an action against the elder Seed, charging him with the alienation of the affections of the former's wife, said to have been committed within the next preceding year, recovered judgment, and levied execution on the realty included in the deed from the father to his son. Clearly the claim accrued, not before, but after, the deed had taken effect; and, as there was no evidence whatever that the liability was in contemplation of any one at the time the conveyance was made, the land was held exempt from the subsequent judgment. In this case, however, although it changed its form by the renewal of notes given for the same, the indebtedness accrued long prior to the conveyance. As we have seen, the statute makes no distinction between the creditors whose claims have matured and those unmatured. They are equally within the protection of the enactment. The effect of the conveyance to the wife was at least to hinder and delay the plaintiff in the collection of its debt. The decree of the circuit court is affirmed.

MOORE, C. J., and McBRIDE and BENSON, JJ., concur.

(82 Or. 443)

SCHOOL DIST. NO. 24 OF MARION COUNTY v. SMITH, County School Superintendent.

(Supreme Court of Oregon. Jan. 5, 1917.)

SCHOOLS AND SCHOOL DISTRICTS ⊂=87—HIGH SCHOOLS—"EXPENDED."

Under Gen. Laws 1915, c. 235, § 4, providing that the cost of educating a high school pupil shall be determined by dividing the total amount expended by the high school district for maintaining high schools during any school year by the average daily attendance, etc., as "expended" means "paid out," an estimate for a high school district, submitted to the county school superintendent as required by section 2, properly included an item for repairs, but not items for depreciation of a school building or interest on money expended in construction of the building.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 206, 207; Dec. Dig. ⊂=87.

For other definitions, see Words and Phrases, First and Second Series, Expended.]

In Banc. Original proceeding in mandamus by School District No. 24 of Marion County against W. M. Smith, County School Superintendent of Marion County. Writ allowed in part and dismissed in part.

This is an original proceeding in mandamus to compel the defendant to audit and allow certain items claimed by petitioner as part of the cost of educating nonresident high school pupils. The statute to be construed is chapter 235, p. 330, General Laws of 1915. Those sections bearing upon the matter here in controversy are, in substance, as follows: Section 1 provides for a special tax levy annually by the county court of each county

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for the purpose of defraying the cost of educating high school pupils residing in any county in which there is no county high school, and not in a high school district, the tax to be levied at the same time as taxes are levied for county purposes upon all the taxable property in the county not situated in any high school district. Section 2 requires the school clerk of each high school district, at the close of the school year, to make out under oath, and deliver to the county school superintendent of each county in which any part of his high school district is situated, a full and complete report of the high schools of his district for the entire year. Such report is required to show the total number of high school pupils enrolled during the year, the average daily attendance, the number of teachers regularly employed, the course of instruction pursued, the text-books used, the total number of new high school pupils enrolled during the year, the total cost of maintaining the high school or high schools during the year, the cost of educating each high school pupil during the year, the name, post office address, and elementary school district residence of each new pupil attending high school in his district and residing in territory not embraced in any high school district, and the total number of such new pupils, and such other information as may be required by the superintendent of public instruction or the county school superintendent. Section 4 imposes the duty upon every county school superintendent to whom this report is made to verify such report and to compile a report showing the total number of such high school pupils residing in his county outside of any high school district, the cost of educating each of such pupils, the total cost of all such pupils, and the total cost of each high school district for all of such pupils attending therein. The same section further specifies that the cost of educating each high school pupil of any high school district shall be determined by dividing the total amount expended by the high school district for maintaining high schools during any school year by the average daily attendance of pupils enrolled in the high school or high schools of the district for the same year. Section 5, among other things, prescribes that not later than December 1st of each year the county superintendent of each county in which there is any county high school shall certify to the county court of his county the total cost for the preceding year of educating all the high school pupils residing in his county and not in any high school district, and the estimated amount needed for that purpose for the current year. Section 6 requires the county court of each county with whom a county school superintendent's certificate is filed at the time of making the tax levy for the year for school purposes to levy a special tax upon all taxable property in the county not situated in any high school district sufficient in amount to defray the cost for the current year of education of high school pupils residing in such county and not in any high school district. Section 7 directs the county school superintendent of each county on the first Monday of October of each year, and at such other times as he may deem it advisable, to apportion the high school's tuition fund in the county treasury to the several high school districts, and to draw an order on the county treasurer against the high school tuition fund for the portion that the high school district is entitled to receive. The county court of Marion county, in anticipation of the requirements of this act, provided a high school fund in the levy made in the spring of 1916, and such fund is now in the county treasury. Petitioner's clerk in his report included the following items as the cost of maintaining high schools during the school year ending June 19, 1916, in this district: (a) Salaries, including the salaries of the principal and teachers in the high school, and one-third of the salary of the city superintendent, if one is employed, $40,163.82; (b) salary of janitor, $1,550.40; (c) supplies, including crayon, erasers, brooms, brushes, ink, and all supplies that are used for maintenance which are not likely to be of service after a period of two years, $1,564.57; (d) fuel, $720.54; (e) light, $171.89; (f) power, $411.76; (g) telephone, $72.23; (h) water, $242.28; repairs, $1,529.84; (i) printing, $141.80; depreciation for year 4 per cent., $4,204.36; (j) insurance, $198.31; interest on investment 5 per cent., $6,790.45; (k) stationery, $256.51—making the total cost for the year $58,018.76; and from his report he ascertained the cost of educating each high school pupil to be $71.13. This report was submitted to the defendant as county school superintendent. He refused to audit or allow the items of repair, $1,529.84, depreciation for year 4 per cent., $4,204.36, and interest on investment at the rate of 5 per cent., $6,790.45, making a total of $12,524.65, deducting which items from the clerk's report of cost reduced the cost of educating each high school pupil to the sum of $56.12, and the defendant offered to draw his warrant in favor of the petitioner for that amount per student, aggregating the sum of $5,956.58; the amount claimed by petitioner at the rate of $71.13 per pupil aggregating the sum of $7,550.36 and making a difference of $1,593.78. If petitioner's contention is correct, it should receive a warrant for $7,550.36. If a portion of the items rejected should be allowed and a portion eliminated, the amount should be decreased in proportion to the amounts disallowed. No question was made as to the correctness, but only to the propriety of the allowance of the items as being a part of the cost of maintenance.

George G. Bingham, of Salem, for petitioner. Ernest R. Ringo, Dist. Atty., of Salem, for defendant.

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McBRIDE, J. (after stating the facts as above). That part of section 4 which prescribes the method to be pursued by the county school superintendent in determining the cost of educating each nonresident high school pupil is complete in itself, and its meaning is, in our opinion, perfectly clear. The whole process is a simple problem in long division. The dividend is the total amount expended by the high school department of the district for the preceding year, the divisor the average daily attendance, and the resulting quotient the cost of educating the nonresident pupil. The word "expended" means "paid out; disbursed." People v. Kane, 43 App. Div. 472, 61 N. Y. Supp. 195, 198; State v. Manchester & Lawrence R., 70 N. H. 421, 48 Atl. 1103; L. H. Kurtz Co. v. Polk County, 136 Iowa, 419, 109 N. W. 612. Depreciation of the building is not money expended. Neither can interest on the amount previously invested in constructing the building be properly termed an "amount expended" during the preceding year; and the county school superintendent ruled correctly in rejecting these items. The item for repairs should have been included in the estimate, and a decree will be entered accordingly. Neither party will recover costs.

(53 Mont. 90)

REA et al. v. ALFALFA PRODUCTS CO. et al. (No. 3706.)

(Supreme Court of Montana. Dec. 7, 1916.)

1. APPEAL AND ERROR ⟸1170(7)—REVIEW—HARMLESS ERROR.
Under Rev. Codes, § 6593, requiring the disregarding of harmless errors, the erroneous admission of evidence as to a fact admitted was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4066, 4543; Dec. Dig. ⟸ 1170(7).]

2. ANIMALS ⟸23(2) — ACTIONS — EVIDENCE —ADMISSIBILITY.
In an action for damages for breach of a contract to feed sheep where defendant justified its breach on account of plaintiff's nonpayment of accrued feed bills, testimony that defendant impressed on plaintiffs' agent the necessity for paying a bill is admissible; the agent being in charge of the sheep.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 45–48; Dec. Dig. ⟸23(2).]

3. ANIMALS ⟸23(2) — ACTIONS — EVIDENCE —ADMISSIBILITY.
In such case, where plaintiffs offered evidence as to the average weight of the sheep, rebutting testimony that only the light end of the sheep had been weighed was admissible.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 45–48; Dec. Dig. ⟸23(2).]

4. TRIAL ⟸62(1) — ADMISSIBILITY IN REBUTTAL—EXCLUSION.
Where defendant offered no evidence in support of an alleged defense, the exclusion of testimony offered to rebut such defense was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 148; Dec. Dig. ⟸62(1).]

5. TRIAL ⟸29(2)—CONDUCT OF TRIAL—COMMENT BY COURT.
A remark by the judge in ruling on questions assuming a state of facts that such was not the testimony was not improper as a comment on the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 81; Dec. Dig. ⟸29(2).]

6. TRIAL ⟸267(3)—CONTRACTS — BREACH — INSTRUCTIONS.
In an action for breach of a contract to feed sheep where plaintiff alleged defendant's delay in constructing yards and corrals, the substitution of the word "reasonable" for the words "reasonably short" in a requested charge, with reference to the time for such construction, was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 672; Dec. Dig. ⟸267(3).]

7. TRIAL ⟸252(1)—INSTRUCTIONS—REFUSAL.
The refusal of requests predicated on mistakes of fact is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596, 612; Dec. Dig. ⟸252(1).]

8. TRIAL ⟸295(4)—INSTRUCTIONS—REFUSAL.
In an action for breach of a contract to feed sheep where the instructions as a whole charged that defendants were under no duty to continue after plaintiffs breached the contract by an unjustifiable failure to pay a previous bill, the improper use of the word "cancellation" in an instruction on such matter cannot be complained of.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 707; Dec. Dig. ⟸295(4).]

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

Action by James Rea and William Rea, Jr., copartners doing business as Rea Bros., against the Alfalfa Products Company, a corporation, and another. From a judgment for defendants, and an order denying new trial, plaintiffs appeal. Affirmed.

F. B. Reynolds, of Billings, for appellants. Grimstad & Brown, of Billings, for respondents.

SANNER, J. Action to establish a claim for damages for breach of contract. The substance of the complaint is: That prior to November 1, 1913, the plaintiffs entered into a written contract with the defendant Alfalfa Products Company (now bankrupt), whereby the latter agreed that it would on or about said date complete yards and corrals at Big Timber so as to take for feeding, and would take and there feed upon its special product "mollasafal," certain of plaintiffs' sheep until the same should be ready for market, at a stipulated price per ton for feed furnished; that pursuant to said contract plaintiffs shipped to Big Timber 8,652 sheep, but the company did not have its yards completed or take said sheep for feeding until December 11, 1913, and did not thereafter furnish for said sheep more than one-half enough feed—in consequence of which plaintiffs were obliged to do with feed of inferior quality or inferior quantity, and were finally compelled on January 14, 1914, to sell the sheep at a price at least $1 per head

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less than they would have been worth, had the contract been performed. The damages are laid in gross at $8,652.

In addition to the general issue, the answer presents: That after said contract was entered into and prior to November 1, 1913, the plaintiffs waived the reception of said sheep on that date and granted to the defendant company an extension for the completion of its yards and corrals until such time as it could procure the necessary materials, delayed without its fault; that pursuant to such extension, the plaintiffs made arrangements satisfactory to them for the pasturage of their sheep near Big Timber in the meantime, and shipped said sheep to Big Timber on November 8, 1913, for such pasturage; that the sheep were taken by the defendant company on December 4, 1913, and were fed and cared for until January 14, 1914; that although the contract called for payment on the first day of each calendar month for all feed furnished during the month preceding, the plaintiffs failed on January 1, 1914, or thereafter, to pay for the feed furnished in December, 1913, and have also failed and refused to pay for any of the feed furnished to their sheep by the company.

The affirmative allegations of the answer were denied by the reply, and the cause was brought to trial before a jury whose verdict was for the defendants. Judgment followed accordingly, and from this, as also from an order afterwards made denying their motion for a new trial, the plaintiffs have appealed.

The verdict is confessedly justified by the evidence, but a reversal is sought for error in respect of the following:

[1] I. Rulings admitting evidence to the effect that while the plaintiffs' sheep were being fed by the defendant company, sheep belonging to one Arnold and some lambs belonging to Glenn Parker were also being fed by the defendant company on mollasafal and did well. As to Arnold's sheep, it was made to appear that they had been fed and handled substantially the same as the plaintiffs' sheep, so that there was a sufficient showing of parity in conditions to authorize the evidence even if it tended to prove that plaintiffs' sheep were sufficiently fed. The true effect of the evidence, however, as to both the Arnold sheep and the Parker lambs was merely to confirm what the parties themselves had admitted, viz. that mollasafal was a satisfactory food; and while it is technical error to receive evidence of facts admitted, such error does not command a reversal. Rev. Codes, § 6593.

[2] II. Rulings permitting the defendants to show that after January 1, 1914, they had impressed upon Mr. Petrie, the man in charge of plaintiffs' sheep, that they could not buy the syrup necessary to make up the feed without money, and the bill for the December feed would have to be paid. We see neither harm nor error in this. That the company might need or want its money and might not feel obliged to go on indefinitely without it was a fact of which the plaintiffs could take notice without any communication, in view of the contract itself. Moreover, Petrie was not merely an employé of plaintiffs charged with the physical direction of the sheep; he was the plaintiffs' agent to speak, and, if necessary, to give directions or to complain for them relative to the feeding, and, of necessity, to receive for and convey to them such information as the defendant company had to give concerning such feeding or concerning any reasons which might exist for the stoppage thereof.

[3] III. Rulings rejecting evidence touching the weight of the sheep when received, offered in rebuttal. The plaintiffs had presented testimony in their case in chief giving the average weight of all the sheep; so likewise had the defendants in their case, and the question was for the jury. The evidence offered in rebuttal was intended to show that only the light end of the sheep had been weighed, and thus by inference to contradict the testimony as previously given on both sides. There was no claim of mistake to be rectified, and we think under the circumstances the rulings were proper.

[4] IV. Rulings rejecting testimony offered in rebuttal, to the effect that the sheep were not sold or shipped pursuant to the demands of the mortgagee thereof. While it was alleged in the answer that the sheep were sold or shipped pursuant to the demands of the mortgagee and not because of any failure of defendants, there was no proof to support this allegation, and therefore nothing to rebut by the evidence offered.

[5] V. The remarks of the court addressed to counsel while sustaining an objection. Counsel for plaintiffs in asking a question about a certain alleged conversation, had assumed a state of facts as applicable to the conversation he had in mind, which pertained to another and different one, and the court remarked, "That wasn't the testimony, Judge Reynolds." In what tone or with what manner this was said we do not know, but the words were justified. The supposed rule forbidding trial judges from commenting on the evidence has no application to a situation like this. It is the duty of the court to see that witnesses are not misled, and that the evidence is not misapplied, and this action of the court, so far as it is disclosed by the record, meets our approval.

[6] VI. Rulings on Instructions:

(a) The modifications of plaintiffs' offered instruction No. 4 were not objectionable. The substitution of "reasonable" for "reasonably short," as applied to the time after November 1, 1913, within which the company should by the contract have completed its yards, worked no essential change, while the interpolation of the clause relating to the waiver was a laudable attempt to state the whole law ap-

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plicable to the delay feature without needless and confusing repetition.

(b) On the facts presented by this record, offered instruction No. 5 was misleading and properly refused. The essence of it, so far as proper, was sufficiently stated elsewhere in the charge.

[7] (c) Plaintiffs' offered instruction No. 7 was intended to advise the jury touching plaintiffs' claim to an offset on January 1, 1914; but it is predicated on two mistakes of fact, viz.: The assumption that there was evidence to warrant the inference of damages to plaintiffs' sheep at that time greater in amount than the feed bill, and that there was a balance due from the company to the plaintiffs for feed furnished in December. The court was therefore under no obligation to give the instruction as offered, even though the reason assigned for such refusal may not have been tenable.

[8] (d) Plaintiffs assail instruction No. 7 as given to the jury because of a technical misuse and misapplication of the term "cancellation"; cancellation not being involved in the case. Granting this, we are at a loss to see how the plaintiffs could have suffered any injury from the instruction, since its obvious meaning, taken in connection with the rest of the charge, is that if the plaintiffs by an unjustifiable refusal to pay for the December feed had breached the contract, the defendant company was under no necessity to go on with it.

The judgment and order appealed from are affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

(53 Mont. 96)

STATE v. BRADSHAW, (No. 3848.)

(Supreme Court of Montana. Dec. 8, 1916.)

1. OBSTRUCTING JUSTICE ⟸3—RESISTING, EXECUTION OF PROCESS—WARRANT OF ARREST—AUTHORITY.

Where an officer attempts to arrest under a warrant fair on its face issued by a competent court, the warrant is his authority, and the person named must submit to arrest though not guilty of any offense, the officer being entitled, under Rev. Codes, §§ 9062–9064, on exhibiting his warrant, to use all necessary force to effect the arrest without subjecting himself to a charge of trespass.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. §§ 3–12; Dec. Dig. ⟸3.]

2. ARREST ⟸63(1)—WARRANT—NECESSITY.

Where an officer attempts to arrest without a warrant, his power is strictly limited by Rev. Codes, § 9057, authorizing arrest without a warrant in enumerated cases, and if the circumstances do not fall within the statute, the person sought to be arrested may use any necessary force to prevent arrest or effect his escape.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 145, 151–156; Dec. Dig. ⟸63(1).]

3. OBSTRUCTING JUSTICE ⟸3—RESISTING EXECUTION OF PROCESS—WARRANT OF ARREST—NECESSITY—GROUNDS FOR ARREST WITHOUT.

Revised Codes, § 8259, declares that every person who willfully delays, resists, or obstructs any public officer in the discharge, or attempt to discharge, any duty of his office shall be punished, while section 9057 declares that a peace officer may arrest without a warrant for a public offense committed or attempted in his presence, for a felony not committed in his presence, and when a felony has been committed and he has reasonable cause to believe that the person sought to be arrested committed it, etc. *Held*, that while the offense for which arrest without a warrant is sought may be in the form of resistance or obstruction offered to an officer in discharging a duty under criminal or civil process, the power to make the arrest depends on the actual existence of the emergency pointed out by the statute.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. §§ 3–12; Dec. Dig. ⟸3.]

4. OBSTRUCTING JUSTICE ⟸14—RESISTING OFFICER—BURDEN OF PROOF.

Upon a prosecution for the offense of resisting an officer attempting to make an arrest without a warrant, the quantum of proof that the officer was by law entitled to make the arrest must be the same as is required to establish any material fact in other criminal cases.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. § 30; Dec. Dig. ⟸14.]

5. ARREST ⟸63(1)—ARREST WITHOUT WARRANT—GOOD FAITH.

A bona fide belief of an officer that defendant was engaged in the violation of the law does not authorize arrest without a warrant.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 145, 151–156; Dec. Dig. ⟸63(1).]

6. OBSTRUCTING JUSTICE ⟸3—RESISTING ARREST—MODE OF MAKING—OFFICIAL CHARACTER OF OFFICER.

An officer, seeking to make an arrest, must disclose his official character, or it must be known to the offender, or there is no obligation on the part of the latter to submit.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. §§ 3–12; Dec. Dig. ⟸3.]

7. STATUTES ⟸167(2)—AMENDMENT—CONSTRUCTION.

Rev. Codes § 8838 (Act of March 6, 1893) declares that any person or persons other than the owner or his agent, who shall drive any horses, mules, or cattle further from their usual ranges than the nearest corral, and who shall neglect to return such animals immediately to their accustomed range, provided they can have the use of such corral, shall be guilty of a misdemeanor. Pen. Code 1895, § 1187 (Rev. Codes, § 8860), declares that any willful driving of any cattle, horses, etc., from their customary range without the permission of their owner shall be an offense. Section 8858 was incorporated in the Penal Code of 1895 as section 1185 by the Omnibus Bill (Rev. Codes, §§ 3560, 3566). Section 3566 declares that if any of the acts enumerated by the preceding sections, among which were section 8858, are in conflict with or inconsistent with any of the provisions of the Code, such acts are to be considered and construed as amendments to the respective section with which they conflict. *Held*, that as section 8858 conflicted with 8860, the latter section must be treated as amended and repealed, so that any driving of grazing animals from their range without the owner's consent would not constitute an offense.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 243; Dec. Dig. ⟸167(2).]

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8. PUBLIC LANDS ⊂⊃19—USE OF.
It is the policy of the federal government, as well as the state, that public lands, not pre-empted by actual settlers, shall not be inclosed, and shall be used by all persons who desire to graze stock thereon.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 25, 26; Dec. Dig. ⊂⊃19.]

9. ANIMALS ⊂⊃94—DRIVING STOCK—CONSTRUCTION.
As Rev. Codes, § 4421, declares that the ownership of property carries with it the right to exclusive possession and enjoyment to the same, one who has acquired title to a portion of land formerly belonging to the public domain may lawfully inclose it and drive stock from such property onto another portion of the public domain without violating section 8858, relating to the driving of stock grazing on public ranges.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 371–374; Dec. Dig. ⊂⊃94.]

Appeal from District Court, Custer County; Daniel L. O'Hern, Judge.

W. J. Bradshaw was convicted of the crime of resisting an officer while the latter was in discharge of his duties, and, from the judgment and order denying new trial, he appeals. Reversed and remanded.

Sharpless Walker and W. C. Packer, both of Miles City, for appellant. J. B. Poindexter, Atty. Gen., for the State.

BRANTLY, C. J. The defendant, having been charged with the crime of resisting a public officer while the latter was in the discharge of his duty in attempting to arrest the defendant, was convicted and sentenced to undergo imprisonment in the county jail and to pay a fine. He has appealed from the judgment and an order denying his motion for a new trial. He assails the validity of the conviction on the grounds that the information does not state a public offense, that the court erred to his prejudice in its rulings upon questions of evidence and in its instructions to the jury, and that the verdict is contrary to the evidence. We shall notice only the contention which questions the sufficiency of the evidence, because in our opinion a conviction could not be sustained upon the evidence found in the record, nor upon that supplemented by any other which might be introduced on another trial.

The charge in the information is that the defendant did—

"willfully, unlawfully, and knowingly resist, delay, and obstruct a public officer named Delos McBride, * * * a duly qualified and acting deputy sheriff, who was then and there in the discharge and attempting to discharge his duty as such deputy sheriff, being then and there engaged in making an arrest of said W. J. Bradshaw for a misdemeanor committed then and there in the presence of said deputy sheriff, to wit, unlawfully driving cattle from their accustomed range," etc.

McBride attempted to make the arrest without a warrant.

[1-6] The statute authorizes a peace officer to make an arrest without a warrant under the circumstances indicated in section 9057 of the Revised Codes; among others, "for a public offense committed or attempted in his presence." Speaking generally, if such an officer has in his hands a warrant fair on its face, issued by a competent court, commanding him to arrest a person named therein, his warrant is his authority, and the person named in it must submit to arrest even though he is not guilty of any offense. The officer, after making his purpose known and exhibiting his warrant, if required to do so, may use force in order to effect the arrest, without subjecting himself to a charge of trespass, provided he uses only such force as is necessary (Rev. Codes, secs. 9062–9064; Sandford v. Nichols, 13 Mass. 286, 7 Am. Dec. 151; Appling v. State, 95 Ark. 185, 128 S. W. 866, 28 L. R. A. (N. S.) 548. His right to arrest without a warrant, however, is vested in him by law, only under the circumstances defined in section 9057, and if the circumstances do not exist, thus bringing into activity the authority of the law, he has no power to make the arrest. His effort to do so is a trespass upon the right of the citizen to the enjoyment of his personal liberty free from aggression by any one. In such case the person sought to be arrested may use such force as may be necessary to prevent the arrest, or to effect his escape after arrest. Miers v. State, 34 Tex. Cr. R. 161, 29 S. W. 1074, 53 Am. St. Rep. 705. True, the offense for which the arrest is sought may be in the form of resistance or obstruction offered to the officer in an attempt to arrest the defendant, or another, or to discharge some duty under civil process (Rev. Codes, § 8259); but the power to make it must be brought into activity, by the actual existence of the emergency pointed out by the law; and upon a prosecution for the offense of resisting an officer, this fact must be established by the same quantum of proof as is required to establish any material fact in any other criminal case. It is not sufficient that the officer believed that the defendant was engaged in a violation of the law, though such belief may have been entertained in the utmost good faith. Such was the rule at common law, and such is the rule under the statute (1 Wharton's Cr. Law (11th Ed.) § 136; Sanders v. Davis, 153 Ala. 375, 44 South. 979; Cummins v. State, 6 Okl. Cr. 180, 117 Pac. 1099. The officer must also make known his official character, or it must be known to the offender; else there is no obligation upon the latter to submit. 2 Wharton's Cr. Law (11th Ed.) § 852; Jones v. State, 114 Ga. 73, 39 S. E. 861; Yates v. People, 32 N. Y. 509.

[7] There is some conflict in the evidence as to whether the defendant was informed of the purpose of the deputy, or presumptively knew of his character and purpose, and also upon the point whether the deputy made a bona fide attempt to effect defend-

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ant's arrest, or went further than to say to him that he was under arrest. It shows without contradiction, however, that the defendant was not engaged in committing any offense, or attempting to commit any. Section 8858 of the Revised Codes declares:

"That any person or persons other than the owner of, or his agents who shall drive any horses, mules or cattle farther from their usual and customary ranges, than the nearest corral, and who shall neglect to return such horses, mules or cattle immediately to their accustomed range, provided they can have the use of such corral shall be * * * guilty of a misdemeanor, and on conviction thereof before any justice of the peace, in the state of Montana shall be fined in any sum not exceeding one hundred dollars nor less than twenty-five dollars, to be collected as other fines are, and may also in the discretion of the said justice of the peace be imprisoned in the county jail for a term not more than three months, or both. All fines collected under the provisions of this Act shall be paid into the school fund of the county in which the said stock do most usually range and graze."

This provision is the only one in the Codes now in force upon the subject, though the district court and the county attorney both entertained the view that the defendant, by his conduct at the time of his alleged resistance to the officer, was acting in violation of section 8860. The trial court proceeded upon this theory, but that this was erroneous will be made clear by a brief reference to the history of these two provisions. Section 8860 was a part of the Penal Code of 1895, as reported by the Code Commission appointed under the act of March 14, 1889 (Laws 1889, p. 116), and the amendment thereto by the act of March 6, 1891 (Laws 1891, p. 278). It is found in the Penal Code of 1895 as section 1187. When the Codes of 1895 were adopted, the Legislature, by an act commonly known as the Omnibus Bill, found in part 5, Title 4 of the Political Code of 1895, and appearing in the Revised Codes as sections 3560–3566, continued in force many of the laws of 1893, among them an act approved March 6, 1893, which is found in the Codes of 1895 as section 1185 (section 8858, supra). It is declared by one of the provisions of the Omnibus Bill (Pol. Code 1895, § 5184 [Rev. Codes, sec. 3564]) that:

"If any of the acts or parts of acts herein enumerated are in conflict with, or are inconsistent with, any of the provisions of the said Codes enumerated in section 3563 [Rev. Codes, § 5183] of this act, or any of them, the acts or parts of acts herein enumerated are to be considered and construed as amendments to the respective Code or Codes, whose provisions they are in conflict with, or are inconsistent with, it being intended hereby that all of the acts or parts of acts herein enumerated shall be the law of the state of Montana, upon the respective subjects, so far as they are inconsistent with the provisions of the said Codes, or any of them, except as herein provided."

Upon a comparison of the two provisions it becomes apparent, not only that section 8858 is in conflict with section 8860, but so much so that the conclusion is necessary that by the retention of the former the Legislature must have intended to supplant entirely the latter. The latter declares any willful driving of any of the animals enumerated from their customary range without the consent of the owner is a misdemeanor; whereas, under the former, they may be driven away without the consent of the owner, provided this is done under the restrictions imposed, and they are thereafter returned. It is usually the case that animals of different owners customarily graze in common upon the public range. When this is the condition, an owner of a part of the herd can more conveniently and expeditiously separate his from the rest if he may drive the common herd to a nearby corral or other similar inclosure which he can make use of for that purpose, thereafter returning the others to the range. The right to do this was commonly recognized among stockmen in this state at the time the law of 1893 was enacted. By bringing it forward and preserving it in force, it was evidently the purpose of the Legislature to give recognition to this custom and denounce as an offense only a violation of it, rather than to declare the more stringent rule found in section 8860. It doubtless also entertained the view that the former would effectively protect the absent owner from loss of his animals by having them driven away and scattered, and at the same time discourage attempted monopoly of the range by a more powerful and aggressive neighbor. It follows, therefore, that the former must be considered the law on the subject with which it deals, though both provisions have been brought forward into the Codes.

[8, 9] It will not be necessary to discuss the evidence in detail. These facts are not controverted: The defendant resides in section 22, township 8 north, range 52 east, being the owner of 400 acres in that section. He owns several other entire sections in that township. He is also the owner of sections 19, 29, 31, and 33 in township 8 north, range 53 east. The intervening sections are owned in whole or in part by other persons. All of section 20 in this township is open public range, except 160 acres covering the north half of the northeast quarter. At the time this controversy arose, this was under the control of J. H. Bickle, the prosecuting witness. He, therefore, was entitled to use the entire section. Prior to August 17, 1915, section 29 had been open range, and was pastured in common by cattle of the defendant, Bickle, and others who have homesteads or hold land by some sort of ownership in the neighborhood. Bickle resides in section 4, township 7 north, range 53 east, about five miles southeast of Bradshaw. Mrs. Agnes Barter has a homestead filing in section 34, township 8 north, range 53 east, but the entire section was open range at the time stated in the information, affording water and good pasturage. There is evidence that while

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the cattle in the community more usually ranged upon sections 20 and 29, they also ranged on section 33 until it was fenced by Bradshaw, and also on section 34. For range during the winter of 1914–15 Bickle had held his cattle in the neighborhood of his home upon the section in which he resides, and others toward the north, and thereafter permitted them to run at large on such public lands as were open range to the north and northwest. For the reason that water was more readily accessible in that locality, they drifted toward sections 33, 29, and 20, and further toward the west, which was mainly open range. In the early part of April, 1915, Bradshaw acquired sections 33 and 29. He inclosed section 33 in June or July. At the time this controversy arose he was engaged in fencing 29. The inclosure was completed on August 19th. During the progress of this work, friction had developed between him and Bickle by reason of the fact that Bradshaw had, at different times, driven from section 29 the cattle running at large there, including some of Bickle's. His apparent purpose was to preserve the grass there for his own cattle. The direction in which he drove them depended upon where he found them upon the section. On the afternoon of August 17th the deputy sheriff, who had been informed of the acts of Bradshaw and was on the watch for him, discovered him and his son, both on horseback, rounding up a number of cattle, including some of Bickle's, near the southeast corner of section 29, and starting them in the direction of section 33. He approached Bradshaw on horseback, and told him not to drive the cattle in that direction, but to drive them to section 20. Upon refusal of Bradshaw to obey, he told him he was under arrest. The latter refused to submit, in the meantime whirling a rope, which he had been using as a quirt. The deputy testified that Bradshaw struck at his horse with the rope, so frightening it that he could not reach Bradshaw to effect his arrest. The deputy then went away, saying that he would have the sheriff come the following day and make the arrest. Bradshaw then drove the cattle through a gap in the fence upon section 33, and thence over upon section 34.

It is the policy of the federal government that the open, unoccupied public lands shall be free to all persons who desire to use them for grazing their stock. This policy is indicated by the act of Congress approved February 25, 1885 (23 Stat. 321, c. 149), prohibiting the erection of inclosures thereon, except by bona fide settlers or persons intending in good faith to make entry of the area so inclosed. This same policy is indicated by our own statute supra. No one can lawfully exercise control over any of them to the exclusion of others and thus monopolize the use of them. Buford v. Houtz, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618. Even when one has acquired title to portions of them, these are still open to use by animals running at large, until the owner chooses to make exclusive use of them. The owner is entitled to so use them at any time, for the ownership of property carries with it the right to the exclusive possession and enjoyment of it. Rev. Codes, § 4421. He may exercise this right either by erecting lawful inclosures or by preventing encroachment by animals running at large, by keeping them driven beyond his boundaries. His right extends no further than to drive them across his own boundaries; but he is not bound to drive them to one portion of their customary range rather than to another.

The purpose of defendant here was, not to monopolize any portion of the public range, nor to drive the cattle away from it, for section 34 was a part of it, but merely to drive them entirely from his own land, leaving them on the range immediately in the vicinity of lands of their owner. This he had a right to do, and in doing so committed no offense.

The judgment and order are therefore reversed, and the cause is remanded to the district court, with directions to discharge the defendant.

Reversed and remanded.

SANNER and HOLLOWAY, JJ., concur.

(40 Nev. 151)

CAREY v. CLARK. (No. 2239.)

(Supreme Court of Nevada. Dec. 15, 1916.)

1. BOUNDARIES ⇐3(3) — LAND CONVEYED — COURSES AND DISTANCES — "PERMANENT MONUMENT."

It is a fundamental rule in construing conveyances that courses and distances give way to permanent monuments, and the northerly side line of a street, extended, is in effect a "permanent monument."

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 6–19; Dec. Dig. ⇐3(3).

For other definitions, see Words and Phrases, First and Second Series, Permanent Monument.]

2. REFORMATION OF INSTRUMENTS ⇐43 — BURDEN OF PROOF.

In suit to quiet title against defendant claiming under a conveyance which he prayed to have reformed to comply with plaintiff's agreement to convey, alleged in the answer, the burden of proof was on defendant to establish his contention as to the description of the property intended to be conveyed by virtue of the original agreement.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 154; Dec. Dig. ⇐43.]

3. APPEAL AND ERROR ⇐1011(1)—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

Where the evidence was conflicting, and there was substantial evidence to support the decision of the trial court, the Supreme Court cannot disturb the findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⇐1011(1).]

4. DEEDS ⇐101—CONSTRUCTION BY PARTIES.

In suit to quiet title against a defendant, who sought reformation of his deed to comply

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with plaintiff's agreement to convey, alleged in the answer, where the parties themselves had construed an ambiguous provision of the agreement, the trial court properly refused to sustain defendant's contention contrary thereto.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 233; Dec. Dig. ⟸101.]

5. APPEAL AND ERROR ⟸1011(1)—PROVINCE OF COURT—DETERMINATION OF FACTS FROM CONFLICTING TESTIMONY.

Where the testimony of defendant and his witnesses was controverted by plaintiff's witnesses, it was the exclusive province of the court below to determine the facts from the conflicting testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⟸1011(1).]

6. EVIDENCE ⟸588 — CONTROL OF TESTIMONY BY PHYSICAL FACTS.

Physical facts will control testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. ⟸588; Witnesses, Cent. Dig. § 1164.]

Appeal from District Court, Humboldt County; Edward A. Ducker, Judge.

Suit by Charles Carey against George H. Clark. From a judgment for plaintiff, and an order denying his motion for new trial, defendant appeals. Judgment and order affirmed.

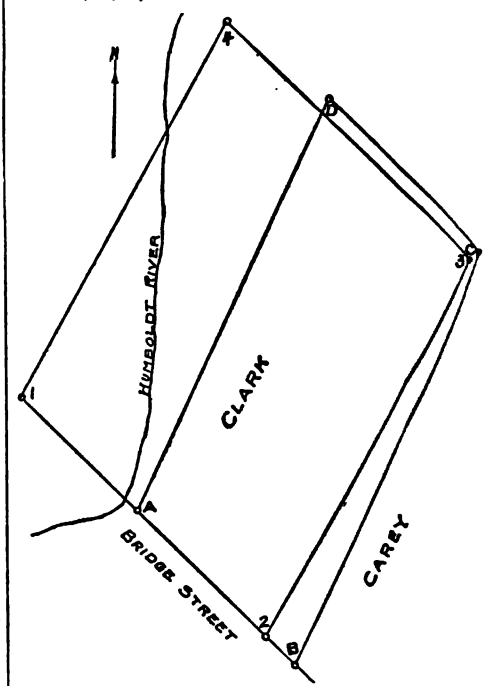
R. Gilray, of Winnemucca, for appellant. Salter & Robins, of Winnemucca, for respondent.

NORCROSS, C. J. Respondent brought suit against appellant in the court below to quiet title to a certain parcel of land in the town of Winnemucca. Appellant, in his answer, denied certain of the material allegations in the complaint and, for a further defense and by way of cross-complaint, alleged mutual mistake in the description contained in a certain deed made by the respondent as grantor to the appellant as grantee, which alleged mistaken description was relied upon by respondent in support of his alleged cause of action. Appellant prayed for reformation of the said deed to comply with the agreement alleged in the answer. Judgment was for the plaintiff. From the judgment and from an order denying a motion for a new trial, defendant has appealed.

From the evidence it appears that on the 12th day of December, 1911, an agreement in writing was entered into between the plaintiff and defendant, whereby the plaintiff agreed to convey to defendant by good and sufficient deed the following described premises:

"Fronting sixty-four feet on the extension of Bridge street to the Humboldt river on the northeasterly side of said extension, extending back from said extension of Bridge street, between parallel lines one hundred and twenty-five feet, the four corners of said piece of ground to be designated and marked by permanent posts by the parties hereto."

Shortly after the making of the said agreement of December 12, 1911, the parties marked the boundaries of the land intended to be conveyed pursuant to said agreement. It appears that the corners were designated by small stakes rather than by "permanent posts." Several months later, on the 27th day of March, 1912, plaintiff made and executed a deed in pursuance of said prior agreement and delivered the same to the defendant, and it is this deed which defendant alleges, by reason of mutual mistake, does not comply with the terms of the agreement. The following diagram shows the premises which the plaintiff contended was conveyed by the deed of March 27, 1912, and the premises which the defendant contends should have been conveyed by said deed and which he asks that the deed be reformed to convey. The land which the plaintiff contends was conveyed by the said deed is marked on the diagram by the lines 1, 2, 3, 4. The land which the defendant contends should have been conveyed is marked by the lines a, b, c, d.



[1] By the description contained in the deed in question, the center of the center pier of a concrete bridge spanning the Humboldt river was used as a starting point for determining the corners of the land which the deed purports to convey. It is clear that there is an error in the description of the starting point which should have been the northerly end of the pier. As it is a fundamental rule in construing conveyances that courses and distances give way to permanent monuments, and as the northerly side line of Bridge street extended is, in effect, a permanent monument, the misdescription in the deed, to this extent, is immaterial.

[2, 3] The burden of proof was on the defendant to establish his contention as to the

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description of the property intended to be conveyed by virtue of the original agreement. The defendant submitted testimony to establish the fact that the alleged corner "a," marked upon the diagram, was fixed by a stake driven in the ground at the time plaintiff and defendant fixed the boundaries of the land to be subsequently conveyed by deed. Plaintiff in his testimony denied that the stake was fixed at this point. Upon the contrary, that it was fixed several feet farther to the west on the northerly side line of Bridge street, extended, near the then bank of the Humboldt river; that the point where the stake was originally fixed had become eroded away. The evidence was conflicting as to all of the corners which the defendant contends were the corners fixed by the parties to the original agreement. The court found in favor of the plaintiff upon all of the issues. As the evidence was conflicting, this court, upon an established principle of appellate procedure too well settled to require a citation of authorities, cannot disturb the findings where the evidence is simply conflicting and where there is substantial evidence to support the decision of the court below.

[4] It is the contention of counsel that the land should extend back from the extension of Bridge street "between parallel lines 125 feet"; that the depth of the lot in question should be 125 feet measured upon a line at right angles from the northerly side line of Bridge street extended. This portion of the agreement may be regarded as ambiguous. Counsel for respondent contends that the meaning of this provision was simply that the side lines should be parallel and 125 feet in length. There is some evidence in the case that both parties construed this provision of the agreement to be in accordance with the contention of the respondent. The deed itself describes the side lines as being 125 feet in length. No objection to this description was interposed by the defendant for a long time after his receipt of the deed in question. It appears, also, that the defendant constructed a temporary fence along what he supposed was the northerly and easterly side lines of the land in question. The side line of the fence so constructed was substantially 125 feet in length. The parties themselves having placed a construction upon the meaning of this provision of the agreement, we think the court below did not err in refusing to sustain this latter contention of the defendant.

The description in the deed is of a rectangular tract, the end lines of which are 100 feet in length, while the agreement called for only 65 feet fronting on the extension of Bridge street. No particular point is made of this description, however, as the controversy was entirely over the situation and length of the true easterly side line as designated on the ground by the parties shortly after the agreement to convey was entered into.

[5] Counsel for respondent do not question the law contended for by counsel for appellant as applied to a state of facts as testified to by the defendant and his witnesses. However, as the testimony of defendant and his witnesses was controverted by the witnesses for the plaintiff, it was the exclusive province of the court below to determine the facts from the conflicting testimony.

[6] Counsel for appellant has contended that plaintiff's testimony is contrary to the physical facts. If this were clearly so, the physical facts would be controlling. There is evidence, however, that the river bank has changed by reason of erosion, and hence that the physical facts were not the same at the time of the trial as at the time of the agreement.

There appears to be no material questions in this case other than controverted questions of fact. The evidence is conflicting, and we cannot say the judgment is not without substantial evidence to support it.

The judgment and order are affirmed.

McCARRAN and COLEMAN, JJ., concur.

(40 Nev. 262)

In re HARTUNG'S ESTATE. (No. 2217.)

(Supreme Court of Nevada. Dec. 29, 1916.)

1. WILLS ⇐441—CONSTRUCTION—INTENTION OF TESTATOR.

Although the intention of a testator must appear from a perusal of the will, although not necessarily articulated in formal language, the court may take into consideration, in determining such intention, the subject-matter, chief aim of the testator, and all the surrounding circumstances.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 958; Dec. Dig. ⇐441.]

2. CHARITIES ⇐35 — CONSTRUCTION — INTENTION OF TESTATOR—"MONUMENT."

A will gave the residue of testator's estate to defendant fraternal order if, within five years from the date of his death, the fraternal order should establish a home for orphans and foundlings to be named after the testator's son, and providing, as an alternative if the order should not accept, a similar gift of the income of the residue to a school district on condition they build an industrial school named after testator's son, or, in default of the district's acceptance, a similar gift to the state university to establish an industrial school fund named after testator's son. *Held* that, the intention of the testator being to provide a "monument" or artificial structure for the purpose of preserving the memory of his son, the fraternal order was not entitled to the annual income of the estate in any event, but only so long as it maintained the home.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 67; Dec. Dig. ⇐35.]

Appeal from District Court, Washoe County; R. C. Stoddard, Judge.

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On petition for rehearing. Petition denied.

For former opinion, see 160 Pac. 782.

George B. Thatcher, Atty. Gen., and Hoyt, Gibbons & French, of Reno, for appellant. Thomas E. Kepner, of Reno, and C. E. Mack, of Virginia City, for respondent.

COLEMAN, J. Counsel for appellant have filed a petition for a rehearing. In the petition it is not contended that the court erred upon any points considered in the opinion, except the one last touched upon. After quoting from the opinion of the court, the petition says:

"In other words, the court has stated a conclusion which purports to be the interpretation of a will, arrived at by the discovery of the testator's intention, and we shall maintain that the court is in error and reached the conclusion by an erroneous path contrary to clear legal principles applicable to the subject."

Counsel then devote 20-odd pages of their petition to a consideration of the law applicable to the question involved. A succinct statement of counsel's contention is contained in the following language of the petition:

"The court can indeed give effect to any intention of a testator which he has shown by the words that he has used, *even though it has not been articulated in formal language; but such an intention must appear from a perusal of the will.* (Italics ours.) It cannot be inferred from mere silence; much less can such an inference be founded upon bare conjecture as to what a testator would have said if he had foreseen the events which have happened since his death. We cannot speculate as to his intentions and make for him such a will as we may consider that he now, in view of the present circumstances would have made."

[1] We are in hearty accord with the views expressed, but we also think that we may take into consideration, in determining the question now before us, the subject-matter, the chief aim of the testator, and all the surrounding circumstances. We were guided by these principles when we rendered the original opinion herein. We will now consider the question more at length.

[2] The will, so far as it throws any light upon the question under consideration, reads as follows:

"Tenth. I give, devise and bequeath all the residue of my estate, both real and personal, as follows:

"(A) To the Independent Order of Odd Fellows of the State of Nevada the income from my estate to be paid over to them by my executors and trustees annually, if within five years from the date of my death the said Independent Order of Odd Fellows of the State of Nevada, does establish a home worthy of its name, for orphans and foundlings near Reno, Nevada, and to be known by the name of the 'Royal D. Hartung Home for Orphans and Foundlings' but if the Independent Order of Odd Fellows of Nevada does not accept the provision of this bequest, within the time herein mentioned, then—

"(B) I give and bequeath all my estate to the board of school trustees of Reno, Nevada, provided that they will build and establish within the Reno school district an industrial school, the land and building to cost not less than twenty-five thousand ($25,000.00) dollars. The cost of this land and the building shall be paid by the taxpayers of the Reno school district. The said school shall be known as the 'Royal D. Hartung Industrial School,' and my estate shall be excepting where already invested in safe, and good income bearing bonds, reduced to cash and loaned out upon first class real estate security, the income thereof to be considered as an annual endowment fund and the income thereof only to be expended annually by the board of trustees for the purpose of paying the teachers, or supplying facilities for instruction in the Royal D. Hartung Industrial School. If, after a reasonable time has elapsed not exceeding seven years after the date of my death, the city of Reno fails to accept the provisions of this bequest, then—

"(C) I give and bequeath all my estate, both real and personal not otherwise herein devised, to the board of regents of the State University of Nevada, that my estate be reduced by them to cash, or good income bearing securities, and loaned out upon first class real estate security and the income thereof alone to be expended annually, or at such other period as such trustees may deem best in assisting poor, worthy students, of high moral character, in obtaining an industrial school or industrial college education in the city of Reno, and I expressly direct that the principal of said gift to said board of regents be kept intact and that the fund be kept a perpetual fund to be known as the 'Royal D. Hartung Industrial Education Fund.' * * *" In re Hartung's Estate, 155 Pac. 353.

In considering this will while before us in another contest, we said:

"It is apparent at a glance that the paramount purpose of the testator was the establishment and maintenance of a permanent monument to the memory of his son. So consumed was he with this idea and purpose, that he imposed three conditions in his will as an assurance that his wishes in this regard would be carried out. The medium through which he most desired the attainment of his aim was the Independent Order of Odd Fellows, for it was to that organization he offered the first inducement, as appears from paragraph 10 of his will. Should the organization named fail to avail itself of the opportunity offered, then the Reno school district or the State University, in turn, was to take the residue of the estate of the testator." In re Hartung's Estate, supra.

If our conclusion as thus expressed was correct, and we think it was, then we naturally ask: What is a monument? What are the sentiments which animate men in erecting them? These, we think, are legitimate questions of inquiry in this connection. A monument is nothing more nor less than an artificial structure, brought into existence for the purpose of perpetuating the memory of some person or event. In this instance the testator sought to perpetuate the memory of his son, Royal D. Hartung.

We think no one would be so reckless in his statement as to say that the respondent, though having established a home as contemplated by the will, would be faithful to its trust if it were now to abandon the home thus established. If such a thing were done, the real purpose of the testator would be defeated. But the testator took the precaution to guard against such a consequence. In the first instance, he imposed upon an organization, whose principal aim is to dispense charity, the erection and maintenance of the home. He imposed a trust in that

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organization, and he evidently had faith in its fidelity to its trust. But that the perpetuation of the monument which he sought to have erected might be assured, he did not leave the matter entirely to the good faith of that organization, but, as an additional guaranty that the trust which he imposed might be faithfully performed, he left his estate to trustees, with directions that they pay over to respondent annually the income therefrom.

It will be noted, from a reading of that portion of the will which we have quoted, that, no matter which of the institutions mentioned therein eventually became the beneficiary under the will, the income alone as it accrued annually could be used, showing clearly the purpose of the testator to keep intact the principal of the estate for all time.

We think that we are safe in saying that the beneficiary under paragraph A of the will is not entitled to the annual income from the estate in any event, but only so long as such beneficiary maintains the home. Then, if the consuming purpose of the testator was the erection and maintenance of the monument to his son, surely we cannot escape the conclusion that the testator intended the income to be used in the attainment of his consuming purpose. What else could have been his intention? We are at a loss to surmise.

It is ordered that the petition for rehearing be denied.

NORCROSS and McCARRAN, JJ., concur.

(40 Nev. 281)

RAMELLI v. SORGI. (No. 2056.)

(Supreme Court of Nevada. Dec. 29, 1916.)

1. COSTS ⇐=264—ON APPEAL—COST BILL—TIME FOR FILING.

A cost bill, though not filed until after decision on rehearing, was filed in time.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1004–1008; Dec. Dig. ⇐=264.]

2. COSTS ⇐=230—ON APPEAL—TRANSCRIPT.

In view of Rev. Laws, § 5333, providing that when appellant specifies as ground for appeal that judge erred in denying a motion for new trial on ground that the evidence did not support the judgment and does not prevail he shall not recover costs for the statement of the testimony, although he prevails on other alleged errors on an appeal from the judgment and from an order denying a motion for a new trial, where the only relief granted appellant was on the appeal from the judgment based on the judgment roll alone, appellant is not entitled to costs for the transcript on appeal from the order denying his motion for a new trial.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 869–876; Dec. Dig. ⇐=230.]

Appeal from District Court, Washoe County; Thomas E. Moran, Judge.

Appeal, pursuant to rule, from the action of the clerk taxing costs of appeal. Costs retaxed, denying one item.

See, also, 38 Nev. 552, 149 Pac. 71, 154 Pac. 73.

Harwood & Springmeyer, of Reno, for appellant. Summerfield & Richards, of Reno, for respondent.

NORCROSS, C. J. [1] Exceptions were taken to the cost bill filed in this case by counsel for appellant. The clerk has taxed the costs in accordance with the cost bill filed. Pursuant to a rule of this court an appeal is taken from the action of the clerk. It is contended that the cost bill was not filed in time, because not filed until after decision upon rehearing. We think this objection is without merit. Argenti v. City of San Francisco, 16 Cal. 277; Cameron L. Co. v. Stack-Gibbs L. Co., 26 Idaho, 626, 144 Pac. 1114; 4 C. J. 641.

[2] Appeals were taken in this case from the judgment and from an order denying a motion for a new trial. 39 Nev. —, 149 Pac. 71, 154 Pac. 73. The only relief granted appellant was on the appeal from the judgment based on the judgment roll alone. We think appellant is not entitled to costs for the transcript on appeal from the order denying defendant's motion for a new trial. Rev. Laws, § 5333.

The clerk is directed to strike from the cost bill so much of the allowance made for "typewriting transcript and statement on appeal," which is inclusive of the statement on appeal from the order denying the motion for new trial. All other items of the cost bill are allowed.

McCARRAN and COLEMAN, JJ., concur.

(40 Nev. 300)

In re GORDON'S ESTATE. (No. 2238.)

(Supreme Court of Nevada. Dec. 30, 1916.)

1. WILLS ⇐=111(4)—SIGNATURE—STATUTE.

Under St. 1915, c. 35, providing that no will shall be valid unless it be in writing and signed by the testator or by some person in his presence and by his express direction, a signature to a will by having another aid or steady the hand of the testator, at his request, is valid, if the testator possessed testamentary capacity, was acting under no undue influence, and realized the force and effect of the provisions of the will he was signing.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 273; Dec. Dig. ⇐=111(4).]

2. WILLS ⇐=302(3)—CONTEST—TESTAMENTARY CAPACITY—SUFFICIENCY OF EVIDENCE.

Evidence in a will contest *held* to sustain a finding that, when the testator's aided signature was made, he did not know that the instrument he was signing contained provisions as to the distribution of his estate which he had formerly discussed with the draftsman, or ordered him to prepare.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 702; Dec. Dig. ⇐=302(3).]

3. APPEAL AND ERROR ⇐=1011(1)—FINDING—CONCLUSIVENESS.

Where there is a substantial conflict in the evidence on a material issue, the trial court's

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determination will not be disturbed, if it is supported by substantial evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⟸ 1011(1).]

Coleman, J., dissenting.

Appeal from District Court, Washoe County; Thomas F. Moran, Judge.

Will contest by Mrs. William J. Gordon, and William J. Gordon, Jr., minor heir of William J. Gordon, deceased, against Mary T. Dougherty. Order refusing to admit the will to probate, and contestee appeals. Order affirmed.

Jas. T. Boyd and Roy W. Stoddard, both of Reno, for appellant. S. Summerfield and A. A. Heer, both of Reno (Robert Richards, of Reno, of counsel), for respondent.

McCARRAN, J. William J. Gordon died on July 15, 1915. He was survived by a widow and by a minor heir, William J. Gordon, Jr. In an instrument purporting to be his last will and testament, after making small bequests of money to his wife, to his infant son, William J. Gordon, Jr., and to each of his sisters, he bequeathed the rest, residue, and remainder of his estate, of every kind and character, to one Mary T. Dougherty. An application to have this will probated resulted in a contest, at the inception of which the court appointed attorneys to represent the absent minor heir. The widow was represented in her individual capacity by other counsel.

The record in the case is voluminous. It will, however, we think, suffice to determine the principal point in the case upon a consideration of three propositions considered by the trial court, and upon which that court, as a final conclusion, refused to admit the will to probate:

"First, did the deceased possess testamentary capacity at the time it is testified that he discussed the making of the will with the draftsman, some time prior to the date he was taken ill?

"Second, did the testator know, at the time it is testified to that the testator signed the will, that it was the instrument he discussed with the draftsman, or ordered him to prepare?

"Third, is the signature of the will the signature of the testator?"

[1] We shall approach the last proposition first, and in doing so we deem it sufficient to quote the words of the trial court, wherein we find presented a fair résumé of the evidence. He says:

"The evidence tends to show that at the time of the alleged signing of the will the testator could hardly see; was seriously ill and very nervous; that in first attempting to sign the will, while propped up in bed, he made the sprawl, and upon one of the witnesses remarking that the signature was not very good, or words to that effect, the testator said, 'I am too nervous,' and requested one of the witnesses to steady his hand; that thereupon, and as testator was propped up in bed, the instrument in front of him on the magazine or cardboard, one of the witnesses proceeded to assist the testator to write his name in the manner following: He put his arm completely around the back of the testator, who held the pen, and in that position, with the witness guiding the hand of the testator, the legible signature William J. Gordon was made."

The court determined that the signature thus made was rendered invalid, but with this conclusion we are not in accord. Our statute (Session Laws 1915, p. 36) provides:

"No will * * * shall be valid, unless it be in writing, and signed by the testator, or by some person in his presence, and by his express direction, and attested by at least two competent witnesses, subscribing their names to the will in the presence of the testator."

That a signature to a last will and testament is not rendered invalid by reason of another having aided the hand of the testator is supported by a line of eminent authorities. In re Miller's Estate, 37 Mont. 545, 97 Pac. 935; Vines v. Clingfost, 21 Ark. 309; Craighead v. Martin, 25 Minn. 41; Fritz v. Turner, 46 N. J. Eq. 515, 22 Atl. 125; Sheehan v. Kearney, 82 Miss. 688, 21 South. 41, 35 L. R. A. 102; Jarman on Wills, pp. 106–111.

In order for this rule to apply, it must appear that the testator, at the time of requesting or receiving the aid in the signing of the instrument, had the present volition to affix the signature, and was aware and fully cognizant of the details of the instrument of will or testament to which he, by the aid of the other, was affixing his signature. The fact that the signature of the testator was made in the manner indicated by the record here would not of itself invalidate that signature. Hence we must decide—and we do this in the light of a harmonious line of authorities—that if the testator in this instance possessed testamentary capacity, was acting under no undue influence, realized the full force and effect of each and every one of the provisions of the will that he was signing, then the signature, in the manner in which it was made, as described by the trial judge, was a valid signature.

[2, 3] We now take up the second question considered by the trial court, namely: Did the testator know, at the time at which his aided signature was made, that the instrument he was then signing contained the provisions as to the distribution of his estate which he formerly discussed with the draftsman, or ordered him to prepare? The record in this case presents a series of events in the later life of the testator, as well as a condition of mind and body, which must not be overlooked in arriving at a conclusion as to the proper answer to be made to this question.

The trial court, which heard the evidence, saw the witnesses, and had opportunity to observe their manner, conduct, and demeanor, had presented to it, as the record discloses, two sharply conflicting lines of evidence. The testimony of Dr. Hartzell, the physician who attended the decedent during his last illness, the testimony of Roy W. Stoddard,

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the attorney for the deceased and the draftsman of his will, as well as the testimony of the witness S. R. Tippett, each of the last-named witnesses being most reputable attorneys of splendid integrity, all tends strongly to establish that at the time of the signing of this instrument the deceased, Gordon, was of sound and disposing mind, and was fully aware of what he was doing. On the other hand, the record establishes a condition attendant in the testator, as well as surrounding circumstances, all of which, to say the least, appeared to lead to the catastrophe in his career relieved only by death. The deceased, up to a few months prior to the time of his death, had resided in the Eastern States. He came to Nevada for the purpose of securing a divorce. He came here in company with the proponent of this will, the principal beneficiary under the instrument, Mary D. Dougherty, and her aunt, Mrs. Kramer.

His wife, from whom he had been estranged, and six year old boy, were in the Eastern States.

Prior to his coming to this state, deceased had been in poor health, and his mental condition is described by his sister, Mrs. Pelton, where, in her deposition, she relates:

"Q. Will you describe your brother's physical condition as you saw it on that day (February 20, 1914)? A. He was very sick. He was losing his sight. He could hardly see. Q. As regards your brother's ability to move, to walk freely, what was his appearance? A. It was very difficult for him to walk. He walked with a stick and was led to the door by some man. I don't know whether it was a nurse; he did not say. Some one was taking care of him."

On being further interrogated, she testified:

"Q. Did you talk with your brother at that time, Mrs. Pelton? A. I did. Q. For how long were you in conversation with him? A. About an hour. Q. As regards his coherence and ability to speak intelligently, what can you say? A. He could not speak intelligently. He could not make two sentences go together. Q. Now, as regards his mental capacity, as shown by his conversation at that time, will you state what your opinion is? A. I do not think he was capable of doing anything. He did not know what he was doing. Q. As compared with his mental condition of prior years, Mrs. Pelton, can you make any comparison? A. None whatever, because he hardly knew me. Q. Can you state whether he seemed stronger or weaker mentally than in previous years? A. Very much weaker. Q. Can you state whether or not he seemed to be under the immediate influence of say liquor at the time? A. He appeared to be under the influence of something. I do not know whether it was drugs or liquor. Q. Did you see your brother again before he went West, Mrs. Pelton? A. Never."

In answer to further inquiry, we find as follows:

"Q. In reference to personal facts is your relations with your brother, was he accurate and clear in regard to his statements? A. Not at all. Q. And as to inferences of your brother upon such facts stated, was he rational in his statement of such opinions, or otherwise? A. Certainly not rational."

The testimony of the witness Mary D. Hartzell, who, prior to her marriage to Dr. Reine K. Hartzell on July 27 following the death of Gordon, was Mary D. Dougherty, and the party who, with her aunt, accompanied the deceased from Philadelphia to the city of Reno, is in part as follows:

"Q. Do you know what his (Gordon) primary object was in coming to Reno? A. He came on account of his health and to obtain a divorce. Q. Obtain a divorce? Before he left the East and came out here, did you, or did you not, have consultations with him with reference to his obtaining a divorce? A. Frequently. Q. In the presence of other people? A. Yes. Q. Sometimes in the absence of other people? A. I suppose so; I don't remember. Q. Who accompanied Mr. Gordon when he left the East and came to Reno? A. Mrs. Kramer, my aunt, and myself. Q. I wish you would state to the court, if you are able to say it, Mrs. Hartzell, why you accompanied Mr. Gordon to Reno? A. Because he was very ill. He had no one else to come with him, so he asked me if I would come, and I said if I could get Mrs. Kramer to come with me I might be able to do so; so I came with him."

On further inquiry, the witness testified:

"Q. I wish you would state to the court, Mrs. Hartzell, whether there was any agreement or understanding, express or implied, between you and Mr. Gordon, before you left the East, that in the event that he could obtain a divorce that you would become married? A. There was. Q. What? A. There was. Q. That agreement or understanding was before you left the East, if I understand you correctly? A. It was."

Gordon, as appears from the record, arrived in Reno some time in the latter part of February or the first part of March, 1915. It appears that the decedent was more or less continuously under a doctor's care from the time of his arrival in Reno until his death; but it was not until the 20th of June, 1915, that he became confined to his room and to his bed. At that time, and from that date forward, he appears to have been continuously under the care of Dr. Reine K. Hartzell and three trained nurses. The testimony of Dr. Hartzell discloses a course of treatment attendant with the administration of most powerful drugs and medicines. The charts kept by the trained nurses, and admitted in evidence in this case in the trial court, disclose the mental as well as the physical condition of the decedent during the time from the 20th day of June until the 30th day of the same month, on which latter day the instrument here in question was signed. These charts disclose, among other things, the following notations made by the attendant nurses:

June 20, between the hours of 12 p. m. and 3:20 a. m.: "Irrational."
June 21, 2 a. m.: "Talking irrationally."
June 22, 12 a. m.: "Rambling."
June 23, 3:30 to 4:45 a. m.: "Talking irrationally."
June 23, 6:15 to 7:30 p. m.: "Talking irrationally."
June 24, 1:45 a. m.: "Talking irrationally."
June 24, 7 a. m.: "Talking irrationally."
June 25, 1 a. m. to 3 a. m.: "Restless irrational."
June 25, 1 a. m. to 6 a. m.: "Very irrational and talked continuously."

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June 25, 6 p. m.: "Irrational all day."
June 26, 2 a. m. to 6 a. m.: "Very irrational." "Irrational from 2 to 6 a. m."
June 27, 4 a. m.: "Irrational."
June 28, 3:45 a. m.: "Talking irrationally."
June 28, 5:30 to 6 p. m.: "Very irrational all day."
June 30, 6 a. m.: "Very irrational."

It was between the hours of 5:30 and 6 p. m. of June 30th that the will here in question was signed. There is no notation in the clinical chart of that day as to Gordon's condition at or about the hour at which the will was signed. Indeed, there is no notation of the doctor's visit, or of the visit of the party, at that hour, although notations of the doctor's visits on other occasions, and at other hours of the same day, are much in evidence in the charts.

The testimony of Attorney Stoddard bears evidence of the affection held by the deceased for his six year old boy. The testimony of Mrs. Hartzell makes reference to this as well. In the copy of a letter written by Gordon to a party in the East, of date April 15th, we find the following:

"As per our conversation you can see by my address that I have started a Nevada residence.
"As to William, I will do as I said I would, but would like to have it arranged so that I could see him occasionally.
"I am getting a divorce upon the grounds of desertion, which you know is true. If I had not been so ill for the past eight months, as you know, I would not have taken this step. I think you understand the situation thoroughly.
"Trusting that you and yours and dear little William are well, I am. * * *"

In another letter to the same party, on April 27th, the following appears:

"Your letter received as to my affairs and business relations and different connections, really I have nothing more to say. As per our conversation of recent date, please remember I will do as I have said as to William, also I will get a divorce after I have resided here six months. If you wish to contest any point of course, I am always willing to meet you as a gentleman."

The question before the lower court was as to the testamentary capacity of the deceased at the time at which he signed the instrument in which he practically disinherited his infant son. The condition of the testator on this occasion was a fact to be arrived at and determined. This court, as well as other courts of review, have repeatedly said that where, on a question vital to the issue, there is a substantial conflict in the evidence, the determination of the trial court will not be disturbed if the same is supported by substantial evidence. To say that there is no conflict of evidence here, to say that the decision of the lower court was not supported by substantial evidence, would be to disregard entirely the mental condition of the testator as indicated by the testimony and as evidenced by the clinical charts made by the trained nurses, who, as we must assume, used the terms found there advisedly. The physical weakness, and indeed the mental condition, of the decedent, was evidenced in no small degree by the pitiable scrawl found in the will, made by his own hand.

With a weakened physical and mental condition which the record shows extended at least as far back as February 20th, treated internally, hypodermically, intervelniously with medicines of which in almost every instance arsenic was a component factor, he passed through successive days, from June 20th to June 30th, when those in charge noted his conduct at intervals as "irrational." On the last-named date the deceased performed an act which, to say the least, had all of the elements of being unnatural, wherein he eliminated his infant son from substantial participation in his estate. In view of all this, as borne out by the record, we are unable to say that the decision of the trial court, wherein it determined that at the time of the signing of the will the testator did not know what he was signing, was not supported by substantial evidence.

It is not for us to say whether, if the matter was before us in the first instance, we would have arrived at the same decision as was arrived at by the lower court. The question before us, as it is presented here on review, is whether there is in the record substantial evidence to support the determination of that court, in view of what we perceive to be a substantial conflict.

Counsel for appellant assign error to the action of the lower court in appointing certain attorneys to supersede others in representing the minor heir. If error, it was such as could scarcely be considered prejudicial to the interests of appellant in the matter so far as it has proceeded. We do not assume to determine the propriety of the action. The error, if such it be, might be properly considered if the matter involved the question of the allowance of fees, or other matters of similar import.

The order of the lower court in refusing to admit the will to probate must, as we view it, be affirmed.

It is so ordered.

NORCROSS, C. J. I concur in the opinion and in the judgment and order. While the question of the capacity of the testator at the time of executing the will is an exceedingly close one, I think it cannot be said, as a matter of law, that the evidence is insufficient to support the judgment.

COLEMAN, J. I dissent. By a great weight of authority in the United States, it is held that in a will contest the burden of proof rests upon the person asserting the lack of capacity of the testator to make the will. 40 Cyc. 1018. Instead of the contestants having shown by a preponderance of the evidence that the testator lacked mental capacity to make a will, I think it can be said there is no evidence worthy of serious consideration tending to show lack of mental capacity at the time the will was executed.

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There were only three persons present when the will was executed—two lawyers and a doctor—and all three of them testified that the mind of the testator was clear. It is sought to overcome this testimony by evidence of his sister given as to his condition in February, 1915, when she was negotiating with him to purchase his interest in the estate of a deceased brother, and of his general ill health. His sister, Mrs. Pelton, testified:

"Q. The fact that he told you that he had been in the hospital for his health, that his eyesight was defective, and that he desired to go West for his health, or words to that effect, and that he was in need of money, didn't impress you as being irrational, did it? A. That particular statement didn't. Q. Did any of those things I have mentioned? A. No. Q. As to those particular things he seemed to be rational? A. Yes. Q. Please state what he said on that occasion that indicated irrationality? A. He talked in a very irrational way. Q. What did he say? A. He said that his wife had left him, that he had this little boy that he wasn't allowed to see, that he was very unhappy, and that he had somebody who was very fond of him taking care of him; that he would like to go back to the West if he did not get well; he would like to go West, and asked me if I would help him go. He asked me to telephone him the next day, and I said I would. I did, and I could not get him. The next thing I knew he had gone West. Q. Will you be so kind, Mrs. Pelton, as to tell us what particular acts that you enumerated in your last answer impressed you as being irrational? A. In the first place, I could not get him on the telephone. He wanted money, and when he had a chance to get it he didn't telephone. Q. What acts and statements have you described? A. Do you mean in regard to his going away? Q. What particular things have you stated in that answer that impressed you as being irrational? A. Because one minute he wanted to go to the hospital, and the next he wanted to go away. He wanted to go back to his wife. That struck me as not to be natural. * * * Q. You said that it was not the fact that he wished to raise money, but something about the way of selling it, that impressed you as irrational? A. I didn't think he should. Q. Why should he not have sold the interest? A. Because it should not have been sold out of the family. It struck me as an unnatural proceeding."

It appears from the testimony of this witness, as given in the opinion of the court and this dissent, that when she saw the testator he was under the influence of liquor or drugs. Most men are irrational when in that condition. But I submit that when her testimony on cross-examination, as quoted herein, is considered there is nothing to sustain the idea that testator was insane at the time of the meeting of testator and his sister; in fact, when boiled down, her testimony shows conclusively that she did not base her statement that the testator was irrational upon his appearance, words, and actions when she saw him in February, 1915, but upon the fact that he sold his interest in an estate out of the family—an incident which transpired after she saw him in Philadelphia. And this, too, notwithstanding the fact that in all probability he received more for it than she was willing to pay. It was a very insane thing to do, possibly; but we usually regard as rational an effort to get the most we can for property.

Testator arrived in Reno about April 1, 1915, and shortly thereafter had some correspondence with one Malcolm Chase, of Boston, who apparently was acting for Gordon's wife in which she sought to overthrow some transaction of Gordon's. In one of his letters, Chase says:

"* * * I cannot see, now that he has paid you, that it makes any difference to you one way or the other."

What is this but an endeavor to influence Gordon to practically repudiate his transaction? In his reply, Gordon says:

"* * * I shall not permit nor be a party to any such dishonest scheme and am surprised and indignant to think that you would propose anything of the kind to me, for you know that I do not do that kind of business."

This letter was written from Reno May 27, 1915, three or four months after he had had the negotiations with his sister for the sale of the interest. Does this letter indicate a weak, incompetent mind? We can almost see the passion with which he wrote flashing from his eyes. I think this letter shows beyond question that testator's mind was not only clear, but vigorous, on May 27, 1915. The attorney who drafted the will was consulted about the making thereof and its proposed terms as early as April, and on numerous occasions up to the day of its execution, and all of the talk was upon the basis upon which it was finally executed. The learned trial judge found that the testator possessed a clear, sound mind when he talked over the making of the will with the attorney some time prior to its execution. In his written opinion, he asks this question:

"Did the testator possess testamentary capacity at the time, it is testified, that he discussed the making of a will with the draftsman, some time prior to the date when he was taken ill?"

In the opinion the court answers this question as follows:

"Considering all the evidence before it, the court answers the first question in the affirmative."

Before proceeding further, I will quote from the opinion of the trial judge. He said:

"After carefully considering the evidence, the court is unable to say that there was any fraud, conspiracy, or undue influence in the case."

In another place he uses this language:

"The evidence showed that the testator on several occasions discussed the proposition of making a will, with the attorney who drafted the instrument, and, on one occasion at least, in the presence of the principal legatee. It seems that the testator on that occasion was requested by the principal legatee to give the trust fund to the boy or minor child of the testator and the testator's wife, and that his reply at that time was that the principal legatee could look after the boy."

Thus it will be seen, if we accept the views of the trial court (and on these points there is no dispute here), that, some time prior to the execution of the will, the testator was of a sound mind, and that no fraud or undue influence was perpetrated or exerted to induce the making of the will which was executed. Upon the argument in this court it was

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stated by counsel for contestants (and not denied) that the estate was practically of no value.

With the finding of the trial judge that testator was sane at the time he discussed the making of the will before us what, let us ask, is the evidence of insanity at the time of the execution of the will? None, unless it be general ill health, the terms of the will itself, and the charts. That mere general ill health is no ground to declare a will void is a rule of law which should require no citation of authority to sustain it, but for the general rule reference may be had to 40 Cyc. 1009. As I read the record in this case, the fact that the testator left his son only $100 should not weigh for much in determining the mental condition of the testator. In the first place, he seems to have had no estate of any consequence; besides, his wife had deserted him five years before and taken the boy; and, so far as appears, the wife may have been amply able to support herself and son; and under all the circumstances surrounding their life—their respective means—he may have felt; and no doubt did feel, justified in leaving his son only $100. There was no evidence as to the wife's financial condition, but the lack of evidence on this point is due to her voluntary action. She was in court in person and by attorney during the trial when the attorney who was appointed by the court to represent the minor heir, apparently over the objection of the mother, stated that he would on the following day call as a witness testator's wife. When court opened the following morning, it was found that Mrs. Gordon did not occupy her accustomed chair. Upon request of counsel appointed by the court, a bench warrant was issued for her, and it developed that she had left the state the night before. Evidently she was not very anxious to aid in the contest made on the will; she was, no doubt, satisfied to support the son herself. In view of this circumstance, and of the apparent paucity of the estate, should we attach any particular significance to the fact that testator left only $100 to his son? I think not.

As to the charts, they show just exactly what is noted upon them, and nothing more. If Mr. Gordon had been continuously irrational, it is apparent that no notations would have been made. It is evident that the notations were made for the purpose of showing just what his condition was at or about the time they were made. We do not make notes of the usual, but of the unusual. This is true of things generally, and any one who has had the least experience in a sick room knows this to be the practice. Furthermore, the undisputed and unquestioned testimony in this case shows clearly that the notations on the charts referred only to the hour when made. The last notation on the charts of the irrational condition of Mr. Gordon, as shown by the opinion of the court, was at 6 a. m., June 30th. The fact is that the charts show the next notation of his having been irrational at 12 p. m., July 4th. The will was executed at 5:30, June 30th. Thus we see from the charts, the only record evidence in the case, that the testator was in normal mental condition at the time the will was executed; and this record evidence is corroborated by the undisputed testimony of three persons who were present at the time of the execution of the will; and it is shown by the evidence that the will which was executed was the will which testator outlined as the will he desired to make when talking over with his attorney its preparation at a time when the trial judge in his written opinion found Mr. Gordon to have been of sound mind.

I am clearly of the opinion that the order and judgment appealed from should be reversed.

(40 Nev. 170)

WREN et al. v. DIXON. (No. 2259.)

(Supreme Court of Nevada. Dec. 15, 1916.)

1. CONSTITUTIONAL LAW ⟸29 — CONSTRUCTION—SELF-EXECUTING PROVISIONS.

Const. art. 10, § 1, as amended in November, 1902 (see St. 1901, p. 136), declared that the Legislature should provide a uniform and equal rate of assessment and taxation to secure a just valuation of real and personal property, mining claims, etc., and that the acreage of patented claims should be assessed at the valuation of $10 per acre. St. 1905, c. 58, provided for the assessment of patented mines at such valuation. Article 10, § 1, as amended in 1906 (see St. 1907, p. 501), provided that patented mining claims should be assessed at not less than $500, except when $100 in labor has been actually performed on such mine during the year, in addition to the tax on the net proceeds, and no legislation was passed pursuant to such provision until 1913. *Held*, that the constitutional amendment of 1906 was self-executing at least as to the provision for taxation of patented mines, and absolutely nullified the statute of 1905, so that an assessment thereunder in 1909 was invalid.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 32; Dec. Dig. ⟸29.]

2. CONSTITUTIONAL LAW ⟸24 — CONSTRUCTION—REPEAL OF STATUTES.

Statutes may be nullified, in so far as future operation is concerned, by a constitution as well as by statute, as the Constitution is the direct, positive, and limiting voice of the people, and may establish a policy, fix a limit to legislation on a given subject, or prohibit specified acts as being performed by public servants.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 21–29; Dec. Dig. ⟸24.]

3. CONSTITUTIONAL LAW ⟸13 — CONSTRUCTION.

The object of construction, as applied to a written Constitution, is to give effect to the intent of the people in adopting it, which intent is to be found in the instrument itself, as it is to be presumed that language has been employed with sufficient precision to convey it, and, unless it appears that the presumption does

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not hold in the particular case, nothing will remain but to enforce it.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 9, 10; Dec. Dig. ⟸13.]

4. TAXATION ⟸348—MINES AND MINERALS—CONSTITUTIONAL PROVISIONS.

Under Const. art. 10, § 1, as amended in 1906 (see St. 1907, p. 501), to provide that, as to unpatented mines and mining claims, the proceeds alone should be assessed and taxed, and that patented claims shall be assessed at not less than $500, except when $100 in labor has been actually performed thereon during the year, in addition to the tax upon the net proceeds, a patented mine cannot be assessed at less than $500 if no labor has been performed, and a patented mine on which labor has been performed is exempt from taxation except on the proceeds thereof, and, in the absence of any saving clause, an assessment at $10 per acre under St. 1905, c. 58, pursuant to article 10, § 1, prior to the amendment of 1906 was invalid.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 584–589; Dec. Dig. ⟸348.]

5. CONSTITUTIONAL LAW ⟸32 — SELF-EXECUTING PROVISIONS.

Prohibitory provisions in a Constitution are usually self-executing to the extent that anything done in violation of them is void, and no legislation is required to execute such provision; but they are not self-executing when they merely indicate principles without laying down rules by which they may be given the force of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 33; Dec. Dig. ⟸32.]

6. CONSTITUTIONAL LAW ⟸29 — SELF-EXECUTING PROVISIONS—CONSTRUCTION.

In determining when a constitutional provision is self-executing, there is a distinction between a declarative limitation of legislative power on a given subject, within which legislation may or should be enacted, and positive constitutional inhibition which no legislative act can relieve or modify: the former might require future legislation; the latter must, from its nature, be self-executing.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 32; Dec. Dig. ⟸29.]

7. TAXATION ⟸618—ASSESSMENT—TAX SALE—VALIDITY.

Where an assessment on a patented mining claim at $10 per acre under St. 1905, c. 58, expressly following Const. art. 10, § 1, as amended in 1902 (see St. 1901, p. 136), was void under the amendment of that section in 1906 (see St. 1907, p. 501), providing for an assessment of such claims at $500, with certain exceptions as to labor performed, etc., the tax sale under the assessment was void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1274; Dec. Dig. ⟸618.]

8. LIMITATION OF ACTIONS ⟸72(3)—TAX TITLE—ACTION TO DETERMINE—STATUTES.

Rev. Laws, § 4946, provides that civil actions can only be commenced within the periods prescribed in the act, after the cause of action has accrued, except where different limitation is prescribed by statute. Section 4951 provides that no action to recover a mining claim shall be maintained unless plaintiff was seised or possessed thereof within two years before the commencement of such action, defining occupation and adverse possession, and extending the provisions of the act applicable to other real estate to mining claims, provided that in such application "two years" shall be intended when "five years" is used, and section 4952 provides that no cause of action to recover real property shall be effectual, unless the person prosecuting the action was seised or possessed of the premises within "five years" before action was commenced, and section 4966 provides that, if one entitled to commence an action to recover real property shall be a minor, the time of disability is no part of the time limited for the commencement of such actions, which may be commenced within two years after the removal of disability. *Held* that, by interpolation, section 4951 was to be read as if providing that, if a person to whom an action to recover a mining claim accrues is a minor, the period of disability shall not be part of the time limited for the commencement of such action, which may be commenced within two years after the disability ceases.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 392; Dec. Dig. ⟸72(3).]

9. LIMITATION OF ACTIONS ⟸5(1)—STATUTES—CONSTRUCTION.

The statute of limitations, like any other statute, is to be construed according to the manifest intention of the Legislature, and, in ascertaining such intention, the language used should be construed, if possible, according to the usual meaning of the words used.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 13; Dec. Dig. ⟸5(1).]

10. DESCENT AND DISTRIBUTION ⟸75 — WILLS ⟸722—TITLE—TIME OF VESTING.

Under the statutory provisions and procedure relative to the estates of decedents, the title to real estate vests in the heirs and devisees at the moment of the death of the testator or intestate, subject only to the right of possession of the executor or administrator under Rev. Laws, § 5950, for the payment of the debts and expenses of administration, with the right in the administrator to possession until the estate is settled or delivered over to the parties entitled by the order of the probate court.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 243–251, 260–262; Dec. Dig. ⟸75; Wills, Cent. Dig. §§ 1728, 1729; Dec. Dig. ⟸722.]

11. LIMITATION OF ACTIONS ⟸174(2)—BAR AGAINST TRUSTEE—RIGHT OF CESTUI QUE TRUST.

Whenever the right of action in a trustee with the legal title is barred by limitations, the right of the cestui que trust is also barred, but, if the legal title be in the cestui que trust, the statute of limitations which might run against the trustee will not constitute a bar against the cestui if he be under disability.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 660; Dec. Dig. ⟸174(2).]

12. DESCENT AND DISTRIBUTION ⟸90(1)—RIGHT OF HEIRS—ESTATE IN ADMINISTRATION.

Where an administrator or executor has been appointed, and the estate is in the course of probate, it is the right of the heirs to maintain an action as against third persons for the possession of the realty.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 351, 352, 368, 375; Dec. Dig. ⟸90(1).]

13. LIMITATION OF ACTIONS ⟸174(2)—PERSONAL REPRESENTATIVE—STATUTE.

Under Rev. Laws, § 5911, providing that every person to whom letters testamentary or of administration shall have issued shall execute a bond with a penalty not less than the value of the personal property, including rents and profits, and may be required to give an additional bond whenever the sale of realty is ordered, the relationship of trustee and cestui que trust between the executor or administrators and the heirs is not created in so far as the same might apply to the realty of an estate, so that the rule

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that a statute of limitations running against a trustee holding the legal title to realty runs also against the cestui does not apply.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 660; Dec. Dig. ⊂⊃ 174(2).]

14. MINES AND MINERALS ⊂⊃50—RECOVERY OF MINING CLAIMS—STATUTES.

Under Act Cong. July 26, 1866, c. 262, 14 Stat. 252, providing for the patenting of mining claims, Rev. Laws, § 4951, providing that no action to recover mining claims shall be maintained unless plaintiff or those under whom he claims was seised or possessed of such claim within two years before the commencement of such action, and section 4952, providing that no cause of action upon title to real property shall be effectual unless the person prosecuting the action was seised or possessed of the premises in question within five years before the commission of the act in respect in which the action is prosecuted, and section 4953, referring to mining claims as such, enacted subsequent to the federal statute, applied to patented as well as unpatented mining claims, and an action to recover a patented claim must be commenced within two years from the time when plaintiff was seised or possessed of such claim.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 136; Dec. Dig. ⊂⊃50.]

15. LIMITATION OF ACTIONS ⊂⊃72(3)—MINING CLAIM—NOTICE—INFERENCE.

Minor heirs of one who had duly patented mining claim were entitled to notice of the hostile character of defendant's possession, which notice could not be given them until they were capable in law of receiving it; so that, under the statute (Rev. Laws, § 4951 et seq.), they might commence an action to recover it within two years after majority, when they were chargeable with notice.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 392; Dec. Dig. ⊂⊃72(3).]

Appeal from District Court, Eureka County; Peter Breen, Judge.

Action to quiet title by Mary Wren, administratrix of the estate of Thomas Wren, deceased, and by Mary Wren individually and Thomas Wren, Jr., and Marie Wren, minors, by their guardian ad litem, L. F. Thomas, against Thomas Dixon. Judgment for defendant; and plaintiffs appeal. Affirmed as to appellant Mary Wren, and reversed as to appellants Thomas Wren, Jr., and Marie Wren, and judgment ordered to be entered in accordance with the prayer of their complaint to the extent of their interest as heirs of Thomas Wren, deceased.

Thomas Wren died on the 8th day of February, 1904, leaving a widow and two minor children. At the time of his death he was the owner in fee simple of a mining claim and mill site situated in the Mt. Hope mining district, Eureka county, Nev., known as the Good Hope mining claim and mill site. Title to this property was in the said Thomas Wren, deceased, at the time of his death, by United States patent issued to him by the government and bearing date February 16, 1886. This patent was duly recorded in the recorder's office in the county of Eureka on the 2d day of February, 1911.

Upon the death of the said Thomas Wren, his last will and testament was duly admitted to probate in the district court of the Second judicial district in and for Washoe county; and on the 18th day of March, 1904, Mary Wren, widow of the deceased, was duly appointed and qualified as administratrix of the said last will and testament, and ever since the last-named date she has been and is now the duly appointed, qualified, and acting administratrix of said estate, which said estate has never been closed, and the same is now pending in the district court.

In 1909 the assessor of Eureka county assessed the Good Hope mining claim and mill site to the estate of Thomas Wren, deceased, at the rate of $10 per acre, under the statutes of Nevada as enacted by the session of the Legislature of 1905. The amount of taxes accruing thereon and payable to the county by reason of such assessment was $11.85. It is admitted that the administratrix of the estate of Thomas Wren, deceased, failed and neglected to pay the taxes levied under the assessment, and thereupon the treasurer and ex officio tax receiver of the county of Eureka advertised the property as delinquent in the payment of taxes, and later sold the property to the defendant here, Thomas Dixon, who paid the tax and costs and expenses thereof and received from the tax receiver a certificate of sale. It is admitted that during the period of redemption after the issuance of the certificate of sale neither the administratrix of the estate of Thomas Wren, deceased, nor any person acting for or in behalf of the minor heirs of said estate, redeemed the property.

On the 20th day of July, 1910, the county of Eureka made and executed and delivered to Thomas Dixon, the defendant here, its tax deed for the patented mine known as the Good Hope mining claim and mill site, property of Thomas Wren, deceased, and a part of his estate. It is admitted that, in so far as the tax sale and proceedings thereunder were concerned, such were regular, except as they may have been affected by the constitutional amendment of 1906. Immediately after the receipt by the said Thomas Dixon, defendant herein, of the certificate of sale of the Good Hope mining claim and mill site in the year 1909, he entered into possession of the patented mine and mill site; and it is admitted that he has remained in actual, continued, open, notorious, and exclusive possession thereof, claiming the same adverse to all persons, said entry and possession dating from the month of January, 1910.

It is admitted that during the years 1910, 1911, 1912, and 1914 the county assessor assessed this property, consisting of a patented mining claim and mill site, to the defendant herein in the manner provided by law, and that the defendant paid all the taxes so levied and assessed against this property for the years 1910, 1911, 1912, and 1914,

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to the county treasurer of Eureka county. It is admitted that Mary Wren, the administratrix of the estate of Thomas Wren, Thomas Wren, Jr., and Marie Wren are the heirs at law of the said Thomas Wren, deceased, and that said Marie Wren and Thomas Wren, Jr., were at the time of the death of Thomas Wren, and were at the time of the commencement of this action, minors.

This action was commenced in the district court of the Third judicial district in and for the county of Eureka on July 3, 1914, by Mary Wren, as administratrix of the estate of Thomas Wren, deceased, and also by Mary Wren in her individual capacity, and by Thomas Wren, Jr., and Marie Wren, minors, by and through their guardian ad litem, L. F. Thomas. The action was one to quiet title in the plaintiffs. The case was submitted to the trial court on an agreed statement of facts. Judgment being rendered for the defendant quieting title to the property in him, appeal is taken to this court from that judgment.

Section 1 of article 10 of the Constitution was originally, and prior to 1902, as follows:

"The Legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal, and possessory, excepting mines and mining claims, the proceeds of which alone shall be taxed, and also excepting such property as may be exempted by law for municipal, educational, literary, scientific, religious, or charitable purposes."

At the legislative session of 1899, and on March 3d of that year, an amendment to this section of the Constitution was proposed and passed (St. 1899, p. 139), and on March 6, 1901, the same was again passed by the Legislature (St. 1901, p. 136); and at the general election in November, 1902, it was approved by the people. This amendment to section 1 of article 10 was as follows:

"But the acreage of patented mining claims shall also be assessed at a valuation of $10 per acre."

The Legislature of 1905 passed an act, section 1 of which provides:

"It is hereby made the duty of the assessors in the various counties of the state to place upon the assessment rolls of their respective counties all patented mines situated within such counties, which mines shall be assessed for taxation at the valuation placed upon them by section 1 of article X of the Constitution of the state of Nevada, as amended by resolution proposed and passed at the Nineteenth Session of the Nevada Legislature, March 3, 1899, agreed to and passed at the Twentieth Session, March 6, 1901, and approved by vote of the people at the general election in November, 1902." Session Acts, 1905, p. 81.

In the year 1903 (St. 1903, p. 289) the Legislature of this state proposed and passed a Constitutional amendment to section 1 of article 10, and in March, 1905 (St. 1905, p. 327), this amendment was again passed by the Legislature, and at the general election of 1906 it was ratified by the vote of the people. Section 1 of article 10 of the Constitution (Revised Laws 1912, § 352), as thus amended by popular vote at the election of 1906, reads as follows:

"Sec. 1. The Legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory, except mines and mining claims, when not patented, the proceeds alone of which shall be assessed and taxed, and, when patented, each patented mine shall be assessed at not less than five hundred dollars ($500) except when one hundred dollars ($100) in labor has been actually performed on such patented mine during the year, in addition to the tax upon the net proceeds; and, also excepting such property as may be exempted by law for municipal, educational, literary, scientific or other charitable purposes."

No legislation was passed pursuant to this new constitutional provision until 1913.

Sweeney & Morehouse, of Reno, for appellants. C. B. Henderson and Carey Van Fleete, both of Elko, for respondent.

McCARRAN, J. (after stating the facts as above). As we view the case at bar, it presents two questions of primary importance: First, in view of the provisions of section 1 of article 10 of the Constitution of this state as amended in 1906 (St. 1907, p. 501), was the assessment made in 1909 by the assessor of Eureka county of $10 per acre on the patented mining claim of Thomas Wren, deceased, a valid assessment, and incidental to this, were the certificate of sale and deed made to the defendant Dixon valid instruments? Second, is the action barred by the statute of limitations? We shall approach these questions in the order stated.

[1, 2] At the outset, let us bear in mind that it was not until after the constitutional amendment of 1902 that mining claims were at all assessable in this state. The amendment to the Constitution adopted that year provided for the assessment of patented mining claims at a valuation of $10 per acre. Pursuant to that particular amendment, and only pursuant thereto, the Legislature of 1905 (St. 1905, p. 81) passed the Act authorizing assessors to assess patented mines; and the statute in that respect points for its authority directly and specifically to the constitutional amendment adopted at the general election in November, 1902. This statute took its constitutional authority and its operative vitality, so to speak, directly from the constitutional amendment providing for the assessment of patented mines at a flat valuation of $10 per acre.

It will be unnecessary for us to comment on or even conjecture as to the reasons that impelled the Legislature of 1903 to take the initial step in setting aside this particular amendment to section 1 of article 10 of the Constitution; suffice it to say that it passed another amendment to that section and article of the Constitution, which at its adoption at the general election of 1906 struck

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completely, nullified, and set aside this former provision. Section 1 of article 10 of the Constitution (Rev. Laws, § 352) after its adoption in 1906 provided:

"The Legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory, except mines and mining claims, when not patented, the proceeds alone of which shall be assessed and taxed, *and, when patented, each patented mine shall be assessed at not less than five hundred dollars ($500) except when one hundred dollars ($100) in labor has been actually performed on such patented mine during the year* [we italicize], in addition to the tax upon the net proceeds; and, also excepting such property as may be exempted by law for municipal, educational, literary, scientific or other charitable purposes."

It must be remembered that the assessment made by the assessor of Eureka county upon which taxes became delinquent and by reason of which certificate of sale and tax deed were ultimately issued to respondent was in 1909, some three years after the adoption of that amendment to section 1 of article 10 of the Constitution last quoted. It is the contention of respondent here that, inasmuch as no statute was enacted carrying out the provisions of this Constitutional amendment until 1913, four years after the assessment of 1909, therefore the statute of 1905, enacted under the provisions of the former constitutional amendment providing for the assessment of patented mines on the basis of $10 per acre, was in full force and effect in 1909; and they support this contention by the assertion that the Constitutional amendment of 1906, fixing the assessment of patented mines at not less than $500, was not self-executing and required some statute similar to that of 1913 to put the principle in operation.

Assuming the correctness of respondent's position as to the operative effect of the constitutional amendment of 1906, which question we deem unnecessary for determination, it does not to our mind strengthen their position as supporting the validity of the assessment made under the statute of 1905. It will not be contended that the statute of 1905 would have been operative or effective for any purpose under the Constitution of this state before the adoption of the constitutional amendment of 1903. The statute of 1905 could only be effective under the authority of the amendment to the Constitution of date last named. Moreover, the peculiar wording and phraseology of the statute of 1905 is not to be overlooked. This statute does not attempt in itself to direct by specific language the assessment of patented mines on the basis of $10 per acre. On the other hand, it studiously avoided such language and pointed directly to a section and an article of the Constitution, naming the date of its adoption as being the law upon which and by reason of which the statute itself would be mandatory on the several assessors requiring them to assess "at the valuation placed upon them [patented mines] by section 1 of article 10 of the Constitution of the state of Nevada as amended," etc. Did this statute have operative vitality? Was it in force and effect after the section of the Constitution upon which it rested for that vitality was by popular will abrogated and a new and irreconcilable policy thereby set up in its stead? Whatever might be said as to the force and effect of this statute up to the time of the adoption of the amendment of 1906, we are unable to find a rule that would give it operative force in the absence of a saving clause in the newly adopted constitutional provision or in some other clause of the Constitution itself some three years after the adoption of the new constitutional provision, which was in itself inconsistent and irreconcilable with that statute. Our position in this respect, based upon the doctrine as we find it established, may be bluntly expressed thus: The constitutional amendment of 1906, fixing a minimum valuation of $500 upon patented mines, absolutely nullified the statute of 1905, which, taking its authority from an abrogated constitutional amendment, fixed the valuation at the arbitrary figure of $10 per acre.

Statutes may be nullified, in so far as future operation is concerned, by a Constitution as well as by statute. Cass v. Dillon, 2 Ohio St. 608. Indeed, it would be strange if it were otherwise. The Constitution is the direct, positive, and limiting voice of the people. It may establish a policy, fix a limit to legislation on a given subject, or prohibit specified acts as being performed by public servants. As said by Mr. Justice Thornton, in the case of Oakland Paving Co. v. Hilton:

"In fact it is the solemn declaration of the paramount organic law operating on all departments of the government, expressed in the clearest and strongest language of prohibition. No act can be done by any department contrary to its provisions. It is a law absolutely controlling the legislative, executive, and judicial departments of the government. It takes effect on laws already passed as well as to those to be enacted in the future." Oakland Paving Co. v. Hilton, 69 Cal. 479, 11 Pac. 3.

Our position here is based upon the doctrine which we find eminently supported by authority, to the effect that, in the absence of a saving clause, the adoption of a new Constitution or the amendment of an old Constitution operates to supersede and revoke all previous, inconsistent, and irreconcilable constitutional and statutory provisions and rights exercised thereunder, at least so far as their future operation is concerned. 6 R. C. L.

The Supreme Court of the United States, in dealing with the question of the effect of federal constitutional amendments on the existing Constitutions and statutes of the several states, speaking through Mr. Justice Harlin, in the case of Neal v. State of Delaware, 103 U. S. 370, 26 L. Ed. 567,

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held, in substance, that the legal effect of the adoption of amendments to the federal Constitution and the laws passed for their enforcement was to annul so much of the state Constitution as was inconsistent therewith.

The state of Pennsylvania, in adopting a new Constitution, incorporated the provision that all pre-existing laws not inconsistent with itself should continue in force. Prior to the adoption of this Constitution, and prior to the establishment or ratification of the federal Constitution, the state of Pennsylvania had a constitutional provision prescribing the requisites for the establishment of citizenship. The new Constitution of Pennsylvania, passed after the act of Congress of 1799, is entirely silent on the subject of citizenship, save and except as it retained, by specific provision, pre-existing laws not inconsistent with itself. In the case of United States v. Villato, 2 Dall. 370, 1 L. Ed. 419, the matter before the United States Circuit Court for the District of Pennsylvania turned upon the question whether the prisoner indicted for treason had become a citizen of the United States in consequence of the oath taken and subscribed by him on the 11th day of May, 1793, under the provisions of the former laws and Constitution of Pennsylvania. The question was decided on the existence or nonexistence of the former law of citizenship of that state after the adoption of the new Constitution, which, although it contained the provision that all pre-existing laws should continue in force, was silent on the question of citizenship. One of the justices of the Circuit Court indulged in this language:

"The act of assembly is obviously inconsistent with the existing Constitution of the state, and therefore cannot be saved by the general provision of the schedule annexed to it."

Another of the justices applied the same rule in different language, thus:

"The only act of naturalization suggested, depends upon the existence or nonexistence of a law of Pennsylvania; and it is plain that upon the abolition of the old Constitution of the state, the law became inconsistent with the provisions of the new Constitution, and, of course, ceased to exist long before the supposed act of naturalization was performed."

Here was a case in which a given subject, namely, citizenship, was specifically dealt with by a provision of the former Constitution of the state of Pennsylvania. At the time of the enactment of the new Constitution of that State, what might be termed a saving clause was incorporated therein, which saving clause would seem to keep in force and effect pre-existing laws not inconsistent with the new Constitution. On the subject of citizenship, however, the new Constitution made no mention; it was absolutely silent. The Circuit Court, in deciding the matter, specifically referred to the fact that the circumstances of the case rendered it unnecessary to inquire into the relative jurisdiction of the state and federal governments on the subject of citizenship, but decided the question rather in the light of the rule asserted in the quotations above set forth, and which by analogy we deem applicable here.

In the case at bar we find a former constitutional provision levying an arbitrary assessment in the way of taxation upon a specific character of property, and under the provisions of that Constitution we find a statute enacted which statute points to that constitutional provision for its operative force and effect. Some years later another constitutional provision is adopted dealing with the same subject as that dealt with in the former. The latter constitutional provision, however, not only nullifies, but absolutely abrogates and sets aside, the former constitutional provision; and under such condition, we are asked to hold in force and effect, without even the pretense of a saving clause, a statute enacted under the former constitutional provision, inconsistent with the latter. But the rule of law interwoven into the best-considered decisions is otherwise, and this rule is so well asserted and by such eminent authority that we cannot hesitate to apply it where, as here, it appears so applicable. 6 R. C. L. Again, referring to the contention that the newly amended section of the Constitution was not self-executing, we may say that, even though such contention be conceded, the provision was, however, prohibitory in its character, inasmuch as it negatived the idea of the assessment of patented mines on a basis of less than $500 in valuation.

The principle to be applied here is aptly illustrated in the decision of the Supreme Court of the United States in the case of Norton v. Board of Com'rs, 129 U. S. 479, 9 Sup. Ct. 322, 32 L. Ed. 774. The Constitution of the state of Tennessee, prior to March 26, 1870, contained this general provision:

"The General Assembly shall have power to authorize the several counties and incorporated towns in this state to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to state taxation." Const. 1834–35, art. 2, § 29.

On the 8th day of February, 1870, the assembly of the state of Tennessee enacted a statute, under this provision of the Constitution, authorizing the city of Brownsville to issue corporate bonds to the amount of $200,000 for railroad purposes, and further authorizing the corporate authority of the city of Brownsville to levy annually an assessment upon all the taxable property within the limits of the corporation sufficient to pay the annual interest on the bonds, and also to establish a sinking fund for the ultimate redemption of the bonds. On the 5th day of May, 1870, this constitutional provision of the state of Tennessee was by public vote amended by the addition of other sections, one of which provided:

"But the credit of no county, city, or town shall be given or loaned to or in aid of any person, company, association, or corporation,

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except upon an election to be first held by the qualified voters of such county, city, or town, and the assent of three-fourths of the votes cast at said election. Nor shall any county, city, or town become a stockholder, with others, in any company, association or corporation, except upon a like election, and the assent of a like majority."

Another section of the amendment read:

"All laws and ordinances now in force and in use in this state, not inconsistent with this Constitution, shall continue in force and use until they shall expire, or be altered or repealed by the Legislature."

The question before the Supreme Court of the United States was as to the effect of the constitutional amendment upon the act of the Legislature passed prior to the adoption of that amendment. A consideration of the reasoning therein resorted to by the learned Chief Justice of the Supreme Court of the United States, keeping in mind its applicability to the point under consideration here, aids us in making our position more lucid. It was there pointed out, in the opinion written by Mr. Justice Fuller, that the inhibition contained in the constitutional amendment was self-executing as an inhibition, and, although it might require a new and additional act of the Legislature to put the full force and effect of the constitutional provision into operation, nevertheless the constitutional provision itself negatived the idea of the very thing provided for in the former legislative act, and hence prohibited the municipality from proceeding thereunder. The court there laid special emphasis upon the fact that, even though the new constitutional provision in its entirety was not self-executing, the inhibition set up by the amendment was self-executing. Thus the statute enacted on the 8th day of February, 1870, by the assembly of the state of Tennessee, conferring power, under a former constitutional provision, to a municipality to perform a specific act, although neither amended nor repealed, was made 'inoperative, because the very thing which it authorized the municipality to do was prohibited by the constitutional amendment of May 5th of the same year. The court there refers to the principle laid down in the cases of Concord v. Portsmouth Savings Bank, 92 U. S. 625, 23 L. Ed. 628, and Railroad Company v. Falconer, 103 U. S. 821, 26 L. Ed. 471, and draws attention to the distinction between the operation of a constitutional limitation upon the power of the Legislature and of a constitutional inhibition upon the municipality itself.

"In the former case," says the court, "past legislative action is not necessarily affected; while in the latter it is annulled. Of course, if an entirely new organic law is adopted, provision in the schedule or some other part of the instrument must be made for keeping in force all laws not inconsistent therewith. * * * But such a provision does not perpetuate any previous law enabling a municipality to do that which it is subsequently forbidden to do by the Constitution."

So in the case at bar we say, assuming that parts of the constitutional amendment of 1906 required future legislation to put them in operation, that phase of the constitutional amendment of 1906 which established a minimum valuation to be placed as an assessment against patented mining claims specifically negatived the idea of a lesser valuation, and hence prohibited assessment of patented mining claims on the basis of $10 per acre. This prohibition was immediately self-executing, and required no statute to either emphasize its inhibition or to place it in operation. So the statute of 1905, which provided for an assessment of patented mines on the basis of a lesser valuation than that fixed specifically as a minimum by the constitutional amendment of 1906, although neither repealed nor amended by legislative act until 1913, became a nullity after the adoption of this constitutional amendment, inasmuch as its operation would be in direct contravention to the inhibition established by the amendment. It was undoubtedly the intention of the people of this state, when they adopted this constitutional amendment, to foster and encourage the mining industry of this state and to promote development of mineralized ground; and to that end they declared that patented mines should be exempt where development or prospect work was performed thereon at least to the extent of $100, and, where no such labor was performed, the patented mine should be assessed for not less than $500.

[3] Mr. Cooley, in his work on Constitutional Limitations, says:

"The object of construction, as applied to a written Constitution, is to give effect to the intent of the people in adopting it. In the case of all written laws, it is the intent of the lawgiver that is to be enforced. But this intent is to be found in the instrument itself. It is to be presumed that language has been employed with sufficient precision to convey it, and unless examination demonstrates that the presumption does not hold good in the particular case, nothing will remain but to enforce it." Cooley, Constitutional Limitations (6th Ed.) 69.

The same principle may be found in application in the cases of People ex rel. Decatur & State Line Ry. Co. v. McRoberts, 62 Ill. 38, and Mitchell v. L. & St. L. R. R. & C. Co., 68 Ill. 286.

[4] This court, in the case of Goldfield Consolidated Mines Co. v. State, 35 Nev. 178, 127 Pac. 77, had under consideration the construction and application of section 1 of article 10 of the Constitution as amended in 1906, and there held that, where $100 worth or more of labor has been expended on a patented mining claim during any one year and prior to the time of assessment, the mine is exempt from taxation except on the proceeds thereof. Following the decision in that case, it may be said that this section of the Constitution sets up two distinct negatives, i. e.: First, a patented mine cannot be assessed at less than $500 if the labor has not been performed; second, a patented mine on which the labor has been performed cannot be assessed at either more or less than $500

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—"is exempt from taxation except on the proceeds thereof." Goldfield Consolidated Mines Co. v. State, supra.

Counsel for respondent asks the question:

"Does this section of the Constitution contain within its own terms a complete rule of conduct protecting the right of exemption for $100 worth of work done upon a patented mining claim?"

We may answer this by saying that in this respect it makes no difference, because, if the labor was performed, assessment for any sum was prohibited; hence the assessment in this case would be void. If labor was not performed, the assessment for a sum less than $500 was prohibited; hence, the assessment in this case would be void. The case presented here emphasizes the rule that prohibitory provisions in a Constitution are usually self-executing.

It is apparent that in either event above referred to a patented mine cannot, under the provisions of this section of the Constitution and in the light of the rule of this court in the Goldfield Case, supra, be assessed for less than $500. Here was a new provision in the organic law of the state, one that set up a prohibition which in itself required no legislation to execute; one that negatived future legislation as to the matter covered by the prohibition; one that nullified, repealed, and set aside the future efficacy of then existing legislation, provisions of which were in contravention to this prohibition. Here was a constitutional provision which with no uncertainty limited the assessment of patented mines by fixing a minimum less than which no assessment was to be valid. It requires no further citation of authorities than those we have herein set forth to support the proposition that any act which came within the prohibition was void, and any statute which sought to continue a policy expressly prohibited by this Constitutional provision, whether enacted prior or subsequent to the adoption of the Constitutional amendment, was, in the absence of a saving clause in the Constitution itself, nullified. There can be no question, as we view the situation, that the statute of 1905 providing for the assessment of patented mines on a basis which fell within the specific prohibition of the constitutional amendment of 1906 was after the adoption of that constitutional amendment nullified, repealed, and set aside as much so as though it had never existed.

[5] The rule is stated and supported by authority that prohibitory provisions in a Constitution are usually self-executing to the extent that anything done in violation of them is void. 6 R. C. L. 62; State ex rel. Delgado v. Romero, 17 N. M. 81, 124 Pac. 649, Ann. Cas. 1914C, 1114. This doctrine was applied by the Supreme Court of California in a series of cases arising after the adoption of the new Constitution of that state in 1879. The case of Oakland Paving Co. v. Hilton, supra, presents a question very much like that at bar, and it will be noted that in that case the court held that, when a constitutional provision is prohibitory in its language, no legislation is required to execute such provision; for it is then self-executing.

"Every constitutional provision," says the court, "is self-executing to this extent, that everything done in violation of it is void."

To the same effect we find the cases of McDonald v. Patterson, 54 Cal. 245; Donahue v. Graham, 61 Cal. 276; Ewing v. Oroville Min. Co., 56 Cal. 649.

Counsel for respondent, in a masterful presentation by way of exhaustive brief, cite us to many eminent authorities relative to the subject at hand. Griffin v. Rhoton et al., 85 Ark. 89, 107 S. W. 380; Marshall v. Sherman, 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654; Southern Express Co. v. Patterson, 122 Tenn. 279, 123 S. W. 353; Davis v. Burke, 179 U. S. 399, 21 Sup. Ct. 210, 45 L. Ed. 249; Willis v. Mabon, 48 Minn. 140, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. Rep. 626; Model Heating Co. v. Magarity, 12 Boyce (Del.) 459, 81 Atl. 394, L. R. A. 1915B, 665; French v. Teschemaker, 24 Cal. 518. These authorities, as well as many others, support one great fundamental principle. This principle is best expressed in the language of Judge Cooley in his work on Constitutional Limitations, wherein he says:

"A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." Cooley, Constitutional Limitations, (7th Ed.) 121.

In the case of Davis v. Burke, supra, relied upon by counsel, we note the significant language emphasizing the very thing we have heretofore mentioned. There Mr. Justice Brown, speaking for the Supreme Court of the United States, said:

"Where a constitutional provision is complete in itself, it needs no further legislation to put it in force. When it lays down certain general principles, as to enact laws upon a certain subject, or for the incorporation of cities of certain population, or for uniform laws upon the subject of taxation, it may need more specific legislation to make it operative. In other words, it is self-executing only so far as it is susceptible of execution. But where a Constitution asserts a certain right, or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provisions."

Here is the line that distinguishes the case at bar. The section of the Constitution under consideration prohibits a given act. In that prohibition it "lays down certain general principles; * * * it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provisions." In short, it is complete in itself to the extent of the prohibition. It is self-executing to the extent that it prohib-

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its the taxation of patented mines for a less sum than $500.

The Supreme Court of Minnesota, in the case of Willis v. Mabon, supra, took occasion to make the following observation patent to the matter under consideration:

"A Constitution is but a higher form of statutory law, and it is entirely competent for the people, if they so desire, to incorporate into it self-executing enactments. These are much more common than formerly, the object being to put it beyond the power of the Legislature to render them nugatory by refusing to enact legislation to carry them into effect. Prohibitory provisions in a Constitution are usually self-executing to the extent that anything done in violation of them is void. * * * The question in every case is whether the language of the constitutional provision is addressed to the courts or the Legislature; does it indicate that it was intended as a present enactment, complete in itself as definitive legislation, or does it contemplate subsequent legislation to carry it into effect? This is to be determined from a consideration, both of the language used and of the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed is fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the Legislature for action, then the provision should be construed as self-executing, and its language as addressed to the courts."

In the case at bar a positive prohibition is found whereby the legislative, as well as the executive, branch of the government is bound, whereby the act of taxation of a given class of property is prohibited where such taxation is less than a given sum. Does not this indicate that it was intended as a present enactment complete in itself, as "definitive legislation"—a complete and positive prohibition? "Does it contemplate subsequent legislation to carry it into effect?" What legislation is necessary to emphasize that which prohibits a given act?

[6] In determining when a constitutional provision is self-executing, we would distinguish between declarative constitutional limitation of legislative power on a given subject, within which limitation legislation might or should be enacted, and positive Constitutional inhibition, which inhibition no legislative act could relieve or modify. The former might require future legislation; the latter must, by reason of its very nature, be self-executing.

But again respondent contends that, inasmuch as it would require legislation to put in operation certain phases of section 1 of article 10 as amended, therefore nothing contained in the section was self-executing. But apply this reasoning to the same section as it was originally written and as it stood before it was amended in 1903; the section then prescribed:

"The Legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal, and possessory, excepting mines and mining claims, the proceeds of which alone shall be taxed."

Here was a constitutional provision which in its entirety, according to respondent's theory, would require legislation to make completely operative. Indeed, legislation was by the very language of the section directed, but did it require any legislation to enforce the inhibitory clause "excepting mines and mining claims, the proceeds of which alone shall be taxed"? Could any amount of legislation more forcibly prohibit the taxing of this class of property? Was not this class of property exempted from taxation by the very language of the section itself? Was not this prohibition self-executing? Manifestly so. Apply this reasoning to the section of the Constitution as it now stands, and in which, as we have already shown, in the light of the decision in the Goldfield Consolidated Case, there is a specific prohibition under which patented mines are not to be assessed in any event for less than $500. Could any legislative language make this prohibition more forcible? Was any legislative language necessary to prohibit what the organic law already prohibited?

[7] Reasoning as we do as to the force and effect of the statute of 1905 after the adoption of the constitutional amendment of 1906, the assessment made by the assessor of Eureka county of the Good Hope mining claim and mill site, being based on a valuation of $10 per acre, was void, inasmuch as an assessment of that character was made in the face of the strict inhibition of the Constitution. It follows that, the act of assessment of the claim in the manner in which it was assessed by the authority of Eureka county being void, the sale which followed the delinquency was in itself void.

The statute of 1905 passed pursuant to the former constitutional amendment had been nullified by the constitutional amendment of 1906. It was of no more force and effect than though it had never existed. Oakland Paving Co. v. Hilton, supra. Hence any assessment made under its provisions or by its authority was as void as the statute itself.

Mr. Cooley, in his work on Taxation (3d Ed.) vol. 2, p. 912, in discussing tax sales as being made exclusively under a statutory power, says:

"It is therefore accepted as an axiom, when tax sales are under consideration, that a fundamental condition to their validity is that there should have been a substantial compliance with the law in all the proceedings of which the sale was the culmination. This would be the general rule in all cases in which a man is to be divested of his freehold by adversary proceedings; but special reasons make it peculiarly applicable to the case of tax sales."

If this rule can be stated by the learned authority as being axiomatic with reference to the proceedings after the assessment, how much more so do they apply in a case where the assessment itself is made under a void statute; yea more, made in the very face of a Constitutional prohibition. To the same effect are the following cases: McLaughlin

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v. Thompson, 55 Ill. 249; Kemper v. McLelland's Lessee, 19 Ohio, 308; Gamble v. Witty, 55 Miss. 26; Hardenburgh v. Kidd, 10 Cal. 402; Riverside Company v. Howell, 113 Ill. 259.

[8, 9] Respondent contends, and the trial court decided, that the action was barred by the statute of limitation; and this constitutes the second, but not the secondary, proposition in the case. We turn first to our statute for answer to this contention, keeping in mind the fact that the property in question was real property, and that the sale was not pursuant to the judgment of any court, but was pursuant to prescribed statutory procedure.

Section 4946, Revised Laws, provides:

"Civil actions can only be commenced within the periods prescribed in this act, after the cause of action shall have accrued, except where a different limitation is prescribed by statute."

Section 4951, Revised Laws (section 9 of the Civil Practice Act), applicable to actions for recovery of mining claims, cited and relied upon by respondent in support of their contention, is as follows:

"No action for the recovery of mining claims, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, or those through or from whom he claims, were seized or possessed of such mining claim, or were the owners thereof, according to the laws and customs of the district embracing the same, within two years before the commencement of such action. Occupation and adverse possession of a mining claim shall consist in holding and working the same, in the usual and customary mode of holding and working similar claims in the vicinity thereof. All the provisions of this act, which apply to other real estate, so far as applicable, shall be deemed to include and apply to mining claims: Provided, that in such application 'two years' shall be held to be the period intended whenever the term 'five years' is used: And, provided, further, that when the terms 'legal title' or 'title' are used, they shall be held to include title acquired by location or occupation, according to the usages, laws, and customs of the district embracing the claim."

It may be well here to note the words of the statute last quoted, which, if we follow the common and ordinary cannons of construction, we cannot declare to be devoid of meaning or to be without the force and effect conveyed by the words therein taken in their usual and ordinary acceptation:

"All the provisions of this act, which apply to other real estate, so far as applicable, shall be deemed to include and apply to mining claims: Provided, that in such application 'two years' shall be held to be the period intended whenever the term 'five years' is used."

With this provision in mind, we turn to those sections of this act which apply to other real estate as regards actions for the recovery thereof; and, without commenting on the significance of its position in the act, it will suffice to say that we find it in the next succeeding section, to wit, section 4952 of the Revised Laws, being section 10 of the act. It prescribes as follows:

"No cause of action, or defense to an action, founded upon the title to real property, or to rents, or to services out of the same, shall be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted, or the defense is made, or the ancestor, predecessor or grantor of such person, was seised or possessed of the premises in question within five years before the committing of the act in respect to which said action is prosecuted or defense made."

It will be noted that by the provisions of section 4951 this section is made to apply to actions for the recovery of mining claims; and where the term "five years" is used, two years is to be understood as applicable to the last-named class of property.

We remember that section 4952 prescribes a limitation as to the time within which a cause of action or a defense to an action founded upon the title to real property shall be effectual; and, with this in mind, we inquire, Is there any provision of this act, or any other statute, which establishes an exception to the rule laid down by section 4952 affecting the time for the commencement of actions founded upon title to real property? And in answer to this we find section 4966, which reads as follows:

"If a person entitled to commence an action for the recovery of real property, or for the recovery of the possession thereof, or to make any entry or defense, founded on the title to real property, or to rents or services out of the same, be at the time such title shall first descend or accrue, either: 1. Within the age of majority; or, 2. Insane; or, 3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life—the time during which such disability continues is not deemed any portion of the time in this chapter limited for the commencement of such actions, or the making of such entry or defense, but such action may be commenced or entry or defense made, within the period of two years after such disability shall cease, or after the death of the person entitled, who shall die under such disability, but such action shall not be commenced, or entry or defense made, after that period." Rev. L. § 4966.

This section applies as an exception to the specific provisions of section 4952, wherein the time for the commencement of an action founded upon the title to real property is fixed. The rule established by section 4952, together with its exception as established by section 4966, applies to actions for the recovery of real estate; and the rule established by these two sections is by specific provision made to apply with equal force and effect to section 4951, because by the last-named section it is provided:

"All provisions of this act, which apply to other real estate, so far as applicable, shall be deemed to include and apply to mining claims; provided, that in such application 'two years' shall be held to be the period intended whenever the term 'five years' is used."

Hence, by interpolation, we read section 4951, Revised Laws, as follows:

"No action for the recovery of mining claims, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, or those through or from whom he claims, were seised or possessed of such mining claim, or were the owners thereof, according to the laws and customs of the district embracing the same, within two years before the com-

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mencement of the action. * * * If a person entitled to commence an action for the recovery of a mining claim, or for the recovery of the possession thereof, or to make any entry or defense, founded on the title to a mining claim, or to rents or services out of the same, be at the time such title shall first descend or accrue, either: 1. Within the age of majority; or, 2. Insane; * * * the time during which such disability continues is not deemed any portion of the time in this chapter limited for the commencement of such actions, or the making of such entry or defense, but such action may be commenced, or entry or defense made, within the period of two years after such disability shall cease, or after the death of the person entitled, who shall die under such disability, but such action shall not be commenced, or entry or defense made, after that period."

In the case of Treadway v. Wilder, 12 Nev. 108, this court held that the statute of limitations, like any other statute, is to be construed according to the manifest intention of the Legislature; and in ascertaining such intention the language used should be construed, if possible, according to the usual meaning of the words used.

Under a statute of Oregon, which in all essential particulars was the same as ours, the Supreme Court of the state, in a case involving the sale of real estate made pursuant to the terms of a father's will, as well as by court decree, held that under such a law an infant had 15 years after the cause of action accrued in which to prosecute his action to recover real property, unless (as provided for in the Oregon law) he should become of age after 10 years had elapsed and before the expiration of 5 years thereafter, in which case the time for the commencement of the action would be one year after the disability ceased. Northrop v. Marquam, 16 Or. 173, 18 Pac. 449. To the same effect is the case of Hulsman v. Deal, 82 Kan. 518, 108 Pac. 849. In the last-named case the Supreme Court of Kansas, under conditions and statutory provisions somewhat similar to those presented in the matter at bar, supports the position we have taken here; and to the same effect is the case of Kessinger v. Wilson, 53 Ark. 400, 14 S. W. 96, 22 Am. St. Rep. 220. See, also, Lanning et al. v. Brown, 84 Ohio St. 385, 95 N. E. 921, Ann. Cas. 1912C, 772, and note.

The appellants in this action, Marie Wren and Thomas Wren, Jr., who appear by their guardian ad litem, were within the age of majority at all times and dates affected by this action. Applying to this case the force and effect of the several sections of our Civil Practice Act quoted above, it follows that the statute of limitations has not run against their right of action.

[10, 11] It is contended by respondent that, inasmuch as the statute of limitation would have run against the administratrix of the estate of Thomas Wren, deceased, therefore the heirs of the said Thomas Wren, although minors during all of the time, were nevertheless directly affected by the same statute.

It has been repeatedly decided by the Supreme Court of California, under statutory provisions and procedure relative to the estates of deceased persons similar to that of ours, that the title to real estate vests in the heirs and devisees at the moment of the death of testator or intestate, subject only to the lien of the executor or administrator for the payment of the debts and expenses of administration, with the right in the administrator to present possession, which continues until the estate is settled or delivered over to the parties entitled by the order of the probate court. Beckett v. Selover, 7 Cal. 215, 68 Am. Dec. 237; Meeks v. Hahn, 20 Cal. 627; Estate of Woodworth, 31 Cal. 595; Colton v. Onderdonk, 69 Cal. 158, 10 Pac. 395, 58 Am. Rep. 556. Holding to the same effect are the cases of Murphy v. Crouse, 135 Cal. 18, 66 Pac. 971, 87 Am. St. Rep. 90, and Bates v. Howard, 105 Cal. 183, 38 Pac. 715.

The Supreme Court of Colorado, in the case of Adams v. Slattery, 36 Colo. 35, 85 Pac. 87, held to the effect that the realty belonging to the estate of a deceased person descends directly to the heirs of the deceased, subject to the payment of the debts of the deceased, and that the administrator has no title or interest in the real estate except the rents thereof, and then only when it becomes necessary to have recourse to the real estate to pay the debts of the deceased.

Mr. Schouler, in his work on Wills, Executors, and Administrators, says:

"Real estate, at the common law, became vested at once on the death of the owner in his heirs or devisees, and the executor or administrator has, as such, no inherent power over it. * * * It is only as legislation or the will of a testator may have conferred an express power upon the executor or administrator that he can exert it in respect of real estate, unless authority has been conferred by the heirs or devisees themselves." Schouler on Wills, Executors, and Administrators (5th Ed.) vol. 2, p. 1199.

This court in at least two instances has expressed itself to the same effect: Price v. Ward, 25 Nev. 203, 58 Pac. 849, 46 L. R. A. 459; Gossage v. Crown Point Mining Co., 14 Nev. 156.

Following, as it does, as a conclusion to be reached from the application of our statutory provision, in the light of decisions rendered under similar statutory provisions in other states, that the legal title to realty belonging to the estate of one deceased descends directly to his heirs, it follows then, as a matter of course, that the heirs of Thomas Wren, deceased, became at his death vested with the legal title to the Good Hope mining claim and mill site; and whatever may be said as to the statute of limitations running against the interest of Mary Wren, wife of the deceased, she being under no disability, it follows that the right to maintain an action to quiet title to the interest of the minor heirs, Marie Wren and Thomas Wren, Jr., is not barred to them by the statute of limitations.

The Supreme Court of California, in the

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case of Crosby v. Dowd, 61 Cal. 557, had under consideration the identical question presented here and under similar statutory provision, and the conclusion reached by that court in that instance, as well as the reasoning resorted to in arriving at that conclusion, will be found in support of the position we take here.

Respondent's strongest position, and one which requires most careful scrutiny in determining whether or not it applies to the case at bar, is that set forth in their contention that the administratrix was a trustee, and the minor heirs, Marie Wren and Thomas Wren, Jr., were cestui que trustents. Asserting this as the first proposition, they follow it up by a contention, supporting the same by a line of authorities, that whenever the right of action in a trustee is barred by limitation, the right of the cestui que trust is also barred, and respondent contends that this rule applies whether or not the cestui que trust be laboring under disability during the period of limitation. Many authorities are assigned by respondent supporting the proposition which they assert; indeed none more forceful than that contained in the decision of Meeks v. Vassault, 3 Sawy. 206, Fed. Cas. No. 9393 affirmed in the decision of the Supreme Court of the United States, Same v. Olpherts, 100 U. S. 564, 23 L. Ed. 735. Harlan v. Peck, 33 Cal. 515, 91 Am. Dec. 653; Jenkins v. Jensen, 24 Utah, 108, 66 Pac. 773, 91 Am. St. Rep. 783; Dennis v. Bint, 122 Cal. 39, 54 Pac. 378, 68 Am. St. Rep. 17; Patchett v. Pacific Coast Ry. Co., 100 Cal. 505, 35 Pac. 73; Williamson v. Beardsley, 137 Fed. 467, 69 C. C. A. 615. A correct statement of the rule applied by these authorities last referred to emphasizes two principal elements which distinguish the cases relied upon by respondent from that at bar. As a general proposition, we think the rule is that, whenever the right of action in a trustee who is vested with the legal title and competency to sue is barred by limitation, the right of the cestui que trust is also barred.

We have already dwelt on the proposition that under a line of authorities rendered in the light of statutes similar to ours, and under the decisions of this court, the legal title to the real estate of one deceased vests in his heirs. Price v. Ward, 25 Nev. 203, 58 Pac. 849, 46 L. R. A. 459; Gossage v. Crown Point Mining Co., 14 Nev. 156. Hence the line to be drawn which would distinguish the case at bar from that line of cases exemplified in the decision of Meeks v. Olpherts, 100 U. S. 564, 23 L. Ed. 735, is one which rests primarily upon the question in whom is the legal title. In other words, if the trustee be vested with the legal estate or title, and while so vested is competent to sue, the statute of limitation running against the trustee will also run against the cestui que trust. But if the legal title be in the cestui que trust, the statute of limitation which might run against the trustee will not constitute a bar against the former if he be under disability during the period of limitation.

In this respect it may be well to note that the case of Meeks v. Vassault, supra, decided by the Supreme Court of the United States, was a matter arising under a probate sale; and there the court especially dwelt upon the right of action which might be maintained by the heirs of the estate against the bondsmen of the administrator.

In the case of Harlan v. Peck, supra, referred to in the case of Meeks v. Vassault, supra, the matter grew out of a probate sale made pursuant to an order of a court of competent jurisdiction and pursuant to statutory provision.

In the case of Jenkins v. Jensen, supra, the court had under consideration a matter involving trust deeds investing the trustees with the legal title to the realty under the peculiar restrictions set forth in the deed.

In the case of Dennis v. Bint, supra, the question involved was the sale of real estate by the administrator following an order made by the court having jurisdiction in probate proceedings. The decision there referred approvingly to the case of Meeks v. Olpherts, supra, and to McLeran v. Benton, 73 Cal. 329, 14 Pac. 879, 2 Am. St. Rep. 814. The decision in the case as did the decision in the cases therein referred to turned upon the proposition that under the statutes of California the administrator, for the purpose of making the sale under the order of the court in probate proceedings, was the trustee and the heirs were the cestui que trustents.

In the case of Patchett v. Pacific Coast Ry. Co., supra, the trustee held the legal title by and through a deed.

In the case of Williamson v. Beardsley, supra, the question of a sale pursuant to an order of a court during probate proceedings was before the court for determination. There, as in the other cases, the title for the purpose of the sale was in the executor, he being the trustee, the heirs being the cestui que trustents.

In Wood on Limitations the author cites the rule which we desire to impress by reason of its importance in assisting us to distinguish the matter at bar:

"When the legal title of property is vested in a trustee who can sue for it, and fails to do so within the statutory period, an infant cestui que who has only an equitable interest will also be barred; but the rule is otherwise when the legal title is vested in the infant, or cast upon him by operation of law. * * *"

Continuing on the subject, the author states that, if the cestui que trust was ignorant of the sale and the purchaser knew of the trust, the cestui que trust will not be barred. Wood on Limitations (2d Ed.) vol. 2, p. 522, § 208.

Section 5950, Revised Laws, being section 94 of the Civil Practice Act, provides:

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"The executor or administrator shall have a right to the possession of all the real as well as personal estate of the deceased, and may receive the rents and profits of the real estate until the estate shall be settled, or until delivered over by order of the district court to the heirs or devisees, and shall keep in good tenantable repair all houses, buildings and fences thereon which are under his control."

In the case of Gossage v. Crown Point Mining Co., supra, this court, speaking through Mr. Justice Hawley, referred with approval to the decision of the Supreme Court of Michigan, which, in passing upon a statute similar to ours, held that the right of possession of real property belonging to an estate is in the heir until the executor or administrator takes possession or otherwise claims his right under the statute. Streeter v. Paton, 7 Mich. 341; Marvin v. Schilling, 12 Mich. 356; Campau v. Campau, 19 Mich. 116. Further observing, the court says:

"All the decisions in the respective states, where the question is alluded to, concede the proposition that, in construing this section of the statute, the entire probate system relative to the settlement of the estates of deceased persons, as well as the statute concerning descents and distribution, must be considered. There cannot be any controversy as to the correctness of this general rule. The rights of the relative parties ought always to be considered, and such an interpretation given as would afford the protection intended to be reached by the Legislature."

The decision of this court in the case of Gossage v. Crown Point M. Co., supra, is decisive of a matter relative to the application of our statute which we deem of vital importance in arriving at a correct conclusion on the matter at bar. This court there approved the reasoning found in the case of Streeter v. Paton, supra, to the effect:

"The object of this particular section of the statute was to prevent injustice to creditors, and to have the rents as well as the proceeds of the sale of the real estate applied to the payment of debts. * * * The language * * * is not imperative, but gives a right which the administrator or executor may or may not exercise. * * * It is the duty of the personal representative to take possession of the real estate, when it, or the rents and profits, may be needed in the settlement of the estate; but when this is not the case, although he may do so under the statute, it is not imperative on him. * * * There is no valid reason why it should be imperative. * * * The personal estate may be more than ample for all the purposes of administration, and years may be required in settling the estate. * * * It would be a harsh construction of the statute that would deprive the heir of his inheritance in the meantime."

Speaking on the question of the right of the heirs to maintain an action in ejectment in their own name, the court said:

"They are the real parties in interest. They alone will be benefited or injured, as the case may be, by the result of the suit. There are no creditors to be affected. No costs or debts of any kind outstanding against the estate. Neither is there any existing equity of any character in favor of the administrator. Moreover, if any legal or equitable right existed in his favor, he has waived the same in favor of the heirs. If any objection, therefore, exists against the right of the heir to maintain this suit, it must be found in the plain language, spirit, and intent of the statute. There is no other reason that could be advanced why the heirs should be compelled to go through the formula and delay of procuring the appointment of a special administrator."

[12] Hence we find that in no uncertain terms we have determined not only that the realty in the estate of one deceased vests immediately in his heirs (Price v. Ward, supra), but, moreover, that even where an administrator or executor has been appointed, and the estate is in course of probate, it is the right of the heirs to maintain an action as against third persons for the possession of the realty.

In the case of Meeks v. Olpherts, supra, the Supreme Court of the United States, in deciding whether or not the statute of limitations would run against an heir under legal disability, looked directly to the decision of the Supreme Court of California in the case of Harlan & Huff v. Peck, 33 Cal. 515, 91 Am. Dec. 653, and in the light of the decision of the highest court of that state in the last-named case held:

"The disability cannot have reference to a person in whom no right of action exists. * * * The right of action on the title which the plaintiff now asserts was in the administrator, and the statute therefore ran against him and against all whose rights he represented. 'In all suits for the benefit of the estate he represents both the creditors and the heirs,' said the Supreme Court in Beckett v. Selover, 7 Cal. 215 [68 Am. Dec. 237]."

The highest court of this state, following a line of Michigan cases, has taken a contrary view as to the matter last quoted, and, in construing our statutory provisions in the light of the policy sought to be carried out as made manifest by our legislative enactments, has determined that an action might be maintained by the heirs in their own name where they sought to secure to themselves possession of the realty as against third parties. Hence the assertion made by the Supreme Court of the United States in the case of Meeks v. Olpherts, supra, that "the disability cannot have reference to a person in whom no right of action exists," does not apply to minor heirs in a case like the one at bar. Rather do we apply the doctrine laid down by that court in the same opinion, wherein it said:

"The legal disability mentioned in section 191 [Civil Code of California] manifestly has reference to a well-known class of persons in whom a right to redress exists, but who for special reasons are incapable of acting for themselves; such as infancy, coverture, and the like. Whatever is a disability under the general statute of limitations is a disability under this statute."

The property in question here had never been taken possession of by the administratrix, if we read the record aright. It was nevertheless realty which belonged to the estate of Thomas Wren, deceased; realty which passed directly to his heirs at the event of his death. Two of these heirs were at that time, as well as at the time of the commencement of this action, minors. Had these heirs been laboring under no disability, it would, in

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the light of the decision of this court in Gossage v. Crown Point Mining Co., supra, have been their right and privilege to institute an action in their own name to quiet title to the property. But these heirs, Marie Wren and Thomas Wren, Jr., were at the time of their father's death, as well as at the time of the commencement of this action, minors; hence laboring under a legal disability. Had these heirs been free from this disability, they might have instituted this action at any time within two years from and after the date of the tax sale at which this respondent alleges he acquired title to the property in question. But the statute of this state (sections 4951–4966, Revised Laws) provides that by reason of this disability this action, which under the decision of this court in the case of Gossage v. Crown Point Mining Co., supra, was theirs, had they been of legal age, may be commenced by them within a period of two years after their disability has ceased.

The cases of Meeks v. Olpherts and Meeks v. Vassault, supra, are earnestly relied upon by respondent in furtherance of his position here. But, in the light of the decision of this court heretofore referred to and in view of our statutory provision, that decision is distinguishable in view of assertions there made and the reasoning resorted to. The court there says:

"Under the statutes of California real estate, like personalty, is assets in the hands of the administrator, and is to be administered, and applied first to the payment of the expenses of the administration and debts of the deceased, and then the residue, after satisfying all lawful claims, distributed to the heirs. Realty and personalty stand upon the same footing, except that the personalty must be first exhausted before the real estate can be sold and applied to payment of the debts of the deceased. The right of possession, and right of action to recover possession of the real estate, vests exclusively in the administrator. The heirs cannot maintain an action to recover the real estate pending the administration, or after administration has been commenced, until the estate has been settled, or the real estate has been distributed to them by the probate court." Meeks v. Vassault, 3 Sawy. 212, Fed. Cas. No. 9393.

Such cannot apply here, in view of the decision of this court in the case of Gossage v. Crown Point Mining Company, supra.

Again, in the Meeks-Vassault Case the court said:

"The cause of action had accrued, but it was in the administrator, and had not yet passed to the heir. There was, however, a party in existence competent to sue, one to whom the law gives the right, and upon whom it imposes the duty to sue. This party is the administrator who is the trustee of the estate, and who for this purpose represents both the heirs and the creditors of the estate. He represents the title."

Again, we say, this reasoning must fall before the force and effect of the decision of this court in the case of Gossage v. Crown Point Mining Co., supra.

But these several lines of reasoning resorted to in the Meeks-Vassault Case cannot avail in this case for any reason. The court there, in speaking of the remedy remaining in favor of the heirs, used the following significant language:

"Whether as effective as desirable or not, the heirs are not without a remedy. They have a remedy against the administrator and upon the administrators' bond; and they may, in a proper proceeding, also compel the administrator to sue."

The reasoning and conclusion arrived at in these cases by the Supreme Court of the United States and by the learned Circuit Court of Appeals cannot avail in the case at bar, first, because a conclusion different from that of the Supreme Court of California, referred to in the Olpherts Case, has been arrived at by the highest court of this state as to the right of the heirs to maintain an action in their own name, for the possession of realty belonging to the estate, as well as for another reason.

[13] Section 5911, Revised Laws, being section 55 of our Civil Practice Act, provides:

"Every person to whom letters testamentary (unless the will otherwise provides) or of administration shall have been directed to issue shall, before receiving the letters, execute a bond to the state of Nevada, with two or more sureties to be approved by the district judge. In form the bond shall be joint and several, and the penalty shall not be less than the value of the personal property, including rents and profits belonging to the estate, which value shall be ascertained by the court by the examination on oath of the party applying, and of any other persons the judge may think proper to examine. The district judge shall require an additional bond whenever the sale of any real estate belonging to an estate is ordered by him to be sold. The bond shall be conditioned that the executor or administrator will faithfully execute the duties of the trust according to law, and shall be recorded by the clerk."

It will be noted that in this section the penalty provided for in the bond is fixed at not less than the value of the personal property, including rents and profits, belonging to the estate. It is only when the sale of any real estate belonging to the estate is ordered by the district judge that an additional bond is required under this statutory provision. Under the latter condition only, a bond is required from the executor or administrator to insure that he "will faithfully execute the duties of the trust according to law." Hence, as we read this provision of our statute, and viewing it in the light of the general policy which we find established by the Legislature applicable to the settlement of the estates of deceased persons, it is made manifest to us that the relationship of trustee and cestui que trust between the executor or the administrator and the heirs is not created by our statute in so far as the same might apply to the realty belonging to an estate. For this reason the rule that would assert that a statute of limitations running against a trustee who holds the legal title to real estate runs also against the cestui que trust does not apply.

The disability which prevented the statute of limitation from running as against the minors, Marie Wren and Thomas Wren, Jr.,

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does not affect the same result as with reference to Mary Wren, in her own right nor to Mary Wren as administratrix. She was laboring under no such disability, and the statute as to the time during which actions might be commenced operates as a bar to her right of action here, inasmuch as the period during which such actions could have been commenced has long since passed.

[14] Counsel for appellants here contend that the statute of limitation governing the commencement of actions of this character has not run against the appellant Mary Wren. In this respect they contend that section 4951, Revised Laws, does not apply, inasmuch as the property in question here was a patented mining claim. In this respect they argue that the term "mining claim," as used in section 4951 and in the exception to section 4953, refers to unpatented mining claims; that the time within which to commence an action for the recovery of a patented mining claim is governed by section 4952, Revised Laws, and hence this action might have been commenced at any time within five years from and after the date at which the appellant Mary Wren was last seised or possessed of the premises, to wit, December, 1909. The contention of appellants in this respect might be more serious were it not for the fact that the history of legislation, as we find it in this state, will scarcely support their position.

The first act of Congress providing for the patenting of a mining claim was passed in the year 1866. Act July 26, 1866, c. 262, 14 Stat. 252; Golden v. Murphy, 31 Nev. 410, 103 Pac. 394, 105 Pac. 99. Section 4951, Revised Laws, was first enacted by our Legislature in 1867. Stat. Nev. 1867, p. 85. Section 4953, Revised Laws, was first enacted in 1869. Stat. Nev. 1869, p. 95. These enactments were carried forward in their original form, by continuation, into our Revised Laws. Revised Laws, § 5817. Each of these provisions of our Code refers to mining claims as such, and this notwithstanding the passage of the federal statute of 1866 providing for the patenting of such property. If the Legislatures of 1867 and 1869 had intended that patented mining claims should not be affected by the provisions of this statute, we may assume that some expression to that effect would be found in the statute. Finding none, we must conclude that the Legislature, when enacting these provisions, did so with full knowledge of the federal statute of 1866 providing for the patenting of mining claims, and hence intended that the force of these sections should apply to patented as well as unpatented mining claims, and that actions for the recovery of mining claims or for the recovery of the possession thereof must be commenced within two years from the time at which the plaintiff or those through or from whom he claims were seised or possessed of such mining claim, whether the same be patented or unpatented.

[15] But it is contended that, inasmuch as respondent here has since 1910 been in open, notorious, and exclusive possession of the property in question, he therefore has acquired the same by adverse possession. As regards this latter contention, the minor heirs were entitled to notice of the hostile character of respondent's claim. This notice could not be given or imparted to the minor heirs until they were capable in law of receiving it. Their infancy made it impossible under the law to charge them with notice of the character or extent of respondent's claim of adverse possession, much less of the nature of the title under which respondent entered. To this notice they were entitled; and under the provision of our statute they had the right to commence this action at any time within two years after they were by law chargeable with notice. Northrop v. Marquam, supra.

The doctrine that statutes of limitation usually except infants from their operation has received eminent sanction. 1 R. C. L. 759.

The judgment appealed from must be reversed, in so far as it affects Marie Wren and Thomas Wren, Jr., and as to these appellants it is ordered that judgment be entered in accordance with the prayer of their complaint, to the extent of their interest in the property as heirs at law of Thomas Wren, deceased.

As to the appellant Mary Wren, the judgment is affirmed.

NORCROSS, C. J., and COLEMAN, J., concur.

(41 Nev. 1)

ZELAVIN v. TONOPAH BELMONT DEVELOPMENT CO. (No. 2144.)

(Supreme Court of Nevada. Dec. 30, 1916.)

1. COSTS ⟸264—ON APPEAL—PRINTING EXPENSES—FILING AND SERVING COST BILL—COURT RULE.

Under Sup. Ct. rule 6, par. 2 (154 Pac. p. ix), providing that a party, desiring to recover as costs his printing expenses, shall within five days after decision of the cause file with clerk and serve on the opposite party a cost bill, stating the actual cost of the printing, service thereof on the opposite party within such time is as necessary as its filing with the clerk.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1004–1008; Dec. Dig. ⟸264.]

2. COSTS ⟸264—ON APPEAL—RULE OF COURT—ENFORCEMENT.

Sup. Ct. rule 6, par. 2 (154 Pac. p. ix), making the filing and service of cost bill within five days after decision of cause a condition to recovery of printing expenses as costs, not being for the convenience of the court or tending to facilitate its business, its enforcement is not subject to its discretion.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1004–1008; Dec. Dig. ⟸264.]

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Appeal from District Court, Washoe County; Cole L. Harwood, Judge.

In the matter of cost bill of appellant, to which respondent filed objections with the clerk of the Supreme Court. From the clerk's adverse ruling, he appeals. Ruling reversed.

For opinion on former appeal, see 149 Pac. 188.

H. R. Cooke, of Tonopah, and Geo. B. Thatcher, of Carson City, for appellant. Dixon & Miller, of Reno, for respondent.

COLEMAN, J. Respondent filed with the clerk of this court objections to the cost bill of appellant, and from an adverse ruling has appealed, pursuant to paragraph 3 of rule 6 (154 Pac. ix), of this court.

[1, 2] While several objections are urged to the cost bill, we deem it necessary to consider only one of them, which is that the cost bill was not filed and served within the time required by paragraph 2 of rule 6 (154 Pac. ix), which reads:

"Either party desiring to recover as costs his expenses for printing or typewriting in any cause in this court, shall, within five days after the decision of the cause, file with the clerk and serve upon the opposite party a verified cost bill, setting forth or stating the actual cost of such printing or typewriting, and no greater amount than such actual cost shall be taxed as costs."

The decision in the case was filed June 5, 1915. On June 11, 1915, appellant filed its cost bill with the clerk of the court, but there is no showing that service was made on respondent on that or on any other day, except as it appears by inference from respondent's brief that it was served on June 12th. It is urged that, as appellant did not receive notice of the decision until June 6th, the cost bill was filed in apt time. Conceding for the purpose of this case that this contention is correct, yet the service on respondent was not made within the required time. Such service on the respondent within the time required by the rule was as necessary as the filing of the cost bill with the clerk. We think that the law applicable to the situation which confronts us in this matter was established by this court in Haley v. Eureka County Bank, 20 Nev. 423, 22 Pac. 1102, wherein it is said:

"The courts may rescind, modify, or repeal their rules, or, in establishing them, may reserve the exercise of discretion; but where there is no such reservation in the rules, and they remain in full force, and are not in any respect repugnant to the provisions of the statute, they have, as before stated, the force and effect of law, and are equally binding upon the court and litigants, and should be applied and enforced in all cases, and upon all questions, coming within their provisions. * * * It is true that rules are sometimes adopted by courts, for their own convenience, which may be enforced or set aside at their own will and pleasure, as deemed meet and proper under the circumstances of each case. 'Such rules are mere engines to promote convenience in business, and when, from any peculiarity, they require to be suspended or waived, in order to promote justice, the power which made them can and ought to suspend them.' Wallace v. Clark [Fed. Cas. No. 17,098] 3 Woodb. & M. 362. But the rule under consideration is not of such a character."

The filing of a cost bill is not a matter of convenience to the court, nor could it tend to facilitate the business of the court, since it must be filed, if at all, subsequent to the disposition of the case by the court. Therefore we do not think this is an instance in which the court can exercise its discretion.

For the reasons given, the ruling appealed from is reversed, and it is ordered that the objection to the cost bill be sustained.

NORCROSS, C. J., and McCARRAN, J., concur.

(40 Nev. 228)

Ex parte DIXON. (No. 2249.)

(Supreme Court of Nevada. Dec. 23, 1916.)

1. COURTS ⇐188(2)—MUNICIPAL COURT—JURISDICTION—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Const. art. 6, § 6, gives to district courts original jurisdiction in cases involving the legality of any tax assessment or municipal fine, etc.; section 8 requires the Legislature to determine the number of justices of the peace in each city, etc., and provides that justice's courts shall not have jurisdiction of cases conflicting with the jurisdiction of the courts of record; and section 9 requires the Legislature to fix by law the jurisdiction of municipal courts. The charter of the city of Reno (article 14, § 1) created a municipal court, by section 3 gave it jurisdiction as then provided for justices of the peace as to civil or criminal cases for the violation of any ordinance, and by section 6 provided that it should be treated as a justice's court, in case its proceedings should be questioned. Rev. Laws, § 5721, relating to transfer of causes from justice's court, provides that the parties cannot give evidence on questions involving the legality of any tax, municipal fine, etc. An ordinance imposed a certain license upon every attorney practicing his profession in the city payable quarterly in accordance with the gross receipts, and thereunder petitioner was convicted in the municipal court and committed. *Held*, where the issue involved the legality of a tax and the constitutionality of the ordinance imposing the tax, the municipal court had no jurisdiction, and was bound to transfer the proceedings to the district court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 458, 464, 468; Dec. Dig. ⇐188(2).]

2. COURTS ⇐486 — MUNICIPAL COURT — JURISDICTION—LEGALITY OF TAX—CERTIFICATION OF QUESTION.

In such case, where defendant challenged the legality of the tax or questioned the constitutionality of the ordinance in the municipal court, that court was ousted of jurisdiction and should have certified the pleading to the district court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1299–1305; Dec. Dig. ⇐486.]

3. COURTS ⇐189(7) — MUNICIPAL COURTS — PLEADING—VERIFICATION.

No plea by a defendant in a justice's court need be verified, and such rule applies with equal force to the municipal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 409, 413, 458; Dec. Dig. ⇐189(7).]

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Original proceeding in habeas corpus by J. B. Dixon against J. D. Hillhouse, Chief of Police of the City of Reno. Ordered that writ be perpetuated and petitioner be restored to his liberty.

J. B. Dixon and Frame, Humphrey & Harcomb, all of Reno, for petitioner. L. D. Summerfield, of Reno, for respondent.

McCARRAN, J. This is an original proceeding in habeas corpus. By the return of J. D. Hillhouse, chief of police of the city of Reno, it appears that petitioner, J. B. Dixon, was on the 5th day of June, 1916, arrested under and by virtue of a warrant of arrest issued by the municipal court of the city of Reno, Washoe county; that the warrant of arrest was issued in accordance with the prayer of a complaint filed with the municipal court of that city; that, upon petitioner's plea of not guilty to the complaint, the action proceeded to trial forthwith; and that on July 5, 1916, the petitioner was by the municipal court of the city of Reno found guilty and a commitment duly issued, under which said committment the respondent detains petitioner and deprives him of his liberty.

The complaint, under which warrant was issued for the arrest of petitioner and upon which the trial was conducted, is in part as follows:

"That on or about the 28th day of April, A. D. 1916, in the city of Reno, county of Washoe, state of Nevada, the crime of misdemeanor was committed, to wit, by J. B. Dixon, who then and there was willfully and unlawfully practicing, and did then and there willfully and unlawfully practice, his profession as an attorney without having first taken out and procured the municipal license required by ordinance of the city council of the said city of Reno; all of which is contrary to the form, force, and effect, and in violation of section 21 of City Ordinance No. 82, as amended, revised, and re-enacted by City Ordinance No. 195 of said city of Reno."

Petitioner filed a motion to set aside the complaint, and argued the following grounds:

"(1) That said complaint does not allege facts sufficient to constitute a public offense.

"(2) That this court has no jurisdiction or power to consider said complaint or to issue any warrant of arrest thereunder or thereupon.

"(3) That the ordinance referred to in said complaint, and sections 4, 20, and 21 thereof, are ultra vires, and beyond the power of the city of Reno to enact.

"(4) That said ordinance and said sections are repugnant to the Constitution of the United States.

"(5) That said ordinance and said sections thereof are repugnant to the Constitution of the state of Nevada.

"(6) That said ordinance and said sections thereof are repugnant to the charter of the city of Reno."

The city of Reno is a duly incorporated municipality, its incorporation was founded upon special acts of the Legislature of this state, and the Legislature of 1915 passed an act amending certain specifically named sections of an act entitled "An act to incorporate the town of Reno, and to establish a city government therefor," approved March 16, 1903, etc. Laws 1915, c. 38.

City Ordinance No. 195 is entitled "An Ordinance to amend, revise, and re-enact the title of, and to amend, revise, and re-enact, city ordinance number 82, entitled 'An ordinance to fix, impose, and collect a license tax on certain trades, business, occupations, callings and amusements in the city of Reno; to regulate and classify the same, to fix a penalty for the violation thereof; to define the duties of certain officers in connection therewith, and to repeal all ordinances and parts of ordinances in conflict therewith,' passed and adopted October 28, 1907; and to repeal all ordinances and parts of ordinances in conflict therewith."

Section 1 of the ordinance provides:

"Every person, firm, association, or corporation engaged in carrying on, maintaining, pursuing, conducting, or transacting, or that hereafter engages in, carries on, maintains, pursues, conducts, or transacts, in the city of Reno the trade business, occupation, calling, or pursuit hereinafter named, shall obtain from said city and shall pay therefor the license herein specified."

Section 4 of the ordinance provides:

"Any person, firm, association, or corporation opening, conducting, maintaining, transacting, engaging in, carrying on, or pursuing any business, trade, occupation, calling, or pursuit hereinafter named without first having obtained from said city the license herein required shall be deemed guilty of a misdemanor, and upon conviction thereof, shall be punished by a fine of not less than twenty-five ($25.00) dollars and not exceeding one hundred ($100.00) dollars, or by imprisonment in the city jail of said city not less than twenty-five (25) days and not exceeding one hundred (100) days, or both such fine and imprisonment."

Section 20 of the ordinance fixes a schedule for certain specified businesses, fixing the license in accordance with the quarterly gross receipts of such business.

Section 21 provides:

"Every attorney, doctor, physician, surgeon, veterinary surgeon, or dentist, practicing or following his or her profession in said city, shall pay for and obtain a quarterly license to carry on such business, as per the schedule hereinbefore recited in section 20 of this ordinance."

[1] Petitioner here contends, among other things, first, that the municipal court of the city of Reno had no power or authority to try, hear, or determine the matters attempted to be adjudged by it at said hearing.

Section 6 of article 6 of the Constitution of this state contains the following provision:

"The district courts in the several judicial districts of this state shall have original jurisdiction in all cases in equity; also in all cases at law which involve the title or the right of possession to, or the possession of real property, or mining claims, or the legality of any tax, impost, assessment, toll or municipal fine, and in all other cases in which the demand (exclusive of interest) or the value of the property in controversy exceeds three hundred dollars, also in all cases relating to the estates of deceased persons, and the persons and estates of minors and insane

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persons, and of the action of forcible entry and unlawful detainer; and also in all criminal cases not otherwise provided for by law; they shall also have final appellate jurisdiction in cases arising in justices' courts, and such other inferior tribunals as may be established by law. The district courts, and the judges thereof shall have power to issue writs of mandamus, injunction, quo warranto, certiorari, and all other writs proper and necessary to the complete exercise of their jurisdiction; and also shall have power to issue writs of habeas corpus on petition by, or on behalf of any person held in actual custody in their respective districts."

Section 8 of article 6, among other things, provides:

"The Legislature shall determine the number of justices of the peace to be elected in each city and township of the state, and shall fix by law, their powers, duties and responsibilities, provided, that such justices' courts shall not have jurisdiction of the following cases, viz.: * * * Second, of cases wherein the title to real estate, or mining claims, or questions of boundaries to land, is or may be involved; or of cases that in any manner shall conflict with the jurisdiction of the several courts of record in this state. * * *"

Section 9 of article 6 provides:

"Provision shall be made by law prescribing the powers, duties and responsibilities of any municipal court that may be established in pursuance of section one, of this article; and also fixing by law the jurisdiction of said court, so as not to conflict with that of the several courts of record."

The municipal court of the city of Reno is created by section 1 of article 14 of the charter of the city of Reno, and by section 3 of the same article it is provided:

"The municipal court shall have the powers and jurisdiction in said city as are now provided by law for justices of the peace, wherein any person or persons are charged with the breach or violation of the provisions of any ordinance of said city or of this charter, of a police nature; provided, that the trial and proceedings in such cases shall be summary and without a jury. The said court shall have jurisdiction to hear, try and determine all cases, whether civil or criminal, for the breach or violation of any city ordinance or any provision of this charter of a police nature, and shall hear, try, determine, acquit, convict, commit, or hold to bail in accordance with the provisions of such ordinances or of this charter. The practice and proceedings in said court shall conform as nearly as practicable, to the practice and proceedings of justices' courts in similar cases. * * *"

Section 6 of the charter in part provides:

"The said court shall be treated and considered as a justice's court whenever the proceedings thereof are called into question."

Section 5721, Revised Laws, having reference to the transfer of cases to the district court from the justice's court, provides:

"The parties to an action in a justice's court cannot give evidence upon any question which involves the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine; nor can any issue presenting such question be tried by such court. * * *"

By section 9 of article 6 of the Constitution it will appear that the Legislature was empowered to fix by law the jurisdiction of municipal courts, and as we read the provision it would appear that the Legislature might confer upon the municipal court jurisdictional power limited to municipal purposes (Meagher v. County of Storey, 5 Nev. 249) embracing any subject, so long as it did not conflict with the several courts of record. Hence we are asked the question, in the light of our constitutional and statutory provisions, was it within the power of the municipal court, as that power had been conferred by the Legislature in the provisions of the charter of the city of Reno, to pass upon and determine the questions of law involving the legality of the ordinances imposing the tax as that question was presented by the motion to set aside the complaint.

In the case of State ex rel. Murphy and Lutz v. Rising, 10 Nev. 97, this court had under consideration this provision of the statute, as well as sections 6 and 8 of article 6 of the Constitution. The court there held that the words "all cases at law" and "all criminal cases," as used in the Constitution, were intended to designate distinct categories mutually exclusive, and that the Legislature has full power to parcel out the jurisdiction of criminal cases between the district courts and justices' courts.

The court, in the case of State v. Rising, supra, after asserting that the words "all cases at law" and "all criminal cases" were meant to convey the idea of distinct categories mutually exclusive, said:

"If we are correct in this view, there can be no doubt that the justice's court had jurisdiction of the offense charged against Grant, and that it was his duty to try and determine it, unless it was made satisfactorily to appear to him, before or during the trial, that the action could not be tried without deciding a question of title to real property, or of the right to the possession thereof; in which case, and in which case alone, it was his duty, in obedience to the statute, and without any reference to the Constitution, which, as we think, has no application to criminal cases in this particular, to transfer the proceeding to the district court."

We think this same line of reasoning will apply even more so to cases arising in the justice court with reference to the right of such court to pass upon a question of law involving the legality of any tax, impost, assessment, toll, or municipal fine.

Section 9 of article 6 of the Constitution provides that the Legislature shall fix the jurisdiction of municipal courts so as not to conflict with that of the several courts of record.

Now the Legislature of this state, in enacting the law creating the charter of the city of Reno, provided by section 3 of article 14 of that charter that:

"The municipal court shall have the powers and jurisdiction in said city as are now provided by law for justices of the peace, wherein any person or persons are charged with the breach or violation of the provisions of any ordinance of said city or of this charter, of a police nature."

And that section further provided:

"The practice and proceedings in said court shall conform as nearly as practicable, to the

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practice and proceedings of justices' courts in similar cases."

Moreover, it was provided in section 6 of the same article that:

"The said court shall be treated and considered as a justice's court whenever the proceedings thereof are called into question."

Here we have constitutional and statutory provisions reserving cases to the district court where the question of the legality of a tax is in issue as a matter of law. We have a statutory provision declaring that an issue presenting the question of the legality of a tax, impost, assessment, toll, or municipal fine shall not be tried in the justice court. The legislative act by which was created the charter of the city of Reno, and from which act the municipal court of that city took its existence and its jurisdiction, declared that the powers and jurisdiction of that court should be the same as those now provided by law for justices of the peace in cases wherein any person is charged with the breach or violation of the provisions of an ordinance of the city. It further provided that the practice and procedure of the municipal court should conform as nearly as practicable to that of the justice court in similar cases, and that in all cases the municipal court should be treated and considered as a justice court whenever its proceedings were called into question.

Hence we might simplify matters here by inquiring as to what would be the required procedure if a charge of similar import were pending against petitioner in a justice court. If under the statute the justice of the peace was denied the right to try and determine the issue of law raised wherein the legality of the tax was questioned, then that denial applies here with equal force to the municipal court.

In the light of the provisions as we find them in the charter of the city of Reno, we apply the reason as well as the interpretation which we find in the case of State v. Rising, supra, and in the language of Mr. Justice Beatty, as said in that case, we say there can be no doubt that the municipal court had jurisdiction of the offense charged against the petitioner, and that it was the duty of that court to try and determine it, unless it was made to appear, before or during the trial, that an issue involving the legality of a tax or the constitutionality of an ordinance imposing a tax was to be decided, in which case it was the duty of the municipal judge, in obedience to the statute, to transfer the proceedings to the district court. Section 5721, Revised Laws.

In the case of State v. Rising, supra, the question was as to the jurisdiction of the justice court to try a criminal case involving a charge of malicious mischief. This court, in answer to the query as to the right of the justice court to try a case involving the right to possession of real property, there said, first of all, that the right of possession to real property was not involved in a charge of malicious mischief; that in such cases mere proof of possession is a sufficient proof. Moreover, the court held that even proof that would support a plea of freehold in the defendant would not justify or excuse him in a case of malicious mischief.

It will not, we apprehend, be seriously disputed that the license provided for in section 21 of the ordinance, being a charge or fee for the transaction of a given business, is a tax, inasmuch as it is a charge imposed upon persons and business to raise money for municipal purposes. City of Santa Barbara v. Stearns, 51 Cal. 499.

[2] Defendant was charged with a misdemeanor in having failed to pay a license tax under an ordinance imposing such tax. Under such a charge we may inquire: Has the defendant the right to challenge the legality of the license tax so imposed? Has he the right to raise the question of the constitutionality of the ordinance imposing the license tax? If the petitioner here, being charged with a misdemeanor in having violated an ordinance imposing a license tax, sought to question the constitutionality of the ordinance or raise any other questions of law, either as to the legality of that tax or as to the ordinance, such ordinance being one imposing a tax, was it not his right to do so? Was it not, moreover, his right to raise such questions in the very first court where judgment might be rendered on his guilt or innocence and where by reason of the charge his liberty was at stake? Manifestly, petitioner was so privileged. The gravamen of the charge in this case was the failure to pay the tax. Hence the legality of the tax was a matter which might properly be raised by way of defense or plea in avoidance. We find from the record that petitioner raised these questions by his motion to set aside the complaint, which was in the nature of a demurrer to the complaint, in which the jurisdiction of the court, the legality of the tax, the constitutionality of the ordinance, were all raised as an issue of law. The question of the legality of the license tax, the question of the constitutionality of the ordinance imposing the license tax, each in turn was presented to the municipal court by the pleadings of the defendant there, petitioner here. It need scarcely be observed that, as we read the constitutional provisions and the provisions found in our statute, it seems manifest that it was never intended by our lawmakers that questions such as those raised in the municipal court in this instance, which challenge the constitutionality of a tax, were to be submitted to that court. The history of the constitutional, as well as the statutory, law of this state, convinces us that questions of this character, in whatever form they might arise, were reserved to another tribunal.

[3] It might be said that, in the light of the decision of this court in the case of State

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v. Justice Court, 29 Nev. 191, 87 Pac. 1, 89 Pac. 24, the municipal court need not certify that case to the district court unless the pleading on the part of the defendant was verified. The answer to this is that no pleading on the part of the defendant in a justice court need be verified, and this applies with equal force to the municipal court.

It follows from the observations that we have made here that when the defendant in the police court of the city of Reno, charged with a misdemeanor in having violated a city ordinance imposing a license tax, raised a question of law as to the legality of the tax and the constitutionality of the ordinance imposing the tax, an issue of law was presented to the police court involving a question as to which, by the provisions of section 5721, Revised Laws, no evidence could be entertained; nor could any issue presenting such question be tried by that court. The municipal court, therefore, should have proceeded no further, but under the provisions of the statute should have suspended all further proceedings in the action and certified the pleadings to the district court.

The judgment rendered by the municipal court in the premises was void. Petitioner being detained on such a judgment is entitled to be released on habeas corpus.

It is therefore ordered that the writ be perpetuated, and that petitioner be restored to his liberty.

NORCROSS, C. J., and COLEMAN, J., concur.

(40 Nev. 241)

In re WILLIAMS' ESTATE. (No. 2204.)

(Supreme Court of Nevada. Dec. 23, 1916.)

1. TAXATION ⇐866—INHERITANCE TAX—COMMUNITY PROPERTY—INTEREST OF WIFE.

Under Rev. Laws, § 2156, defining community property, and section 2165, providing that upon the death of the husband one-half of the community property goes to the surviving wife, the right of the wife in the community property during her husband's life is not a mere expectancy, but is a property interest, though subject to the husband's control, and at the husband's death it is merely freed from his control, and does not pass under the inheritance laws, and therefore is not subject to taxation under St. 1913, c. 266, § 1, imposing a tax on all property passing by will or statutes of inheritance.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. ⇐866.]

2. HUSBAND AND WIFE ⇐265—COMMUNITY PROPERTY—NATURE OF WIFE'S INTEREST—STATUTE—"HELD."

The use of the expression "goes to" the wife in Rev. Laws, § 2165, different from the expression "belongs to" the husband in section 2164, does not show an intention of the Legislature that the interest of the wife in the community should vest only after the husband's death, in view of Const. art. 4, § 31, requiring laws to be passed defining the rights of the wife to property held in common with her husband, since "held" does not convey the idea of mere expectancy, but imports ownership.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 917-924; Dec. Dig. ⇐265.

For other definitions, see Words and Phrases, First and Second Series, Held.]

Appeal from District Court, Churchill County; T. C. Hart, Judge.

Proceedings to determine the tax on the estate of Warren W. Williams, deceased. From an order adjudging the wife's interest in the community subject to tax, the wife appeals. Reversed and remanded, with instructions to enter judgment for appellant.

Hoyt, Gibbons & French, of Reno, for appellant. George B. Thatcher, Atty. Gen., for respondent.

McCARRAN, J. Warren W. Williams died January 24, 1914, leaving an estate approximating $384,000. In arriving at an amount upon which an inheritance tax would fall, deductions were made amounting to $55,887.77 leaving a balance in the estate of $328,527.33. The deceased left a will, in which he set forth:

"I hereby declare that all of my property is community property, one-half of which belongs to my wife; and for that reason I hereby refrain from any attempt to in any wise dispose of that portion of the same by will or testament."

The district court found that the estate of the surviving wife came to her by inheritance, and was liable to taxation under our inheritance tax law, and therefore adjudged the amount of $4,620.55 to be payable against the widow's one-half of the community property. From this order appeal is taken.

One question is presented here, namely, Did the surviving widow of Warren W. Williams, deceased, take her one-half of the community property left by the decedent as an heir, or was the one-half of the community property something which belonged to her absolutely in her own right, and as such did not pass to her by succession or inheritance? Our inheritance tax law was enacted by the Legislature of 1913, and is found on page 411 of the Session Acts of that year. Section 1 of the act provides:

"A tax shall be and is hereby imposed upon the transfer of any and all property within the jurisdiction of this state, and any interest therein or income therefrom, whether belonging to the inhabitants of this state or not, and whether tangible or intangible, not hereinafter exempted, which shall pass in trust or otherwise by will or by the statutes of inheritance of this or any other state or by deed, grant, sale or gift made without valuable and adequate consideration in contemplation of the death of the grantor, vendor, assignor or donor or intended to take effect in possession or enjoyment at or after such death, as specified in this act. * * *"

The property in question, being one-half of the property of which the decedent died possessed, did not pass by will in this instance, inasmuch as the decedent made no

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attempt to convey in that manner. Our state is one of those in which the law of community property prevails. In 1873 our Legislature, in compliance with constitutional provision, passed an act, defining the rights of husband and wife, and section 1 thereof prescribes:

"All property of the wife, owned by her before marriage, and that acquired by her afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property; and all property of the husband, owned by him before marriage, and that acquired by him afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property." Revised Laws, § 2155.

By section 2 of the act, the Legislature of this state specifically defined and limited the property that should be known and designated as community property. It says:

"All other property acquired, after marriage, by either husband or wife, or both, except as provided in sections 14 and 15 in this act, is community property." Revised Laws, § 2156.

Section 14 of the act has to do with the earnings and accumulations of a wife while living separate from her husband; section 15 bears upon a similar subject; and neither has any effect on the matter under consideration. Section 2165 of our Revised Laws provides:

"Upon the death of the husband one half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes to his surviving children equally, and in the absence of both such disposition and surviving children, the entire community property belongs without administration to the surviving wife, except as hereinafter provided, subject, however, to all debts contracted by the husband during his life that were not barred by the statute of limitation at the time of his death. * * *"

Hence, in the event of the death of the husband, one half of the community property, according to the statute, "goes to the surviving wife," and the other half is subject to whatever testamentary disposition the deceased husband may have seen fit to make.

The language of our statute relative to the disposition of the community property in the event of the death of the wife is somewhat different. It provides:

"Upon the death of the wife the entire community property belongs, without administration, to the surviving husband. * * *" Revised Laws, § 2164.

Hence in these two sections of our Revised Laws, passed long prior to the time at which any inheritance tax law was considered in this state, we find the law governing the disposition of property belonging to the estate which was held in the community of husband and wife, the record title of which may have been in the husband alone.

[1] It is the contention of respondent in this instance that the one-half of the community property which under the statute goes to the surviving wife is but an estate in expectancy, and that she takes the same as an heir. In support of their contention, they cite the several decisions rendered by the Supreme Court of California, and lay special emphasis upon the fact that these decisions were rendered in the light of a statute of which our section 2165 is in all probability a copy. In re Burdick, 112 Cal. 393, 44 Pac. 734; Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; Sharp v. Loupe, 120 Cal. 93, 52 Pac. 134, 586; Plass v. Plass, 121 Cal. 133, 53 Pac. 448; Estate of Moffit, 153 Cal. 359, 95 Pac. 653, 1025, 20 L. R. A. (N. S.) 207; Keating v. Smith, 154 Cal. 186, 97 Pac. 300; Estate of Kennedy, 157 Cal. 523, 108 Pac. 280, 29 L. R. A. (N. S.) 428; Estate of Rossi, 169 Cal. 148, 146 Pac. 430; Knox v. Emerson, 123 Tenn. 409, 131 S. W. 972.

We are further reminded by respondent that as early as 1860 the Supreme Court of California, speaking through Mr. Chief Justice Field, used the expression:

"The interest of the wife is a mere expectancy, like the interest which an heir may possess in the property of his ancestor." Van Maren v. Johnson, 15 Cal. 308.

The expression of the Supreme Court in that case was commented on in the later case of De Godey v. Godey, 39 Cal. 164, and there the court, referring to the community property, said:

"It belongs to the matrimonial community, and not less to the wife than to the husband. It is true that the interest of the wife therein pending the marriage has been termed 'a mere expectancy' (Van Maren v. Johnson, 15 Cal. 308); but while, perhaps, no other technical designation would so nearly define its character, it is, at the same time, an interest so vested in her, as that husband cannot deprive her of it by his will (Beard v. Knox, 5 Cal. 256 [63 Am. Dec. 125]), nor voluntarily alienate it for the mere purpose of divesting her of her claims to it."

The court, continuing, made the further observation, and one which we deem pertinent on the subject, bearing upon the thought evidenced in the written lines of statute law, that the wife is an active party in the community, and where by their joint efforts the husband and wife acquire property, her right therein at all times is a thing recognized. The court says:

"The theory upon which the right of the wife is founded (as we said in Galland v. Galland, 38 Cal. 265) is that the common property was acquired by the joint efforts of the husband and wife, and should be divided between them if the marriage tie is dissolved either by the death of the husband or by the decree of the court, etc. Her mere right in the community property is as well defined and ascertained in contemplation of law, even during the marriage, as is that of the husband. It is true that the law confers upon the latter the authority to manage and control it during the existence of the marriage, and the power to sell it for the benefit of the community, but not, as we have seen, so as to defraud the community of it."

In the Matter of the Estate of Burdick, 112 Cal. 387, 44 Pac. 734, the court there, speaking of the wife's interest in the community property, reasons thus:

"No one disputes that it is succession; but the language is the same in regard to the moiety

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given to the wife. It 'goes' to her just as it 'goes' to the descendants."

The term "goes," as used in section 1402 of the Civil Code of California, it will be seen, is used in section 2165 of our Code. This is the term referred to where, in the assertions last quoted, the court says, "It 'goes' to her just as it 'goes' to the descendants." This conclusion is scarcely borne out by the provisions of the statute, because under any number of decisions in California, as well as in other jurisdictions having similar Code provisions, it has been held that the portion of the community property which is by statute reserved to the wife is not subject to testamentary disposition; and it cannot be correctly said that it goes to her just as it goes to the descendants. The descendants may take by will or under the statutory provisions governing the laws of descent, but to the wife is expressly reserved one-half of the property belonging to the community to which she contributed her efforts jointly with her husband. Community property, that peculiar class of property designated by statute, contemplates the existence of only two persons, namely, the husband and wife, living in the marriage status. Other descendants play no part in the creation of this estate. They may contribute to its accumulation or they may not. As to this the law gives no concern. But as to the community of husband and wife, the law contemplates property acquired by the joint efforts of the two, and seeks to designate, without segregation, an interest of which the wife cannot be deprived by the testamentary act of her husband, and to that extent goes to her by operation of the very law which created the estate itself, as distinguished from that portion of the community property which may go to the descendants under testamentary disposition or the laws of descent.

Mr. Justice Harrison, in a separate opinion concurred in by Justice Garoutte, in the Matter of the Estate of Burdick, supra, said:

"The wife's interest in the community property upon the death of the husband has many incidents similar to those of an heir, but I do not think that, under the language and spirit of the laws of this state, she can be said to be his heir to her share of that property, or that her interest therein comes to her by virtue of a 'succession' to the property of her husband. The property that is acquired by the labor of the wife during the marriage, equally with that acquired by the labor of the husband, becomes community property; and, although section 172 of the Civil Code gives to the husband the management and control of the community property—that acquired by her labor as well as that acquired by his—yet by the terms of the same section he cannot give away, or convey without valuable consideration, any portion of this property, unless she gives her written consent thereto."

Continuing, he said:

"Although this interest of the wife in the community property may not fall within the common-law definition of an 'estate,' it is not to be classed as a 'mere possibility,' like the expectancy of an heir."

After referring to the cases of Van Maren v. Johnson, supra, and Packard v. Arellanes, 17 Cal. 525, as to the term "mere expectancy" used in those cases, the learned Justice continued by saying:

"It is a misapplication of terms to say that the property which the wife has 'acquired' during the marriage by her skill or labor, and of which her husband had not, in his lifetime, any power of voluntary conveyance, except with her consent, or of testamentary disposition, is inherited from him; and to refer her rights in the community property to 'succession,' under the language of section 1383 of the Civil Code, begs the entire question."

The position taken by the Supreme Court of California in the matter of the Estate of Burdick, supra, was again accepted by that court in the case of Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170. In these cases the question of the application of the inheritance tax law was not under consideration, but in the case of the Matter of the Estate of Moffitt, 153 Cal. 359, 95 Pac. 653, 1025, 20 L. R. A. (N. S.) 207, the question of the surviving wife's share of the community property being subject to the payment of inheritance tax was the principal matter under consideration and the court there, in applying the inheritance tax law, referred to and reaffirmed the rule laid down in the cases of In re Burdick, Spreckels v. Spreckels, and Sharp v. Loupe, and in reality made the rule in these cases the basis for the conclusion that the interest of the wife in the community property is subject to the inheritance tax.

In the Matter of the Estate of Kennedy, 157 Cal. 516, 108 Pac. 280, 29 L. R. A. (N. S.) 428, the question of the application of the inheritance tax law to the wife's portion of the community property was again under consideration, and there again the court referred to its former decisions, and especially to the decision in the Matter of the Estate of Moffitt, supra, and in respect to the latter said that the conclusion there reached—

"was based solely on the proposition, established in this state by several prior decisions, that the wife takes such property solely by succession as an heir of the husband, and therefore 'by the intestate laws of this state.'"

The Supreme Court of Illinois, in the case of Billings v. People, 189 Ill. 472, 59 N. E. 798, 59 L. R. A. 807, had under consideration the application of an inheritance tax as applicable to property passing to a surviving wife under a statute which read as follows:

"The surviving husband or wife shall be endowed of the third part of all of the lands whereof the deceased husband or wife was seised of an estate of inheritance, at any time during the marriage, unless the same shall have been relinquished in legal form." Hurd's Rev. St. Ill. 1899, c. 41, § 1.

The court there, speaking through Mr. Justice Carter, held that a wife's interest in the realty of her deceased husband was subject to the tax.

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Hence, in these two jurisdictions, one a community, the other a dower state, the courts have held practically to the same conclusion, namely, that the wife takes as an heir from her husband.

The Supreme Court of Nebraska, in considering the question in the light of statutes which do not recognize community property as such, but under which the surviving spouse takes a one-fourth interest of all the real estate of which the wife or husband was seised of an estate of inheritance, at first followed the rule laid down by the Supreme Court of California in Re Moffitt, and In re Kennedy, and likewise adopted the conclusion reached by the Supreme Court of Illinois in the case of Billings v. People; and in the Matter of the Estate of Sanford, 90 Neb. 410, 133 N. W. 870, 45 L. R. A. (N. S.) 228, held that the surviving wife's interest was subject to the inheritance tax; but the court, on rehearing in the last-named case, reversed its former decision made in the same case, and held that the value of the widow's dower interest should be deducted from the appraised value of the estate and the inheritance tax should be computed on the remainder thereof. In this respect the court said:

"It would seem, from a review of the cases decided since our opinion was adopted, that such is the weight of authority. The reason for the rule seems to be that the widow takes her dower interest in the estate of her deceased husband by operation of law; that she could not be deprived of it by his will; that it is something which relongs to her absolutely and independent of any right of inheritance or succession, and therefore so much of the estate as belonged to her by right is not chargeable with an inheritance tax." In re Sanford, 91 Neb. 753, 137 N. W. 864, 45 L. R. A. (N. S.) 236.

Considering the same subject in the matter of the Estate of Strahan, 93 Neb. 828, 142 N. W. 678, the court reaffirmed its position laid down on rehearing in Re Sanford, and there made some very pertinent observations bearing on the reason for the conclusion reached relative to the nature of the wife's interest by dower in the estate of her deceased husband, saying:

"She cannot be deprived of that interest by his will. It is something which belongs to her absolutely and independently of any right of inheritance or succession. Strictly speaking, the widow's share should be considered as immune, rather than exempt, from an inheritance tax. It is free, rather than freed, from such tax. It is not excepted from the taxable class because it never was in such class. Like all debts, taxes, costs, expenses, and other similar items, it is deducted before any inheritance tax is assessed. The share of the realty and personalty, which under our law go to the widow independent of any will or act of the husband, is not, so to speak, a part of his estate, and is no more liable to a succession tax at his death than is her individual property, derived from her own ancestors and held in her own name, though the husband may have had the management and control of the estate during his lifetime. The effect of our decedent law is practically the same as the law of community of property, and the courts of those states which have adopted that law have held, with but a single exception, that the wife is not liable, upon the death of her husband, to pay an inheritance tax on her one-half of the community property, for the reason that the property does not pass to her by will or by the intestate laws of the state."

They commented on the rule applied thus:

"It is sustained by the greater weight of authority, and the more recent decisions of the courts of last resort in this country."

In the Matter of Avery's Estate, 34 Pa. 204, the Supreme Court of that state held that where a testator devised his whole estate to his executors in trust for legatees and devisees, and the widow refused to take under the will, she took her share under her paramount title as a widow, and not as a payment out of the fund bequeathed to the executors in trust, and that therefore her share so taken was not subject to inheritance tax.

In re Weiler (Sur. Ct.) 122 N. Y. Supp. 608 and In re Starbuck, 137 App. Div. 866, 122 N. Y. Supp. 584, and in many other cases referred to, the courts of New York, in dealing with the widow's estate of dower, have held that such—

"was property, which became vested as an inchoate estate upon her marriage and consummate upon the death of her husband, independent of the will, and not by virtue thereof."

Speaking on the subject of the exemption of community property from inheritance tax, Mr. Ross, in his work on Inheritance Taxation, page 83, comments thus:

"That the independence of dower from the law of succession and testamentary disposition, and its consequent exemption from inheritance taxation, have not readily been discerned, is not surprising, in view of the peculiar features of dower and the obscurity of the law on which it rests. The surprise comes when, in a jurisdiction where the community system has been adopted, the exemption of the share of a wife in the common property on the death of her husband should be doubted. Yet that doubt has arisen, and, in California, has been resolved adversely to the wife. Some years ago the Supreme Court of the state made the startling announcement that the interest of a wife in the community property during the lifetime of her husband is only an expectancy, and that on his death she takes it as his heir. Matter of Burdick, 112 Cal. 387 [44 Pac. 734]; Spreckels v. Spreckels, 116 Cal. 339 [48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170]; Sharp v. Loupe, 120 Cal. 89 [52 Pac. 134, 586]. This notion all but ignores the community property rights of the wife, and reduces the community system to a mere name, without substance. It is a misconception of the law, and has been so recognized by other courts, but it is still adhered to in California, with the result that the share of a wife in the community property is, on her husband's death, subject to the inheritance tax."

A consideration of this matter was entertained by the Supreme Court of Idaho in the case of Kohny v. Dunbar, 21 Idaho, 258, 121 Pac. 544, 39 L. R. A. (N. S.) 1107, Ann. Cas. 1913D, 492. The statute of Idaho (Rev. Codes, § 2680), like our statute, provides that:

"All other property acquired after marriage by either husband or wife, including the rents and profits of the separate property of the husband and wife, is community property, unless by the

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instrument by which any such property is acquired by the wife it is provided that the rents and profits thereof be applied to her sole and separate use. * * *"

The Idaho statute in this respect compares with section 2156 of our Revised Laws. Section 2686 of the statute of Idaho provides:

"The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate. * * *"

This section of the Idaho statute compares with section 2160 of our Revised Laws. Section 5713 of the Revised Code of Idaho is as follows:

"Upon the death of either husband or wife, one half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her, or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall all pass to the survivor, to the exclusion of collateral heirs, subject to the community debts, the family allowance, and the charges and expenses of administration."

The provision in this section of the Codes of Idaho by which one-half of the community property goes to the surviving spouse differs some from sections 2164 and 2165 of our Revised Laws, inasmuch as by the former section of our Code it is provided that on the death of the wife the entire community property belongs without administration to the surviving husband, while in the latter section of our Code it provides, as does the Code of Idaho, that upon the death of the husband one half of the community property goes to the surviving wife, and the other half is subject to testamentary disposition of the husband.

Mr. Justice Ailshie, in speaking for the Supreme Court of Idaho, after dwelling at some length on the laws of that state relative to the acquisition and disposition of community property, says:

"The foregoing section (section 5713, Revised Codes) of the statute recognizes the husband and wife as equal partners in the community estate, and it authorizes each to dispose of his or her half by will. It also provides that the survivor shall continue to be the owner of half of such property subject only to the payment of the community debts. This statute clearly and unmistakably provides that the surviving spouse takes his or her half of the community property, not by succession, descent, or inheritance, but as survivor of the marital community or partnership."

In an early case (Hall v. Johns, 17 Idaho, 224, 105 Pac. 71) that court had expressed itself that:

"The title to the community property is in the husband, and during the existence of the community, the wife's interest in the community property is a mere expectancy."

In the case of Kohny v. Dunbar, supra, however, the court dwelt upon this expression, and emphasized the fact that while such an expression was applicable to the matter involved in the case of Hall v. Johns, as it might have been applicable when used by the Supreme Court of California in the case of In re Burdick, supra, it had no reference, and could not be correctly asserted where the question involved was the determination of the nature of the wife's interest in the community property.

The Supreme Court of Utah, in the case of the Estate of Bullen, 151 Pac. 533, L. R. A. 1916C, 670, reviews at length various decisions rendered in the several jurisdictions, and under the several statutory provisions, on the subject of the application of the inheritance tax law to property passing to the surviving spouse. The statute of the state of Utah (Comp. Laws 1907, § 2826), somewhat similar to that found in Nebraska, provides:

"One-third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, and to which the wife had made no relinquishment of her rights, shall be set apart as her property in fee simple if she survive him. * * *"

The court there held that:

"What the wife receives under section 2826 one-third in fee simple of all the legal and equitable estate in real property possessed by the husband during coverture, and not relinquished by her, she receives, not as an heir of her husband, but in her own right, something which belongs to her absolutely, and of which she could not have been deprived by will or by any other voluntary act of her husband without her consent. Under that section, she is not an heir within the meaning of our intestate or succession statutes. Waddle v. Frazier, 245 Mo. 391, 151 S. W. 87; Golder v. Golder, 95 Me. 259, 49 Atl. 1050; Gardner v. Skinner, 195 Mass. 164, 80 N. E. 825; Braun v. Mathieson, 139 Iowa, 409, 116 N. W. 789; Gauch v. St. Louis Mut. L. Ins. Co., 88 Ill. 251, 30 Am. Rep. 554; McNutt v. McNutt, 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 372; Miller v. Finegan, 26 Fla. 29, 7 South. 140, 6 L. R. A. 813."

In the case of Warburton v. White, 176 U. S. 494, 20 Sup. Ct. 408, 44 L. Ed. 555, the Supreme Court of the United States, speaking through Mr. Justice White, now Chief Justice, in considering the question, under the statutes of the state of Washington, on the necessity of the wife joining with the husband in the disposition of community property, reviewed the several decisions of the Supreme Court of the state of Washington on the subject, and in dwelling on the interest of the wife in the community property said:

"Property acquired during marriage with community funds became an acquêt of the community, and not the sole property of the one in whose name the property was bought, although by the law existing at the time the husband was given the management, control, and power of sale of such property, this right being vested in him, not because he was the exclusive owner, but because by law he was created the agent of the community; the proceeds of the property when sold by him becoming an acquêt of the

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community, subject to the trust which the statute imposed upon the husband, from the very nature of the property relation engendered by the provision for the community."

Mr. Justice Holmes, in speaking for the Supreme Court of the United States in the case of Arnett v. Reade, 220 U. S. 311, 31 Sup. Ct. 425, 55 L. Ed. 477, 36 L. R. A. (N. S.) 1040, referred to the decision in the case of Warburton v. White, supra, and, addressing himself to the same subject, said:

"It is very plain that the wife has a greater interest than the mere possibility of an expectant heir. For it is conceded by the court below and everywhere, we believe, that in one way or another she has a remedy for an alienation made in fraud of her by her husband."

Mr. Ross, in his work on Inheritance Taxation, after referring to the several decisions of the Supreme Court of California, makes special note of the decision of the Supreme Court of Idaho in the case of Kohny v. Dunbar, supra, and says: "There can be no doubt that the Idaho court has reached the right conclusion;" and then proceeds to make the further observation which we think most applicable to the provisions of our statute as they are presented to us, and says:

"The Legislature, in adopting the community system, intended to provide a real marital community in property and accord to the wife a fuller measure of property rights than was hers under the common law. The Legislature did not suppose it was providing her a mere expectancy during the husband's life and an inheritance on his death. That would be far from what is contemplated in the very nature of community property. And certainly, in adopting the inheritance system of taxation, the Legislature did not have in mind the exaction of tribute from the community interest of a wife upon the death of her husband. In his lifetime such interest is her own property, practically in the fullest sense, except that the law constitutes him the agent for its control and management; and the removal of the agent by death in no wise works a transmission of title to be subjected to the succession tax." Ross, Inheritance Taxation, 84.

[2] Respondent argues at some length that the expression "goes to" in section 2165 implies a different significance from the term "belongs" as found in section 2164 with reference to the community property on the death of the wife. In this respect they say that the term "goes to," as used with reference to the community property on the death of the husband, means "vests in;" and hence we are to infer that this term was used advisedly by the Legislature to convey the idea that the wife's interest in the community property vested in her only after the death of the husband; and this would lead to the conclusion that prior to the dissolution of the community the wife was not in any wise vested with any part of the community property. We are not willing to accept this reasoning as against those provisions which we find in our general legislation on the subject of the relation of husband and wife, and more especially in view of the peculiar provisions of our organic law on the subject. Section 31, art. 4, of our Constitution reads:

"All property, both real and personal, of the wife owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, shall be her separate property; and laws shall be passed, more clearly defining the rights of the wife in relation, as well to her separate property, as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property."

The word "held" has been construed to mean ownership (Wey v. Salt Lake City, 35 Utah, 504, 101 Pac. 381; Higgins v. Downs, 101 App. Div. 119, 91 N. Y. Supp. 937), and we find no good reason for holding that the word "held," as here used, was not intended to convey the idea of a peculiar yet distinct ownership. Here is a provision in the Constitution recognizing the separate property of the wife, and also recognizing a class of property which would be known as community property, which property would be "held" by her in common with her husband. Would it not be a distortion of the sense generally conveyed by the word "held," and especially in view of the manner of its use here, to say that it only conveyed an idea of future expectancy? Upon what substantial theory shall we say that it was used by the framers of the Constitution to convey no greater idea of property ownership in the wife than that of an heir of her husband, with whom it was declared she held in common?

Here was a constitutional recognition of the wife's "rights" in two distinct classes of property, i. e., that which was designated her separate property and that which was designated as property "held by her in common with her husband." Here is a peculiar avoidance of terms that might convey an indefinite sense. If the framers of the organic law sought to protect in the wife a right in the community property which would only accrue to her on the dissolution of the community; if they sought to have laws enacted more clearly defining the rights of the wife to an interest in the community property which should come to her on the death of the husband; why did they use the comprehensive term "rights of the wife * * * to that (property) held in common with her husband?" Any reasonable interpretation of this provision must, as we view it, convey the idea of property rights in præsenti.

We are referred by respondent to the decision of the Supreme Court of Tennessee in the case of Knox v. Emerson, 123 Tenn. 415, 131 S. W. 972. The case is not strictly in point here, save by way of contrast with the facts therein dealt with. The principal question was as to the application of the inheritance tax law where the estate passed by will. This decision was rendered in the light of a statute establishing a dower interest in favor of the wife. The court there held no more than to declare the property thus passing to be subject to the taxation. The court reasserts a principle declared in

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State v. Alston, 94 Tenn. 674, 30 S. W. 750, 28 L. R. A. 178, wherein it says:

"In arriving at the meaning of the statute under consideration, it is proper to remember that a succession tax is not a burden imposed upon property, but is a privilege tax upon the right of taking property from another, whether by will or devolution as a matter of law."

It is not necessary to dwell on this principle here, because, viewing the matter as we do in the light of the great weight of authority, and especially under statutes providing for the community system, there is no "taking property from another, either by will or legal devolution." The property here going to the appellant was property which she at all times under our statutory provision "held in common with her husband." Hence there was no privilege to be taxed, but rather a "right" in property recognized by statutory prescription "held" by her at all times "in common with her husband." The death of the husband only dissolved the community, and released that which she held from the statutory dominance of her deceased spouse.

The decision of the lower court in this case was based squarely upon that line of decisions which we find emanating from the Supreme Court of California, and to which we have referred more or less extensively, the doctrine announced by which has been commented on, if not criticized, in the several jurisdictions where this matter has been carefully considered. The doctrine asserted by the Supreme Court of California in these several decisions is based upon the conclusion that the interest of the wife in the community property is the mere possibility of an expectant heir. This doctrine has received the stamp of disapproval by the Supreme Court of the United States in the case of Arnett v. Reade, supra, as well as by an equally significant expression coming from that court in the case of Warburton v. White, supra. For this reason, if for no other, we would be unwilling to follow this doctrine, notwithstanding its eminent authority, and the further fact that the statutes of the state of California are almost identical to our own. But more than this, we are at a loss to reconcile the decisions of that court in the cases of Moffitt, Spreckels, and Kennedy, supra, holding that the surviving wife takes her share of the community property only as an heir, with the doctrine found in many other decisions, for example, De Godey v. Godey, 39 Cal. 157, to the effect that the wife's "right in the community property is as well defined * * * in contemplation of law, even during the marriage, as is that of the husband."

This court, speaking through Mr. Justice Leonard, in the case of Wright v. Smith, 19 Nev. 143, 7 Pac. 365, in considering the effect of our statutory provision on the community property on the death of the husband, said:

"Under the statute the title to community property, subject to the payment of legal indebtedness, was in appellant (surviving wife), and an administrator was not required to convey the title or distribute the estate."

The decision in the case of Wright v. Smith, supra, as indicated by the expression quoted, as well as by other expressions found in the opinion, supports the position we take here.

From all our statutory enactments bearing upon the subject of the relation of husband and wife, and especially from those having to do with the acquisition, retention, and disposition of the community property, we are unable to arrive at a conclusion that the Constitution framers and the Legislature, in establishing the community system and in promulgating laws defining the rights of husband and wife as to property thus held, intended other than that the wife should have an interest in the property acquired by the joint effort of the community, which interest, while it should remain in a sense indistinguishable during the existence of the community, was nevertheless a property interest of which she was, at all times, possessed. The fact that the Legislature may have seen fit to place the control of this community property in the husband in no wise detracts from the fact that the property as such was a thing in which the wife had at all times a vested interest. We are unwilling to accept what we deem an inconsistency which would hold that, while on the one hand, the husband could not deprive the wife of her interest by testamentary disposition, and that, as illustrated in the case at bar, no provision or mention need be made in a will or testament as to the disposition of that one-half of the community property which, under the law, goes to the wife, yet, on the other hand, she can be regarded as taking this property only as an expectant heir.

It may, we think, be asserted, supported by the great weight of authority, that the interest of the wife in the community property and her title thereto is no less than that held by the husband, and this interest and title in the wife is not to be regarded as a mere expectancy. 5 R. C. L. 850.

Concluding, as we do, that the wife's interest in the community property goes to her, not by succession or inheritance, but rather by a right vested in her at all times during marriage, it follows that it is not subject to the law of inheritance tax.

The judgment is reversed. The cause is remanded, with instructions to the lower court to enter judgment for the appellant.

NORCROSS, C. J., and COLEMAN, J., concur.

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(173 Cal. 760)

SEXTON v. ATCHISON, T. & S. F. RY. CO. et al. (S. F. 7859.)

(Supreme Court of California. Dec. 8, 1916.)

1. RAILROADS ⇐9(1)—RAILROAD COMMISSION —JUDICIAL REVIEW.

Under Const. art. 12, §§ 22, 23, creating the Railroad Commission and declaring the authority of the Legislature to confer powers germane to the subject of the regulation and control of public utilities upon the Railroad Commission to be plenary and unlimited by any provision of the Constitution, Public Utilities Act (St. 1915, p. 161) § 67, providing that no court of this state, except the Supreme Court, to the extent herein specified, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, provided that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases, cannot be questioned by reason of any other provision of the state Constitution.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12–16; Dec. Dig. ⇐9(1).]

2. RAILROADS ⇐9(2)—CONTROL AND REGULATION—SUPERVISION BY PUBLIC OFFICER—STATUTE—"OFFICIAL DUTIES."

In Public Utilities Act, § 67, in the use of the words "official duties," meaning any duty defined by the act, is a valid and effective limitation of the power of the state courts to the actions specifically authorized by the act, so that the superior court has no power to enjoin the Railroad Commission or render any judgment that would interfere with it in the performance of its official duties, and hence has no right on the suit of a stockholder to enjoin a railway company and its directors from complying with the provisions of section 11 of the act, providing for free passes on railroads for the commission and its officers and employés.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 17–19; Dec. Dig. ⇐9(2).

For other definitions, see Words and Phrases, First and Second Series, Official Duty.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by J. E. Sexton against the Atchison, Topeka & Santa Fé Railway Company. From judgment for defendant sustaining demurrers to the complaint, plaintiff appeals. Affirmed.

McNair & Stoker, of San Francisco, for appellant. Douglas Brookman, of San Francisco, for respondent Railroad Commission of California. E. W. Camp and U. T. Clotfelter, both of Los Angeles, for respondent Atchison, T. & S. F. Ry. Co.

ANGELLOTTI, C. J. Demurrers to plaintiff's complaint were sustained in the superior court and judgment was thereupon given in favor of defendants. This is an appeal by plaintiff from such judgment.

The action was by plaintiff as a stockholder of the defendant railway company against such railway company and its directors and the members of the Railroad Commission of the state to obtain a decree restraining the railway company and its directors from issuing or honoring free transportation over its lines in the state to the Railroad Commission, its officers and employés, and restraining the Railroad Commission from instituting or prosecuting any action, civil or criminal, as against said railway company or any of its officers, agents, or employés for failure to comply with the provisions of the Public Utilities Act relative to such transportation. The Public Utilities Act provides in section 11 as follows:

"The commissioners and the officers and employés of the commission, shall, when in the performance of their official duties, have the right to pass, free of charge, on all railroads, cars, vessels and other vehicles of every common carrier * * * subject in whole or in part to control or regulation by the commission, between points within this state, and such persons shall not be denied the right to travel upon any railroad, car, vessel or other vehicle of such common carrier, whether such railroad, car, vessel or other vehicle be used for the transportation of passengers or freight, and regardless of its class." Stats. 1915, p. 121.

It further provides in subdivision 3 of section 17 that:

"The members of the Railroad Commission, their officers and employés, shall be entitled, when in the performance of their official duties, to free transportation over the lines of all common carriers within this state." Stats. 1915, p. 126.

It is in pursuance of these provisions that the directors of the railway company have authorized and caused the issuance of free transportation to the members, officers, and employés of the Railroad Commission, and caused the same to be honored, and will continue to do so unless restrained. Under other provisions of the Public Utilities Act, any railway company failing to comply with any provision of the act, including these provisions, and its officers, are subject to severe penalties, each day's continuance of such a failure being declared a separate and distinct offense, and it is substantially alleged that the penalties are so drastic that neither the company nor its directors can reasonably afford to refuse to comply with the provisions for the purpose of testing the validity of the same. It is further alleged in the complaint that in the event of any such failure the Railroad Commission will institute proceedings against the company and its officers to enforce the civil and criminal penalties prescribed by the act.

It is claimed that these provisions of the act are unconstitutional, null, and void, in that their enforcement deprives the railway company of its property without due process of law, and denies to said company the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States and of section 14 of article 1 of the Constitution of this state. It is also claimed that they violate section 19 of article 12 of the state Constitution. The question whether a state may lawfully, in view of the provision of the federal Consti-

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tution referred to, require free transportation at the hands of a railway company for the Railroad Commission and the officers and employés of such commission, when in the performance of any of their official duties, especially when, as here, those duties include not only the supervision of railroads, but also of gas companies, electric light companies, pipe line companies, telephone, telegraph, and water companies, etc., is not discussed in the briefs, and is, as we look at the matter, one that we cannot properly decide on this appeal.

Section 67 of the Public Utilities Act provides, among other things, as follows:

"No court of this state (except the Supreme Court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, *or to enjoin, restrain or interfere with the commission in the performance of its official duties:* Provided, that the writ of *mandamus* shall lie from the Supreme Court to the commission in all proper cases." (The italics are ours.)

In Pacific Tel. & Tel. Co. v. Eshleman et al., 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822, it was held by all the six justices participating: First, that by virtue of certain provisions of sections 22 and 23 of article 12 of our Constitution substantially declaring the authority of the Legislature to confer any powers germane to the subject of the regulation and control of public utilities upon the Railroad Commission to be plenary and unlimited by any provision of the Constitution, the validity of any such grant of power by the Legislature cannot be questioned by reason of any other provision of the state Constitution; and, second, that the provision of section 67 hereinbefore quoted is therefore a valid and effective limitation on the courts of the state, the theory, as substantially stated in the concurring opinion of Mr. Justice Sloss, being that to limit the power of review by the courts of orders of the Railroad Commission or to limit the power of courts to restrain or interfere with the commission in the performance of its official duties was quoad hoc to confer upon the Railroad Commission a greater or more absolute power. While that case involved questions as to the review of an order of the Railroad Commission, the reasoning is equally applicable to that portion of the provision of section 67 relative to the matter of enjoining, restraining, or interfering with the commission in the performance of its official duties. It is unnecessary here to restate or attempt to add to the learned and exhaustive discussion of the question contained in the opinion of Mr. Justice Henshaw and the concurring opinion of Mr. Justice Sloss. Briefly stated, the conclusion of Mr. Justice Henshaw, concurred in by Justices Lorigan and Melvin, was substantially that such deprivation of jurisdiction of the courts of the state as is made by section 67 of the Public Utilities Act may not be questioned; and the conclusion of Mr. Justice Sloss, concurred in by Mr. Justice Shaw and the writer of this opinion, was that there could be no objection under the Constitution of the state to said section 67, and that, by reason of said section, no court of the state other than the Supreme Court has any power to review the orders of the commission, or to control its official action.

It is urged that said section 67 has only to do with the matter of review and enforcement of orders and decisions of the commission, and is not concerned with the matter of the enforcement of the provisions of the Public Utilities Act by the commission. It is further urged that there can be no official duty within the meaning of that term as used in the section to enforce a provision of the act that is in violation of a constitutional provision, as is claimed to be the situation with relation to the provisions of the act regarding free transportation, and that it was not the design of the section to interfere in any way with the jurisdiction of the superior court to inquire as to the validity of any provision of the act and to prevent by injunction the attempted enforcement by the commission of the provision if it found it to be invalid. The first of these claims is not very earnestly pressed, and, of course, could not be in view of the language of the section. The matter of orders and decisions of the commission is dealt with in the first portion of the provision; while the latter portion, in language that cannot be read otherwise, prevents any such interference as is therein declared with any official duty of the commission. We are satisfied that the second claim is equally untenable. The plain design of the provision was to prevent any interference with the commission by the courts, except as prescribed in the act itself, in the performance of any duty defined by the act. The term "official duties," as used therein, cannot reasonably be given any other meaning, especially when considered in connection with the first portion of the provision, as it must be. Concededly no review of any order or decision of the commission on the alleged ground that it is violative of any constitutional provision or on any ground is permitted to any court, except as provided in the act itself. The clear intent of the provision as a whole is to place the commission, in so far as the state courts are concerned, in a position where it may not be hampered in the performance of any official act by any court, except to the extent and in the manner specified in the act itself. To the extent deemed necessary to accomplish this the jurisdiction of state courts is limited by the provision; that of the superior court apparently being entirely taken away except as to certain actions specially authorized by the act itself to be brought therein at the instance of the commission to enforce penalties

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or to compel compliance with the provisions of the act. That such special provision is made for certain proceedings in the superior court, and that therein questions as to the validity of certain provisions of the act may be presented and determined, in no wise indicates that the construction we give the provision before us is not correct. This particular jurisdiction is simply left in the superior court by the act itself. The question presented is simply one of construction, and we entertain no doubt as to the plain meaning of the provision.

[1, 2] It seems clear, in view of what has been said, that the superior court has no power to enjoin the commissioners, or to render any judgment herein that would "interfere" with them in the performance of the official duties purported to be cast upon them by the Public Utilities Act, the validity of any provision of which so far as germane to the subject of the regulation and control of public utilities cannot be questioned, as we have seen, by reason of any provision of the state Constitution other than those relative specially to the Railroad Commission. They are authorized to proceed in accord with the provisions of the act unhampered in any way by any injunction of the superior court. It would appear to follow that the superior court has no right on the suit of a stockholder to enjoin the railway company and its directors from complying with the provisions of the act. The learned trial judge said as to this:

"I do not think that it could be claimed under the statute and the telephone case that this court would have any power to enjoin the commissioners, but the same object is accomplished by enjoining the directors of the railway company from issuing the free passes. The language of section 67 is broad enough to cover a proceeding of this sort. The judgment asked for here would necessarily be an interference with the commission in the performance of its official duties, if not in effect an injunction and restraint forbidden by the statute."

We see no necessity for saying anything further on this point.

The judgment is affirmed.

We concur: SLOSS, J.; SHAW, J.; HENSHAW, J.; MELVIN, J.; LAWLOR, J.

(173 Cal. 743)

LARRABEE v. WESTERN PACIFIC RY. CO. (No. 2287.)

(Supreme Court of California. Dec. 4, 1916.)

1. NEGLIGENCE ⟸136(26) — ACTIONS—QUESTION OF LAW OR FACT—CONTRIBUTORY NEGLIGENCE.

Under Code Civ. Proc. § 1963, subd. 4, declaring a disputable presumption that a person takes ordinary care of his own concerns, the question of contributory negligence becomes a question of law only when the evidence is such that the court is impelled to say that it is not in conflict on the facts, and that from these facts reasonable men can draw but one inference pointing unerringly to the negligence of plaintiff contributing to his own injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 286, 333; Dec. Dig. ⟸136(26).]

2. RAILROADS ⟸327(2) — OPERATION—ACCIDENTS AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Where the driver of a team and wagon was within sight of an approaching train 1,500 feet before reaching a crossing and did not stop, look, or listen, he was guilty of contributory negligence barring recovery for his death in collision with the train at the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1044; Dec. Dig. ⟸327(2).]

3. RAILROADS ⟸330(4) — OPERATION — ACCIDENTS AT CROSSING—CONTRIBUTORY NEGLIGENCE.

The conduct of the driver of a wagon approaching a railroad crossing, otherwise negligent, is not relieved from fault by virtue of his right to presume that the railroad would not run its train at an excessive speed in approaching the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1074; Dec. Dig. ⟸330(4).]

4. RAILROADS ⟸327(6) — OPERATION—ACCIDENTS AT CROSSING—CONTRIBUTORY NEGLIGENCE.

That a train by which the driver of a wagon was struck at a crossing was a special train did not relieve the driver of the imputation of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1049; Dec. Dig. ⟸327(6).]

5. RAILROADS ⟸350(11)—OPERATION—ACCIDENTS AT CROSSINGS—INSTRUCTIONS.

In an action for death at a railroad crossing in a rural district, the court should instruct that in the absence of any statute or ordinance regulating the speed of trains a rate of 60 miles per hour was not of itself negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1164½; Dec. Dig. ⟸350(11).]

6. RAILROADS ⟸351(4) — OPERATION—ACCIDENTS AT CROSSINGS—INSTRUCTIONS.

An instruction in an action for death at a railroad crossing that, whenever highways are laid out to cross railroads, canals, or ditches on public lands, the owners or corporations using them must at their own expense so prepare the roads, canals, or ditches that the public highway may cross the same without danger or delay, taken from Pol. Code, § 2694, is inappropriate and misleading, where the highway in question was not laid out on public lands.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1197; Dec. Dig. ⟸351(4).]

Department 2. Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Ellen Larrabee, administratrix of the estate of E. F. Larrabee, against the Western Pacific Railway Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

Warren Olney, Jr., of San Francisco, W. H. Carlin, of Marysville, and A. R. Baldwin and John S. Partridge, both of San Francisco, for appellant. Edward B. Stanwood and E. Ray Manwell, both of Marysville, and Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for respondent.

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HENSHAW, J. This action was brought to recover damages from defendant for causing the death of plaintiff's intestate. Trial was had before a jury which gave its verdict for plaintiff, and from the judgment which followed and from the order of the court denying defendant's motion for a new trial, it prosecutes this appeal.

The case is a railroad crossing case. The deceased, while traveling southward in a horse-drawn hay wagon along the county road, which road crosses the track of defendant's steam railway at an acute angle, was struck by defendant's train coming from the north and moving in the same direction as was deceased's wagon. Mr. Larrabee, the deceased, was a farmer, whose home was about five miles south of Marysville. The county road upon which he was traveling was the only road leading from Marysville to his home. Larrabee had traveled the road many times, was perfectly familar with it and with the railroad crossing. Upon the morning of the accident he had gone from his home to Marysville with a load of hay. He was returning from Marysville in his empty hay wagon. The railroad tracks were built on an embankment about seven feet above the normal grade of the county road, which ran, facing southerly, along the left-hand side of the railroad tracks. The county road approach to the railroad crossing was by an easy grade. Weeds were growing along the top of the railroad embankment. The time was midday. An officers' train of defendant, a "special," was traveling from Marysville southward at a speed of from 55 to 60 miles an hour. The deceased and his wagon were seen by the engineer of this train some 2,000 feet northerly of the crossing. It was observed that the deceased was traveling toward the crossing, but was in a place of perfect safety. The whistle of the engine was sounding continuously, and its noise was a loud screech. Such is not only the testimony of the engineer and his fireman, but of Miss Jaques, who, at a greater distance from the train than was the deceased, heard and testified to this continuous whistling. The horses of Larrabee were traveling at a walk. Larrabee was in a semirecumbent position, and when the engineer discovered that he paid no attention to the approaching train, he immediately applied his emergency brakes. It was impossible, however, to stop the train before it reached the crossing, and it passed the crossing at a speed of about 40 miles an hour, striking the horses and front end of the hay wagon, tossing them to the left or east of the track, and killing Larrabee. The driving wheels of the engine were flattened where they slid after the application of the emergency brakes, and the testimony is that everything possible was promptly done by the engineer to avoid the collision from the moment that he observed that Larrabee was passing with his team from a place of safety to one of danger. Larrabee drove upon the track without either stopping or looking or listening, or, if he did look and listen, and under these circumstances heard the whistle and observed the approach of the train, as he must have done, for admittedly the train would have been visible to him while still in a place of safety at a distance of 1,500 feet from the crossing, the unescapable conclusion is that he drove upon the track in wanton recklessness.

We may pass over without consideration the first proposition argued by appellant, namely, that the evidence fails utterly to disclose that it was negligent, and consider the single question of the asserted contributory negligence of the deceased. Contributory negligence, of course, presupposes a primary negligence upon the part of defendant, and, for the purposes of this consideration only, it will be assumed that defendant was so negligent.

[1, 2] What then is to be said of the conduct of the deceased? Respondent contends that the question whether that conduct did or did not constitute contributory negligence is peculiarly and exclusively a question of fact for the jury. And herein it is said, first, that the jury was at liberty to infer that the deceased exercised ordinary care and diligence. Code Civ. Proc. 1963, subd. 4; Gay v. Winter, 34 Cal. 153; Baltimore & P. R. Co. v. Landrigan, 191 U. S. 462, 24 Sup. Ct. 137, 48 L. Ed. 262. In the latter case the court had instructed the jury that "in the absence of all evidence tending to show whether the plaintiff's intestate stopped, looked, and listened before attempting to cross the south track, the presumption would be that he did." Respondent invokes this evidentiary presumption to rebut contributory negligence and to establish that the deceased did all things which should be done by a prudent man situated as he was. It is true that in by far the greater number of cases the question of contributory negligence is, as it has been frequently declared to be by this court, a question of fact for the determination of the jury, and it becomes a question of law only "when the evidence is such that the court is impelled to say that it is not in conflict on the facts, and that from these facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury." Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 Pac. 513. But, touching the presumption that the deceased exercised ordinary care, it is to be noted that that presumption is given weight only in the absence of evidence on the subject of the deceased's conduct. It has been declared to be "an artificial presumption of so weak a character that it is not to be allowed to have the effect of evidence before the jury where the uncontradicted evidence of the circumstances attending the accident overthrows it." Thompson, Negligence, § 401. In this case the pos-

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itive and uncontradicted evidence discloses that the deceased did not exercise ordinary care; for, if he had done so, he could easily have escaped his fatal accident. The testimony of the continuous sounding of the whistle has been adverted to, as has also the fact that it was heard by a disinterested witness, Miss Jaques, at a much greater distance from the train than was the deceased. It is said that a wind was blowing from the southward which, taken with the noise of the rattling wagon, might have impaired the deceased's ability to hear the train. But to this the twofold answer is: First, that Miss Jaques, similarly situated so far as concerns the location of the wind, distinctly heard the whistle; and second, if the deceased's sense of hearing was thus interfered with, it became the more incumbent upon him to use his sense of vision. It is said that his vision was obstructed by weeds growing along the railroad embankment. It is in evidence, however, that the engineer of the train saw him at a distance of at least 1,500 feet, and, conversely, he could have seen the approaching train at that distance. Moreover, as he ascended the slight grade of the county road approaching the track, he was beyond peradventure of doubt above the obstruction of the weeds while still in a place of safety. He was familar with the crossing and its environment, he knew of the weeds, and their presence, and if they did interfere with his sight, this, so far from justifying him for his failure to use other precautions imposed upon him the duty of doing so. For, as is said in Green v. Southern Pacific Co., 132 Cal. 254, 64 Pac. 255, where it was shown that the traveler's view was interfered with by corn growing to an average height of 9 feet, and where the traveler was sitting upon the seat of his wagon which brought his eyes to a point less than 8 feet above the ground:

"His knowledge that the track was hidden by the corn was a reason for his taking more than ordinary precautions against meeting the train."

And in Herbert v. Southern Pacific Co., 121 Cal. 227, 53 Pac. 651, it is said:

"If the view of the track is obstructed, he should take greater pains to listen. If, taking these precautions, he would have seen or heard the approaching train, the very fact of injury will raise a presumption that he did not take the required precautions."

There is thus an abundance of direct evidence to show that the deceased did not observe the legal requirements of ordinary care—the requirements of stopping and looking and listening—before he essayed the fatal crossing. The evidence to this effect is direct, positive, and uncontradicted. The uncontested facts themselves speak convincingly to the same effect. The man was driving in a slow-moving wagon in broad daylight, was approaching a crossing with which he was perfectly familiar, and approaching it under circumstances where he could with perfect safety have stopped his progress and looked back to see whether or not a train was approaching him from behind, his view of that train was unobstructed for at least 1,500 feet. These very facts overcome the presumption of the exercise of due care, and, as said by this court in Herbert v. Southern Pacific Co., supra, "raise a presumption that he did not take the required precautions."

[3, 4] Nor is it true, as respondent argues, that the deceased's conduct, otherwise clearly negligent is relieved from this reproach by virtue of his right to presume that the defendant would not run its train at an excessive rate of speed in approaching this crossing. Nor does the added circumstance that this was a special train in the slightest change the deceased's legal responsibilities. Railroads are entitled to operate special trains and to operate them at high rates of speed. Their regular trains cannot be and no one expects them to be always on schedule. With all this the deceased was, of course, familiar. The statements in Strong v. Sacramento & Placerville R. R. Co., 61 Cal. 326, and in Whalen v. Arcata & Mad River R. Co., 92 Cal. 669, 88 Pac. 833, to the effect that the deceased had the right to rely upon the "performance by those on the locomotive of every act imposed by law upon them when approaching a crossing," cannot be considered to be the law of this state as affecting the rights and duties of one about to venture to make a railroad crossing. Such a one is not entitled to rely upon such a performance of duty so as to relieve him from the necessity of looking if he does not hear, and of stopping if he cannot see. Suffice it upon this to cite the later case of Koch v. Southern Cal. Ry. Co., 148 Cal. 680, 84 Pac. 176, 4 L. R. A. (N. S.) 521, 113 Am. St. Rep. 332, 7 Ann. Cas. 795; Griffin v. San Pedro, L. A. & Salt Lake R. R. Co., 170 Cal. 772, 151 Pac. 282, L. R. A. 1916A, 842.

Upon this proposition the court directly instructed the jury that, if they found "that at and just prior to the accident defendant's train was running at an unusual rate of speed, this would not relieve the deceased from the duty resting upon him upon approaching said crossing to stop and look and listen for such approaching train, and if he failed so to do, and such failure contributed directly and proximately to the accident, then, regardless of said speed of said train, your verdict must be for the defendant." The conclusion is unescapable that the jury ignored this instruction in reaching its verdict and that its verdict is therefore against law. Declez v. Save, 71 Cal. 552, 12 Pac. 722; Mattingly v. Pennie, 105 Cal. 518, 39 Pac. 200, 45 Am. St. Rep. 87.

[5] In contemplation of the reversal which must be adjudged, some further matters command attention. The court refused to instruct the jury to the effect that:

"In the absence of any statute or ordinance regulating the speed of its trains, a rate of 60 miles per hour was not of itself negligence."

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This instruction should have been given. There was no law nor ordinance controlling the rate of speed of this train. It was traveling in a rural district and crossing a country road. The rate of speed of a train, the place and circumstances under which it is traveling, may all be considered by the jurors where no law limits the speed, to aid them in determining whether or not at the place and at the time of the operation of the train its rate of speed was negligent. But with this they should have been told that the rate of speed alone—even an excessive rate of speed—was not negligence per se. Such is the precise declaration of this court in Bilton v. Southern Pacific Co., 148 Cal. 447, 83 Pac. 442, where it is said:

"It is true that, in the absence of any statute or ordinance on the subject, no rate of speed is negligence per se."

To the same effect is Green v. Los Angeles, etc., Ry. Co., 148 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68.

[6] The court instructed the jury as follows:

"Whenever highways are laid out to cross railroads, canals, or ditches, on public lands, the owners or corporations using the same must, at their own expense, so prepare their roads, canals, or ditches that the public highway may cross the same without danger or delay."

This instruction, touching the facts in this case, was inappropriate and misleading. No question here is presented of a highway "on public lands laid out to cross a railroad." The section of the Political Code (section 2694) from which this instruction is taken, has no bearing upon the situation here presented.

The judgment and order appealed from are reversed.

We concur: MELVIN, J.; LORIGAN, J.

(31 Cal. App. 736)

PEOPLE v. SMITH. (Cr. 506.)

(District Court of Appeal, Second District, California. Oct. 28, 1916.)

1. HUSBAND AND WIFE ⇐304 — ABANDONMENT—STATUTE.

Pen. Code, § 270a, providing that a husband having ability to provide for his wife's support, who willfully abandons and leaves her in a destitute condition, unless justified by her misconduct, is punishable by imprisonment, does not authorize punishment of a husband for neglect to provide for his wife, who has been living in another state, before he knows of her presence within this state.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1102; Dec. Dig. ⇐304.]

2. HUSBAND AND WIFE ⇐313 — ABANDONMENT—DESTITUTE CONDITION.

Pen. Code, § 270a, does not authorize the punishment of a husband for neglect to provide for his wife, without evidence that the wife was without sufficient means of support at the time of the alleged offense.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1110; Dec. Dig. ⇐313.]

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Milton A. Smith was convicted of crime, and his motion for new trial denied, and he appeals. Judgment and order reversed.

Homer E. Johnstone, of Bakersfield, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

CONREY, P. J. In this action the defendant has been convicted of the offense described in section 270a of the Penal Code, in that on or about March 24, 1916, in the county of Kern, he did willfully, etc., neglect, refuse, and omit to provide his wife with necessary food, clothing, shelter, and medical attendance; he having the ability to so provide and not being justified in so refusing or failing to provide for her "by any misconduct on the part of the said wife." The defendant appeals from the judgment and from an order denying his motion for a new trial.

The defendant and the prosecuting witness, Florence E. Smith, were married in the state of Washington in August, 1907, and lived together in that state until September, 1911, when the defendant moved to Portland, Or. Some time later he came to California and for a year or two prior to March 24, 1916, and on that date was living at Bakersfield in Kern county. There was some correspondence between the husband and wife while he was in Portland. Afterward it appears that for some time she did not know where he was living, but in the latter part of the year 1915 she learned that he was living in Bakersfield. She did not then communicate with the defendant, but after waiting some five or six months she came to California and arrived at Bakersfield on March 24, 1916. Without any delay she made the complaint upon which this prosecution is founded, and the defendant did not know of her presence in California until he was arrested on this charge. The only evidence that Mrs. Smith at any time prior to the commencement of this action was without means of support is found in her testimony wherein she states that during the time of their separation she never received any money from the defendant, and in her affirmative answer to a question inquiring whether during the time of their separation she had "at any time been in want."

[1, 2] The defendant is not prosecuted for having abandoned and left his wife in a destitute condition, for if such offense was committed by him at all it was not in the state of California. Also, it may well be doubted whether any refusal or neglect of the defendant to provide his wife with the necessaries of life while she was absent from California can be construed into an offense committed at the place of the husband's residence and against the laws of California. If

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the defendant had received information of her presence in this state and then if, without legal justification, he had refused or neglected to provide his wife with food, clothing, etc., she having need of such support from him, such facts no doubt would constitute an offense against the provisions of the Penal Code. But it seems clear to us that the provisions of the Code under which the defendant is prosecuted in this action are not intended to authorize a punishment of the husband for neglecting to provide for his wife before he knows of her presence within the state. Neither do we think the judgment can be sustained without evidence that the wife was without other sufficient means of support at the time of the alleged offense. People v. Selby, 20 Cal. App. 796, 148 Pac. 807.

Having reached the conclusion above stated, we deem it unnecessary to discuss the numerous propositions urged in the brief of defendant's counsel wherein he claims errors in the rulings of the court and in the instructions given, and in the refusal to give instructions requested by the defendant.

The judgment and order are reversed.

We concur: JAMES, J.; SHAW, J.

(31 Cal. App. 732)

DEVELOPMENT BLDG. CO. v. WOODRUFF. (Civ. 1621.)

(District Court of Appeal, Second District, California. Oct. 27, 1916.)

APPEAL AND ERROR ⟸1011(2)—REVIEW—FINDING ON CONFLICTING EVIDENCE.

Where, on motion by defendant, an attorney at law, whose office furniture had been attached in an action, an affidavit and counter affidavit were filed presenting a conflict of evidence on the issue as to whether or not the property was necessary office furniture then in use by defendant in the practice of his profession, and so exempt under Code Civ. Proc. § 690, subd. 4, the appellate court cannot review the evidence and make a finding different from that of the superior court on the issue of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3989; Dec. Dig. ⟸1011(2).]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by the Development Building Company, a corporation, against F. B. Woodruff. From an order vacating and setting aside a levy, under writ of attachment, on defendant's personalty, plaintiff appeals. Order affirmed.

Williams, Goudge & Chandler, of Los Angeles, and F. Walton Brown, for appellant. F. B. Woodruff, of Los Angeles, for respondent.

CONREY, P. J. Under a writ of attachment duly issued in this action the sheriff levied upon certain personal property of the defendant. Thereafter, upon motion of the defendant, the court made an order vacating and setting aside the levy made against said property, from which order the plaintiff appeals.

The defendant is an attorney at law, and the motion was made upon the ground that the personal property seized was his professional and necessary law office furniture and as such exempt from execution or attachment. Code Civ. Proc. § 690, subd. 4. In support of this motion respondent presented to the court an affidavit in which he stated that on the day of the levy, and for several years prior thereto, he was in the actual possession and enjoyment of said property and was using the same in the actual practice of his profession, the same being his necessary office furniture as described. A counter affidavit was filed wherein an agent of the plaintiff stated that on the date of the levy and for some time prior thereto the described property was used by persons other than the defendant and during that period of time was not being used by the defendant and was not necessary to him in his business as an attorney at law. Omitting further facts detailed in the affidavits, it is sufficient to observe that they present a conflict of evidence upon the issue as to whether or not the property in question was necessary office furniture then in use by the defendant in the practice of his profession. The superior court having determined that issue of fact in favor of respondent upon evidence definitely tending to support respondent's claim, we are not authorized to review the evidence and make a different finding. From the facts found the conclusion necessarily followed that the property was exempt from attachment.

The order is affirmed.

We concur: JAMES, J.; SHAW, J.

(31 Cal. App. 730)

PEOPLE v. ANDRADE. (Cr. 494.)

(District Court of Appeal, Second District, California. Oct. 25, 1916.)

1. HOMICIDE ⟸332(1) — APPEAL — NONAPPEARANCE BY APPELLANT—EFFECT.

Where accused is convicted of first degree murder, some examination will be made of the record on appeal to determine whether conviction was proper, notwithstanding the judgment might be affirmed under direct provision of Pen. Code, § 1253, for failure of appellant to appear.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 699; Dec. Dig. ⟸332(1).]

2. HOMICIDE ⟸253(1)—EVIDENCE.

Evidence *held* to support conviction of first degree murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523, 531; Dec. Dig. ⟸253(1).]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Jose Andrade was convicted of murder, and appeals from the judgment and order denying new trial. Affirmed.

See, also, 29 Cal. App. 1, 154 Pac. 283.

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Ralph H. Walker, of Visalia, and Edwards & Smith, of Dinuba, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. [1, 2] The defendant was convicted of the crime of murder, and by the verdict of the jury his punishment was fixed at imprisonment for life. Judgment in accordance with that decision was regularly made. A motion for a new trial, being presented, was denied by the court, and an appeal was taken from the judgment and order. The transcript on appeal was filed on May 13, 1916. No brief was offered to be filed on the part of appellant until October 17th. At the last-mentioned date a brief was deposited in the office of the clerk of this court. At the time set for oral argument on the calling of the calendar on October 24, 1916, appellant's counsel did not appear, and the Attorney General moved for an affirmance under the provisions of section 1253 of the Penal Code. The motion was properly made under the sanction of the statute, and it would have been altogether appropriate that the judgment asked for be entered. However, as the charge is that of murder and the defendant was convicted of the first degree of that crime, we have felt it fitting that some examination be made of the record in order to determine as to whether the defendant was properly convicted. There was a former trial in this case, and, upon an appeal being taken, a new trial was ordered to be had because of certain errors committed by the trial court. It was from the judgment pronounced and order made after the second trial that this appeal was taken. We have carefully examined the record and are convinced that the evidence heard by the jury fully sustains the verdict, and that no material errors were committed by the trial judge which would entitle defendant to have the judgment set aside. The facts of the case, as disclosed by the evidence, were in brief as follows: Defendant in January, 1915, was one of a party of woodchoppers engaged on a ranch in the county of Tulare. On about the 9th day of January, their work at the ranch being finished, they prepared to go to Visalia. The deceased happened by their camp, riding in a country wagon and driving a mule. He stopped and talked with the men, all of whom were Mexicans, and offered them wine which he had in a jug, of which all partook. Deceased assisted them in repairing a wagon and then requested the defendant to accompany him while he went to secure more wine. The defendant at first demurred, but was finally persuaded to go, and the two men rode away together. They visited an Italian, who sold them more wine, and later left his place. Cook, the deceased, was not seen again alive, but on the following morning his dead body was found in a road. The post mortem examination disclosed that Cook had been struck on the back of the head, where the blow had cut the scalp and slightly fractured the skull; there were two bruises upon his face, a bruise upon a shoulder, and a bullet wound near one of his ears. The bullet which produced this wound was found lodged in the brain of the deceased near the side of the head opposite from the point of its entrance. The defendant was arrested in another county. After being brought back to Tulare he made a statement to the sheriff in which he admitted having killed Cook, but said that Cook had gotten out on the ground and, after abusing him (the defendant), had pulled him roughly out of the wagon and kicked him in the side; that he (the defendant) had thereupon shot Cook and had immediately gone away. This statement was shown to have been repeated in the presence of other persons, and it was shown to have been voluntarily made. Taking all of the circumstances disclosed by the evidence, including the condition of the body of the deceased and the statements made by the defendant, the jury was fully authorized to conclude that the use of the deadly weapon by defendant was unjustified and that his act in shooting Cook was malicious.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

(31 Cal. App. 764)

HARBAUGH v. LASSEN IRR. CO.

(Civ. 1581.)

(District Court of Appeal, Third District, California. Nov. 1, 1916. On Petition for Rehearing, Dec. 1, 1916.)

1. EXECUTION ⟸161—QUASHING—JUDGMENT.
An execution for $586.95, issued on a judgment for only $86.95, being unauthorized, may be quashed on motion.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 467–471; Dec. Dig. ⟸161.]

2. EXECUTION ⟸162—QUASHING—JURISDICTION.
That the one of two judges of a superior court to whom a motion to quash an execution is presented is not the judge who was presiding when the execution was ordered to be issued does not deprive him of jurisdiction to quash the writ.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 472; Dec. Dig. ⟸162.]

3. EXECUTION ⟸162—QUASHING—JURISDICTION.
Code Civ. Proc. § 182, providing that if an application for an order is refused or granted conditionally, no subsequent application for the same order shall be made except to a higher court, does not deprive the superior court of jurisdiction, after it has ordered the issuance of an execution, to order the quashing of the execution for failure to conform to the judgment.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 472; Dec. Dig. ⟸162.]

On Petition for Rehearing.

4. APPEAL AND ERROR ⟸1149—CORRECTION OF JUDGMENT—VERDICT.
The Supreme Court is without jurisdiction to correct a judgment to make it conform to the

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verdict in respect to the amount recovered; appellant's remedy in such case, if any, being by proper application to the lower court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4483–4496; Dec. Dig. ⊂⊃1149.]

Appeal from Superior Court, Lassen County; H. D. Burroughs and Clarence A. Raker, Judges.

Action by L. A. Harbaugh against the Lassen Irrigation Company, a corporation. From an order granting defendant's motion to recall and quash an execution, plaintiff appeals. Affirmed, and rehearing denied.

See, also, 24 Cal. App. 773, 142 Pac. 847.

F. A. Kelley, of Susanville, for appellant. Pardee & Pardee, of Susanville, for respondent.

BURNETT, J. The appeal is from an order granting defendant's motion to recall and quash an execution. The judgment in the cause was rendered October 16, 1907. An attempt was made to have this judgment reviewed by the appellate court, but the appeal was dismissed on August 12, 1914. On May 20, 1915, the superior court of Lassen county, Hon. J. O. Moncur, judge presiding, made an order, directing execution to issue on said judgment, and the clerk of said superior court issued an execution under the seal of said court on the 27th day of November following. A copy of this writ is set out in the transcript. It recites that "$586.95, with interest, is now (at the date of this writ) actually due on said judgment," and contains the usual direction to the sheriff to satisfy said judgment. Then follows in the transcript a copy of the "order granting motion to settle and quash execution." It recites:

"The defendant's motion, issued in the above-entitled court and cause, to recall and quash execution, coming on regularly to be heard on Monday, April 3, 1916, at 2 o'clock p. m., Pardee & Pardee for the motion, and no one appearing for plaintiff, the evidence on said motion being presented, * * * the said motion was then submitted, and, the same being by the court duly considered, it is ordered that the motion be, and the same is hereby, granted, and the said execution be, and the same is hereby, recalled and quashed. Clarence A. Raker,

"Judge of the Superior Court of the State of California, in and for the County of Modoc, Presiding in the Above-Entitled Court and Cause on the Hearing of Said Motion."

It is apparent that the transcript is quite incomplete, as it does not contain a copy of the notice of said motion or of the papers used on the hearing in the court below as required by section 951 of the Code of Civil Procedure. Nor is there any bill of exceptions or other document setting forth in any way the evidence upon which the court below acted. We may therefore accept as true the statement of other facts by respondent. Indeed, appellant does not question the accuracy of said statement. It seems that the only language in said judgment which purported to be an adjudication of the matters at issue was as follows:

"Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed, that the plaintiff do have and recover from defendant plaintiff's costs and disbursements incurred in this action, amounting to the sum of $86.95."

As we have seen, the execution, issued November 27, 1915, recites that the judgment was for the sum of $500 and costs, $86.95, or a total of $586.95. In the meantime, L. A. Harbaugh, the plaintiff, died on or about the 23d day of July, 1915, and at the time the order appealed from was made, no proceedings had been taken for administration of his estate. The grounds of the motion were fully stated in the notice, and included the following:

"That the writ contained an erroneous statement that the judgment in the case was for $500, together with $86.95 costs; whereas, the judgment was for $86.95 costs, only," and "that, owing to the death of the plaintiff prior to the date when the execution was issued, the attorney for plaintiff had no authority to cause an execution to be issued and placed in the hands of the sheriff."

We must presume that said motion was supported at the hearing by competent evidence, and we are not required to go further than to base the decision upon said first ground mentioned.

[1] It is undoubtedly the rule that an execution issued on a judgment which does not authorize it may be quashed on motion. 17 Cyc. 1154. The judgment being for $86.95, and the execution for $586.95, the latter, of course, was unauthorized.

[2] We can see no merit in the contention that the court was without jurisdiction for the reason that one judge was presiding when the writ was ordered to be issued, and a different judge when the writ was recalled. It was the same court and both judges had the same authority. It is not disputed that Judge Moncur could have quashed the writ. It must follow that Judge Raker had power to do the same, since his jurisdiction was coextensive with that of the former. Indeed, in either case, the act was that of the court rather than of the judge.

[3] Section 182 of the Code of Civil Procedure has no application to the condition herein revealed. That section provides:

"If an application for an order, made to a judge of a court in which an action or proceeding is pending, is refused in whole or in part, or is granted conditionally, no subsequent application for the same order shall be made to any court commissioner, or any other judge, except of a higher court."

The subsequent application here was manifestly not for the same order. The fact is that its purpose was to prevent a violation of the first order. This latter was in effect, of course, to have an execution issued in accordance with the judgment. This was not done, and it was for the correction of this error that the second application was made.

There is nothing in this proceeding, we may

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state, that would prevent the issuance and operation of a proper writ of execution in accordance with said judgment.

The order is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

On Petition for Rehearing.

PER CURIAM. [4] In his petition for rehearing, appellant calls attention to a certified copy of the judgment entered in the superior court in the above-entitled cause. Said copy was filed herein after our former opinion was rendered and without any suggestion of diminution of the record. Under the recognized practice, we would be justified in disregarding said document. However, we have examined it and we find that the said judgment was radically defective, and through some one's carelessness it utterly failed to determine and decree the amount to which plaintiff was entitled under the verdict of the jury. It does, indeed, recite said verdict, but the judgment is as follows:

"Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that the plaintiff do have and recover from said defendant plaintiff's costs and disbursements incurred in this action, amounting to the sum of $86.95."

It may be that upon proper application the lower court may be warranted in correcting the mistake and making the said judgment conform to the verdict. But there seems no way open to us in this proceeding to accomplish the desired result, although, if legally possible, some remedy should be afforded.

The petition for rehearing is denied.

(31 Cal. App. 762)

PEOPLE v. GORMAN. (Cr. 638.)

(District Court of Appeal, First District, California. Nov. 1, 1916.)

1. CRIMINAL LAW ⟸814(17)—APPLICABILITY OF INSTRUCTIONS.

Requested instructions on the law of circumstantial evidence, where the prosecution did not rely on circumstantial evidence alone or chiefly to obtain conviction, were properly refused, not being applicable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883, 1979; Dec. Dig. ⟸814(17).]

2. CRIMINAL LAW ⟸814(2)—INSTRUCTIONS—APPLICABILITY.

In manslaughter trial, there being little or no evidence offered to support a suggested theory of the prosecuting officer in his opening statement as to conspiracy to commit robbery, and a police officer testifying that he saw accused strike the fatal blow, it was proper to refuse an instruction for accused upon conspiracy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1979, 1982–1984; Dec. Dig. ⟸814(2).]

3. HOMICIDE ⟸287—INSTRUCTION—ABSENCE OF MOTIVE.

It was proper to refuse instruction that, if the evidence failed to show any motive on the part of defendant consistent with reason and soundness of mind to commit the crime charged, this was a circumstance in favor of his innocence to be considered by the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 592; Dec. Dig. ⟸287.]

4. CRIMINAL LAW ⟸941(1)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE.

Where affidavits offered by accused for new trial on ground of newly discovered evidence were merely cumulative and largely negative in their averments, the court did not abuse its discretion in denying the motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2328, 2330; Dec. Dig. ⟸941(1).]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Edward Gorman was convicted of manslaughter, and appeals from the judgment and order denying new trial. Affirmed.

J. K. Ross and John W. Elwell, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. This is an appeal from a judgment of conviction of the defendant of the crime of manslaughter, and from an order denying his motion for a new trial.

[1] The defendant was charged with murder in the killing of one Eugene Kelly in a brawl on Third street, in the city and county of San Francisco, during the early morning hours of September 8, 1915. It is the first contention of the appellant that the court erred in its refusal to give certain instructions requested by the defendant relating to the law of circumstantial evidence, and presented upon the theory that the case of the prosecution was based upon circumstantial evidence alone; but an inspection of the record discloses that the prosecution did not rely upon circumstantial evidence alone or chiefly to obtain the defendant's conviction, and, this being so, it is obvious that the instructions which the defendant requested, however correctly they may have stated the law of circumstantial evidence, had no application to the case, and were therefore properly refused by the trial court.

[2] The same reasoning applies to the instruction asked by the defendant upon the subject of conspiracy. The charge was murder; and while it is true that the prosecuting officer in his opening statement to the jury had something to say about a conspiracy of several of the participants in the embroglio to commit a robbery, there was little or no evidence offered to support this view of the case; while, on the other hand, there was the direct testimony of a police officer to the effect that he saw the defendant strike the fatal blow. Under these conditions the matter of a possible conspiracy between several of the participants in the brawl to rob some one involved in it was not a sufficient factor in the case to warrant the giving of an instruction upon that subject.

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[3] The appellant's next contention is that the court erred in refusing to give the jury the following instruction at the defendant's request:

"If the evidence fails to show any motive on the part of the defendant consistent with reason and soundness of mind to commit the crime charged, this is a circumstance in favor of his innocence, and should be considered by the jury in connection with the other evidence in the case."

The appellant cites no direct authority supporting his contention that this instruction should have been given while, on the other hand, it has been expressly decided that it is not error in the trial court to refuse to give a requested instruction in substantially the form of that presented by the defendant herein. People v. Glaze, 139 Cal. 154, 72 Pac. 965.

The appellant further contends that the evidence is insufficient to warrant a conviction, and devotes considerable space in the brief of his counsel to certain alleged inconsistencies and uncertainties in the testimony of the witnesses for the prosecution. We are satisfied, however, upon a careful reading of the record, that there was sufficient evidence presented which, if believed by the jury, would have warranted a verdict of manslaughter, and, this being, so, the judgment of conviction will not be disturbed.

[4] The next contention of the appellant is that the court erred in its refusal to grant him a new trial upon the ground of newly discovered evidence. The affidavits offered by the defendant at the hearing of his motion for a new trial were merely cumulative, and, besides, were largely negative in their averments; and, in our opinion, the court did not abuse its discretion in denying the defendant's motion upon that ground.

As to the final charge of the appellant, that the court and the prosecuting officer were guilty of certain acts of misconduct which materially and improperly prejudiced the defendant's case before the jury, we find this contention to be entirely without merit.

Judgment and order affirmed.

(31 Cal. App. 734)

GOLDEN v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO.

(Civ. 1990.)

(District Court of Appeal, First District, California. Oct. 28, 1916.)

APPEAL AND ERROR ⇐1199—MODIFICATION OF JUDGMENT AFTER AFFIRMANCE.

In action to have declared a lien upon stock pledged to defendant and enjoin an absolute sale thereof, the superior court, after affirmance by the District Court of Appeal of its final judgment declaring such lien and enjoining sale absolutely, had no jurisdiction to strike the injunctive part of the judgment entirely, such judgment not being conditioned on plaintiff's paying the pledge within a reasonable time, although the court might have modified the injunction to permit defendant to sell the stock as pledgee and in no other way.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4674–4676; Dec. Dig. ⇐ 1199.]

Application for writ of review by Albert E. Golden against the Superior Court of the City and County of San Francisco. Order of Superior Court annulled, vacated, and set aside.

James H. Boyer, of San Francisco, for petitioner. T. C. West, of San Francisco, for respondent.

PER CURIAM. This is an application for a writ of review directed against the superior court of the city and county of San Francisco, for the purpose of having set aside and annulled a certain order of that court, by which a final judgment, after its affirmance by the District Court of Appeal, was modified in a material respect, by striking therefrom an order for an injunction, restraining the defendant in that action from making a sale of certain stock. The action had been brought for the purpose of having declared that the defendant held certain shares of stock as pledgee; the stock having been given as security for a loan of $1,125. The defendant appearing by answer, set up the claim that he was the owner of the stock absolutely. The court, however, decided against him on that issue, made its findings accordingly, and entered a judgment that the plaintiff should have the stock surrendered to him upon payment to the defendant of the sum of $1,125, the amount of the loan; and as a part of the judgment the court enjoined the defendant from making any sale of the stock to any person save the plaintiff. The judgment was appealed from, and was affirmed by the District Court of Appeal of the Second District, and a petition to the Supreme Court for a rehearing was denied. Subsequently, when the remittitur went down, the defendant went into the court below and moved that the judgment be modified by striking therefrom the order for injunction, which motion the court granted upon the theory that the judgment originally was a conditional one, that is to say, that the note representing the loan and the stock involved in the suit should be surrendered to the plaintiff and the note canceled upon condition that he pay the sum of $1,125, and that the plaintiff not having made said payment within a reasonable time the court was justified in striking out from the judgment that part of it relating to the injunction.

The court, we think, was in error in believing that it was a conditional judgment. As stated before, the action was simply one to have declared a lien upon the stock that had been pledged to the defendant, and to prevent the defendant in the meantime from making an absolute sale of it. That purpose was plainly indicated by the complaint, the

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answer, and the findings of the court. While the judgment is too broad in the sense that it prevents a sale of any kind, the very evident intent of the action was to prevent a sale by the defendant save and except as a pledgee, and the court below would have had a right to modify the phraseology of the injunctive part of the judgment to the extent of making it clear that the defendant migh sell the stock as a pledgee and in no other way; but in striking out the injunctive part of the judgment entirely it made a material modification of the judgment itself, and thereby deprived the defendant in that action of a very substantial right which he had secured by the litigation. This the court had no jurisdiction to do, and for that reason we are of the opinion that the order complained of should be annulled, vacated, and set aside.

It is so ordered.

(31 Cal. App. 785)

PEOPLE v. WING. (Cr. 507.)

(District Court of Appeal, Second District, California. Nov. 3, 1916.)

1. CRIMINAL LAW ⟸517(4)—EVIDENCE—CONFESSIONS—SUFFICIENCY OF PREDICATE.

In a burglary case, evidence of the unlawful taking of an automobile from the locked building of the owner in the nighttime *held* to sufficiently establish the corpus delicti to permit the introduction of a confession.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1147; Dec. Dig. ⟸517(4).]

2. CRIMINAL LAW ⟸519(4)—EVIDENCE—CONFESSIONS.

In a burglary case, a confession, stated by the officers receiving it to have been made without inducement, threat, or other undue influence, which contained a statement that it was voluntarily made, and which accused testified had been made without threats, offers of reward, or immunity, was admissible as a voluntary confession.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1163; Dec. Dig. ⟸519(4).]

3. BURGLARY ⟸41(1) — EVIDENCE — SUFFICIENCY.

In a burglary case, in which accused was charged with the theft of an automobile, evidence *held* to support a verdict of guilty.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 94; Dec. Dig. ⟸41(1).]

4. CRIMINAL LAW ⟸757(1) — TRIAL — INSTRUCTIONS.

An instruction, containing a statement which suggested to the jury that the defense of an alibi was occasionally fabricated and that temptation to resort to it might be great in cases of importance, was not erroneous as invading the province of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1772, 1773, 1776–1779; Dec. Dig. ⟸757(1).]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Bruce Wing was convicted of burglary of the first degree, his motion for a new trial denied, and he appeals. Affirmed.

C. B. Conlin, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. Appellant was convicted of the crime of burglary of the first degree, and appeals from a judgment of imprisonment and an order denying his motion for a new trial.

The evidence showed that during the month of October, 1915, the appellant visited the salesroom of an automobile dealer in the city of Los Angeles and remained about the place for an hour or so. He made inquiries regarding the purchase of a machine stating that a physician named McLaughlin desired to buy a car, and that if it was purchased that he (appellant) would be employed to drive it. He particularly looked over an "Enger" automobile which was standing on the floor, that machine being painted a cream color. He inquired as to whether it was in running order and ready to be used, and something about the method of operating it. He left the place late in the afternoon, and the salesroom was closed up that evening as usual; that being Saturday of the week. On the following day one of the salesmen returned to the place and found that the cream colored machine at which appellant had been looking was gone. A tire had also been taken from another machine standing in the place. About six months later officers who had been working on the case found an automobile in a closed garage in the lower part of the city which answered the description on the "Enger" automobile. The machine, however, had been painted black, and even the hub caps, which had borne the name "Enger" cut in the metal, had been covered with some substance so as to obliterate the lettering, and the caps, which had been nickel, were also painted black like the rest of the machine. The number had been removed from the automobile, and generally it had been disguised as much as could be. The under part of the hood, however, which was not exposed to view, still remained a cream color. The officers watched this garage for a day or so before any one came to take out the machine. Appellant then appeared and, opening the garage, busied himself about the machine. The officers appearing casually to pass by, stopped, and inquired of appellant what kind of a machine it was, and he replied that it was a "Pilot." They then asked him to whom it belonged, and he said that it belonged to a Dr. McLaughlin who lived at a certain number on Ditman street. The officers thereupon disclosed their official identity and requested appellant to take them to the doctor's residence. Appellant replied that he had an engagement with the doctor to meet him there at that time. After waiting a half hour or more, the officers got into the machine with appellant and he drove them to Ditman street. They searched carefully on both sides

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of the street in the block containing the number which appellant had given them, but failed to find that any such person as McLaughlin lived in that neighborhood. Thereupon, after having the automobile identified by the owners, they conducted appellant to the jail, where he thereafter remained. Soon after his arrest the appellant was brought into the presence of the detectives and questioned regarding how he came into possession of the machine. The officers testified that the statement was free and voluntary and not induced by any threats, intimidation, or promises of any sort. While the questions were being asked, one of the officers operating a typewriter took down the questions and answers. In this statement, which was afterwards signed by the appellant, the appellant stated that on the day preceding the taking of the automobile he had visited the salesroom where the automobile was kept, and on the same night at about 11 o'clock he had returned there, entered through a window, and, after opening the large rear door which was barred, had taken an extra tire from another machine and had driven the "Enger" automobile away and secreted it in a garage, where it remained for some time; that during the time he first had it in the garage he repainted and disguised it; that thereafter he used it in livery service for the purpose of earning money.

[1] It is contended on the part of appellant that the evidence was insufficient to establish the corpus delicti, and that therefore the admission of the confession of appellant was error. We do not agree with appellant in this contention, for it seems to us that the facts which we have first briefly stated establish fully that the automobile was unlawfully taken from the possession of the owner and from a building which had been closed and fastened on that night. Three witnesses who were employed about the automobile salesroom all testified to facts from which an irresistible inference would arise that the machine was taken without the consent of any person authorized to give it. The circumstances tended to show, also, that it was taken during the nighttime.

[2, 3] There was no error in the admission of the alleged confession of appellant upon the ground that the confession was not shown to have been voluntary, for the officers testified that no inducement, threat, or other improper influence was exerted upon the appellant to induce him to make the statement. In the statement, which was reduced to writing, defendant was shown to have been asked this question, "All of these statements you have just made have been free and voluntary, have they?" to which the answer was given, "Yes." He was then asked as to whether any threats had been made, or any offers of reward or immunity, and he answered in the negative. The evidence clearly supports the verdict of the jury.

[4] It is complained that an instruction which the trial judge gave, and which contained a statement which suggested to the jury that the defense of an alibi was occasionally fabricated and that temptation to resort to it might be great in cases of importance, was erroneous, in that it invaded the province of the jury. The instruction as a whole, a part of which only we have referred to, was copied verbatim from one approved by the Supreme Court in the case of People v. Lee Gam, 69 Cal. 552, 11 Pac. 183. In that case the Supreme Court held that such an instruction did not violate any substantial right of the defendant. No other ground for reversal is urged.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

(31 Cal. App. 733)

CITY STREET IMPROVEMENT CO. v. LEE, Mayor (FURGERSON et al., Interveners). (Civ. 1544.)

(District Court of Appeal, Third District, California. Oct. 30, 1916.)

1. APPEAL AND ERROR ⟸907(1)—FINDINGS—JUDGMENT ROLL.

Where an appeal is upon the judgment roll alone, it must be presumed that there was evidence to justify a finding of the trial court, although an inconsistent allegation in the petition was not denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3673, 3678; Dec. Dig. ⟸907(1).]

2. MUNICIPAL CORPORATIONS ⟸297(1) — CHARTER—CONSTRUCTION—IMPROVEMENTS.

Under Charter of City of Santa Rosa, § 72, providing that the filing of written objections to the proposed improvement of one block or more of a street by the owners of two-thirds of the frontage within 20 days from the posting of notice of intention to order such improvement will bar further proceedings for six months, but when not more than two blocks remain ungraded or unimproved, and a block or more has been so improved, the council may order improvement, notwithstanding such objections, where a portion of a street had been improved under the law authorizing such improvement and thereafter it was proposed again to improve it under the same authority, the proceedings must be treated as for a first improvement, although after the original improvement other parts of the street had been improved, so that timely written objections filed by the owners of the prescribed amount of frontage will bar further proceedings for the period of six months.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 797; Dec. Dig. ⟸297(1).]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Mandamus by the City Street Improvement Company against Charles E. Lee, Mayor, in which Nellie Furgerson and others intervene. From a judgment dismissing the writ, the petitioner appeals. Affirmed.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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L. M. Hoefler, of San Francisco, and George F. Snyder, for appellant. John T. Campbell, of Santa Rosa, for respondent Charles E. Lee. R. M. F. Soto, of San Francisco, for respondents Nellie Furgerson and others.

HART, J. The petitioner, a corporation, filed a petition in the court below for a writ of mandate to force the mayor of the city of Santa Rosa, a municipal corporation, to enter into a contract with the said petitioner for doing certain street work on Santa Rosa avenue, in said city. The respondent mayor answered the petition, and certain property owners, whose property abuts upon said streets and which would, as a consequence, be assessed for the improvement which had been proposed to be made on said avenue, providing the proceedings were legal and valid, filed a complaint in intervention. The court, upon the trial of the issues made by the answer and the complaint in intervention, rendered and entered a judgment dismissing the writ. The petitioner brings the case to this court on an appeal from said judgment.

On the 21st day of September, 1915, the council of the city of Santa Rosa, proceeding in accordance with the provisions of the charter of said city relating to the public streets thereof and their improvement (see Stats. 1905, pp. 891–898, inclusive), passed a resolution of intention to order the improvement of Santa Rosa avenue, a public street in the said city, from the south side of the bridge over Santa Rosa creek, southerly to the south city limits, where not already paved and improved, by grading the roadway thereof and constructing thereon an asphaltic pavement of a character fully and clearly described in said resolution. The said resolution of intention and notices of the passage of the same were duly and regularly posted, as required by section 72 of the charter.

On the 9th day of October, 1915, and within 20 days from the first day of the posting of said notices, the owners of more than two-thirds of the frontage of the property fronting on said proposed work, which embraced portions only of said avenue not already improved, filed written objections to the said proposed work. The complaint, in this connection, alleges:

"That not more than two blocks of the said Santa Rosa avenue, including street crossings, remained ungraded to the official grade and unimproved; that a block or more on both sides of the unimproved portions of said Santa Rosa avenue was, at all times herein mentioned, and now is, improved with the same character of improvements specified in the said resolution of intention."

Thereafter, and within due time, and after the posting of notice as required calling for the same, sealed proposals or bids for doing the work according to the plans, specifications, and estimates previously made and filed by the city engineer and which were approved and adopted by the council, were received and the council on the 27th day of October, 1915, opened and examined and publicly declared said proposals, and rejected all said proposals or bids except that of the petitioner herein, who was then by said council declared to be the lowest responsible bidder for the doing of said proposed work and awarded to it the contract.

Thereafter, and within three days after the expiration of the five days within which the owners of a majority of the frontage of the property upon the line of the proposed work might themselves have taken the work at the same price or bid at which the contract was awarded to the petitioner, the latter signed and presented to the respondent mayor for his signature, a form of written contract for the performance of said work and improvements at the prices specified in its said bid; said form of contract providing in detail that the petitioner would do all the work according to the specifications adopted for that purpose. With the said form of contract, the petitioner presented to the mayor a bond duly executed by it, and sufficient in all respects, conditioned for the faithful performance of the said contract. The said mayor, without specifying or suggesting any objections to the form of the contract presented to him by the petitioner, or to the bond offered at the same time, refused to execute said contract or any contract for the doing of said work.

The respondent mayor answered the complaint, admitting all the allegations thereof, but alleged, in the nature of a special plea in bar, that in the year 1888, by due proceedings had by the city council of said city of Santa Rosa in pursuance of the provisions of the then existing charter of said city, Santa Rosa avenue was regularly ordered to be improved in accordance with certain plans and specifications adopted by said council for that purpose; that said avenue was, in said year, improved as so ordered after proceedings regularly had for the letting of the contract to do said work; that, in due course, the street commissioner reported to the council that the work and improvement had been completed, and the council thereupon accepted the street as so improved; that, on the 6th day of July, 1893, the city council of said city, acting in pursuance of the provisions of section 20 of the general street law of 1885, known as the "Vrooman Street Law" (St. 1885, p. 160), passed an ordinance, numbered 150, accepting, as improved in the year 1888, as above indicated, Santa Rosa avenue, from the south bank of the Santa Rosa creek southerly to the city line.

The complaint in intervention also pleads said ordinance No. 150, and further points out a number of objections to the proceedings leading to the ordering of the work to be done on the portions of Santa Rosa ave-

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nue described in the resolution of intention adopted by the council on the 21st day of September, 1915, and, finally, to the awarding of the contract to do the work described in said resolution to the petitioner.

We do not conceive it to be necessary to consider all the points urged by the respondents against the validity of the proceedings leading to the awarding of the contract by the council to the petitioner. We think the judgment should be sustained for the reason that, in our opinion, the council never acquired jurisdiction to order the work proposed to be done, and this proposition will now be considered.

According to the complaint, the resolution of intention described the work or improvement proposed to be done or made substantially as follows:

"To improve Santa Rosa avenue, a public street in the City of Santa Rosa, Sonoma county, California, from the south side of the bridge over Santa Rosa creek, southerly to the south city limits, where not already paved and improved, by grading the roadway thereof and constructing thereon an asphaltic pavement consisting of three (3) inches of asphaltic concrete foundation covered with an asphaltic concrete wearing surface two (2) inches in thickness, the finished surface of which shall be to official grade."

The court made the following finding:

"That on the 11th day of May, 1888, the council of said city of Santa Rosa, by an order in due form, did order that Santa Rosa avenue should be graded and graveled, with common gravel, to the established grade, under plans and specifications therefor to be adopted and furnished by the city engineer of said city, and further ordered the sidewalks to be graveled, with common gravel, to the official grade and curbing for sidewalks to be placed; that thereafter a contract was duly let for the doing of said work, and the said Santa Rosa avenue, from the south side of the bridge to the southerly city limit, was graveled with common gravel, curbs for sidewalks were laid, and the sidewalks were graveled, with common gravel, all to the official grade, as required by ordinance, and said street work was thereafter accepted by said city of Santa Rosa as herein set out; that thereafter an assessment was made in due form of law against the owners of property fronting on the line of said work for the costs, and expenses of said work, and the contractor collected from the owners of the property the several amounts against them, as shown in said assessment."

[1] The appeal here is upon the judgment roll alone. Therefore, notwithstanding that there is neither by the defendant nor the intervenors a denial of the allegations of the complaint "that not more than two blocks of the said Santa Rosa avenue, including street crossings, remained ungraded and unimproved," from which allegation it is to be implied that there were two blocks on said street ungraded and unimproved, it must be presumed that there was evidence which justified the above finding, and that Santa Rosa avenue was in the said year 1888 improved under due proceedings by the city council in the manner described by said finding from the south side of the bridge southerly to the south limits, which embraced the two blocks designated or specified in the resolution of intention of September 21, 1915.

[2] Section 72 of the charter of the city of Santa Rosa provides (among other things) that the filing of written objections to the proposed improvement of one block or more of a street by the owners of two-thirds of the frontage of the property fronting on the proposed work within twenty days from the first day of the posting of notice of the resolution of intention to order such improvement will operate, ipso facto, to bar further proceedings in relation to the doing of said work for a period of six months. The said section then proceeds:

"When not more than two blocks, including street crossings or intersections, remain ungraded to the official grade, or otherwise unimproved, in whole or in part, and a block or more on one or both sides upon said street has been so graded or otherwise improved, said council may order such work or improvement mentioned to be done upon said ungraded or unimproved part of said street notwithstanding such objections, and said work shall not be stayed or prevented by any written objections, unless the council shall deem the same proper."

Counsel for the petitioner contend that the case here comes within the exception thus made by said section 72 with reference to the effect of written objections by the property owners upon the power of the council to order the work to be done. This position is doubtless founded on the allegation of the complaint, and expressly admitted by the answer of the mayor and not denied in the complaint of the intervenors, that "a block or more on both sides of the unimproved portions of said Santa Rosa avenue was at all times herein mentioned, and now is, improved with the same character of improvements specified in said resolution of intention," etc.

We cannot agree to the contention. As we have shown, it must be accepted as an established fact in this case that at least that portion of Santa Rosa avenue embraced within the resolution of intention had once been improved after proceedings regularly had by the city council under the then existing law empowering the municipality of Santa Rosa to coerce the improvement of its streets at the expense of the property owners; and our judgment is that, where a street or any part thereof has once been improved under a law containing provisions similar to those of section 72 of the charter in question, and, after such improvement has been made, proceedings are taken by the governing body of a municipality to again improve said street, timely written objections filed by the owners of the prescribed amount of the frontage of the property fronting on the line of the proposed improvement will have the effect of barring further proceedings in relation to the proposed improvement for the period of six months. In other words, we think that in such a case the provision of section 72 of the charter first above referred

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to applies. That provision is fashioned after or the same as the provision upon that subject in the Vrooman Act. We think it is not reasonable to suppose that, a street having been once improved at the expense of the property owners and to their satisfaction, the Legislature, or, in this case, the framers of the charter or the people who ratified and so made it the organic law of the municipality, intended that the governing body of the latter should be vested with an unhampered or a discretionary power of again ordering such street to be improved at the expense of the property owners in the face of a protest regularly filed by the latter against the proposed improvement. The provision that further proceedings shall be barred for six months upon the due filing of written objections by the property owners was doubtless inspired to some extent by the consideration that owners of property subject to taxation for street improvements might not be prepared at the particular time at which streets were called up for improvement to meet or discharge the burden thus to be imposed upon them, and that a postponement of the work for the period designated might be sufficient to enable them to do so; or, it may be, that the framers of the act, in incorporating that provision into the law, conceived that the judgment of the property owners as to the necessity of the improvement at the particular time should be deferred to. But whatever might be the underlying motive for the provision, whether one or the other of the two above suggested or both combined, there can be no less reason or propriety for applying the provision to the case where, as here, the street has once been improved under the direction of the municipal authorities and it is proposed to again improve it, than to the case where a street has been called up for the first time for improvement. Indeed, we think there is a much stronger reason for applying the provision to the situation presented here, since the proceedings involved here, if consummated, will result in taxing the property owners the second time for the improvement of said street.

We have found no direct authority which supports the above views and the conclusion declared. But there is in the case of City Street Imp. Co. v. Babcock, 139 Cal. 690, 693, 73 Pac. 666, an expression, which involves, however, a mere dictum, the question not being directly before the court, that would seem to indicate that the Supreme Court leaned to the conclusion to which we have been led. Speaking of that part of section 8 of the Vrooman Act which, like the latter part of section 72 of the charter involved here, makes an exception, where similar conditions exist, to the rule that written objections duly filed by property owners will bar further proceedings in relation to the proposed improvement of a street, the Supreme Court in that case said, although expressly disclaiming any intention to decide the question therein:

"It is certainly doubtful if this exception applies at all to a block which has been previously improved."

The position above taken cannot be affected by a consideration of the fact, which is alleged in the complaint and nowhere denied, thus imparting to it the dignity of a finding, that at some time since the year 1888, not definitely stated or disclosed, a block or more on both sides of the blocks proposed to be improved had been improved by the construction thereon of asphaltic pavement, etc., and that the blocks proposed to be improved are to be in like manner and character improved. To repeat, what we believe to be the true meaning or intent of section 72 of the charter, so far as it relates to the effect of the due filing of written objections to work proposed to be done, is that where a street or any part thereof has once been improved under the law authorizing such improvement, and thereafter it is sought again to improve it under the same authority, the proceedings looking to the second improvement must be regarded and treated as the same in all essential particulars as those necessary for the improvement of a street in the first instance or where a street or no part thereof has ever theretofore been improved, notwithstanding that at some time subsequent to the first or original improvement other parts of said streets had been again improved.

Our conclusion, as stated in the outset, is that, since the property owners on the parts of Santa Rosa avenue proposed to be improved by the resolution of intention of September 21, 1915, in due time filed sufficient objections to the proposed improvements, the council was wholly without authority or jurisdiction to order the work to be done, and, consequently, its action in awarding the contract to the petitioner to do the work was absolutely void.

The judgment appealed from is, accordingly, affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(31 Cal. App. 772)

PEOPLE v. DUNCAN. (Cr. 501.)

(District Court of Appeal, Second District, California. Nov. 2, 1916.)

CRIMINAL LAW ⊜829(1)—APPEAL AND ERROR—REVIEW—INSTRUCTIONS.

In a homicide case, refusal of requested instructions covered correctly by given instructions was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⊜829(1).]

⊜For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Harry Duncan was convicted of manslaughter, his order for a new trial denied, and he appeals. Affirmed.

Arthur E. T. Chapman, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

CONREY, P. J. The defendant in this action was accused of the crime of murder and found guilty of manslaughter, for which he has been sentenced to a term of eight years in the state prison at Folsom. He appeals from the judgment and from an order denying his motion for a new trial.

There are no briefs. The present attorney for appellant was substituted in the place of the former attorneys a few weeks before the appeals came on for hearing, and the case has been presented upon his oral argument. No attack is made upon the sufficiency of the evidence, which shows that one J. F. Toolen, a police officer, came to his death by means of a shot fired from a revolver by the defendant.

Appellant's first proposition is that the defendant was prejudiced by certain alleged misconduct of the district attorney; it being claimed that that officer asked an improper question for the sole purpose of prejudicing the defendant in the minds of the jurors. Defendant's objection to the question was sustained by the court, and we cannot say that the district attorney was not acting in good faith. The record does not show any persistent course of action by the district attorney such as has sometimes been held to constitute prejudicial misconduct.

Appellant next complains of the court's refusal to give two requested instructions. The record does not show by whom those instructions were requested, but we will assume that they were proposed by defendant's counsel. The subject-matter of those instructions was covered correctly by the court in other instructions given to the jury, and the refusal to give them in the precise form requested by the defendant did not deprive him of any right.

At the oral argument appellant's counsel suggested that the court erred in giving six of the instructions that were given. As to three of these he stated no reasons why they were erroneous, and was unable to refer us to the pages of the clerk's transcript where they would be found. Subsequently he sent to us a memorandum of the pages. In two of the three instances there are two instructions on each page, and we do not know to which instruction counsel referred. Solving the doubt in his favor, we have examined all of them without discovering any valid objection thereto.

This leaves for consideration the instructions considered by counsel and designated as points 4, 5, and 6. Under point 5 his claim is that the instruction assumes the defendant to be guilty, and thereby invades the province of the jury. In our opinion, the instruction contained no such assumption. Under points 4 and 6 the only objection was that those instructions had no application to the case as presented by the evidence. The point appears to be well taken with respect to one of those instructions, but it related to a minor matter, and the instruction was not at all likely to have affected the verdict.

As none of the points suggested have raised any doubtful question which seems to call for discussion and explanation of the law of the case, we deem it unnecessary to extend this opinion by setting forth the language of the instructions or stating our opinion in detail concerning them. Upon the record in this case, it appears that the defendant is fortunate in that he was convicted of manslaughter, the lowest degree of the offense charged.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

(31 Cal. App. 768)

CURTIN v. KATCHINSKI et al. (Civ. 1645.)

(District Court of Appeal, First District, California. Nov. 2, 1916.)

1. BANKRUPTCY ⊂⊃363—DISCHARGE—LIABILITY OF SURETIES.

The fact that the plaintiff in an action presented his claim against the defendant therein to the bankruptcy court, and received dividends thereon in excess of the sum in which an undertaking to dissolve an attachment in the action was given, did not operate to discharge the sureties upon the undertaking.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 550–554; Dec. Dig. ⊂⊃363.]

2. ATTACHMENT ⊂⊃344—RELEASE OF PROPERTY ON BOND—LIABILITY OF SURETIES—DEMAND FOR REDELIVERY.

Where property of defendant released from attachment had been sold by the order of a referee in bankruptcy and the sale approved by the bankruptcy court, no demand upon the defendant, or the sureties on the undertaking to dissolve the attachment, for the redelivery of the attached property, was necessary before bringing an action against the sureties on the undertaking.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1238–1240; Dec. Dig. ⊂⊃344.]

3. ATTACHMENT ⊂⊃344—LIABILITY ON UNDERTAKING—CONDITION PRECEDENT—EXECUTION.

Under Code Civ. Proc. § 555, providing that a suit may be commenced on an undertaking to dissolve an attachment when execution be returned in whole or in part, although defendant in an action was adjudicated a bankrupt after attachment was dissolved upon undertaking but did not obtain his release within one year, there being no inhibition in the National Bankruptcy Act against the issuance and levy of execution in such a case, the issuance and return of an execution unsatisfied is a condition precedent

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to the maintenance of an action against the sureties on the undertaking.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1238–1240; Dec. Dig. ⟸344.]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by D. A. Curtin against B. Katchinski and others. From a judgment for defendants and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Randolph V. Whiting, of San Francisco, for appellant. M. H. Wascerwitz, of San Francisco, for respondent Katchinski. Joseph H. Mayer and George D. Perry, both of San Francisco, for respondent Heilfronn.

RICHARDS, J. This is an appeal on behalf of the plaintiff in an action brought to recover the sum of $1,000 alleged to be due upon an undertaking by the defendants as sureties for the release of certain personal property from attachment.

The facts, which are substantially undisputed, are briefly these: The plaintiff and appellant herein commenced an action against the firm of Leipsic Bros. to recover the sum of $3,284.03, and caused to be attached certain personal property owned by said firm. Thereupon the defendants herein as sureties for Leipsic Bros. executed an undertaking for the release of said attached personal property in the sum of $1,000, and the property was released from the attachment. Subsequently the firm of Leipsic Bros. filed a petition in bankruptcy and were adjudged bankrupts, and the property which had theretofore been under attachment was taken into possession by the trustee, and sold under the order of the referee in bankruptcy for the sum of approximately $1,000 and the sale confirmed. Plaintiff presented his claim for the sum of $3,284.03 against said bankrupts, and in due course received dividends thereon aggregating the sum of $2,189.34. He also prosecuted his said action against Leipsic Bros., and recovered judgment against the firm for $3,713.13, upon which nothing was paid except the above dividends. He then began this action against said sureties upon the attachment bond. Leipsic Bros. were not made parties to this action for the reason that they had not joined in the execution of the attachment bond. The undertaking sued upon was given in conformity with section 555 of the Code of Civil Procedure, and by its terms the respondents herein "undertake in the sum of one thousand dollars and promise that in case the plaintiff recover judgment in said action the defendants (Leipsic Bros.) will upon demand redeliver the attached property so released to the proper officers to be applied to the payment of the judgment, or in default thereof that the defendants and sureties will on demand pay to the plaintiff the full value of the property so released not exceeding the sum of one thousand dollars." Prior to the commencement of the action upon this undertaking, the plaintiff demanded of the sureties the sum of $1,000 claimed to be due thereon, but he made no demand upon Leipsic Bros. for the redelivery of the attached property or the value thereof, nor did the plaintiff cause to be issued an execution upon the judgment obtained in the original action against Leipsic Bros., nor has such execution ever been issued or returned unsatisfied in whole or in part. It further appears that the firm of Leipsic Bros. have not obtained their discharge in bankruptcy, and that more than one year had elapsed between the adjudication of their bankruptcy and the institution of the present action.

Upon the foregoing facts the trial court gave judgment in the defendants' favor and denied the plaintiff's motion for a new trial, whereupon he prosecutes this appeal.

[1, 2] We are inclined to agree with the contention of the appellant that the fact that as plaintiff in the original action he presented his claim against Leipsic Bros. to the bankruptcy court, and received dividends thereon in excess of the sum in which the undertaking involved in the pending suit was given, did not operate to discharge the obligation of the sureties upon said undertaking; and also with his contention that no demand for the return of the released property was necessary in view of the fact that said property had been sold and the sale confirmed by the bankruptcy court, and hence that the making of such demand either on Leipsic Bros. or the defendants herein would have been an idle and useless act.

But conceding this much to the appellant, the insuperable objection to the maintenance of this action consists in the admitted fact that no execution was issued or returned unsatisfied in whole or in part prior to the institution of the present suit. Section 552 of the Code of Civil Procedure, under the title of "Attachment," reads as follows:

"Sec. 552. When suits may be commenced on the undertaking. If the execution be returned unsatisfied, in whole or in part, the plaintiff may prosecute any undertaking * * * pursuant to section 540 or section 555, or he may proceed, as in other cases, upon the return of an execution."

[3] It has been expressly held that under this section of the Code the issuance and return of an execution unsatisfied in whole or in part is a condition precedent to the maintenance of an action upon an undertaking given under the terms of section 555 of the Code of Civil Procedure. Brownlee v. Riffenburg, 95 Cal. 447, 30 Pac. 587. It is urged, however, by the appellant that the issuance and return of an execution was rendered unnecessary, and therefore excused, by reason of the fact that Leipsic Bros. had gone into bankruptcy, and that the issuance or attempted levy of an execution would be a fruitless and useless proceeding; and they cite the case of Rosenthal v. Perkins, 123 Cal.

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240, 55 Pac. 804, as sustaining this view. An examination of that case, however, shows that it differs from the case at bar in this essential respect: That in that case the principal debtor, for the release of whose property the undertaking had been given, had taken the benefit of the state insolvent act then in force, by the terms of section 45 of which act the issuance and levy of executions was forbidden against insolvents who had come within its provisions. The Supreme Court, in distinguishing that case from the case of Brownlee v. Riffenburg, supra, held that this inhibition against the issuance and levy of an execution against insolvent debtors of necessity rendered section 552 of the Code of Civil Procedure inapplicable to such a case; for to hold otherwise would have rendered impossible an action on an undertaking given under section 555 of the Code of Civil Procedure after the principal debtor had taken advantage of the insolvent act. But the national bankruptcy act contains no such inhibition against the issuance and levy of executions after the lapse of one year as against debtors who have not obtained their discharge within that time; and this being so, and the entire proceeding being statutory, we are of the opinion that the rule laid down in the case of Brownlee v. Riffenburg, supra, must be given full application to the case at bar.

Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(24 Wyo. 452)

MORTIMORE v. STATE. (No. 864.)

(Supreme Court of Wyoming. Dec. 23, 1916.)

1. CRIMINAL LAW ⟸516 — EVIDENCE — CONFESSIONS—EXCULPATORY STATEMENTS.
In a prosecution for murder, the admissibility of a statement by accused, admitting that he had shot the decedent, though accompanied by exculpatory statements, is governed by the rules relating to confessions, and the statement is not admissible without a showing of its voluntary character.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1139–1145; Dec. Dig. ⟸516.]

2. CRIMINAL LAW ⟸519(4)—EVIDENCE—CONFESSIONS—VOLUNTARY CHARACTER.
The mere fact that statements by accused were made to the prosecuting attorney or deputy sheriff, or both, would not exclude them, in the absence of improper inducement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1183; Dec. Dig. ⟸519(4).]

3. CRIMINAL LAW ⟸519(3)—EVIDENCE—CONFESSIONS—VOLUNTARY CHARACTER.
The mere fact that defendant was in jail when he made a statement, and in the custody of the deputy sheriff, would not exclude it, in the absence of improper inducement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1167; Dec. Dig. ⟸519(3).]

4. CRIMINAL LAW ⟸531(3) — EVIDENCE — CONFESSIONS—PRELIMINARY PROOF.
Evidence *held* to show that a statement of defendant offered as a confession was not made under any promise or threat, or any improper inducement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1215; Dec. Dig. ⟸531(3).]

5. CRIMINAL LAW ⟸527 — EVIDENCE — CONFESSIONS—VOLUNTARY CHARACTER.
That defendant was only 17 years old did not render his statement made voluntarily, inadmissible, in the absence of any showing of lack of intelligence or understanding on his part tending to throw doubt on the voluntary character of the statements.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1200, 1201; Dec. Dig. ⟸527.]

6. HOMICIDE ⟸196 — EVIDENCE — ADMISSIBILITY—ACTS OF DECEASED.
In a prosecution for murder of defendant's father, where defendant claimed that the killing was in defense of his brother, evidence of specific acts of violence by deceased, known to defendant, toward other members of the family was admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 421; Dec. Dig. ⟸196.]

7. HOMICIDE ⟸196—EVIDENCE—ADMISSIBILITY—THREATS.
In a prosecution for murder of defendant's father, evidence of threats by decedent against his wife, not accompanied by any assault or any attempt to carry them out, was properly excluded.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 421; Dec. Dig. ⟸196.]

8. HOMICIDE ⟸196—EVIDENCE—ADMISSIBILITY—ABUSIVE LANGUAGE.
In a prosecution for murder of defendant's father, evidence that decedent had addressed his wife and daughter by abusive or insulting epithets was properly excluded.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 421; Dec. Dig. ⟸196.]

9. CRIMINAL LAW ⟸451(3) — EVIDENCE — OPINION EVIDENCE—ADMISSIBILITY.
In a prosecution for murder of defendant's father, testimony as to whether defendant was happy or angry on the morning of the homicide was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1041; Dec. Dig. ⟸451(3).]

10. CRIMINAL LAW ⟸451(1) — EVIDENCE — OPINION EVIDENCE—ADMISSIBILITY.
In a prosecution for the murder of defendant's father, a question whether witness thought that when decedent was making an assault on defendant's brother the brother was in danger, whether referring to the witness' opinion or what he thought at the time, was incompetent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1040; Dec. Dig. ⟸451(1).]

11. CRIMINAL LAW ⟸1170(3)—WRIT OF ERROR — REVIEW — PREJUDICIAL EFFECT OF ERROR.
In a prosecution for murder of defendant's father, where a brother of defendant, in answer to a question what his father was doing, said he was trying to get hold of his brother's throat, any error in sustaining a motion to strike the answer as not responsive was not prejudicial, where the witness then stated that the father had his brother down and grabbed at his throat and caught him in the face.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3147; Dec. Dig. ⟸1170(3).]

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12. CRIMINAL LAW ⊂⊃448(11) — WITNESSES ⊂⊃248(2)—EVIDENCE—ADMISSIBILITY.
In a prosecution for murder of defendant's father, where defendant's brother was asked what his father was doing, the answer that he was trying to get hold of his brother's throat was not incompetent as a mere conclusion, or as not responsive to the question.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1036, 1041; Dec. Dig. ⊂⊃448(11); Witnesses, Cent. Dig. § 862; Dec. Dig. ⊂⊃248(2).]

13. HOMICIDE ⊂⊃164 — EVIDENCE — ADMISSIBILITY.
In a prosecution for murder of defendant's father while he was assaulting defendant's brother, a question as to the strength of decedent, compared with that of his three sons combined, was immaterial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 318; Dec. Dig. ⊂⊃164.]

14. CRIMINAL LAW ⊂⊃684 — EVIDENCE — REBUTTAL.
Under Comp. St. 1910, § 6235, providing that after defendant has produced his evidence the state will be confined to rebutting evidence, unless the court for good reasons in furtherance of justice shall permit it to offer evidence in chief, the admission in evidence in rebuttal of statements of defendant as to decedent finding fault with him on the morning of the homicide was not an abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1615, 1618; Dec. Dig. ⊂⊃684.]

15. CRIMINAL LAW ⊂⊃814(10) — TRIAL — INSTRUCTIONS.
The refusal of an instruction that, if defendant had some weakness of mind, infirmity of temper, or immature judgment, due to youth or any other cause, because of which he was below the average of man, that fact should be considered and defendant given the benefit of such condition was properly refused, in the absence of any evidence making the instruction applicable aside from the age of the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1979, 1981; Dec. Dig. ⊂⊃814(10).]

16. HOMICIDE ⊂⊃300(1)—TRIAL — INSTRUCTIONS.
In a prosecution for murder of defendant's father, who was committing an assault on defendant's brother, an instruction that defendant was the best judge of what was necessary to defend himself and of the means to be used for his own protection, and his judgment, if honestly exercised, is, to a large extent, controlling, was properly refused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 614; Dec. Dig. ⊂⊃300(1).]

Error to District Court, Converse County; Charles E. Winter, Judge.

Dewey Mortimore was convicted of manslaughter, and brings error. Reversed.

William B. Ross, of Cheyenne, and Harry J. Devine, of Douglas, for plaintiff in error. D. A. Preston, Atty. Gen., Wilfred O'Leary, Deputy Atty. Gen., and Robert D. Hawley, Co. and Pros. Atty., of Douglas, for the State.

POTTER, C. J. The plaintiff in error, Dewey Mortimore, was charged with the crime of murder in the first degree and found guilty of manslaughter. He will be referred to as the defendant unless by name. The jury added to the verdict a recommendation that the court be as lenient as possible under the law, and he was sentenced to imprisonment in the penitentiary for the term of not more than 3 years and not less than 2 years. The charge was predicated upon the killing of the defendant's father, Silas Mortimore, and it was sought to justify or excuse the homicide as an act in defense of the defendant's brother, Alla Mortimore, who was being violently assaulted by the father.

The evidence shows without conflict that the cause of Silas Mortimore's death was a gunshot wound in the head received when he was assaulting his son, Alla, after having said, as he approached him, that he would "choke his head off" or "choke him to death." This occurred on the morning of February 15, 1915, at the home of the deceased, about eight miles from Glenrock, in Converse county. The family of deceased living with him at that time consisted of his wife, their three sons, Alla, 28, Mote, 25, and Dewey, 17 years of age, and a daughter 19 or 20 years of age. Dewey was temporarily at home from school, which he was attending at Casper in an adjoining county. The deceased is described in the evidence as having been a large man, about 6 feet tall, and weighing about 215 pounds, and of greater physical strength than either of his sons, a drinking man, and in the habit of keeping and drinking whisky at his home; and the testimony shows that he had been drinking on the morning of the homicide.

On February 17, 1915, at the county jail when the defendant was there confined, he stated the circumstances of the homicide to the prosecuting attorney in the presence of the deputy sheriff and a stenographer, and said, in effect, that he fired the shot which killed his father, and that he did it to save his brother. His statements on that occasion were in reply to questions by the prosecuting attorney, and, together with the questions, were taken down in shorthand by the stenographer and afterwards transcribed by him and signed by the defendant. The prosecution was permitted to prove these statements over the objection of defendant's counsel, after the stenographer had testified to the accuracy of his notes and transcript and he had been examined as to the circumstances under which the statements were made. Omitting the questions of the prosecuting attorney, the defendant's statements at the time referred to were substantially as follows:

We were eating at the breakfast table and we started eating. Father had drank a little that morning, and my oldest brother and him started talking. Mote was the first one he started talking with, and then my oldest brother and he started talking, and he got mad and jumped up from the table and knocked my brother over to the window. He jumped up from the table and hit my brother and said: "I will choke

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your head off." My brother tried to hold him off, and he hit my brother in the face and skinned his eye and his hands. I jumped up from the table and watched a little while, and then I felt kind of scared that he would kill my brother. He had my brother down in the window, and he couldn't get up. He grabbed him and pushed him right into the window so he couldn't do anything, and the hired man was in there too, and my oldest brother and myself, and my mother came in, and she was not eating with us. And a woman and a child that was staying at our place were up stairs. I went to the chimney where the gun was, and by that time he had my brother down so he couldn't do anything, as he was all in. My mother tried to make father let go, and I seen there was no hope, so I shot. I was the length of the room from him. He had said he would kill all of us—not that morning. He always has whisky, and was all the time making trouble lately. Mote was engaged to be married to the woman that was there, and father did not want him to get married. I don't know what they were talking about at the table, for when they were quarreling I couldn't eat a thing. The gun was a 25-30 rifle. I did it to save my brother. He (evidently referring to the father) has had three revolvers on his desk when he has been drunk. My father would have choked me to death last summer if my mother and two brothers had not stopped him. I was afraid he would kill my brother. I was scared about it.

He was then asked if there was anything else he wanted to tell that he knew, and he was told to tell only what he wanted to, as he did not have to tell what he did not want to, and that as his family would probably be down to talk with him, he need not say anything that would hurt him. He then said that he and his father had a "couple of words about the girl that morning"; that he liked the girl and was "sticking up for her."

[1] It is contended that these statements should have been excluded because not voluntary. It seems to be conceded by counsel that the rules regulating the proof of confessions are applicable to this evidence, for it is not suggested that they might be admissible if not shown to have been voluntarily made. And we are of the opinion that such rules are applicable, for while a confession is generally restricted to statements acknowledging or importing guilt, and mere exculpatory statements denying guilt are not confessions (1 Greenleaf on Ev. §§ 170, 210; 1 Wigmore on Ev. § 821; 2 Bishop's New Cr. Proc. [2d Ed.] § 1217), a statement, admitting an act essential to the crime charged and importing guilt, should not be treated as a mere admission receivable in evidence without a showing of its voluntary character, because of other statements at the same time and in connection with it intended to excuse or justify the act (State v. Porter, 32 Or. 135, 49 Pac. 964; People v. Quan Gim Gow, 23 Cal. App. 507, 138 Pac. 918; State v. Nagle, 25 R. I. 105, 54 Atl. 1063, 105 Am. St. Rep. 864; State v. Mariano, 37 R. I. 168, 91 Atl. 21). And see Opinion of Lamar, J., Owens v. State, 120 Ga. 296, 48 S. E. 21, dissenting from a conclusion criticized as unsound in Wigmore on Evidence, vol. 5, § 821. And it is held that such a statement should be regarded as a confession when appearing to have been offered and relied on as such. Bram v. United States, 168 U. S. 541, 18 Sup. Ct. 183, 42 L. Ed. 568.

Not only does it appear that the statements were offered as a confession, and particularly to show that the defendant fired the fatal shot, but it is the only direct evidence that the shot was fired by him; a condition convincingly attesting the reasonableness of the rule, in a case like this, that a statement, admitting participation in the homicide which, standing alone, would be a confession, is not changed in character by exculpatory statements at the same time excusing or justifying it. This is implied by the well-settled principle that when a confession is offered and admitted, the defendant is entitled to have all that was said at the time introduced in evidence, including exculpatory statements, and that a statement directly involving guilt does not lose its character as a confession from the fact that it was accompanied by statements of an exculpatory nature seems to be conceded or recognized in the many cases applying the rule as to confessions to such statements, without referring to the distinction between a mere admission and a confession. The jury may believe the inculpatory statement and disbelieve what the defendant said on the same occasion in his own favor, and that, it seems, is what the jury did in finding the defendant guilty of manslaughter.

To render the evidence of the statements admissible, it was necessary to show that they were freely and voluntarily made under the rules relating to confessions. And we think that was done, and the evidence properly admitted. The grounds relied on in support of the contention that they were not voluntary are these: That they were made by a boy only 17 years of age, when in jail and in custody of the officers, not represented by counsel or by any friend or other person, and upon being informed by the prosecuting attorney that he or they would take the story.

[2, 3] The mere fact that the statements were made to the prosecuting attorney or to the deputy sheriff, or both, would not exclude them, nor the fact that the defendant was in jail at the time and in the custody of the deputy sheriff, in the absence, in either case, of any improper inducement. 2 Wharton's Cr. Ev. (10th Ed.) §§ 649, 651a, 661, 662; 12 Cyc. 402, 466, 468; 2 Bishop's New Cr. Proc. § 1238; Murphy v. People, 63 N. Y. 590; McCleary v. State, 122 Md. 394, 89 Atl. 1100; State v. Lance, 166 N. C. 411, 81 S. E. 1092. The question in such case is whether the statement was voluntary, as in the case of a confession by an accused under other circumstances. Hartung v. People, 4 Parker, Cr. R. 319, 333; People v. Rogers, 18 N. Y. 9,

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72 Am. Dec. 484; Redd v. State, 68 Ala. 492; State v. Guy, 69 Mo. 430. The rule is stated in section 649 of Wharton's Criminal Evidence:

"Confessions made to persons in authority, such as constables, arresting officers, or to magistrates, are not excluded by the mere fact that they were made to such persons, unless it appears that an improper inducement was made by such authoritative person. But the rule is equally well settled that even a slight inducement held out by such a person renders the confession involuntary, because the accused would have reason to believe that such person is not only credible, but is in a position to carry the inducement into effect."

And in section 662:

"A confession is admissible when voluntarily made to a public officer, even though the prisoner be in custody of such officer, unless the confession be in some sense elicited by threats or promises."

In section 661 it is said that legal imprisonment is not such duress as to exclude a confession in the absence of threats or promises. In Spicer v. State, 69 Ala. 159, the court say:

"Nor was it material, in the absence of all evidence tending to show that the confessions were involuntary, that they were made while the defendant was under legal arrest, and in response to questions propounded by the officer having her in custody."

And in Bishop's New Criminal Procedure (2d Ed.) vol. 2, § 1238:

"That the confessing person was, whether lawfully or unlawfully" under arrest, "while it is a circumstance to be considered, does not alone exclude the confession; yet added facts may."

And see State v. Raftery, 252 Mo. 72, 158 S. W. 585, and an elaborate note on the subject, citing cases on this point and others here raised, appended to the case of Ammons v. State, 18 L. R. A. (N. S.) 768–874, and a later note under Lindsay v. State, 50 L. R. A. (N. S.) 1077–1089. That the accused was not represented by counsel will not alone exclude a confession. McCleary v. State, supra; State v. Gorham, 67 Vt. 365, 31 Atl. 845; State v. Patterson, 68 N. C. 292; Commonwealth v. Sturtivant, 117 Mass. 122, 19 Am. Rep. 401.

[4] The statements do not appear to have been made under any promise or threat, or any improper inducement. On the contrary, the stenographer, who was present and took down the statement and transcribed the same as aforesaid, and who was the only witness on the subject, testified that neither of the officers made any threat or tried to influence the defendant to say anything that he did not want to say; that he exhibited no sign of unwillingness, but seemed ready, willing, and anxious to tell his story; that the prosecuting attorney told the defendant that he would take the story, but that he need not tell anything if he did not want to, and that whatever he said might be used against him later. And it appears that the first question asked the defendant was: "You are telling this of your own free will, are you, Dewey, knowing that it may be used in court against you later?" and that he answered, "Yes." And there was no attempt to show, nor do we find anything in the evidence to indicate, that the defendant was frightened or that he felt compelled to make any statement by the fact that he was restrained of his liberty or confined in jail, or the remark of the prosecuting attorney that he would take the story. It is contended by his counsel that the prosecuting attorney's statement that he would take the story might have been understood by the defendant as in the nature of a command. But the caution to the defendant in that connection that he need not tell anything if he did not want to, and that what he said might be used against him later, and his affirmative answer to the question that he was making the statement of his own free will, knowing that it might be used in court against him later, in the absence of any explanation to the contrary, seems to dispose of that contention.

[5] The fact that the defendant was only 17 years of age did not render his statement made under the circumstances aforesaid, inadmissible. Wharton's Cr. Ev. (10th Ed.) 676a; 1 R. C. L. p. 561; and see notes citing cases in 18 L. R. A. (N. S.) 786; 50 L. R. A. (N. S.) 1082. Like other facts it is a circumstance proper to be considered in determining whether his statements were made freely and voluntarily, but we find nothing in the evidence or in the record to show any lack of intelligence or understanding on the part of the defendant that might tend to destroy or throw doubt upon the voluntary character of his statements. In Commonwealth v. Cuffee, 108 Mass. 285, it appeared that a boy 13 or 14 years old, while under arrest on suspicion that he was guilty of murder, made statements to the police officers tending to show his guilt, and it was held that those statements were admissible, in the absence of any evidence of threats or promises, other than might be inferred from his arrest and custody and his examination by the officers without warning him of his right not to answer unless choosing to do so, or offering him an opportunity to consult with counsel or friends.

[6] Several assignments of error relate to the exclusion of evidence of specific acts of violence by the deceased upon the defendant and upon other members of the family, and threatening remarks, when the defendant was present, prior to the homicide. The stated purpose of such evidence was to show what the defendant had to apprehend from his former experience with the deceased, as to facts coming under his own observation. It was sought to show these facts by the testimony of Mote Mortimore and Mrs. Mortimore. The grounds of the objection were that the evidence was incompetent and irrelevant, not part of the res gestæ nor the proper way to prove character, and not showing threats of injury to Alla. The de-

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fendant was permitted to introduce evidence as to the general reputation of the deceased in the community for violence, and the prosecution introduced testimony on the same subject in rebuttal, resulting in some conflict in the evidence as to that matter. When the evidence of such specific acts and threats was offered, Alla and Mote Mortimore had testified concerning the facts of the homicide, the former as a witness called by the prosecution and the latter as a witness for the defendant. Alla stated the circumstances substantially as follows:

We were eating breakfast; my father came to breakfast, and we were eating oatmeal; he sat down at the table and asked my mother for some gravy. He didn't eat oatmeal that morning; mother started for the gravy, and he jumped up from the table with his plate and told her he would get it himself. He cussed her. He went to the stove with his dish. I told him I didn't think he was acting the man. He whirled around to me and he said: "Why, God damn your soul! I will choke the head off of you!" and he rushed to me, shoved me back in the window, and was trying to choke me, and he was shot. Those were the only words I had with him that morning. Mote, Dewey, and myself and a fellow named Smith were at the table at the time. Father had sat at the head of the table and Mote at his left. I was on his right. Smith sat next to me, and Dewey next to Mote. Mother was not at the table. "Q. What did your father do to you? A. Well, he blacked one eye and skinned my hand up. Q. Skinned your hand up? A. Yes; and made my nose bleed. Q. Did he at any time get hold of your throat? A. No, sir. Q. Did he push you up against the window, or up against this man Smith? A. No; the table was in the other wall. He shoved me back against the window and Smith's chair was up against mine, shoved up against the window. Q. Is Smith here now? A. No. Q. Where is Smith? A. I don't know. Q. What did Smith do? A. I don't know as he did anything. Q. As I understand it, you and your father were up spatting at each other. A. No; I was in my chair. Q. He pushed you and your chair all up to the window? A. Yes; * * * I was sitting at the table. He just rushed back and shoved me. The chair slipped back by the window down behind Smith. Q. Your father struck you, and you heard the shot; that is all you know about it? A. Yes, sir; that is all I know about it. Q. Did you hear a warning of any kind? A. No. Q. What did your father do when you heard the shot? A. He fell is all I know. Q. Where did he fall? A. Stretched out on the floor. Q. What did you do? I got up as soon as I could. Q. Where did you get up from? A. Down in the chair. Q. Where were the other members of the family? A. I couldn't say; my mother was right behind him. * * * Q. What did you do, Alla? A. I went out in the kitchen and said we would have to do something, and I believe I went outdoors. Q. You went out of the house? A. Yes, sir. Q. Were you badly hurt? A. Well, my nose was bleeding. Q. What did Dewey say to you? A. Why he told me, he says, 'Oh Al.' he says, 'my father is killed,' or something like that. Q. Did he say he had killed him? A. I couldn't say. * * * Q. What else did Dewey say to you? A. Nothing. Q. What did you hear him say to Mote? A. Didn't hear him say anything to Mote. * * * Q. What did you hear him say to your mother? A. I didn't hear him say anything to her, not that I know of. Q. Where was this man Smith all the time? A. I couldn't say where he was."

On cross-examination, he stated that his father was drunk that morning; that his father said to his mother when he got up to get the gravy, "God damn you; I will get it myself." Following that, he testified as follows:

"Q. Why was he displeased with your mother? A. I couldn't say he was displeased. She was too slow for him, I suppose. Q. What was her condition at that time? A. My mother has rheumatism. Q. When he had you shoved back against the window, could you get up? A. No. * * * Q. What was he doing at the time he was shot; what was he trying to do? A. Well, it was just trying to get me by the throat, I suppose. Q. Don't you know what he was trying to do? you say you suppose. A. That is what he was trying to do; he was clutching at my throat as much as he could. He kept trying to, I kept catching him by the hands as much as I could to keep him from it. * * * Q. Where did you say your mother was? A. She was right behind him. Q. What was she doing? A. Trying to get him off. Q. Was she having any effect, or was she able to? A. She didn't seem to. Q. Couldn't you tell whether she was getting him off? A. Well, she wasn't getting him off. Q. You say you and him had had no difficulty at all? A. No, sir; never had. Q. The only thing you had done was to protest against his treatment of your mother? A. Yes, sir; that is all. Q. Was your father in the habit of drinking? A. Yes. Q. Did he have any liquor in the house at that time? A. No, sir; he drank the last of it that morning. Q. Did he have any liquor at any other place? A. There was at the station at Glenrock. Q. What did he have there? A. A keg. Q. It hadn't been delivered to the house? A. No. Q. Do you know where Mote was at the time your father was trying to get you by the throat? A. No; I couldn't say. Q. Had he ever made any threats against the family prior to that time? A. He had. Q. What had he threatened to do? A. Well, he said he would kill us all if we ever tried to do anything with him."

On redirect examination he was asked whether his father struck him in the face with his fist or his open hand. He answered:

"I think it was his open hand; he was trying to catch me by the neck, and I was trying to guard him off."

Mote Mortimore related what occurred on that morning as follows:

My oldest brother got up first, and my youngest brother, Dewey, he told me, "I can beat you dressing." I told him, "I don't think you can," and he jumped out of bed and went to dressing, and I waited until he was almost dressed; then I got up and commenced to dress, and after he got dressed he said, "I told you I could beat you," and he went on down stairs. By the time he got to the bottom of the steps I was at the top steps ready to come down, and he went on down into the dining room and was putting on his overshoes when I got down the steps, and my coat was hanging by the dining room door, and the door was open. I walked out to the door and got my coat, and when I turned around, putting it on, Dewey walked out into the kitchen right behind me. I went on out and started to do the chores, and Dewey come out and helped me. After we got through, we went in the house, and he told me, "Let's play some music." I told him, "All right." I got the violin and he got the guitar, and he and I sat in the dining room by the stove and played until my mother hollered breakfast. I got up to put the violin away. He told me, "Don't put it away; we will play a tune or two after breakfast." I told him, "No; I have to make off an order after breakfast, and I want to get through in time so that my father can catch the train to Douglas." So I put the violin away and walked over and sat down to the table. Just after I sat down my mother asked my

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father if he wanted some oatmeal. He says: "No; where is the gravy?" She says, "I am going to get it now." She was going to the safe then after a bowl. He commenced swearing at her, and jumped up and went out to the kitchen with his plate and was helping himself to gravy, and my oldest brother told him that he was not acting the man. He whirled around. The kitchen cabinet was sitting right by the kitchen door leading into the dining room. He put his plate, kind of pitched it over on the table. He says, "Why, God damn your soul! I will choke you to death!" He ran in and my oldest brother jumped to get up from the table. He knocked him into the window and had him down so he couldn't do a thing, and grabbed him by the throat. My brother threw up his hands and tried to catch him, and instead of catching him by the throat he got him by the face. One finger was in his left eye. I tried to get around the table to him, and when he knocked him back and grabbed him, blood commenced running down my brother's face and on my father's hand. It looked as if he pulled all the skin and meat off of my brother's face as his hand come off, and I thought that my oldest brother was hurt pretty bad from the way it looked. Just then the gun popped, and he fell. My oldest brother was trying to get up at that time. Q. What was done at that time? A. Well, we were all—we didn't know what to do—it all happened so quick that we didn't hardly realize what had happened, and as soon as he fell, I whirled and looked at the door where the guns all sat. There was no one in sight, all the guns was sitting in the corner where they always sat. We went out into the kitchen, and I helped my mother to the lounge, and we got her some water. After that I went back into the room where my father was, and I stayed there with him for quite a while. I then took all the guns out of that room and put them in another room.

He said, further, that his mother followed his father into the dining room, when he said that he would choke Alla's head off, and took hold of him saying: "Papa, you wouldn't treat Alla that way at the breakfast table, would you;" that he paid no attention to her, but kept right on, and he (the witness) tried to get around to him, but it all happened in a few seconds; also that his father commenced cussing his mother before he got up from the table, and kept cussing her until Alla told him he didn't think he was acting the man.

Mrs. Mortimore in her testimony mentioned the violin and guitar playing by Dewey and Mote, and stated the other facts substantially as above. She testified as to the remarks preceding the assault as follows:

"I asked Mr. Mortimer if he wanted oatmeal. He said, no; he wanted gravy. 'Where is the gravy?' I hadn't yet put the rest of the breakfast on the table. So I told him, 'I will get gravy, and put the rest of the breakfast on the table.' He commenced to swear, and he says, 'I don't need any woman to wait on me. I will wait on myself;' so he took his plate and he went to the stove and was helping himself to gravy. In the meantime he was talking very unkind against me. I went to the safe to get the bowl to pour the gravy out when he left the chair. Alla says to him, he says, 'Pa, why don't you act like a man and have some principle,' or something to that effect, and he turned from the stove and started back to the dining room. He set his plate down on the table, swore to Alla, and said 'I will choke your head off,' or he 'will choke him to death'—I couldn't say, the one or the other."

It was also shown by the testimony of Mote Mortimore that when the deceased was under the influence of liquor he was very quarrelsome, troublesome, and dominating, and would jump on to people and hit them with anything he had in his hands if they did not do just as he wanted them to do; also, in answer to a question as to his habit in regard to going armed, that he carried a 45 automatic whenever he went any place, and lots of times when on the ranch, and that he had two pistols, one of which he kept under his pillow and the other hanging by the head of the bed; that he frequently made threats, some of the times when the whole family was present, to use those pistols on his mother and the whole family, saying that he would kill the whole family if he started in on any of them; that such remark was made a number of times, and that he also had said in the presence of defendant and Alla that if he ever killed one member of the family he would kill them all; that on the evening prior to the killing, in the conversation with Mote in the dining room, the deceased said to him: "I will see all of you buried." Mote also testified that when the deceased was assaulting Alla at the time of the homicide, his face was white and his teeth gritted and he was scary looking.

The defendant was permitted to show that on one occasion when the deceased wanted some writing paper the defendant went from the dining room where they were to the desk in the sitting room to see if he could get some for him, and the rest of the family, except Dewey and the deceased, went up stairs; that, hearing a racket down stairs, they rushed down, and found the deceased on top of Dewey on the floor in the sitting room; that he had Dewey by the hair with one hand, and when the others went in the deceased got up, walked into the dining room, got all his guns and pistols, all loaded, and put them on the desk in front of him; that the rest of them then left the house, for they were afraid the deceased might use the guns; that Alla went out first and saddled his horse, saying he was going to have the father arrested, and the mother asked him not to do it for the sake of the family; and that he had said that if anybody ever came to arrest him, he would kill them if possible.

The several offers to prove other specific acts of violence by the deceased known to defendant, which were excluded, as well as the threatening remarks, were made after objections had been sustained to questions intended to bring out the facts stated in the offers. It was sought to prove thereby that on the morning of the shooting, and just prior thereto, the deceased, when passing Mrs. Mortimore, one of whose legs was crippled from inflammatory rheumatism and the knee swollen, kicked her on that leg and laughed when she screamed; that a short time before the homicide, in the presence of Alla, Mote,

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and the defendant, the deceased caught Mrs. Mortimore by the hair of her head and beat her head against the wall, and the sons were afraid to interfere and protect her; that, in the presence of Alla, Mote, and the defendant, the deceased on two occasions brutally assaulted their sister, 19 years old, on one of the occasions knocking her down and beating her, and on another knocking her down and beating her head upon the floor; that on other occasions the deceased mistreated her in the presence of Alla, Mote, Mrs. Mortimore, and the defendant, by twisting her arm so that the bones would stick out and the arm remain swollen for weeks at a time; that during the spring preceding the homicide, when the defendant had been ill at Casper and was home at the ranch and an invalid, the deceased knocked him down, got his head under the safe, and was on top of him beating him, when he was induced to get off and let him alone, that assault occurring after the deceased had ordered the defendant to get up and go to the field and mow the latter had said that he was ill and unable to go; that in July, 1914, the deceased assaulted Mrs. Mortimore at a neighbor's ranch, where they were visiting, which resulted in blacking her eyes, and when she returned home with her eyes still black and swollen she told the three sons and the other members of the family of said assault, and that it was the cause of her eyes being in that condition; also that in the presence of Alla, Mote, the defendant, and other members of the family the deceased made threats to or concerning Mrs. Mortimore, at one or more times saying that he would strangle her, twisting his hands around to show how he would do it, and at other times that she would wake up some morning and find her stomach full of lead, or that he would shoot seven balls into her stomach and the other into his own; that the deceased, in the presence of the three sons and others, used vulgar and indecent language to Mrs. Mortimore, and called her a brutal offensive name and addressed the sister by certain offensive and insulting epithets, stated in the offer.

It appears that the evidence of these facts was offered to show the defendant's knowledge of the character of the deceased for violence and brutality based upon his own observation. For that purpose, where there is evidence tending to show that the defendant acted in self-defense, or, as in this case, in defense of another, evidence of specific acts of violence by deceased in the presence of the defendant, or communicated to him before the homicide, is held to be admissible by many of the authorities, and we think upon strong and convincing grounds. It is true that the general rule permits the character of the deceased, when admissible at all, to be shown only by evidence of general reputation, and not by evidence of specific acts. Evidence of the violent and dangerous character of the deceased known to the defendant is admissible, where there is evidence tending to prove that the latter acted in self-defense, or in defense of another for whom he might rightfully so act, as an aid in determining the reasonableness of the defendant's apprehension of danger at the time of the homicide. 1 Wharton's Cr. Ev. (10th Ed.) § 63A. And it is held competent to show such character by evidence of general reputation in the community, on the theory that the defendant may be presumed to know the general reputation of the deceased in that respect. But in several well-reasoned cases it is held that former specific acts of violence of the deceased, showing his brutal or dangerous disposition and character, known to the defendant, that is, acts committed in his presence, or communicated to him before the homicide, are admissible in evidence, not for the purpose, primarily, of showing the deceased's character, but to explain the defendant's motive and what he might reasonably have apprehended as to the danger. People v. Curtis, 52 Mich. 616, 18 N. W. 385; People v. Harris, 95 Mich. 87, 54 N. W. 648; People v. Farrell, 137 Mich. 127, 100 N. W. 264; State v. Burton, 63 Kan. 602, 66 Pac. 633; Boyle v. State, 97 Ind. 322; Sneed v. Terr., 16 Okl. 641, 86 Pac. 70, 8 Ann. Cas. 354; Bailey v. People, 54 Colo. 337, 130 Pac. 832, 45 L. R. A. (N. S.) 145, Ann. Cas. 1914C, 1142; Bowlus v. State, 130 Ind. 227, 28 N. E. 1115; State v. Beird, 118 Iowa, 474, 92 N. W. 694; Bell v. State, 69 Ark. 148, 61 S. W. 918, 86 Am. St. Rep. 188; Commonwealth v. Garanchoskie, 251 Pa. 247, 96 Atl. 513; Campbell v. Commonwealth, 88 Ky. 402, 11 S. W. 290, 21 Am. St. Rep. 348; State v. Felker, 27 Mont. 451, 71 Pac. 668; Foster v. State, 102 Tenn. 33, 49 S. W. 747, 73 Am. St. Rep. 855; State v. Williams, 168 N. C. 191, 83 S. E. 714; Bullock v. State, 73 Tex. Cr. R. 419, 165 S. W. 196; Williams v. State, 44 Tex. Cr. R. 300, 70 S. W. 756, 100 Am. St. Rep. 855. See, also, Wharton on Homicide (3d Ed.) § 272; 6 Ency. Ev. 780; note to Sneed v. Terr., in 8 Ann. Cas. 357; note to State v. Feeley, 3 L. R. A. (N. S.) 372; and note to State v. Thompson, 124 Am. St. Rep. 1029, 1030.

The authorities to the contrary seem to regard such evidence as an attempt to show the character of the deceased. But we think the distinction between evidence for that purpose and evidence to show defendant's actual knowledge of the deceased's character, in such cases, is coming to be more generally recognized, and that it is a reasonable one. The reason for it appears to us to be at least as strong, if not stronger, than that which permits proof of the general reputation of the deceased for violence. Upon this question the court, in Sneed v. Territory, supra, say:

"If the offer of evidence under consideration here can be classed as an attempt to prove character or reputation by specific acts, then it falls within an exception to the general rule; but we think that, while the evidence sought to

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be introduced may tend to show the character of the deceased, yet the purpose of its introduction and the reason for its admissibility was that it showed knowledge in the defendant of the violent temper of the deceased. * * * The knowledge of the defendant, derived from such personal observation, as well as otherwise, of the violent temper of the deceased, and his liability to attack persons without cause, is a most important circumstance in determining from the standpoint of the accused the reasonableness of the danger apprehended by him, and from which the defendant might estimate the conduct of the deceased, the character of the attack made upon him, and what one might expect from his assailant, as well as that which he might at the moment deem necessary to guard himself against. Certainly the knowledge, derived from this source, of the acts of the deceased showing his disposition for violence and a depraved condition of mind, would be as likely, or more likely, to affect the mind of the defendant than general information he might have obtained, in common with the community, that the deceased was a man of high temper and violent disposition when in a state of intoxication."

In Boyle v. State, supra, in holding that it was error to exclude communications made to the defendant by the deceased the night before the homicide, to the effect that he had shot one man and stabbed another, the court, by Niblack, J., say:

"As, in personal conflicts, every man is permitted, within reasonable limits, to act upon appearances and to determine for himself when he is in real danger, it would seem to follow, as an inevitable consequence, that whoever relies upon appearances, and a reasonable determination upon such appearances, as a defense in a case of homicide, ought to be allowed to prove every fact and circumstance known to him, and connected with the deceased, which was fairly calculated to create an apprehension for his own safety. Any narrower rule than this would, we think, prove inadequate to full justice in all cases of homicide, and would, in many cases, operate as a serious abridgment of the law of self-defense."

The principle permitting this kind of proof to show the defendant's knowledge, as bearing upon the reasonableness of his apprehension of danger at the time of the homicide, is approved in Wigmore on Evidence, wherein the learned author says that:

"The fact that the circumstance creating apprehension is a single act or series of acts, instead of a general character, does not necessarily destroy its capacity to create apprehension. Nor does its distance in time from the moment of the affray necessarily have that effect. Such particular acts may or may not in a given case be calculated to create apprehension; but there is no reason for a fixed rule of exclusion, invariably forbidding their consideration. * * * Nevertheless, in the majority of jurisdictions, such evidence was, for a long time, absolutely excluded. In some instances this was probably due to a notion that the deceased's character is sought objectively to be shown by particular acts; but the real purpose is merely to show such conduct as would naturally excite apprehension, whether it objectively indicates a fixed train of character or not. Certainly all the analogies of the law (apart from the common sense of the situation) favor such evidence. * * * The true solution is to exercise a discretion, and to admit such facts when common sense tells us that they could legitimately affect a defendant's apprehensions. The state of the law in more recent times has come, on the whole, to favor the admissibility of such facts." 1 Wigmore on Ev. § 248.

In the Michigan Case of People v. Harris, supra, after stating that it was competent for the defense to show any facts calculated to affect the mind of the accused or to warrant his apprehension of danger, the court say:

"Suppose that the defense could have shown that the accused had been informed of the fact, or had had personal knowledge of the fact, that in another encounter the deceased had brutally kicked or bitten or choked or stamped upon his antagonist, can it be said that such knowledge or information would not have materially increased his apprehension of danger? * * * His guilt must depend upon the circumstances as they appeared to him, and his mental condition must necessarily be materially affected by any knowledge he possessed of the physical strength or violent temper of the deceased, or his violence when in anger."

And, after referring to Hurd v. People, 25 Mich. 405, the court further say:

"The language of that case is equally applicable to this, for knowledge obtained from others or from personal observation of particular acts of violence would be as likely to affect the mind of the prisoner as general information that he might have obtained, in common with the community, that deceased was a man of high temper."

The underlying principle is that stated in Bishop's New Criminal Procedure (2d Ed.) vol. 3, § 610, as follows:

"Under a claim of self-defense, where the necessity of the defendant's resorting to it should be judged of by the facts as they appeared to him, whatever they truly were, he may give in evidence whatever he knew of the character, prior contduct, threats, or other utterances of the person with whom he was contending, which, not as showing that the man was bad, but that in the special instance and circumstances he was dangerous, might reasonably have place among the considerations guiding his actions."

And in Wharton's Criminal Evidence, § 84:

"Taking the authorities as a whole, therefore, we may hold that it is admissible for the defendant, having first established that he was assailed by the deceased, and in apparent danger, to prove that the deceased was a person of ferocity, brutality, vindictiveness, and of excessive strength; such evidence being offered for the purpose of showing, either: (1) That the defendant was acting in terror, and hence incapable of that specific malice necessary to constitute murder in the first degree; or (2) that he was in such apparent extremity as to make out a case of self-defense; or (3) that the deceased's purpose in encountering the defendant was deadly. * * * And it cannot now be questioned that this is the universal rule in this country and in all prosecutions for homicide, where the defense is self-defense; proof of the dangerous character of the deceased, known to the defendant, and affording him reasonable grounds for belief that he was in imminent danger of death or great bodily harm at the hands of the deceased, only averted by the taking of life, is relevant."

The court, by McClain, J., in State v. Beird, supra, say that the admission of evidence, showing the violent, quarrelsome, or reckless disposition of the deceased, or his previous threats towards the defendant, if known to the defendant at the time of the affray,

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where self-defense is relied on, is under the well-established principle that one who is assaulted and is acting in self-defense is justified in determining, as a reasonable person, the extent of the peril in which he is placed, by taking into consideration the violent character or previous threats of his assailant, as known to him; and:

"In the application of this principle it has been held that instances of specific acts of violence to others on the part of the deceased, which had come within defendant's observation, or had been communicated to him, may be shown" (citing People v. Harris, supra).

And upon that principle, and apparently approving the rule as applied in the case cited admitting evidence of specific acts of violence to others, it was held to be error to exclude evidence of acts of aggression by the deceased towards other persons a short time before, and in the course of his progress to the scene of the affray in which he was killed by the defendant, though such acts were not known to the defendant; it appearing that the defendant claimed to have acted in self-defense.

We are convinced that the better reasoning sustains the rule that such evidence is admissible, under a claim of self-defense, where there is evidence tending to support it, when the facts might have affected defendant's apprehensions. There was in this case, not merely an impending assault by the deceased upon the defendant's brother, but an actual and violent assault by one of greater strength and with the advantage of position, immediately following a threat, seemingly made in anger, which, if carried out, might result, not only in great bodily harm to the one assailed, but the taking of his life. That he was in danger of some bodily harm was apparent. The question then was the probability of the assault continuing and the extent of the danger; and we think it clear that the defendant's apprehension as to that matter might reasonably have been affected by his knowledge of the previous assaults upon himself, his mother, and sister. We are of the opinion, therefore, that the evidence to show such acts was admissible, and that its exclusion was error and prejudicial; and the prejudice was enhanced by the conflict in the evidence respecting the general reputation of the deceased. We include in this the evidence offered to show the assault by the deceased upon his wife when visiting at another ranch, and immediately communicated by the latter to the defendant and his brothers in explaining, on her return home, what caused her eyes to be blackened and swollen. The mistreatment of Mrs. Mortimore by the deceased on the morning of and just before the homicide by kicking and hurting her crippled leg was clearly admissible for the reason aforesaid, and also as showing the state of mind of the deceased at the time.

[7] The offers to prove certain threats concerning Mrs. Mortimore, not accompanied by any assault or followed by an attempt to carry out either threat, were properly excluded. We are not prepared to hold that mere threats may show a violent and dangerous character. Such threats, though suggestive of an ugly temper or a mean and brutal disposition, might be made without any intent of carrying the same into execution, or by one never guilty of a violent assault upon another person. The only possible ground, it seems to us, upon which they could be deemed to have affected the defendant's apprehensions would be that they might have added something to the defendant's knowledge of the deceased's character, in connection with the violent acts known to him. But it was not offered to show that they were in fact connected with those acts, and we think it would be going too far to hold such isolated threats admissible as bearing upon what the defendant may reasonably have apprehended at the time of the homicide, from his knowledge of the deceased's character. Threatening remarks and conduct of the deceased towards or concerning the family were allowed to be proven, and we think properly.

[8] The evidence offered to prove that the deceased had addressed his wife and daughter by abusive or insulting epithets was properly excluded. We are unable to see how that fact could have had any legitimate effect upon what the defendant may have reasonably apprehended.

[9] Error is assigned upon the refusal of the court to permit Mote Mortimore and Mrs. Mortimore, in answer to questions propounded to them for that purpose, to state whether the defendant was happy or angry on the morning and at the time of the homicide. The questions propounded to Mote were:

"What was Dewey's frame of mind that morning, if you could determine from his conduct and actions?" "What would you say as to whether or not he was in a happy frame of mind?" "Do you know whether or not he was angry that morning?"

He was also asked:

"What were Dewey's actions to indicate whether he was in a happy or unhappy frame of mind?"

The answer to the last question, "He seemed to be happy," was stricken out on objection that it was a conclusion. Before the question asking him if he could say whether or not the defendant was in a happy frame of mind, the witness had affirmatively answered the question if he could determine whether or not he was in such a frame of mind. These questions were asked by counsel for defendant on direct examination. Mrs. Mortimore was asked this question, "Was Dewey angry at the time that he shot, as far as you knew?" She answered, "He was not." An objection, then interposed, was sustained, and the ruling excepted to. But she was next asked whether she knew at that time whether or not he was angry or what the condition was, and she answered:

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"I don't think he was. There was nothing happened to cause him to be angry."

Because of this answer, which remained in the evidence, no prejudice would seem to have resulted from the ruling upon the preceding question and answer, even though the answer be regarded as stricken out. It was not ordered out, though the objection was sustained.

The right of a nonexpert witness to state his opinion regarding the appearance and demeanor of another was considered in Horn v. State, 12 Wyo. 80, at pages 148–152, 73 Pac. 705, wherein it was held that a witness was properly permitted to state the manner of the defendant as to sincerity in making an alleged confession. It was held that the testimony was admissible under the rule allowing nonexpert witnesses to state their opinion concerning another's appearance and demeanor, which are incapable of adequate description by other means; and we stated that such opinions are received on the ground of necessity, since from the nature of the fact sought to be elicited no better evidence is obtainable. A number of cases announcing that rule were cited, and we quoted with approval from Hardy v. Merrill, 56 N. H. 227, 22 Am. Rep. 441, among other remarks of the court in that case the following:

"And so, also, in the investigation of mental and physchological conditions—because it is impossible to convey to the mind of another any adequate conception of the truth by a recital of visible and tangible appearances, because you cannot, from the nature of the case, describe emotions, sentiments, and affections, which are really too plain to admit of concealment, but, at the same time, incapable of description—the opinion of the observer is admissible from the necessity of the case; and witnesses are permitted to say of a person: 'He seemed to be frightened;' 'He was greatly excited;' 'He was much confused;' 'He was agitated;' 'He was pleased;' 'He was angry.' All these emotions are expressed to the observer by appearances of the countenance, the eye, and the general manner and bearing of the individual—appearances which are plainly enough recognized by a person of good judgment, but which he cannot otherwise communicate than by an expression of results in the shape of an opinion."

See 1 Wharton's Cr. Ev. (10th Ed.) § 460; State v. Vanella, 40 Mont. 326, 106 Pac. 364, 20 Ann. Cas. 398. We think it was competent for the witness to state whether on the morning of the homicide the defendant was or appeared to be happy or angry, or whether at the time of the homicide he was or was not angry, or what appeared to be his mental condition in that respect. The matter is one of mixed fact and opinion, and the opportunity of the witness to have noticed the condition testified about and how closely it was noticed may be tested on cross-examination, and the weight to be given to the testimony will be for the jury to determine.

[10] Other rulings of the court relating to the evidence here assigned as error are discussed in the briefs under the same head as the rulings last above considered. Objections were sustained to the following questions propounded to Mote Mortimore by counsel for defendant:

"When he was making this assault upon your brother Alla, state whether or not you thought he was in danger?" "At that time state whether or not you thought there was any danger of either death or great bodily harm to your brother Alla?"

Whether these questions called for the opinion of the witness as to whether the danger was imminent, or an expression of what he thought about it at the time, the testimony would be incompetent. The situation was capable of adequate description without stating the observer's impressions or conclusions as to the probable result. If it was competent to show what this witness thought as to the danger, it would also be competent for the prosecution to show by others, if any, who may have been present, what they thought, and that they thought differently about it. But the reasonableness of the defendant's apprehensions is not to be determined by what other persons present at the time may have thought or concluded as to the existence or imminence of danger.

[11, 12] Mote was also asked by counsel for the defendant what his father was trying to do when he was shot. An objection to the question as calling for a conclusion was sustained. Thereupon he was asked what his father was doing, which he answered by saying: "He was trying to get hold of my brother's throat." A motion to strike out that answer as not responsive was sustained. By the next question he was asked to state more in detail what the father was doing, and he then stated that he had his brother down in the window, grabbed at his throat, and caught him in the face. That answer seems to have explained the situation sufficiently to remove any prejudicial effect of the rulings upon the preceding question and answer, if erroneous; and the witness had made a similar previous statement. But to say that one person was trying to get hold of another's throat need not necessarily be a mere opinion or conclusion; it may be intended as a statement of a fact, as describing the acts or movements of the person referred to. The statement of a witness, "It looked to me as though they were trying to get hold of him to get him down," was held to be a mere conclusion, in State v. Yeater, 95 Kan. 247, 147 Pac. 1114. The attending circumstances may tend to explain what was intended, and whether a remark about what one was "trying" to do is stating a fact or a mere conclusion. In this case Alla had testified that his father was trying to get him by the throat, and he was trying to keep him from it, thereby, we think, evidently intending to state a fact and not a mere opinion—what he saw and felt of the deceased's actions; probably meaning the same as that he was clutching at or reaching for his throat.

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It is conceded that it would be proper to ask what the deceased was doing. And we think the question should be confined to that or to asking that his acts or motions be described. However, in view of the circumstances, it seems to us that the answer of the witness, "he was trying to get hold of my brother's throat" might be fairly understood to mean, not what the assailant had in mind to do, but what he was actually doing; as though the witness had said that he was grasping at, or, as he did afterwards say, "grabbing at" his throat. While the matter is unimportant because of the subsequent answer and the previous testimony of the same witness, the answer stricken out was not, in our opinion, clearly incompetent as a mere conclusion, or as not responsive to the question.

[13] On defendant's cross-examination of Alla Mortimore he was asked, after having described his father as a large man about 6 feet tall and weighing about 215 pounds, how he compared physically with him (the witness) and "the boys," evidently referring to Mote and Dewey. He answered that there was no comparison at all, he was a stronger man than either of us. He was asked how his father "would compare with all three of you in regard to physical strength." An objection to that question as calling for a conclusion was sustained, and that ruling is assigned as error.

It is generally held to be competent on an issue of self-defense, where the homicide was connected with an actual or threatened physical assault or combat, to show that the deceased was a stronger man than the defendant, as bearing on the imminence of the danger, and also competent for the prosecution to show that there was no such disparity in size or strength as to induce the defendant to apprehend greater danger on account of any such difference. 21 Cyc. 969, 970; 2 Wharton's Cr. Ev. (10th Ed.) § 930; State v. Nett, 50 Wis. 524, 7 N. W. 344. And the rule would no doubt apply where the act is claimed to have been done in defense of another so related to the defendant as to justify such an act, since in such case, every circumstance relevant to the plea of self-defense is relevant to show justification to the same extent as if the homicide had been committed in self-defense, and the person so interfering is governed by the status of the one in whose behalf he claims to have acted. 2 Wharton's Cr. Ev. (10th Ed.) § 932; 21 Cyc. 972; Trapp v. Territory, 225 Fed. 968, 141 C. C. A. 28.

But the authorities are in conflict respecting the method of such proof. The majority of the decisions sustain the right to show the difference in physical strength by the direct statement of a witness competent to speak upon the matter that the assailant or the assailed was the larger or stronger. Wilkins v. State, 98 Ala. 1, 13 South. 312; Commonwealth v. Barnacle, 134 Mass. 215, 45 Am. Rep. 319; Brownell v. People, 38 Mich. 732; State v. Crea, 10 Idaho, 88, 76 Pac. 1013; State v. Buster, 28 Idaho, 110, 152 Pac. 196; Smith v. United States, 161 U. S. 85, 16 Sup. Ct. 483, 40 L. Ed. 626; Sanchez v. State, 69 Tex. Cr. R. 134, 153 S. W. 1133. And see State v. Nett, supra. The contrary was held in State v. Barber, 13 Idaho, 65, 88 Pac. 418. It was held in Stephenson v. State, 110 Ind. 358, 11 N. E. 360, 59 Am. Rep. 216, that it is not competent for a witness to give his opinion of the subject, but that a witness may describe the size and build of the parties, and state the facts of any test of their strength which he may have seen, and may also state whether one seemed to be in more robust health than the other, or that one was active and the other clumsy. The court placed the decision on the ground that there could have been nothing about the appearance of the parties indicative of strength not readily described to the jury. It was held in a Washington case (State v. Cushing, 17 Wash. 544, 50 Pac. 512) that it was improper on the question of the strength of the deceased to prove by a witness that on a certain occasion the deceased exhibited great physical strength in lifting a hog into a wagon, but that where the relative strength of the parties to an encounter is in question, it should be shown only by general reputation, the same as when the character of the deceased for violence is sought to be proved; the court referring to and disapproving Stephenson v. State, supra, in that respect.

There would seem to be much reason for permitting the witness to state the strength of his father as compared with his own, for, having lived with him all his life it is not impossible that he could have acquired such knowledge as to make his statement one of fact, or at least a competent opinion about a matter incapable of adequate description by other means. Smith v. United States, supra. Certainly size and weight cannot always be a sure criterion, and evidence of specific tests of strength, if admissible, might not be sufficient to convey to the mind a clear conception of the matter. In State v. Knapp, 45 N. H. 148, testimony as to the exhibition of strength by defendant in his encounters with others was held admissible on a trial for rape, but the court said that:

"Of course, such testimony would not show respondent's exact strength, but it might tend legitimately to show that he possessed ordinary, or more than ordinary, strength."

That question, however, need not be decided, for whatever may be the proper rule respecting the relative strength of the one assailed and his assailant, we fail to see the materiality of the comparative strength of the deceased and his three sons. The assault was made on Alla, and without any threat at that time of an assault upon either of the others. And it does not appear that the three brothers were acting in concert. We do not

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suppose it would be contended that to justify the homicide as an act in defense of the defendant's brother it would be necessary to show that the three brothers were incapable of overpowering their father by physical means, or that the alleged defense would be overcome by showing that the three brothers by acting together could have prevented further injury to the one assaulted. Hence whether the objection to the question was or was not properly sustained upon the ground stated, the evidence would be immaterial, and the refusal to allow an answer was not error.

[14] The defendant did not go on the stand as a witness, but on rebuttal the prosecution was permitted, over objection that it was not proper rebuttal, to show a conversation between the defendant and others at Glenrock after and on the day of the homicide, in which he said that he had been playing on the piano and his father found fault with it, and he, the defendant, went into another room and played the guitar, and his father found fault with that, and he then went out in the yard or in the field, and when he came back breakfast was ready. The prosecuting attorney stated that this evidence was offered to show a quarrel between the deceased and defendant, and from the remarks of the court in ruling upon the objection, the testimony seems to have been admitted on the theory that it might tend to rebut the testimony of Mrs. Mortimore that there had been no trouble that morning. Proper rebuttal of that testimony would be evidence of the fact of trouble by the testimony of a witness who had seen what occurred, and it may be doubtful whether the defendant's admissions or statements concerning it would be admissible for that purpose. Evidence of a quarrel between defendant and deceased, or of defendant's admissions that there had been a quarrel or trouble between them, would be admissible in chief as tending to show motive, and, as a rule, it ought to be so introduced, thus giving the defendant a clear opportunity to explain or rebut it. But much discretion must be allowed the trial court under the statute (Comp. Stat. 1910, § 6235), providing that after the defendant has produced his evidence the state will then be confined to rebutting evidence unless the court, for good reasons, in furtherance of justice, shall permit it to offer evidence in chief. If the defendant after this evidence had been received on rebuttal had offered himself as a witness, or others, to explain or disprove the statements, it might have been error to deny him that privilege. But, if not strictly rebutting evidence, we are not prepared to hold that the court abused its discretion in admitting it when offered.

[15] The defendant requested an instruction to the effect that if the jury should find that the defendant has some weakness of mind, infirmity of temper, or immature judgment due to youth or any other cause, because of which he is below the average of men, that fact should be considered and the defendant given the benefit of such condition. Even if correct as an abstract statement of the law, which need not be decided, there was nothing in the evidence making the instruction applicable, aside from the age of the defendant, and, if that might be considered, the instruction goes much further. The case cited by counsel (People v. Borgetto, 99 Mich. 336, 58 N. W. 328), is not in point. In that case there was testimony relating to the defendant's mental condition, and the question considered was the competency of certain rebutting witnesses.

[16] The court also refused an instruction requested by defendant on the subject of self-defense, to the effect that the defendant was the best judge of what was necessary to defend himself and of the means to be used for his own protection, and that as a matter of law and common sense the party attacked is obliged to exercise his best judgment at the time as to what shall be done, and his judgment, if honestly exercised, is, to a large extent, controlling, and absolutely controlling, unless the jury find that his exercise of it at the time and under the circumstances was unreasonable under all the evidence. The instruction, in the first place, would not state the situation accurately as to the assault, which was not upon him, but his brother. Its refusal was clearly not prejudicial, in view of the other instructions on the subject of self-defense of which no complaint is made, and which seem to fully and fairly state the generally accepted rules applicable to the case. This instruction seems to have been taken from Kent v. Cole, 84 Mich. 579, 48 N. W. 168, the only case cited in its support. In that case it appears that defendant, in an action of trespass for assault and battery, requested an instruction that defendant was the best judge of what was necessary to defend himself against the attack upon him and all the means to be used for his own protection, and the trial court, referring to that request, charged that it was undoubtedly correct as a technical legal proposition, but added the remainder of what is contained in the requested instruction. The defendant was complaining in the appellate court of the entire charge, and that court held, quoting the charge, that, as a whole it correctly stated the law. It is possible that some of the language used in the requested instruction might make it misleading, particularly that about defending himself, as he was not the one attacked. We think it preferable to follow the more generally approved instructions on the subject.

Error is assigned upon certain alleged remarks of the prosecuting attorney during the trial and in argument, which counsel for defendant contend were in violation of the statute permitting a defendant in a criminal case to testify under oath or make a statement without being sworn, and forbidding

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any comment upon defendant's neglect or refusal to make a statement. The only controversy between counsel as to this matter relates to the making of the alleged remarks and the effect thereof; that is to say, whether they were made as alleged, and how they are to be understood or construed. It may be doubtful whether the exceptions are sufficiently shown by the bill, but we have not looked into that carefully, as we think it unnecessary to consider the questions raised concerning the remarks complained of. They may not arise on another trial, and it is not perceived that their consideration at this time would materially assist in such trial.

For the material and prejudicial errors above pointed out, the judgment will be reversed, and the cause remanded for a new trial.

Reversed.

BEARD, J., concurs. SCOTT, J., did not participate in the decision.

(61 Okl. 305)

ATCHISON, T. & S. F. RY. CO. v. JAMISON. (No. 8029.)

(Supreme Court of Oklahoma. Nov. 28, 1916.)

(Syllabus by the Court.)

Same as syllabus in A., T. & S. F. Ry. Co. v. Jamison, 149 Pac. 195.

Commissioners' Opinion, Division No. 2. Error from District Court, Alfalfa County; James B. Cullison, Judge.

Action by George T. Jamison against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

J. R. Cottingham, S. W. Hayes, Geo. M. Green, and Chas. H. Wood, all of Oklahoma City, for plaintiff in error. Geo. W. Partridge, of Cherokee, and M. C. Garber, of Enid, for defendant in error.

BRUNSON, C. This case presents error from the district court of Alfalfa county, where it was tried after being remanded by this court in its opinion of May 25, 1915, A., T. & S. F. Ry. Co. v. Jamison, 149 Pac. 195. It is now again before us on the identical pleadings, facts, and questions.

The defendant in error admits in his brief that this case was tried on the same pleadings and with practically the same proof as upon the occasion of the former trial, and it is clear to our minds that the decision in the case on the former appeal is decisive of the questions presented by this record.

It is contended that the court committed prejudicial error in failing and refusing to instruct the jury upon contributory negligence. We have examined the instructions given by the court in this case to the jury, and they do not squarely present that issue to the jury, and in the language of the court in the former trial:

"Although requested by defendant, the court wholly failed to charge the jury as to the defense of contributory negligence, * * * which had been properly presented by the pleadings and evidence, considered by the jury, under appropriate instructions."

Because of the error of the court in failing to instruct the jury as above indicated, the judgment should be reversed, and the cause remanded to the trial court with instructions to set aside the judgment and grant a new trial.

PER CURIAM. Adopted in whole.

(62 Okl. 62)

BALL v. HALL et al. (No. 8129.)

(Supreme Court of Oklahoma. Oct. 10, 1916. Rehearing Denied Dec. 19, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⊂⇒758(1)—BRIEFS—SPECIFICATIONS OF ERROR—DISMISSAL.

Where plaintiff in error fails to comply with rule 25 of this court (38 Okl. x, 95 Pac. viii), in that his brief contains no specifications of error relied on for reversal of the cause, as required by said rule 25, the cause may be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3093; Dec. Dig. ⊂⇒758(1).]

Commissioners' Opinion, Division No. 4. Error from District Court, Logan County; A. H. Huston, Judge.

Action by Milo E. Ball against Flora E. Hall and another. Judgment for defendants, and plaintiff brings error. Dismissed.

John A. Remy, of Guthrie, for plaintiff in error. John J. Hildreth, of Guthrie, for defendants in error.

EDWARDS, C. This cause was begun in the justice court of Logan county, and from a judgment in favor of defendants in error was appealed to the district court of Logan county, where a trial was had, and from a judgment in favor of the defendants in error an appeal was prosecuted to this court.

Plaintiff in error fails to set out in his brief the specifications of error complained of, separately set forth and numbered, as required by rule 25 (38 Okl. x, 95 Pac. viii). Plaintiff in error argues certain propositions of law in his brief, but no specifications of error as required by the foregoing rule are made, and this court has repeatedly held that, where such rule has not been complied with by plaintiff in error, the appeal will be dismissed. Eikler v. Badger, 25 Okl. 853, 108 Pac. 359; Mahaney v. Union Inv. Co., 23 Okl. 533, 101 Pac. 1054; Arkansas Valley Nat. Bk. v. Clark, 31 Okl. 413, 122 Pac. 135; Reynolds v. Phipps, 31 Okl. 788, 123 Pac. 1125; Lawless v. Pitchford, 33 Okl. 633, 126 Pac. 782; Indian Land & Trust Co. et al. v. Widner, 35 Okl. 652, 130 Pac. 551; U. S.

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Fidelity & Guaranty Co. v. Overstreet, 38 Okl. 170, 132 Pac. 480; Carver v. Kenyon, 40 Okl. 232, 135 Pac. 1050.

The appeal is dismissed.

PER CURIAM. Adopted in whole.

(62 Okl. 63)

CHICAGO, R. I. & P. RY. CO. v. LILLARD.
(No. 7279.)

(Supreme Court of Oklahoma. Sept. 12, 1916. Rehearing Denied Dec. 19, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⟸1210(1)—DISPOSITION OF CAUSE—PROCEEDINGS ON REMAND.
Where a cause is reversed and remanded by the Supreme Court, with directions to the trial court to "take such other and further proceedings in the matter as shall accord with the Supreme Court opinion," it stands in the court below the same as if no trial had been had, and the parties are entitled to proceed to a new trial of the case in accordance with the law of the case as laid down in the opinion of the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4670, 4710; Dec. Dig. ⟸1210(1).]

2. MASTER AND SERVANT ⟸288(15), 289(8)—INJURIES TO SERVANT—ACTIONS—QUESTIONS FOR JURY.
Where an employé is furnished by the master with a defective tool and calls the attention of the master to the defective condition of such tool and continues at work under specific orders from the master to use such tool, the questions whether he assumed the risk or was guilty of contributory negligence in continuing to use the defective tool are for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1085, 1097; Dec. Dig. ⟸288(15), 289(8).]

3. MASTER AND SERVANT ⟸293(16)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.
Instructions examined, and *held* to be free from error.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1153; Dec. Dig. ⟸293(16).]

Commissioners' Opinion, Division No. 1. Error from District Court, Seminole County; Tom D. McKeown, Judge.

Action by H. G. Lillard against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

C. O. Blake, R. J. Roberts, and W. H. Moore, all of El Reno, and K. W. Shartel, of Oklahoma City, for plaintiff in error. Fowler & Biggers, of Wewoka, for defendant in error.

RUMMONS, C. This action was begun in the district court of Seminole county by defendant in error, hereinafter styled the plaintiff, against plaintiff in error, hereinafter styled the defendant, to recover damages for the loss of his right eye, which, he alleged, was occasioned by a splinter from a steel bit flying off and striking him in such eye, while he was endeavoring to fasten such bit in the socket of the drill. Plaintiff alleges that the drill bit was broken and defective and would not fit in the socket made for holding it; that he was compelled to use the same, and that it was necessary, to fit such bit in the socket, to tap it with a hammer; and that by reason of the defective condition of said bit plaintiff's injury occurred. The defendant answered, pleading a general denial, contributory negligence, and assumption of the risk. This cause has been before this court once before, the judgment in favor of plaintiff having been reversed and the cause remanded. The opinion of the court appears in 42 Okl. 109, 141 Pac. 8, the syllabus of which opinion reads as follows:

"1. When the appliance or machinery furnished employés is at all complicated in character or construction, the employer is charged with the duty of making such reasonable inspection as is necessary to detect defects; but the master is under no duty to inspect simple or common tools, or to discover or remedy defects arising necessarily from the ordinary use of such instruments.

"2. Where an employé is injured in adjusting an ordinary, blunt-ended, straight drill bit, thirteen-sixteenths of an inch in size and eight inches in length, by tapping it into the socket with a hammer, it is error to instruct the jury that 'it is the duty of the employer to use ordinary care in furnishing to his employés safe and suitable appliances with which to perform the work required of them, and also to see that the same are kept in proper repair, and use ordinary care in making proper inspection of the tools as will protect the employés against dangers incident to their employment,' without qualifying such instruction by a statement of the law applicable to the use of simple tools and appliances."

[1] The first error assigned by the defendant is that the trial court erred in setting the case down for retrial upon the return of the mandate, and in not rendering judgment for defendant upon such mandate. Defendant relies, in support of this contention, upon the case of St. Louis & S. F. Ry. Co. v. Hardy, 45 Okl. 423, 146 Pac. 38, which case was an action to compel by mandamus the district judge of Choctaw county to enter judgment in favor of the railway company in the case of St. Louis & S. F. Ry. Co. v. Mayne, reported in 36 Okl. 48, 127 Pac. 474, 42 L. R. A. (N. S.) 645. In the Mayne Case, supra, the judgment of the trial court was reversed, and the cause was not remanded upon the ground that there was no evidence in the case tending to show a violation of any duty the master owed to the servant. When the mandate was sent down the district judge permitted the plaintiff to amend his petition, and undertook to set the cause down for trial. Thereupon the railway company brought action to compel the district judge to enter judgment in its favor upon the mandate of the Supreme Court. In the case of St. Louis & S. F. Ry. Co. v. Hardy, supra, this court ordered judgment to be so entered. We do not think the case last mention-

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ed is authority for the contention of defendant in the instant case. In the instant case the judgment of the trial court was reversed because it erred in instructing the jury that it was the duty of the master to use ordinary care in furnishing the servant safe and suitable appliances by which to perform the work required of him, and also to see that the same was kept in proper repair and to use ordinary care in making proper inspection of the tools as will protect the servant against the dangers incident to his employment. This instruction was held erroneous because it imposed upon the master the duty of inspection of the tools furnished his servants, and it was held that in the case of simple tools no such duty of inspection was imposed upon the master. Because of the error in giving such instruction, the judgment was reversed, and the cause was remanded to the court below. This court, when the case was here before, only passed upon the error in the instruction above mentioned, and did not dispose of the entire case. The cause, therefore, was remanded to the trial court, to be proceeded with in conformity to the opinion of the court, and a new trial thereof was proper, and the court did not err in setting the cause down and trying the same again de novo. State Bank of Waterloo v. City Nat. Bank, 18 Okl. 10, 89 Pac. 206; Ball v. Rankin, 23 Okl. 801, 101 Pac. 1105.

[2] Defendant next complains of the refusal of the court to direct a verdict in its favor. The plaintiff testified that he told the foreman that the drill was broken and it would not work and that the foreman said, "Go on and use it and get that work out;" that the foreman was mad about it, and said, "Damn it, hurry up; go on and use it;" and that he was in a hurry for that piece of work. The foreman denied this conversation. It is contended for defendant that in the case of a simple tool the master is not responsible for injury to the servant resulting from the using of such tool, if it be in a defective condition, even though his attention has been called to such defective condition and he directs the servant to go on and use the tool. It is true that a number of authorities support this contention of the defendant, but we think the better rule is that laid down in N. Y., N. H. & H. R. R. v. Visvari, 210 Fed. 118, 126 C. C. A. 632, L. R. A. 1915C, 9. The court there holds that in case the servant gives notice of the defect in a tool and continues to work with such tool under specific orders from his superior, the question whether he voluntarily and negligently continued to use the defective appliance is a question of fact for the jury. Southern Kansas Ry. Co. v. Croker, 41 Kan. 747, 21 Pac. 785, 13 Am. St. Rep. 320; Missouri, K. & T. R. Co. v. Puckett, 62 Kan. 770, 64 Pac. 631; Wurtenberger v. Metropolitan St. Ry. Co., 68 Kan. 642, 75 Pac. 1049; Choctaw, O. & G. R. Co. v. Jones, 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837, 7 Ann. Cas. 430. There being evidence that the plaintiff used the defective drill under specific and urgent orders from the foreman, there arose a question of fact to be determined by the jury and the court committed no error in refusing to direct a verdict for defendant.

[3] The third specification of error is that the court erred in giving instruction No. 2 of his charge to the jury, which reads as follows:

"The court instructs the jury that it is the duty of an employer to use ordinary care in furnishing to its employés reasonably safe tools with which to perform their work; but in this connection you are instructed that if the tools furnished by the employer to the employé is so simple in its construction, so well understood by men of ordinary intelligence, it is not incumbent upon the employer to inspect the same before furnishing the same to the employé."

This instruction, it is alleged, is defective, in that some phrase is omitted therefrom. While this objection seems to be well taken, the omission could not have misled the jury. It is urged, however, that a graver objection to this instruction is that it leaves to the determination of the jury whether or not the drill bit here in controversy was or was not a simple tool, when it had been determined on the original appeal that it was a simple tool. We find no merit in this contention, for the reason that the court, in instruction No. 4, explicitly advised the jury that the defective tool complained of was a simple tool, and that there was no duty imposed upon the defendant to inspect the same. Instruction No. 4 is as follows:

"The court instructs the jury that under the law and the evidence in this case the alleged defective tool which it is alleged defendant furnished to plaintiff and with which plaintiff is alleged to have been working at the time of receiving the injuries described in his petition was of such a simple character that there was no duty upon the defendant to inspect the same before furnishing it to the plaintiff, and you would not be justified in finding that defendant was negligent in furnishing such tool, although you should further find that it was in a defective condition at the time plaintiff received the same."

The fourth specification of error complains of the giving of instruction No. 3, which is as follows:

"The court instructs the jury that if you believe from a preponderance of the evidence that the defendant failed to use ordinary care in furnishing the plaintiff reasonably safe tools with which to work, and that the same were defective when furnished to the plaintiff, and that the foreman in the defendant's shop ordered the plaintiff to perform said work after being notified by the plaintiff of the defective character of said tools, and you further find and believe from the evidence that the plaintiff was not guilty of contributory negligence, in this, that after discovering the defect in the tool furnished, although ordered by the foreman to use the same, an ordinarily prudent person would not have used the same under the circumstances, and that the plaintiff was injured by losing his eye as a direct and proximate result of the negligence of the defendant in ordering the plain-

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tiff to work with said tools, and you believe the injury was not the result of a risk assumed by the plaintiff in accepting said employment, then you should find for the plaintiff; otherwise you will find for the defendant."

Defendant complains that this instruction is in conflict with the opinion of this court upon the former appeal, in that to instruct the jury that if they believe from a preponderance of the evidence that the defendant failed to use ordinary care in furnishing plaintiff reasonably safe tools with which to work, and that the same were defective when furnished the plaintiff, is tantamount to instructing them that the defendant must use ordinary care in the inspection of tools, because the only way it could furnish reasonably safe tools during a continuous employment would be by having such tools inspected at proper intervals. We think this argument of the defendant more ingenious than forceful, for the reason that the court in this instruction proceeds to say, "and that the foreman in the defendant's shop ordered the plaintiff to perform said work after being notified by the plaintiff of the defective character of said tools," and also instructs them upon the doctrine of contributory negligence. As we have hereinbefore held that the master becomes liable, in the absence of contributory negligence, for an injury to the servant resulting from the use of a defective tool if the master's attention has been called to such defect and the servant is directed to proceed with the use of it, this instruction correctly states the law. In any event, instruction No. 4, above quoted, relieves the charge as a whole from being open to the construction sought to be placed upon it by defendant.

The fifth, sixth, seventh, eighth, ninth, and tenth specifications of error complain of the instructions given by the trial court, Nos. 5, 7, 8, 9, 10, and 11, upon contributory negligence and assumption of the risk. It is urged that the assumption of the risk which defendant seeks to interpose as a defense is not the assumption of risk referred to in article 23, § 6, of the Constitution, and that the court should, as a matter of law, have determined that the defendant assumed the risk of using the defective tool.

The court properly instructed the jury upon contributory negligence, and that if the tool was in such defective condition that an ordinarily prudent person would not have undertaken to use the same, plaintiff could not recover, even though he had been ordered to use the tool by the defendant. The court properly instructed the jury upon the assumption of the risk when he told them that an employé, when he enters the service of an employer, impliedly agrees that he will assume all risks which are ordinarily and naturally incident to the particular service in which he engages. It was for the jury to say whether or not the risk in using this defective tool was so apparent and obvious that the plaintiff assumed it as incident to the particular service in which he was engaged. Enid Electric & Gas Co. v. Decker, 36 Okl. 367, 128 Pac. 708; Dewey Portland Cement Co. v. Blunt, 38 Okl. 182, 132 Pac. 659; Chicago, R. I. & P. R. Co. v. Duran, 38 Okl. 719, 134 Pac. 876; Ft. Smith & W. R. Co. v. Knott, 159 Pac. 847, No. 6573 (not yet officially reported); New York, N. H. & H. R. Co. v. Vizoarl, 210 Fed. 118, 126 C. C. A. 632, L. R. A. 1915C, 9; Chesapeake & Ohio R. Co. v. De Atley, 241 U. S. 310, 36 Sup. Ct. 564, 60 L. Ed. 1016.

Finding no prejudicial error in the record, this cause should be affirmed.

PER CURIAM. Adopted in whole.

DRENNAN et al. v. HARRIS et al.
(No. 8006.)

(Supreme Court of Oklahoma. Nov. 21, 1916. Petition for Rehearing Stricken from Files Dec. 19, 1916.)

(Syllabus by the Court.)

1. GUARDIAN AND WARD ⟸125—SALES UNDER ORDER OF COURT — ACTIONS — LIMITATIONS.

Where land is sold by a guardian under order of the probate court, the purchaser thereof, after the lapse of five years from and after the date of the recording of the guardian's deed, is not barred by the statute of limitations, under subdivision 2 of section 4655 of Revised Laws of 1910, from bringing suit against one who is and has been in possession thereof for more than one year, taking the rents and profits therefrom and claiming to be the owner thereof under a title having no relation to the guardianship proceedings.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 428, 429; Dec. Dig. ⟸125.]

2. GUARDIAN AND WARD ⟸90—SALES UNDER ORDER OF COURT—CONCLUSIVENESS OF ORDER.

Where the petition of a guardian asking for an order to sell real estate belonging to his ward is filed with the county court and contains allegations substantially in compliance with the provisions of the statute, the county court acquires jurisdiction to make the order; and, notwithstanding the proceedings may be irregular, the judgment rendered will not be void and subject to collateral attack.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 349–355; Dec. Dig. ⟸90.]

3. GUARDIAN AND WARD ⟸42, 103 — SALES UNDER ORDER OF COURT—REQUISITES—EFFECT.

The mode of sale by a guardian of his ward's real estate is pointed out by express statute, and he cannot make sale of such lands, except where he acts under an order of the probate court, which directs the manner of sale and specifically describes the real estate to be sold. The sale when made must be reported to the county court and confirmed by it, otherwise no title can pass to the purchaser. The order of sale is merely interlocutory, made in the course of judicial proceedings, and the final order is that of confirma-

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tion after the sale is made. The order of sale and the order of confirmation are both judicial acts; and these two orders concurring make the sale a judicial sale.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 173–185, 191, 378–381, 391; Dec. Dig. ⟸42, 103.]

4. CHAMPERTY AND MAINTENANCE ⟸7(1) — GRANTS OF LANDS HELD ADVERSELY—JUDICIAL SALES.

The champertous statute does not apply to judicial sales, and hence the fact that the defendants had been in possession of the land, claiming to be the owner thereof and taking the rents and profits therefrom for more than a year prior to the time it was sold by the guardian, does not effect the purchaser's title.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. §§ 54–56; Dec. Dig. ⟸7(1).]

5. USE AND OCCUPATION ⟸10—AMOUNT OF RECOVERY.

"The detriment caused by the wrongful occupation of real property, in cases not embraced in sections 2874, 2880, 2881 and 2882, is deemed to be the value of the use of the property for the time of such occupation, not exceeding six years next preceding the commencement of the action or proceeding to enforce the right to damages, and the cost, if any, of recovering the possession." Section 2873, Revised Laws of 1910.

[Ed. Note.—For other cases, see Use and Occupation, Cent. Dig. § 26; Dec. Dig. ⟸10.]

Commissioners' Opinion, Division No. 2. Error from District Court, Grady County; Will Linn, Judge.

Action by Julian C. Harris and another against R. H. Drennan and another for the possession of certain real estate and damages. Judgment for the plaintiffs, and defendants bring error. Affirmed.

Riddle & Hammerly, of Chickasha, for plaintiffs in error. C. S. Arnold, of McAlester, and Bond, Melton & Melton, of Chickasha, for defendants in error.

BRUNSON, C. The parties will be designated here as they were in the trial court.

This suit was instituted to recover the possession of certain real estate mentioned and described in the petition and located in Grady county, Okl., to quiet the title thereto and for damages. The cause was tried to the court without a jury. It made findings of fact and rendered a judgment in favor of the plaintiffs for the possession of the land, canceling the deeds and instruments mentioned and described in the petition as being a cloud on the plaintiffs' title, and for damages in the sum of $1,260, from which judgment an appeal is prosecuted to this court.

At the beginning of the trial a stipulation was entered into wherein it was agreed that the lands in question were allotted and patented to Joanna Frazier, deceased, on the 3d day of November, 1903; that they were selected by the duly appointed, qualified, and acting administrator of the estate of the said deceased allottee. A part of said stipulation reads as follows:

"It is agreed by and between the plaintiff and defendant that the reasonable rental value of the land involved in this case is $210 per year for the years 1910, 1911, 1912, 1913, 1914 and 1915; and it is further admitted that the defendants R. H. Drennan and Henry Ford had been in the open and notorious possession of the lands, claiming title thereto under certain conveyances, to wit, Warranty deeds executed and delivered in 1905, since 1905, and in the continuous and notorious possession holding the same adversely to the plaintiff and all of plaintiff's alleged grantors, and that neither the plaintiff nor any of plaintiff's alleged grantors have ever received any of the rents and revenues from said lands since the date the defendant purchased the same and took possession thereof in 1905, nor have been in possession of said land since said date."

The undisputed evidence shows that, at the time of the death of said Joanna Frazier, she left surviving her, her husband, Harris Frazier, and as her sole heir her daughter, Clara Frazier, a minor.

On the 8th day of August, 1908, Clark Wasson the duly appointed, qualified, and acting guardian of said Clara Frazier, a minor, under order of the county court, executed a guardian's deed to Julian C. Harris, conveying to him all the right, title, and interest of said minor in and to the land in question, which deed was recorded in Grady county, Okl., on the 14th day of August, 1908. On the 1st day of September, 1910, Julian C. Harris conveyed said land by warranty deed to Clarence J. Crockett, which deed was filed for record in Grady county, on the 1st day of January, 1912. On the 30th day of December, 1911, Clarence J. Crockett conveyed said land by warranty deed to T. F. Memminger and E. S. Ellis, which deed was filed for record in Grady county on the 1st day of February, 1913; and on the 7th day of November, 1913, said Memminger and Ellis conveyed said land by deed back to said Clarence J. Crockett, which deed was filed for record in Grady county on the 6th day of February, 1914, and this suit was filed on the 12th day of November, 1914. On the 24th day of March, 1905, Allenton Ward and Eliza Ward conveyed by warranty deed their interest in and to said land to A. J. Waldock, which deed was duly recorded in Grady county; and on the 6th day of March, 1905, said A. J. Waldock by warranty deed conveyed all his interest in and to said land to the said R. H. Drennan, which deed was duly recorded in Grady county, and that thereupon said R. H. Drennan went into the actual and notorious possession of said lands, and since that time he has been in possession thereof holding the same adversely. On the 21st day of November, 1908, Harris Frazier by warranty deed sold his interest in and to said land to said A. J. Waldock, and thereafter on the 25th day of November, 1908, the county court of Choctaw county, Okl., made and entered an order of that date approving said deed, and said deed and order were thereafter recorded in Gray county, Okl.

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In addition to a general denial, the defendants pleaded the five-year statute of limitation against the plaintiffs' right to recover possession of the lands under the guardian's deed; pleaded the three-year statute of limitation against the plaintiffs' right to recover damages for the wrongful withholding of the possession of the lands from the plaintiffs; pleaded the champertous statute against the plaintiffs' right to recover; and also pleaded that the petition of the guardian to sell real estate filed in the probate court did not allege facts sufficient to give the county court jurisdiction to make and enter an order authorizing the guardian to sell said land; and alleged that for that reason the guardian's deed conveying the land to Julian C. Harris is void.

There was admitted in evidence, without objection, letters of guardianship showing Clark Wasson to be the guardian of said Clara Frazier, a minor. There was then offered in evidence, over proper objections and exceptions, a petition of the guardian for the sale of the real estate, the order of the county court directing the guardian to sell real estate, the order of the county court approving sale of the real estate, and the guardian's deed conveying said land to Julian C. Harris.

When the plaintiffs concluded their evidence and rested, the defendants offered in evidence the warranty deed from Julian C. Harris to Clarence J. Crockett, it being offered for the purpose of showing that, at the time the suit was filed by the plaintiff Julian C. Harris, he had no right, title, or interest in or to said lands, whereupon the defendants rested. The plaintiff Harris then asked and was granted permission to open the case and make Clarence J. Crockett a party plaintiff to the suit, to which action of the court the defendants made no objection. The defendants then offered in evidence the deed from said Clarence J. Crockett to Memminger and Ellis seeking to show that Crockett had no right, title, or interest in or to said land, whereupon they rested. The plaintiffs then offered in evidence, over proper objections and exceptions, the deed from Memminger and Ellis, conveying the said lands back to Clarence J. Crockett, whereupon the defendants moved the court to strike from the record said deed, and asked the court not to consider it in evidence, which motion was overruled and exceptions saved. At the conclusion of the testimony the defendants moved the court for judgment, which motion was overruled and exceptions saved.

[1] The plaintiffs' tenth assignment of error is as follows:

"The court erred in failing to hold that the cause of action alleged was barred by the statute of limitations under section 4655, subsec. 2, of Rev. Stat. 1910. Said statute reads as follows: 'Actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods hereinafter prescribed, after the cause of action shall have accrued, and at no time thereafter. * * * Second. An action for the recovery of real property sold by executors, administrators or guardians, upon an order or judgment of a court directing such sale, brought by the heirs or devisees of the deceased person, or the ward or his guardian, or any person claiming under any or either of them, by the title acquired after the date of the judgment or order, within five years after the date of the recording of the deed made in pursuance of the sale.'"

The defendants are seeking to invoke the aid of this statute of limitation to defeat the plaintiffs' right of recovery. The statute of limitation began to run immediately upon the date of the recording of the guardian's deed, which was on the 14th day of August, 1908. This suit was filed on the 12th day of November, 1914, so it can be seen that more than five years' time had elapsed from the date the deed was recorded until the suit was filed. If this statute is applicable to the facts in this case, then the plaintiffs cannot recover. It is contended that this section of the statute should have the same construction placed on it that has been placed on the third subdivision of the same section of the statute, which subdivision provides that actions for recovery of real property sold for taxes shall be brought within two years after date of the recording of the tax deed. It has been held by the Supreme Court of Kansas in several cases that an action to dispossess the holders of premises under a tax deed must be brought within two years, and that the holder of a tax deed out of possession must likewise begin suit to recover possession of the land within two years from the date his tax deed was recorded. But the authorities cited and relied upon by the defendants are based upon tax sales and are controlled by the statutes of the various states from which they are taken. No decisions are cited or relied upon by the defendants placing this construction upon the statute in question. This statute has been construed by the Supreme Court of Kansas in the case of Young v. Walker, 26 Kan. 242. That case was a suit in ejectment brought by Young against Walker to recover possession of certain lands. Young, as administrator of the estate of one Walker, deceased, sold the lands at an administrators' sale to J. C. Clark. Clark then made a deed conveying the land to Young, who went into possession of the same. Walker contends that the administrator's deed was void, because he failed to conduct the sale according to law. The above statute of limitation was pleaded as being applicable in that case—more than five years' time having intervened from the time said administrator's deed was recorded until the suit was filed. The trial court found the issues in favor of Walker, and rendered judgment accordingly.

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Mr. Justice Valentine in delivering the opinion of the court said:

"It was not enacted for the purpose of curing administrators' deeds which were already good. It was really enacted for the purpose of curing administrators' deeds which would otherwise be void; and whether it will so apply as to cure the present deed, and make it valid, we shall now proceed to consider. If it will, it will certainly do justice in the present case; it will prevent the plaintiff from perpetrating a villainous wrong; it will prevent her, after she and the persons under whom she claims have received full payment for the property, from then repudiating such payment and recovering the property; and it will give the property to the defendants, who purchased it in good faith, and paid a fair price for it, and have held possession of it for several years. * * *

"The statute of limitations was unquestionably enacted for the purpose of curing irregularities. If everything was regular, there would be no need of any statute of limitations. If the administrator's deed was valid without such statute, then there would be no need of the statute. Therefore it is evident that the statute was enacted for the purpose of curing administrators' deeds which would otherwise be void."

In the case of Dodson v. Middleton, 38 Okl. 763, 135 Pac. 368, it appears that Peter Middleton, who was the owner of a quarter section of land in Logan county, died intestate in 1893. Among his heirs were Hannah Middleton, 16 years of age, and Lydia Middleton, 11 years of age. Upon application to the probate court, Bettie McCord was appointed guardian for said minors. She thereafterwards filed her petition in the probate court asking for an order of court directing her to sell the interest of said minors in and to said land. The order was granted, and sale was made to Anna B. Dodson, who took possession of the land. The guardian's deed was filed for record on the 31st day of January, 1899. On August, 16, 1906, suit was filed to recover possession of the land by the minors, and the five-year statute of limitation was pleaded against their right to recover. Mr. Justice Hayes, delivering the opinion of the court, said:

"The statute of limitation governing this case may be found in the following sections of Comp. Laws of 1909 (Revised Laws 1910, §§ 4654–4656)"—which are the sections of the statute relied upon in this case.

"The disability of the defendant Hannah Middleton has been removed for more than two years prior to the institution of her action; and, if a guardian's deed made in pursuance of a void judgment of a court ordering a sale is sufficient to bring into operation the foregoing statute of limitation, plaintiffs' defense as to her is established, and the trial court, to that extent, committed error."

If Julian C. Harris had been in possession of this land under his deed from the guardian and the heirs of the deceased allottee had filed this suit, the five-year statute of limitation would apply; but, unless the suit had been filed by such heirs within five years from the date the guardian's deed was recorded or within two years after such heir or heirs had reached their majority, they could not recover. This section of the statute was not enacted for the purpose of protecting parties in possession of land claiming the same under color of title acquired from parties having no right, title, or interest therein. It is a special statute of limitation and was enacted for the protection of titles to real estate acquired through sales made by guardians, executors, or administrators. Hence we conclude that the trial court did not err in holding that the plaintiffs' cause of action was not barred under this statute.

[2] It is contended that the guardian's deed conveying the land to Julian C. Harris is void for the reason that the petition of said guardian filed in the probate court asking the court for an order to sell said real estate did not state facts sufficient to give the probate court jurisdiction to make an order authorizing the guardian to sell said land. With this contention we cannot agree.

Section 6553, Revised Laws of 1910, provides that when the income of an estate under guardianship is not sufficient to maintain the ward and his family, or maintain and educate the ward when a minor, his guardian may sell the real estate for that purpose upon obtaining an order therefor.

Section 6557, Revised Laws of 1910, provides that to obtain such an order the guardian must present to the county court of the county in which he was appointed guardian a verified petition thereby setting forth the condition of the estate of his ward and the facts and circumstances on which the petition was founded, tending to show the necessity or expediency of the sale.

The record shows that the guardian did file a verified petition in the county court in which he was appointed guardian, showing that a necessity existed for the sale of the interest of said minors in said land in order that funds may be had wherewith to support, maintain, and educate said minors, and we think the petition was sufficient to confer jurisdiction on the court to make the order of sale.

In the case of Howbert v. Heyle, 47 Kan. 58, 27 Pac. 116, Judge Valentine, speaking for the Supreme Court of Kansas, said:

"It is further claimed by the plaintiff in error that the petition of the guardian to sell the land of the plaintiffs is insufficient: First, because it does not state facts, but only conclusions and inferences; and, second, because it does not give a sufficient description of the land to be sold. We think the petition is amply sufficient, when attacked collaterally, as it is now attacked. It stated that the minors had no money or personal property, and that it was to their interest, and necessary for their support and education, that the land should be sold."

In the case of Sockey v. Winstock, 43 Okl. 758, 144 Pac. 372, it is said:

"The petition for the sale of real estate of wards by a guardian is required to state the purpose for which the sale is asked; * * * and we think the petition in this case is sufficient.

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It states that the sale is necessary in order to educate and properly maintain said minors."

[3, 4] It is contended that each and all of the respective alleged conveyances upon which plaintiffs base their right to recover are champertous and void, all of them having been made in contravention of section 2260, Revised Laws of 1910. But the defendants in their brief concede that the guardian's deed conveying the land to Harris is not affected by this statute and is valid, if it should be determined that the sale by the guardian is a judicial sale.

In the case of Halleck v. Guy, 9 Cal. 181, 195, 70 Am. Dec. 643, in discussing the nature of administrator's sales of lands through the probate court, it was said:

"The mode of the sale is pointed out by express statute. When sold, the report of the sale is made by the administrator to the court, and unless confirmed by order of the court there is no binding sale, and no title can pass to the purchaser. To be valid, the sale must first be ordered by the court, and afterwards confirmed by it. The order for the sale, and the order of confirmation, are both judicial acts; and these two, concurring, make the sale a judicial sale, and therefore not within the statute of frauds."

See, also, Williamson v. Berry, 49 U. S. (8 How.) 547, 12 L. Ed. 1170; Morrison et al. v. Burnette et al., 154 Fed. 617, 83 C. C. A. 391; Vandever v. Baker, 13 Pa. 121; Sackett v. Twining, 18 Pa. 199, 57 Am. Dec. 599; Hutton v. Williams, 35 Ala. 517, 76 Am. Dec. 297; Noland v. Barrett, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572; Maul v. Hellman, 39 Neb. 322, 58 N. W. 112.

At page 17 in Rorer on Judicial Sales, we find this language:

"Whereas, in judicial sale, or sales, under orders and decrees, the property to be sold is described, and the manner of sale is directed, or ought to be, and the person appointed to sell is all the time subject to the court, and nothing is binding until by the court confirmed. * * *

"The decree of sale is merely interlocutory, made in the course of judicial proceedings, and the final decree is that of confirmation after the sale is made."

So it is in this state, the guardian has no power to sell the land of his ward, except where he acts under and by authority of an order of sale made by the probate court, which order describes specifically the land to be sold. It lays hold and acts directly on the real estate itself, and when the land is sold, according to said order, a report of the sale is made by the guardian to the court, and unless such sale is confirmed by the court there is no binding sale and no title passes to the purchaser; hence we conclude that this sale of the real estate by the guardian to Harris was a judicial sale and that the champertous statute does not make the guardian's deed void.

The court in his findings of fact found that the deed from Harris to Crockett, the deed from Crockett to Memminger and Ellis, and the deed from Memminger and Ellis back to Crockett, were all champertous and void as to the defendants in possession of the land. It was decided in the case of Huston v. Scott, 20 Okl. 142, 94 Pac. 512, 35 L. R. A. (N. S.) 721, that a deed conveying land to a champertous grantee was void as to the party in possession of the land, but that such deed was good as between the parties, and this is the uninterrupted holding of this court. But it is contended that the plaintiff Julian C. Harris would have to recover on the strength of his own title, and that he divested himself of his title when he conveyed the land to Crockett. However, the defendants concede that said deed was champertous and void as to the defendants in possesson. These contentions are inconsistent with each other, and, if the first contention be sustained, Harris could not recover because he had conveyed his title to Crockett, and under the second contention neither Crockett nor Memminger and Ellis could recover because the deeds conveying the land to them are champertous and void as to the defendants in possession of the land. It is true that the plaintiff Harris would have to recover on the strength of his own title; but, since under the champertous statute he was powerless to convey his title to the land as against the defendants in possession, it naturally follows that Harris is the owner of the title to the land as against the defendants in possession thereof, and that he is the real party in interest and is the owner of the title to the land so far as the defendants in this case are concerned, and he could maintain this suit. This doctrine finds support in the case of Butler et al. v. Fryer, 159 Pac. 367, decided by this court, but not yet officially reported. If the court committed error in admitting the deed in evidence conveying the land from Memminger and Ellis back to Crockett, such error was cured by the court in his judgment wherein he decided that said deed was champertous and void as to the defendants in possession of the land. The court was correct in his findings of fact and conclusions of law on this proposition.

[5] In assignments 1 and 2 it is contended that the court erred in rendering judgment for the plaintiffs for the sum of $1,260. It was stipulated that the rental value of the lands in question was $210 a year, and the court permitted a recovery for six years or for the years 1909 to 1914, inclusive. It is shown that Crockett conveyed the lands in question to Memminger and Ellis on December 30, 1911, and that they conveyed it back to Crockett on November 7, 1913, and it is contended that the plaintiffs are not entitled to recover rents for this period of time. It is also contended that under subdivision 2 of section 4657, Revised Laws of 1910, the plaintiffs were not entitled to recover rents for more than three years; but this statute does not apply for the reason that the plaintiffs are seeking to recover damages for the wrongful withholding of the possession of the land. Neither is the

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other contention good because the title of Memminger and Ellis to said land was void as to the defendants while they were in possession. The plaintiffs' right to recover on this cause of action is controlled by section 2873, Revised Laws of 1910, which reads as follows:

"The detriment caused by the wrongful occupation of real property, in cases not embraced in sections 2874, 2880, 2881 and 2882, is deemed to be the value of the use of the property for the time of such occupation, not exceeding six years next preceding the commencement of the action or proceeding to enforce the right to damages, and * * * costs, if any, of recovering the possession."

The findings of fact and the judgment of the trial court are supported by ample evidence, and the judgment is not contrary to law.

Finding no error in the record, the judgment of the trial court is affirmed.

PER CURIAM. Adopted in whole.

(61 Okl. 309)

JEFFERSON TRUST CO. et al. v. J. S. MAYFIELD LUMBER CO. et al.

(No. 8063.)

(Supreme Court of Oklahoma. Nov. 28, 1916.)

(Syllabus by the Court.)

MORTGAGES ⟸151(3) — LIENS — PRIORITY — MECHANICS' LIENS.

A materialman sold lumber to a contractor to be used in erecting certain structures upon the land of M. After the material so sold was furnished and used, M. assumed the debt of the contractor and gave his note therefor. *Held*, that the materialman was not thereby converted from a subcontractor into a principal contractor, and that a lien filed after 60 but within 120 days after the last material was furnished was inferior to the lien of a mortgage executed and recorded prior to the filing of the materialman's lien.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 332-336; Dec. Dig. ⟸151(3).]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Oklahoma County; J. W. Hayson, Judge.

Action by the J. S. Mayfield Lumber Company and others against the Jefferson Trust Company and another. From a judgment for plaintiffs, defendants appeal. Reversed, with directions.

Wilson & Tomerlin and Asp, Snyder, Owen & Lybrand, all of Oklahoma City, for plaintiffs in error. Burwell, Crockett & Johnson, of Oklahoma City, for defendants in error.

BURFORD, C. The Mayfield Lumber Company sued to foreclose a materialman's lien filed within 120 days but more than 60 days after the last material was furnished. The Jefferson Trust Company and Geo. A. Jones, defendants, filed cross-petitions to foreclose certain mortgages recorded after the commencement of the building for which the lumber company furnished material, but prior to the filing of the lumber company's lien. Interveners and plaintiffs each claimed priority of lien. The cause was tried to the court without a jury. He made findings of fact and conclusions of law and rendered judgment against the respective defendants below, bound therefor in favor of the plaintiff and interveners for the various amounts found to be due them, and foreclosing their respective liens. Priority of lien was given the lumber company over the trust company and Jones, and from this judgment they appeal.

The validity of the various liens or the correctness of the amount found due upon them from J. W. Mann or the Mann Development Company, defendants below, is not questioned here, and that part of the judgment is not before us for review.

Upon the question of priority of lien between the lumber company and the trust company and Jones, the material facts found by the court, to which no objection is made here by either party, and by which we are therefore bound, are that the lumber company sold to a contractor certain material to be used in a building upon the land here involved, the property of the Mann Development Company. After the material had been furnished, J. W. Mann, for and on behalf of the corporation, executed a note to the lumber company for the amount of the contractor's bill under an arrangement with the contractor, whereby the development company was to complete the building. The court's finding is that the sale of lumber was made by the lumber company to "a subcontractor by the name of E. B. Gordon or Gordon & Ogle." This is evidently a clerical error, as Gordon is referred to and treated throughout as a contractor and not a subcontractor. However, we attach little importance to this, for, as above stated, the validity of the lien itself is not before us, and treating Gordon as a contractor—the more favorable view for the lumber company—we are of opinion that the priority of their lien cannot be sustained. Clearly, in the first instance, the lumber company, having sold and furnished the material to Gordon, was a subcontractor. The giving of a note by Mann for the development company could not convert them into an original contractor. The present case is not distinguishable in principle from Bryan v. Orient Lumber & Coal Company, 156 Pac. 897, rendered since the trial below and not yet officially reported. There, although other questions were involved, it was held that, where lumber was furnished to a contractor, the giving of a note by the husband of the owner to the materialman could not operate to convert him into an original contractor so that his lien could be filed after 60 days had elapsed since the last material was furnished. The proof in this case showed that the mortgages

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of the trust company and Jones were recorded after the building was started, but before the lumber company furnished its last material and, of course, before it filed its lien. The trial court was, under the holding of Bryan v. Orient Lumber Company, supra, in error in holding that the lien of the lumber company had priority.

The cause should therefore be reversed, with directions to the trial court to set aside that portion of the judgment giving priority of lien to the lumber company, and, without disturbing the remaining portions of that judgment, to modify the whole so as to give priority of lien to the Jefferson Trust Company and Geo. A. Jones over the J. S. Mayfield Lumber Company, and for such further proceedings as may be proper to enforce the rights so adjudicated.

(62 Okl. 28)

WALKER et al. v. LOVE et al. (No. 8153.)

(Supreme Court of Oklahoma. Dec. 12, 1916.)

(Syllabus by the Court.)

1. NEW TRIAL ⟸85—GROUNDS—ABSENCE OF DEFENDANTS.

The single allegation that the defendants were not in court at the trial of the cause is not sufficient ground for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 170–172; Dec. Dig. ⟸85.]

2. APPEAL AND ERROR ⟸694(1)—RECORD—QUESTIONS PRESENTED FOR REVIEW—SUFFICIENCY OF EVIDENCE.

This court is unable to determine whether or not a judgment is supported by the evidence when the evidence is not incorporated in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2915; Dec. Dig. ⟸694(1).]

Commissioners' Opinion, Division No. 2. Appeal from Superior Court, Muskogee County; H. C. Thurman, Judge.

Action by Elvira Love and another against H. T. Walker and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

H. T. Walker, of Muskogee, for plaintiffs in error. Brown & Stewart, of Muskogee, for defendants in error.

BURFORD, C. Elvira Love and Robert Love sued H. T. Walker and K. H. Walker upon a promissory note and to foreclose a real estate mortgage. The answer was an unverified general denial, and the claim that $16 had been paid upon the note, for which no credit had been given. It appears that the cause was regularly set for trial, and that at the trial the defendants did not appear after being called in open court. Plaintiffs then waived a jury and introduced their evidence, and judgment was rendered in their favor. It appears that in the judgment a credit of $21 was given the defendants. The defendants filed a motion for new trial, alleging that the judgment of the court was contrary to law and to the evidence, and was not sustained by sufficient evidence, and "because the defendants were not in court at the trial of this cause." This motion was overruled, and the cause was brought here for review.

[2] The evidence is not incorporated in the record, and therefore we are unable to determine whether or not there was any evidence to sustain the judgment further than to say that the unverified general denial left standing the allegation of the execution of the note and mortgage. Whether or not anything was due thereon was a matter of proof, and in the absence of the evidence we must assume that there was sufficient proof to justify the trial court in finding the amount which it did.

[1] As to the allegation that the defendants were not in court at the trial of the cause, that is clearly not sufficient to entitle them to a new trial. No excuse for failure to appear is given or alleged. If defendants could obtain a new trial in a cause by simply staying away from court, there would be no end to litigation.

Judgment affirmed.

PER CURIAM. Adopted in whole.

(62 Okl. 47)

MIDLAND SAVINGS & LOAN CO. v. DRAKE et al. (No. 5423.)

(Supreme Court of Oklahoma. Dec. 12, 1916.)

(Syllabus by the Court.)

USURIOUS CONTRACTS.

The syllabus in Midland Savings & Loan Company v. Henderson & Beats, 150 Pac. 868, L. R. A. 1916D, 745 (not yet officially reported) is adopted as the law of this case.

Commissioners' Opinion, Division No. 2. Appeal from District Court, Muskogee County; R. C. Allen, Judge.

Action by the Midland Savings & Loan Company against Nettie Drake and others. Judgment for defendants, and plaintiff brings error. Reversed, for further proceedings.

B. G. Wood, of Muskogee, and A. J. Bryant, of Denver, Colo., for plaintiff in error. William T. Hutchings, of Muskogee, guardian ad litem of Dorothy Perryman, pro se.

BURFORD, C. Plaintiff in error sued to foreclose a mortgage based upon a building and loan contract. Upon the trial the court found that the contract was usurious upon its face, and rendered judgment for defendants. The contract was entered into prior to statehood, and the mortgage covered lands in the then Indian Territory. It is not necessary to set out the various terms of the building and loan contract or mortgage as they appear to be practically identical with those set out and passed upon by this court in Midland Savings & Loan Co. v. Henderson & Beats, 150 Pac. 868, L. R. A. 1916D,

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745, and the principles decided in that case, as well as Legg v. Midland Savings & Loan Co., 154 Pac. 682, and Midland Savings & Loan Co. v. Kuntz, 158 Pac. 604, are decisive of the case at bar. The cases of Midland Savings & Loan Co. v. Deaton, 157 Pac. 285, Midland Savings & Loan Co. v. Summers, 160 Pac. 488, and similar cases were decided upon contracts made since the admission of Oklahoma into the Union, and are inapplicable here.

Upon the authority of Midland S. & L. Co. v. Henderson, supra, the contract involved in the case at bar was not usurious upon its face, and the court erred in so holding.

The cause should be reversed for further proceedings.

PER CURIAM. Adopted in whole.

(61 Okl. 313)

ST. LOUIS & S. F. R. CO. v. BRUNER.

(No. 4925.)

(Supreme Court of Oklahoma. Dec. 12, 1916.)

(Syllabus by the Court.)

RELEASE ⊂=55 — EVIDENCE — BURDEN OF PROOF.

Where the execution of a release for damages for personal injuries is admitted, and fraud in procuring the execution of the same and want of consideration therefor are pleaded, the burden is upon the party executing the release to prove by a preponderance of the evidence such fraud or want of consideration.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 4; Dec. Dig. ⊂=55.]

Commissioners' Opinion, Division No. 1. Error from District Court, Creek County; Wade S. Stanfield, Judge.

Action by Florence Bruner against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed, and remanded for new trial.

W. F. Evans, of St. Louis, and R. A. Kleinschmidt and E. H. Foster, both of Oklahoma City, for plaintiff in error. W. V. Pryor, C. B. Rockwood, and C. W. Lively, all of Sapulpa, for defendant in error.

RUMMONS, C. This action was commenced in the district court of Creek county by the defendant in error, hereinafter styled plaintiff, against the plaintiff in error, hereinafter styled defendant, to recover damages for injuries received because of the running away of a team attached to a vehicle in which plaintiff was riding, resulting in plaintiff being thrown to the ground and injured. Litigation arising out of this accident has been before this court in case of St. Louis & San Francisco Railroad Co. v. Mollie Bruner, 152 Pac. 1103, and the case of St. Louis & San Francisco Railroad Co. v. A. D. Bruner, 156 Pac. 649.

Among other defenses pleaded by the defendant in its answer was the execution by plaintiff, in consideration of the sum of $50, of a release discharging defendant from all liability arising out of said accident. To the answer of defendant plaintiff replied, denying generally each and every allegation of new matter therein contained, and denying that she ever accepted any sum of money from defendant or signed any release, or released said defendant from any liability for its wrongful and negligent acts. Plaintiff further alleged in said reply that, if she did sign any release at any time, the same was obtained by fraud and without consideration, and the same is void. This reply was not verified.

At the conclusion of the evidence of plaintiff, defendant demurred thereto, which demurrer was overruled, and exception saved to such ruling by the defendant. At the conclusion of the case defendant moved for a directed verdict, which motion was overruled, and exception saved to such ruling. Plaintiff recovered judgment for the sum of $750, and defendant prosecutes this proceeding in error to reverse the same.

Defendant makes several assignments of error, but we deem it only necessary for a determination of this case to consider the assignment that the court erred in overruling the demurrer of defendant to the evidence of plaintiff. The plaintiff not having verified her reply to the answer of defendant, the execution of the release set up in defendant's answer was admitted, and the burden was upon the plaintiff to establish the facts alleged in her reply seeking to avoid such release. St. Louis & San Francisco Railroad Co. v. Bruner, 152 Pac. 1103, and cases therein cited.

Plaintiff offered no evidence in chief tending to show that the release relied upon by defendant was obtained by fraud or without consideration, nor did she offer any evidence whatever tending to impeach such release.

Settlements and compromises fairly made and in good faith are favored by the law as a discouragement to litigation, and in the absence of evidence tending to impeach a compromise settlement entered into in a personal injury case, on any of the grounds sufficient in law to avoid such settlement, such settlement will be upheld. St. Louis & San Francisco Railroad Co. v. Chester, 41 Okl. 369, 138 Pac. 150.

The plaintiff having failed to offer any evidence upon which the release relied upon by the defendant could legally be set aside, the trial court erred in overruling the demurrer of the defendant to the evidence of plaintiff.

This cause should be reversed and remanded, with directions to grant defendant a new trial.

PER CURIAM. Adopted in whole.

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(62 Okl. 45)

GILKESON et al. v. CALLAHAN. (No. 8243.)

(Supreme Court of Oklahoma. Dec. 12, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⟸1008(2)—REVIEW—QUESTIONS OF FACT—FINDING BY COURT.

A jury case having been tried to the court without a jury, a general finding by the court in favor of one of the parties will, upon review here, be given the same weight as the verdict of a jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3957, 3964; Dec. Dig. ⟸1008(2).]

2. APPEAL AND ERROR ⟸1010(1)—REVIEW—QUESTIONS OF FACT—FINDINGS OF COURT.

The first paragraph of the syllabus in Freeman v. Eldridge, 26 Okl. 601, 110 Pac. 1057, is adopted herein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3981; Dec. Dig. ⟸1010(1).]

3. APPEAL AND ERROR ⟸1140(4)—DISPOSITION OF CAUSE—AFFIRMANCE—EFFECT OF REMITTITUR.

In an action for damages, where it clearly appears that the court rendered judgment for an excessive amount and the amount of the excess can be ascertained from the record, the cause will not be reversed on account of such error, provided a remittitur for the excess is filed, and when filed the judgment may be affirmed for the correct amount.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4466; Dec. Dig. ⟸1140(4).]

Commissioners' Opinion, Division No. 2. Error from District Court, Muskogee County; Geo. C. Crump, Judge.

Action by Alice A. Callahan against John R. Gilkeson and another. Judgment for plaintiff, and defendants bring error. Affirmed upon condition.

B. B. Wheeler, of Muskogee, for plaintiff in error Gilkeson. White & Disney, of Muskogee, for plaintiff in error American Surety Co. Spencer E. Sanders and Irvin Donovan, both of Muskogee, for defendant in error.

GALBRAITH, C. This appeal is from the judgment of the trial court in an action for damages against the contractor and the surety on the bond given to guarantee the faithful performance of a building contract. The facts are as follows:

On November 18, 1914, Gilkeson, the contractor, entered into a contract in writing with Mrs. Callahan, whereby he undertook and agreed to furnish material and to construct a dwelling house on the land of one of Mrs. Callahan's minor children, according to plans and specifications attached to the contract, for the consideration of $2,500, the payment of $1,500 of which was arranged for at that time, and the remaining $1,000 was to be paid as follows:

"That the said Alice A. Callahan, is to place in the Commercial National Bank of Muskogee, Oklahoma, the sum of $1,000 to be paid to the said John R. Gilkeson, as follows: $500.00 thereof to be turned over to the said John R. Gilkeson by the said Commercial National Bank when the roof of said house is finished and the remaining $500.00 to be paid to the said John R. Gilkeson when said house is completed, according to the plans, specifications and blue prints referred to in this contract."

The contract further provided:

"Said house is to be built according to the plans and specifications hereto agreed upon by and between John R. Gilkeson and Alice Callahan which said plans, blueprints and specifications are made a part hereof and adopted by both parties, and said house is to be built of good, substantial material, and to be finally completed on or before the first day of February, 1915, and the said John R. Gilkeson covenants and agrees to furnish the labor and material necessary to build and finish said house complete, and further covenants and agrees to furnish surety bond for $1,500.00 to protect said Alice A. Callahan from materialman, mechanics or laborers' liens, and to guarantee the completion of said house as set forth in the plans and specifications and blue prints which are signed by the parties hereto and referred to each part of this contract."

Mrs. Callahan did not deposit the $1,000 in the Commercial National Bank, contending that the contract did not require her to do so until the first $500 was payable under the contract; that is, when the roof of the house was completed. Gilkeson commenced the erection of the building, but did not complete it. On January 27, 1915, he wrote Mrs. Callahan a letter stating that he would have the house completed on the 1st day of February, 1915, and demanded that she deposit the $1,000 in the bank on or before that day. Mrs. Callahan did not deposit the money in response to this demand, and on February 1st the house was not completed, nor was the roof of the house completed, and on the 2d day of February Gilkeson abandoned the work, and afterwards Mrs. Callahan took over the work, purchasing the material, and hiring the labor, and completed the building according to the plans and specifications, at a cost of about $2,000 in addition to the $1,500 paid Gilkeson. She sued the contractor and the surety on his bond for the damages she sustained by reason of the contractor's failure to complete the building according to the contract, fixing her damages in the excess of what the building cost her above the price she agreed to pay the contractor. A jury was waived, and the cause was tried to the court. There was a finding for the plaintiff and judgment rendered in her favor against the defendants for $1,376.38.

[1, 2] It is first complained that the evidence shows that Mrs. Callahan first breached the contract by failing to deposit the $1,000 in the bank as provided by the contract, and that her failure to deposit this money was the cause of Gilkeson's refusal to complete the house as he had agreed to do, and that she cannot make her own default the basis of her right to recover in this action.

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It is urged in her behalf that the contract did not stipulate when this $1,000 should be deposited in the bank, and therefore she was not required to make the deposit until the first payment, as stipulated in the contract, was due, that is, when the roof of the house was completed, and the roof was not completed when Gilkeson abandoned the building, and therefore the $500 never became due prior to the time he gave up the job, and there was no breach of the contract on her part. It appears by the letter of the contractor under date of January 27, 1915, that he did not expect this deposit to be made in the bank at the time the building contract was signed. In this letter he only demands that it be deposited by the 1st of February, 1915. The construction of the contract was a question of law for the court. The finding of the trial court was in effect that there had been no breach of the contract on the part of Mrs. Callahan at the time Gilkeson abandoned the building. No sufficient reason appears for overruling this finding and conclusion.

Again, it is complained that the judgment is contrary to law and the evidence. It is argued that it is contrary to law, inasmuch as there was evidence that the plans and specifications were changed and extra work performed and extra expenses incurred not contemplated by the contract. It was alleged in the petition that, when Mrs. Callahan took over the building, she built it according to the original plans and specifications, and that she had done and performed all the things on her part required by the contract. Whether she had done this or not, and whether the building was completed according to the plans and specifications, and the amount that it cost in excess of the contract price, were all questions of fact that were submitted to the court for determination. There is a sharp conflict in the testimony of the witnesses called on behalf of the contractor, and those called on behalf of Mrs. Callahan; but there is evidence to support the finding of the court that the building was completed according to the plans and specifications, and that the only change in the plans of the building was the substitution of one flue in place of two called for in the contract, and that this change in the plans was made before the contractor abandoned the building.

Again, it is complained that in completing the building Mrs. Callahan contracted for more expensive material than was stipulated for in the contract, and had extra work done that was not provided for in the plans and specifications, thereby adding to the cost of the building. This likewise was a question of fact, and the finding of the court thereon in favor of Mrs. Callahan is likewise supported by evidence and is binding upon this appeal.

[3] Again, it is complained that the court erred in its calculation as to the amount of the judgment. This assignment is confessed by the defendant in error. It is conceded that the total cost of the building to Mrs. Callahan, including the $1,500 paid to the contractor was $3,615.98. The contract price of $2,500 deducted from this amount leaves $1,115.98, and this amount the defendant concedes should have been the amount of the judgment in the court below. The amount that the judgment exceeds this sum is therefore not supported by the evidence and is erroneous. This, however, ought not to work a reversal in this case, since the amount of the error can be definitely ascertained, and will not so operate if a remittitur for the erroneous amount included in the judgment is filed as hereafter directed. M., K. & T. R. Co. v. Johnson et al., 30 Okl. 754, 120 Pac. 1100; Farmers' & Merchants' Ins. Co. v. Cuff, 29 Okl. 106, 116 Pac. 435, 35 L. R. A. (N. S.) 892.

It is contended on behalf of the surety company that it is released from liability because of numerous changes in the plans and specifications without notice to it, which greatly increased the cost of the building.

It is sufficient to say, in reply to this argument, that, while there was a sharp conflict in the testimony as to the number of changes that were made in the plans and specifications, there was sufficient evidence to support the finding of the court that these changes were not of sufficient importance to work a release of the surety. It was stipulated in the contract that changes might be made in the plans and specifications without notice to the surety, and without affecting its liability, provided such changes did not exceed 10 per cent. of the amount of the penalty prescribed in its bond. It is not shown in the evidence that the change in the flues constructing one in lieu of two called for in the plans increased the cost of the building in any amount. Then this change was made before the contractor abandoned the job. It was also contended that another change was made after Mrs. Callahan took charge of the building. This is true, but it is not shown that this change in the plans added to the cost of the building.

After a careful consideration of the entire record in this cause, we are constrained to hold that there is evidence to support the finding of the court that both the contractor and the surety company are liable for the amount of the damages sustained by reason of the breach of this contract, and that this amount was $1,115.98.

If therefore the defendant in error will file with the clerk of the trial court a remittitur of the amount that the judgment exceeds this sum and present evidence of that fact in this court, the judgment appealed

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from should be affirmed, and the costs of the appeal should be equally divided between the parties.

PER CURIAM. Adopted in whole.

(62 Okl. 7)

CLARK et al. v. BOARD OF COM'RS OF OSAGE COUNTY. (No. 7846.)

(Supreme Court of Oklahoma. Dec. 5, 1916.)

(Syllabus by the Court.)

1. GARNISHMENT ⟸17—PERSONS SUBJECT—COUNTY.

Where the object to be accomplished is in violation of public policy, the aid of equity may not be invoked. Upon grounds of public policy a county is exempt from garnishment, and this exemption extends to equitable garnishment.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 32–34, 44; Dec. Dig. ⟸17.]

2. CONTRACTS ⟸299(1)—ACTIONS—RIGHT OF ACTION—PERFORMANCE.

The terms of a contract examined, and *held*, that under its provisions that there should be no liability until full performance of the work contracted for, there was no liability in a suit for the contract price of the work; the evidence showing that the performance of the work had not been completed at the time of the trial.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1372–1381; Dec. Dig. ⟸299(1).]

Commissioners' Opinion, Division No. 3. Error from District Court, Osage County; R. H. Hudson, Judge.

Action by Charles Clark and others against the Board of County Commissioners of Osage County. Judgment for defendant, and plaintiffs bring error. Affirmed.

Grinstead & Scott, of Pawhuska, for plaintiffs in error. John W. Tillman and C. K. Templeton, both of Pawhuska, for defendant in error.

JOHNSON, C. The board of county commissioners of Osage county entered into contracts with Donothan & Moore, a copartnership, for the construction of a courthouse and jail for the county. Contemplating a possible default by the contractors in the performance of their agreements, the contract contained the following clause, to wit:

"And if the architects shall certify that such refusal, neglect or failure is sufficient grounds for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor, he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor, but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architects, whose certificate shall be conclusive upon the parties."

After partial construction and partial payment of the contract price of the construction, Donothan & Moore notified the board of county commissioners in writing that, on account of financial reverses, they would be unable to complete their contracts, and requested the board to take charge of and complete the work out of the unpaid part of the contract price, which the board proceeded to do. Plaintiffs in error furnished materials to Donothan & Moore prior to the abandonment of the work by the latter, for which they were not paid, and obtained judgments against Donothan & Moore upon the indebtedness represented thereby. In this action, plaintiffs in error sued the board of county commissioners and Donothan & Moore, alleging the completion of the work by the county, the fact that the county had not taken from Donothan & Moore a bond for the protection of materialmen, the indebtedness by the county to Donothan & Moore for a balance of the contract price not expended by the county in the completion of the buildings, the unsatisfied judgments above mentioned, the insolvency of Donothan & Moore, and the absence of an adequate remedy at law; and sought a decree of equitable garnishment against the county to the extent of such amount alleged to be owing by the county to Donothan & Moore. The county contended that it was not liable to garnishment, either legal or equitable; that the work under the contract was not wholly finished at the time of the suit, and under the specific terms of the contract there was no liability until full completion of the work; and that the county had certain claims of offsets and damages against Donothan & Moore, which more than consumed the unexpended balance in the courthouse and jail fund. The lower court rendered judgment in favor of defendants, and plaintiffs have appealed.

[1] The decisive issues are: (1) The liability of the county to the proceeding in equitable garnishment; and (2) the liability of the county to Donothan & Moore as based upon the state of completion of the work. We think that the lower court was correct in holding against the liability of the county, upon both of such issues, and this without regard to the validity of the county's claim for offsets and damages.

Practically every appellate court of the country, which has passed upon the question, has held that, in the absence of a statute specifically conferring the right of garnishment against a county, garnishment does not run against a county. Edmondson

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v. De Kalb County, 51 Ala. 103; Boone County v. Keck, 31 Ark. 387; Stermer v. La Plata County, 5 Colo. App. 379, 38 Pac. 839; Ward v. Hartford Co., 12 Conn. 404; Duval County v. Charleston Lbr. Co., 45 Fla. 256, 33 South. 531, 60 L. R. A. 549, 3 Ann. Cas. 174; Morgan v. Rust, 100 Ga. 346, 28 S. E. 419; Fast v. Wolf, 38 Ill. App. 27; Wallace v. Lawyer, 54 Ind. 501, 23 Am. Rep. 661; Des Moines Co. v. Hinckley, 62 Iowa, 637, 17 N. W. 915; Webb v. McCauley, 4 Bush (Ky.) 8; Clark v. Clark, 62 Me. 255; Williams v. Boardman, 9 Allen (Mass.) 570; McDougal v. Hennepin Co., 4 Minn. 184; State v. Eberly, 12 Neb. 616, 12 N. W. 96; Boalt v. Williams Co. Com'rs, 18 Ohio, 13; Pettebone v. Beardslee, 1 Kulp (Pa.) 180; Herring-Hall-Marvin Co. v. Kroeger, 23 Tex. Civ. App. 672, 57 S. W. 980; Eureka Sandstone Co. v. Pierce Co., 8 Wash. 236, 35 Pac. 1081; Merrell v. Campbell, 49 Wis. 535, 5 N. W. 912, 35 Am. Rep. 785; Switzer v. Wellington, 40 Kan. 250, 19 Pac. 620, 10 Am. St. Rep. 196.

There is no statute of this state specifically authorizing garnishment as against a county. The Supreme Court of Montana sustained garnishment as against a county in the case of Waterbury v. Deer Lodge County, 10 Mont. 515, 26 Pac. 1002, 24 Am. St. Rep. 67, but based the decision upon a statute of that state expressly authorizing the writ as against a county. In a case, cited by plaintiff in error, viz. Riggin v. Hillard, 56 Ark. 476, 20 S. W. 402, 35 Am. St. Rep. 113, the Supreme Court of Arkansas sustained an equitable garnishment against a county, where the liability was complete and admitted. However, that case, in addition to being contrary to the doctrine of almost the universal holding of other courts, referred to the Arkansas case of Boone County v. Keck, supra, holding that legal garnishment could not run against a county, and itself recognized that garnishment of a county was against public policy; and the conclusion reached in that case, that equitable garnishment would lie when its correlative remedy, legal garnishment, was contrary to public policy, was virtually a holding that equity may disregard public policy. In the Georgia, Indiana, Nebraska, Ohio, and Texas cases above cited, relief was sought in equity, and equitable garnishment against a county was held not to lie.

This court has held that, on grounds of public policy, the government of the United States and the several states, and officers and agents thereof, are exempt from garnishment. Manwell v. Grimes, 149 Pac. 1182 (not yet officially reported). This court has held that neither a county, nor its officers, are liable for material furnished to a contractor in the construction of public buildings for the county, regardless of the fact that no bond had been taken for the protection of materialmen. Bushnell v. Haynes et al., 156 Pac. 343 (not yet officially reported); Wilson v. Nelson, 153 Pac. 1179 (not yet officially reported). This court has also held that public buildings are not subject to materialmen's liens. Western Terra Cotta Co. v. Bd. of Education of City of Shawnee, 39 Okl. 716, 136 Pac. 595; Gloyd v. Morris, 42 Okl. 75, 140 Pac. 1149. The reason of these cases is that all men are presumed to know the law, that, if material is advanced in the absence of the bond for the protection of materialmen, it is done in the face of this knowledge and the absence of the bond, which the materialman may have required, and at the sole risk of the creditor, this conjoined with the public policy of not allowing the public interests to be embarrassed by private dispute, to obviate which the bond for the protection of materialmen is provided by statute. The same reasoning is applicable to the instant situation.

In addition to the above, our statute (section 4836, Revised Laws of 1910) provides:

"4836. *Garnishee Not Liable for What.*—No judgment shall be rendered upon a liability of the garnishee arising: * * * Third. By reason of any money in his hands as a public officer, or for which he is accountable to the defendant merely as such officer."

This is an express recognition of the public policy of this state, as laid down by implication in other states.

It is clear that a county is not liable to garnishment, and for reasons of public policy. It seems to us that it would be a subversion of equity, to say that it would violate public policy. Garnishment is purely a statutory proceeding, and is usually invoked to reach assets of a debtor, who has no property accessible to the ordinary legal writs, and who, without regard to the garnished property, is in the insolvent condition which plaintiff in error contends gives rise to ground for the interposition of equity in this case. If the exemption of public policy, as applicable to counties in cases of legal garnishment, could be avoided by application to equity, as is attempted in this case, this would amount to a substitution of the equitable for the legal proceeding in practically all cases where a county is indebted to a defendant, for salaries or on public contract or otherwise, for there would be no difference in the equitable principles applicable to the various classes of indebtedness. The equitable proceeding, as contended for here, would be much easier than the legal garnishment, for no bond of affidavit would be necessary. This would amount to a practical abolition of the exemption, and complete violation and subversion of the public policy involved. The bond is for the protection of materialmen, furnishing materials to public contractors, and to allow the county to make settlement with such contractors without becoming embarrassed by, or involved in, the multitude of small disputes which might arise between the con-

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tractor and his own creditors. If a materialman makes advances of materials in the absence of such a bond, under the holding of this court in the cases of this court upon the question, hereinabove cited, he is guilty of laches, makes the advance upon the credit of the contractor and solely at his own risk, for the requirement of the bond and reliance upon its liability is his legal remedy. Such laches would be an additional reason why he might not invoke the aid of equity. We must therefore hold that the exemption of the county from garnishment extends to the equitable remedy.

[2] In addition to the above, in this case, if the liability be predicated upon the contract, hereinabove quoted from, independently of the exemption of the county from garnishment, there was no liability on the part of the county to the contractor until full completion of the work; and all of the evidence showed that the work was not fully completed. If the liability be predicated upon quantum meruit, there was an entire absence of proof of the quantum meruit value of the work done by the contractor.

It follows that the suit was not maintainable under either of the issues, denominated by us as decisive; and that the judgment of the lower court should be affirmed.

PER CURIAM. Adopted in whole.

(62 Okl. 29)

FIDELITY & DEPOSIT CO. OF MARYLAND v. N. S. SHERMAN MACHINE & IRON WORKS. (No. 7752.)

(Supreme Court of Oklahoma. Dec. 12, 1916.)

(Syllabus by the Court.)

PRINCIPAL AND SURETY ⊂⊃152—REMEDIES OF CREDITOR—ACTION AGAINST SURETY.

By virtue of sections 969 and 4694, R. L. 1910, an action may be maintained against a surety for hire on a bond, given pursuant to section 3881, without joining the principal.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 416–419; Dec. Dig. ⊂⊃ 152.]

Commissioners' Opinion, Division No. 3. Error from District Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by the N. S. Sherman Machine & Iron Works against the Fidelity & Deposit Company of Maryland. Judgment for plaintiff, and defendant brings error. Affirmed.

H. A. King and Twyford & Smith, all of Oklahoma City, for plaintiff in error. Wilson, Tomerlin & Buckholts, of Oklahoma City, for defendant in error.

BLEAKMORE, C. This action was commenced in the court below by N. S. Sherman Machine & Iron Works, as plaintiff, against the Fidelity & Deposit Company of Maryland, to recover on a bond executed pursuant to the provisions of section 3881, R. L. 1910, as defendant, to recover a sum alleged to be due on account of materials furnished to Derr & Lucia, partners, principals on such bond, and used in construction on a system of sanitary sewers for the town of Watonga. Defendant demurred to the petition on the ground of defect of parties in that the principals on the bond were not made defendants. The demurrer was overruled, whereupon defendant answered by way of general denial and set forth:

"Further answering, this defendant alleges that the principals on the alleged bond, to wit, C. F. Derr, H. B. Derr, and F. P. Lucia, being the parties with whom plaintiff in its petition alleges to have made a contract out of which plaintiff's action arose, are the real parties in interest herein, and that this defendant is reliably informed that there are certain matters and things growing out of said alleged contract between the said principals and plaintiff N. S. Sherman Machine & Iron Works, which makes it necessary for said principals on said alleged bond to be made parties to this action in order that there may be a full determination of the allegations of plaintiff's petition. The details of which are at this time unknown to this defendant."

Derr & Lucia applied to be made parties defendant, presenting and offering to file an answer and cross-petition, wherein they set up a balance alleged to be owing them from plaintiff by reason of the assignment to them of certain sums alleged to be due and payable on an account growing out of two contracts between plaintiff and the Municipal Excavator Company, aggregating $728.66. Such application was denied, to which defendant excepted. Upon trial to a jury the evidence established the claim of plaintiff. Defendant offering no evidence, the court directed a verdict and rendered judgment for plaintiff. Defendant alone has appealed.

The principal ground assigned for reversal is the refusal of the court to make Derr & Lucia parties defendant, and permit them to file an answer and cross-petition. It is urged that only joint action against both principal and surety could be maintained on the bond in suit, for the reason that such bond is a joint and not a joint and several obligation as appears by the following provision therein:

"The said principals bind their heirs, administrators, executors, successors and assigns, and the said surety binds its successors and assigns jointly and firmly by these presents."

The common-law doctrine invoked by defendant has been modified in this jurisdiction by section 969, R. L. 1910, which provides:

"Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several."

By section 4694, R. L. 1910, it is further provided:

"Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and indorsers and guarantors, may all or any of them

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be included in the same action, at the option of the plaintiff."

It was stipulated that defendant was a surety for hire, and had received a premium for writing the bonds in question.

In Schowalter v. Beard, 10 Okl. 454, 63 Pac. 687, it was said:

"Another defense urged is that the obligation is joint, and that all the obligors should be made parties defendant. We think section 851, 219 St. Okla. 1893 (sec. 969, Revised Laws 1910), settled this proposition, as all the obligors on this agreement were parties who received some benefit, and the statute above cited makes all such contracts, presumably, joint and several, and the proof shows that all these defendants were owners of, or parties interested in, lot 18, on which the wall was partly to be erected."

In Thompson v. Grider Implement Co. et al., 36 Okl. 165, 128 Pac. 267, it is held:

"Under section 5571 of Comp. Laws 1909, permitting persons severally liable upon the same obligation or instrument to be sued, either together or separately, at the option of the plaintiff, the plaintiff may bring suit against one of the sureties on a construction bond, without joining the principal and the other sureties."

See, also, Rutherford v. Holbert, 42 Okl. 735, 142 Pac. 1099, L. R. A. 1915B, 221.

The statutory rule alike obtains and has been applied in actions against joint makers of promissory notes. McMaster v. City Nat. Bank, 23 Okl. 550, 101 Pac. 1103, 138 Am. St. Rep. 831; Horne v. Okla. State Bank of Atoka, 42 Okl. 37, 139 Pac. 992.

In Francis v. First Nat. Bank of Eufaula, 40 Okl. 267, 138 Pac. 140, this court, speaking through Mr. Justice Kane, said:

"This was an action upon a promissory note, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below. The note was signed by the Presbyterian Church of Eufaula, as principal, and the defendant, Edna B. Francis, and several other persons as sureties. The indorsers only were made parties defendant. After the petition was filed, the defendants filed a motion, praying that the Presbyterian Church be made a party defendant, which was overruled. * * * As stated by counsel for plaintiff in error, the determination of this controversy involves only two questions: (1) Was it an abuse of the discretion of the trial court when the court refused to make the Presbyterian Church a party defendant? (2) Did the court err in sustaining the motion of plaintiff for judgment on the pleadings? The statute seems to be conclusive on the first proposition. Section 4694, Rev. Laws 1910, provides: 'Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and indorsers and guarantors, may all or any of them be included in the same action, at the option of the plaintiff.' In Outcalt v. Collier, 8 Okl. 473, 58 Pac. 642, it was said: 'The common-law rule governing the enforcement of joint obligations, and making a judgment against one or more joint makers of a promissory note a bar to further proceedings against the other joint makers, has been so far modified by our statute as that obligations appearing to be joint will be presumed to be joint and several until such presumption is in some manner overcome; and, unless such presumption is overcome, any one or more of the joint makers of a promissory note may be proceeded against severally, without prejudice to the rights of holder against other makers.' The foregoing case is followed in McMaster v. City Nat. Bank of Lawton, 23 Okl. 550, 101 Pac. 1103, 138 Am. St. Rep. 831. In Kirkpatrick v. Gray, 43 Kan. 434, 23 Pac. 633, where an identical statute is construed, it was held: 'The holder of a promissory note may, at his option, bring and maintain an action against one who signed the same as surety only, and cannot be compelled to bring in the principal debtor as a party defendant in order to have it determined who is primarily liable on the note, or to give the surety the benefit of the provisions of section 470 of the Code, as that section only applies in cases where the principal and surety are jointly sued.' The question in the Kansas case was whether the owner and holder of a promissory note may bring an action against the surety alone, or can he be compelled to bring in the principal debtor, in order that the judgment may be rendered against the one primarily liable. In discussing this question, Mr. Justice Johnston, who delivered the opinion for the court, said: 'We see no conflict between sections 39 and 470 of the Code. Section 39 confers upon the plaintiff the option or privilege of suing any one of those who are severally liable on a promissory note, and section 470 simply provides for cases where the principal debtor and surety are jointly sued, and has no application where they are sued severally.'"

Upon the authority of the foregoing cases it must be held that the rights of the defendant were not prejudicially affected by the refusal of the court to make the principals on bond in suit parties defendant.

An examination of the entire record discloses no error in the proceedings below, and the judgment should therefore be affirmed.

PER CURIAM. Adopted in whole.

(62 Okl. 10)

DUNCAN ELECTRIC & ICE CO. v. FERGUSON, County Treasurer, et al. (No. 8097.)

(Supreme Court of Oklahoma. Dec. 5, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⊂⊃773(5)—BRIEFS—FAILURE TO FILE—REVERSAL.

Where plaintiff in error files his brief in accordance with the rules of this court, and defendant files no brief within the time allowed, and no reason is given for failure to file same, this court is not required to search the record to find some theory upon which to sustain the judgment of the trial court, but, if the plaintiff's brief appears reasonably to sustain the assignments of error, may reverse the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3110; Dec. Dig. ⊂⊃ 773(5).]

Commissioners' Opinion, Division No. 4. Error from District Court, Stephens County; Cham Jones, Judge.

Application by the Duncan Electric & Ice Company to A. B. Ferguson, County Treasurer, and others, for correction of an assessment. From an adverse judgment of the district court on appeal from an order denying the application, plaintiff brings error. Reversed.

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Hainer, Burns & Toney, of Oklahoma City, for plaintiff in error. D. A. Bridges, Co. Atty., of Duncan, for defendants in error.

EDWARDS, C. The Duncan Electric & Ice Company, a corporation, filed its application, supported by affidavits, with the board of county commissioners of Stephens county for the correction of an erroneous assessment. From an order denying such application the plaintiff in error appealed to the district court of Stephens county, where said cause was tried, and judgment rendered in favor of the defendants, from which judgment the plaintiff in error has appealed to this court. The plaintiff has filed his brief in accordance with the rules of this court, and the defendant has filed no brief in support of its judgment, nor is any reason given for failure to file the same.

The brief filed by the plaintiff in error appears reasonably to sustain the assignments of error, and where the county attorney, selected by the people of the county to represent its interests, is so indifferent to the welfare of the county as to wholly neglect a matter of this kind, this court is not required to search the record to find some theory upon which the judgment may be sustained, but will reverse the judgment in accordance with the prayer of the petition in error.

The judgment is reversed.

PER CURIAM. Adopted in whole.

(62 Okl. 26)

JONES et al. v. FRANK. (No. 8069.)

(Supreme Court of Oklahoma. Dec. 12, 1916.)

(Syllabus by the Court.)

1. NEW TRIAL ⊂⊃49—GROUNDS—MISCONDUCT AFFECTING JURY.

The verdict of a jury in favor of a party will be set aside where, after the impaneling of the jury, and before verdict, he treats or entertains the jury or any member thereof.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 97-99; Dec. Dig. ⊂⊃49.]

2. NEW TRIAL ⊂⊃11(1)—POWER OF COURT—SECOND MOTION.

The trial court has power during the term at which a judgment was rendered to grant a new trial for misconduct of the prevailing party in treating the jury, even though he may have previously overruled a motion for new trial upon other grounds.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 14; Dec. Dig. ⊂⊃11(1).]

3. NEW TRIAL ⊂⊃11(1), 165—PROCEEDINGS TO PROCURE—RENEWAL OF MOTION.

The right of a party to a new trial, except for newly discovered evidence, impossibility of making a case-made for grounds sufficient to vacate judgment under the statute or upon a petition for new trial under section 5037 of the Code (Rev. Laws 1910), is exhausted if, unless unavoidably prevented, he fails to file a motion for new trial at the term and within three days after verdict, report, or decision in the cause is rendered, or when, such motion having been filed, it is overruled, but the trial court has inherent power, to be exercised not as a right of the party, but within his sound judicial discretion, to set aside an order overruling a motion for new trial, and to grant such new trial, at any time within the term at which such verdict, report, or decision is rendered, and such power may be exercised upon the court's own motion, or when the grounds for new trial are called to the court's attention by a second motion for new trial, filed after the three-day period has expired.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 14, 334, 335; Dec. Dig. ⊂⊃11(1), 165.]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Murray County; F. B. Swank, Judge.

Action by T. R. Frank against B. J. Jones and another. Judgment for defendants. From an order granting a second motion for new trial, defendants appeal. Affirmed.

Broadbent & Rawlings and J. H. Casteel, all of Sulphur, for plaintiff in error. Allen & Haste, of Sulphur, for defendants in error.

BURFORD, C. T. R. Frank sued B. F. Jones and C. W. Lumpkin for damages for an alleged conspiracy to defraud. The cause was tried to a jury, and verdict returned for defendants. Motion for new trial was filed and overruled. Thereafter, during the term, defendants filed a second motion for new trial, alleging that one of the defendants had treated the jury to dinner during the progress of the trial. The facts in relation thereto were alleged to have been discovered after the original motion was passed upon. The trial court heard evidence upon the motion and set aside his former order denying the new trial and granted such new trial. The propriety of that action is now before us for review.

[1] There can be no question, under the decision of this court in Garvin v. Harrell, 27 Okl. 373, 113 Pac. 186, 35 L. R. A. (N. S.) 862, Ann. Cas. 1912B, 744, that for the prevailing party to treat the jury or any member thereof, during the progress of the trial, is misconduct which will justify a new trial. The motive is immaterial, and ordinarily, if the fact be known to the jurors, it need not be proven that the action influenced the verdict. If, for instance, it could be shown that the only juror treated voted against the verdict returned by his associates, a different case might be presented; but, though that was the case as to one juror here, it was not the case as to all. The point is raised that the jurors were not competent witnesses to prove these facts. We do not find it necessary to pass upon this question, as the evidence of the restaurant keeper was sufficient to establish both the fact of the treat and the knowledge of at least some of the jury other than the one dissenting. In any event we would not reverse the cause for erroneous admission of evidence unless it appear probable that an injustice had been

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done, and the justice of the result reached by the trial court cannot be a matter of doubt. As was said by the Supreme Court of Maine in Cottle v. Cottle, 6 Greenl. (6 Me.) 140, 19 Am. Dec. 200, quoted and approved by this court in Garvin v. Harrell, supra:

"It may be useful to the party to learn that a good cause may be injured, but cannot be promoted, by conduct of this sort, and to the public generally to know that it will be tolerated in no case whatever."

[2, 3] The more serious question arises upon the right of the trial court to act at all after the first motion for new trial had been filed and overruled, and after the time for filing a motion for new trial had expired. Eliminating entirely questions of newly discovered evidence, impossibility of making a case-made, causes for vacating judgments, and petitions for new trials after the term, under section 5037 of the Code, and referring our language only to the general causes for new trial set out in the statute, it must be taken to clearly appear from section 5035, Rev. Laws 1910, that the right of a party to file a motion for new trial, unless unavoidably prevented is limited to a period of three days after the verdict, report, or decision involved is rendered, which period must also be within the term. The rights conferred by statute cannot be broadened by amendments made after the time for filing has expired, which set up new grounds, nor could the same effect be produced by a second motion for new trial filed out of time. Rice v. Folsom, 32 Okl. 496, 122 Pac. 236; Rogers v. Quabner, 41 Okl. 107, 137 Pac. 361; Wiggins v. Jackson, 153 Pac. 879; Potts v. Rubesam, 156 Pac. 356. Consequently this court has frequently dismissed appeals where no motion for new trial was filed in time, and correctly so; for in those cases error was alleged in the action of the trial court in *denying* a motion which the party had no *right* to file. Here we have a case where the court *granted* a new trial, and not the *right* of the party, but the *power* of the court, is in question. Such *right* of a party and the *power* of the court are entirely different things.

"It is a general rule of law that all the judgments, decrees, or other orders of the court, however conclusive in their character, are under the control of the court which pronounces them, during the term at which they are rendered or entered of record, and may then be set aside, vacated, or modified by the court." Philip Carey Co. v. Vickers, 38 Okl. 643, 134 Pac. 851; Parks v. Haynes, 152 Pac. 400; St. L., I. M. & So. Ry. Co. v. Lowrey (No. 7877) 160 Pac. 716, not yet officially reported, Appellate Court Bulletin, October 20, 1916.

This power extends to vacating an order granting a new trial, especially upon a showing of fraud. St. L., I. M. & So. Ry. Co. v. Lowrey, supra. The power of the trial court to grant a new trial may be exercised upon its own motion. Todd v. Orr, 44 Okl. 459, 145 Pac. 393; Hamra v. Fitzpatrick, 154 Pac. 665; St. L., I. M. & So. Ry. Co. v. Lowrey, supra. It would clearly be beyond the range of any logical conclusion to hold that the trial court had power to grant a new trial in this cause upon his own motion, and yet had no power to do so when the grounds therefor were suggested by the parties. Nor does this conclusion in any way abridge the limitation of section 5035 of the Code, referred to supra; for the statute is to be taken as limiting the right of the party. Any motion for new trial filed beyond the limitations of the statute must be addressed to the inherent power of the court to be exercised in his sound judicial discretion. Its office is merely to call to the attention of the court the reasons justifying him in using the power which he alone has. It does not present any matter which the party may demand as a right.

These limitations are noted by the Supreme Court of Missouri in State ex rel. v. Adams, 84 Mo. 310–314, cited and approved in Todd v. Orr, supra:

"The sum of the whole matter, under our laws, then, seems to be this: A party sleeps on his rights until the time allowed him by law to make his motion for new trial expires; he can no longer claim to make his motion as a matter of right, but he may afterward suggest to the court that substantial justice has not been done him, and the court may look into the matter or not. This, I think, is a recognition of the right of the court, of its own motion, to set aside the verdict; for if, after the time prescribed within which a party may file his motion has elapsed, the court may, on the suggestion of the party, set aside the verdict, why not of his own motion? And is it not in effect of his own motion if in such case he sets it aside?"

In Bank of Willmar v. Lawler, 78 Minn. 135, 80 N. W. 868, referring to the effect of the statute governing motions for new trial, the Supreme Court of Minnesota said:

"The power to grant a new trial is not given to the district court by statute. 'The power of such court to grant a new trial is not, like the right to appeal under our law, conferred by statute; it is inherent in courts of general jurisdiction, not given, but regulated by statute.' McNamara v. Minn. C. Ry. Co., 12 Minn. 388 (Gil. 269). The provisions of such a statute regulating motions for new trial do not prevent the court, in a proper case, from granting a new trial on its own motion."

From the considerations above referred to it must follow that the trial court had the power to grant a new trial in this cause, even when his attention was called to the reasons for so acting, solely by a second motion for new trial filed out of time. That he did not abuse his discretion in so acting we have already indicated.

The cause should be affirmed.

PER CURIAM. Adopted in whole.

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(62 Okl. 66)

CLEMENTS et al. v. JACKSON OIL & GAS CO. et al. (No. 7999.)

(Supreme Court of Oklahoma. Nov. 14, 1916. Rehearing Denied Dec. 19, 1916.)

(Syllabus by the Court.)

1. CONTRACTS ⟸261(3)—RESCISSION—INABILITY OF ADVERSE PARTY TO PERFORM.

That a party to a contract has no funds, assets, or property with which to make payments, or from which he can secure the money to make the payment of a sum contracted to be paid for certain work to be done, constitutes such a failure of consideration as will authorize the other party to the contract to rescind the same and to refuse to perform the work yet to be done under such contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1176; Dec. Dig. ⟸261(3).]

2. GUARANTY ⟸16(3)—REQUISITES OF CONTRACT—CONSIDERATION.

An agreement to perform the terms of a contract which the party has a right to rescind constitutes a consideration separate and apart from the original contract, sufficient to support a guaranty of payment by third parties.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 16; Dec. Dig. ⟸16(3).]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Jackson County; Geo. C. Crump, Judge.

Action by W. P. Clements and another against the Jackson Oil & Gas Company and others. From a judgment sustaining a demurrer to the petition, plaintiffs appeal. Reversed, with directions.

S. B. Garrett, of Altus, for plaintiffs in error. Everett Petry, of Altus, for defendants in error.

BURFORD, C. This is a companion case to No. 7998, 161 Pac. 216, decided herewith. The discussion of principles in that case is adopted herein. In this case, however, the principles are to be applied to entirely different allegations. The facts alleged in the petition and essential here, not set out in the opinion in No. 7998, are as follows: That the original contract for drilling entered into between the Jackson County Oil & Gas Company and plaintiffs provided that upon completion of the well the company should pay the cost of pulling casing and returning the rig and tools to Electra, Tex. Upon the same day that plaintiffs agreed to continue drilling beyond 1,000 feet and that the contract of guaranty considered in No. 7998 was executed, the individual defendants likewise executed and delivered the following instrument:

"Know all men by these presents, that whereas the Jackson County Oil & Gas Company entered into a certain contract in writing with W. P. Clements and W. E. Green for the drilling of a deep well near Altus, in Jackson county, Oklahoma, bearing the date of October 29, 1914, and wherein it was further agreed that said Jackson County Oil & Gas Company should pay the expense of drawing the casing of said well and returning to Electra, Texas, or any other point to which the cost of transportation would be no greater than to Electra, Texas, all of the tools, rig, casing and appliances in drilling said well. Now, therefore, we, the undersigned officers and directors of the Jackson County Oil & Gas Company, bind ourselves severally for the payment of said sums agreed to be paid in the original contract for the return of said rig, casing, tools and appliances so agreed to be returned. It being expressly understood that each party signing this guaranty shall be liable for 1/7 of said expenses. Witness our hands this 16th day of January, 1915. [Signatures.]"

This contract was treated below and in the briefs here as one of guaranty. Under the rules of this court we should so treat it, where parties have relied upon a definite theory below. However that may be, it does not seem to be material to determine that question, as we think the allegations of the petition are sufficient to render it enforceable, either as an original obligation or as a guaranty.

[1, 2] The consideration for the execution of this instrument is alleged in the petition to be "that the plaintiffs would continue to drill said well to a deeper depth of 200 feet below said 1,000 feet." Is this a consideration for the contract of January 16th here treated as above stated as one of guaranty? Obviously not, if the plaintiffs were required under the original contract to drill the additional 200 feet. Were the plaintiffs so obligated? The petition alleges (very differently from the petition in No. 7998) that at the time of the execution of the guaranty "the funds of the Jackson County Oil & Gas company were exhausted, and the said Jackson County Oil & Gas Company had no assets or property with which to secure plaintiffs for their services in drilling said well to a greater depth than the said 1,000 feet." As against a demurrer, which admits the facts alleged and all fair inferences to be drawn therefrom, we think this is sufficient to bring the facts within section 984, par. 4, Rev. Laws 1910, and to authorize the plaintiffs to rescind the contract. That statute authorizes rescission by a party when "the consideration, before it is rendered to him, fails in any material respect from any cause." It is alleged that the oil company had no funds to pay and no property or assets with which to "secure plaintiffs for their services." True the original contract provided for a cash payment and not for securing plaintiffs for services rendered, but as against a demurrer we think it can fairly be said that if the oil company could not secure plaintiffs, it could not secure any one else, and that in this view the petition alleges that the oil company did not have and could not get the money to make payments for drilling the 200 feet. Under such circumstances we hold the plaintiffs had a right to rescind the contract. It is clearly to be inferred from the petition that they were refusing to proceed, and that upon the execution of the guaranty they did go ahead and do the drilling, thus waiving the right to

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rescind. This waiver was a sufficient consideration to uphold the contract of guaranty. This is but another way of saying that the drilling of the additional 200 feet was the consideration of the guaranty, since the plaintiffs, by reason of the financial condition of the oil company, were no longer bound to drill the additional depth, under the original contract. They did what they were not then bound to do, because absolved therefrom by reason of failure of consideration. Not even a trustee or receiver in insolvency or bankruptcy can force the execution of the contract unless he is able to perform his part. The party intending to enforce the contract must be able to perform upon his part. Florence Mining Co. v. Brown, 124 U. S. 385, 8 Sup. Ct. 531, 31 L. Ed. 424. For these reasons we are of opinion that the contract of guaranty was supported by a sufficient consideration. It is further urged that the original contract provides that the casing was to be drawn and the rig and tools returned only in event no oil or gas in paying quantities was found, and that inasmuch as the petition fails to allege in terms that no such minerals were found, it fails to allege the happening of a condition precedent to recovery. With this contention we do not agree. This petition is before us upon a general demurrer. It is alleged that the casing was drawn and removed, acts commonly known to be inconsistent with any idea of a producing and paying well. Furthermore, the contract of January 16th does not call for payment under the terms and conditions of the original contract, but only for payment of the amount therein agreed to be paid. As was said in Lamm & Co. v. Colcord, 22 Okl. 493, 98 Pac. 355, 19 L. R. A. (N. S.) 901:

"In construing the language of an instrument of guaranty for the purpose of interpreting the same to determine the intention of the parties, it should be taken most strongly against the guarantor, and in favor of the party parting with his property upon the faith of the interpretation of such instrument most favorable to his rights."

For these reasons we hold the petition sufficient to state a cause of action. The judgment of the trial court is reversed, with directions to set aside the order sustaining the demurrer to the petition and to take such further proceedings as may be proper.

PER CURIAM. Adopted in whole.

(62 Okl. 48)

REIRDON v. SMITH et al. (No. 6553.)

(Supreme Court of Oklahoma. Dec. 12, 1916.)

(Syllabus by the Court.)

1. INDIANS ⊂⊃16(1) — LANDS — LEASE—VALIDITY.

Where a full-blood Choctaw allottee leases allotted lands to R. on November 28, 1905, for a term of five years, commencing with the date of the lease, and on August 12, 1908, leases the same lands to S. and others for a term of five years from the date of the lease, such second lease being subject to the existing lease for five years, which by its terms was to run until 1910, was unauthorized and void.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 45; Dec. Dig. ⊂⊃16(1).]

2. LANDLORD AND TENANT ⊂⊃26—LEASE — RECORD—NECESSITY FOR ACKNOWLEDGMENT.

Section 660, c. 27, Mansfield's Digest Ark., in force in Indian Territory before statehood, providing, "Deeds and instruments of writing for the conveyance of any real estate, or by which any real estate may be affected in law or equity, shall be proven or duly acknowledged in conformity with the provisions of this act before they or any of them shall be admitted to record," required that a lease of land be acknowledged before such lease would be entitled to record, and any purported recording of an unacknowledged lease would be a nullity.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 76–79; Dec. Dig. ⊂⊃26.]

3. INDIANS ⊂⊃16(2)—LANDS—LEASE—RECORD.

Act Cong. June 28, 1898, c. 517, 30 Stat. 507, known as the "Atoka Agreement," requiring and providing that every lease which is not evidenced by writing, or which is not recorded in the clerk's office of the United States court for the district in which the land is located, within three months from the date of its execution, shall be void, an unacknowledged lease of an Indian allotment, even though entered of record, would be a nullity and void.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 45; Dec. Dig. ⊂⊃16(2).]

4. EJECTMENT ⊂⊃9(3)—RIGHT OF ACTION—TITLE OF PLAINTIFF.

Plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of that of his adversary.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 18, 20–24, 27; Dec. Dig. ⊂⊃9(3).]

Commissioners' Opinion, Division No. 1. Error from District Court, Marshall County; Jesse M. Hatchett, Judge.

Action by C. R. Smith and others against J. P. Reirdon. Judgment for plaintiffs, and defendant brings error. Reversed, with directions to enter judgment for defendant.

George E. Rider and E. S. Hurt, both of Madill, for plaintiff in error. Kennamer & Coakley, of Madill, for defendants in error.

RUMMONS, C. This action was begun in the district court of Marshall county April 5, 1915, by the defendants in error, hereinafter styled plaintiffs, against the plaintiff in error, hereinafter styled defendant, in ejectment and for the recovery of mesne profits of a tract of land in Marshall county, the allotment of a full-blood Choctaw Indian.

Ward Webster, the allottee, on December 5, 1903, executed a lease to the defendant for said tract of land for a term of five years. This lease, though recorded in the recording district at Tishomingo, was not acknowledged. On the 28th day of November, 1905, the allottee executed to defendant another lease of said land for the full term of five years. On August 12, 1908, the allottee executed to plaintiffs a lease of said land for a term of five years. On September 4, 1909, the allottee executed a lease of said lands to defend-

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ant for a term of three years, commencing November 28, 1910.

Plaintiffs claim to be entitled to the possession and the rents and profits of said lands after the expiration of the second lease to defendant on November 28, 1910. The case was tried to the court without the intervention of a jury, resulting in a judgment for plaintiffs in the sum of $215, as the rents and profits of said land for the years 1911 and 1912, and a finding that at the time of judgment, because of the expiration of their lease, the plaintiffs were not entitled to possession thereof. To reverse this judgment, defendant prosecutes this proceeding in error.

[1] This case is governed by the decision of the Supreme Court of the United States in case of United States v. Noble, 237 U. S. 74, 35 Sup. Ct. 532, 59 L. Ed. 844. It is there held in construing the act of Congress governing the leasing of Quapaw allotments, which in its terms is substantially similar to the act of Congress governing the leasing of Choctaw allotments except that in the case of Choctaw allotments the limitation to which a lease might extend is five years, while in the case of Quapaw allotments it might extend to ten years, that a lease for ten years, made in 1905, subject to an existing lease for ten years on the same property, which by its terms was to run to 1912, was unauthorized and void. At the time the lease under which plaintiffs claim was taken, the lease to defendant taken in 1905 had more than two years to run, and if this lease was valid plaintiffs' lease would fall under the ban of the decision of the United States v. Noble, supra, and be of no effect. It remains, therefore, to be determined whether or not the lease to defendant executed in 1905 was valid and effectual.

[3] The trial court considered the first lease to defendant, executed in 1903, as being of no force and effect, and treated the lease to defendant in 1905 as valid, and, following the decisions of this court, prior to the decision in United States v. Noble, supra, held the lease to plaintiffs to be a valid lease effective upon the expiration of the lease to defendant made in 1905, and held the third lease to defendant made in 1909 as void and of no effect. We think the trial court correctly interpreted the lease of 1903. The Atoka Agreement (Act Cong. June 28, 1898, 30 Stat. 495, 507) provides:

"Every lease which is not evidenced by writing, setting out specifically the terms thereof, or which is not recorded in the clerk's office of the United States court for the district in which the land is located, within three months after the date of its execution, shall be void, and the purchaser or lessee shall acquire no rights whatever by an entry or holding thereunder."

By act of Congress approved February 19, 1903 (32 Stat. 841, c. 707), known as the Recording Act, chapter 27, Mansfield's Digest, 1884, so far as the same was applicable and not inconsistent with any act of Congress, was extended to the Indian Territory.

[2] Section 660, c. 27, Mansfield's Digest, is as follows:

"All deeds and other instruments in writing for the conveyance of any real estate, or by which any real estate may be affected in law or equity, shall be proven or duly acknowledged in conformity with the provisions of this act before they or any of them shall be admitted to record."

It follows, therefore, that the first lease of 1903, not having been acknowledged, was not entitled to record, and the purported recording of the same was a nullity. Campbell v. Richardson, 6 Okl. 375, 51 Pac. 659; Ray v. Southern Trading Co., 29 Okl. 242, 116 Pac. 810. Therefore this lease was not recorded as required by the act of June 28, 1898, and was void and of no effect. The defendant therefore was free to enter into a new lease with the allottee, which he did in 1905, and we conclude that the trial court correctly held the lease of 1905 was valid and effectual.

[4] The court, however, erred in holding the lease of plaintiffs executed in 1908 to be a valid lease. This lease, upon the authority of United States v. Noble, supra, was an "overlapping lease," and therefore void and of no effect. It does not matter whether or not the lease to defendant executed in 1909 was void, for, the plaintiffs' lease being void, they had no title upon which to maintain this action, since the plaintiff in an action in ejectment must recover upon the strength of his title, and not upon the weakness of that of his adversary. Mullen v. Glass, 43 Okl. 549, 143 Pac. 679; Shaffer v. Turner, 43 Okl. 744, 144 Pac. 366.

The judgment of the court below should be reversed, with directions to enter judgment for the defendant.

PER CURIAM. Adopted in whole.

(62 Okl. 147)

ROGERS v. MILLIKEN OIL CO. et al.

(No. 7326.)

(Supreme Court of Oklahoma. Oct. 24, 1916. Rehearing Denied Nov. 14, 1916. Second Petition for Rehearing Denied Jan. 9, 1917.)

(Syllabus by the Court.)

1. DAMAGES ⇐163(1)—OIL AND GAS LEASE—FORFEITURE—LIABILITY FOR DAMAGES.

Assuming, without deciding, that an action in damages lies for failure by the lessee or his assigns to execute upon demand a release of an oil and gas mining lease which had become forfeited, *held* that, the plaintiff having relied for proof of measure of damages upon an alleged contract for sale of a lease upon the same land, he must prove either that he had a valid contract with such prospective purchaser, enforceable according to its terms, had the release by defendant been executed, or that such pro-

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spective purchaser would have completed the contract, regardless of its enforceability, had such release been executed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 454, 455; Dec. Dig. ⟸163(1).]

2. DAMAGES ⟸190—OIL AND GAS LEASE—FORFEITURE—LIABILITY FOR DAMAGES.

Evidence examined, and *held*, that the plaintiff in this case failed to prove a contract enforceable had the defendant executed a release, or that the prospective purchaser would have completed the same upon the execution of such a release, and that therefore a demurrer to the evidence was properly sustained.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 513; Dec. Dig. ⟸190.]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Pawnee County; L. M. Poe, Judge.

Action by J. L. Rogers against the Milliken Oil Company and another. From a judgment for defendants on a demurrer to the evidence, plaintiff appeals. Affirmed.

McNiell & McNiell and L. V. Orton, all of Pawnee, for plaintiff in error. Rice & Lyons, of Tulsa, for defendants in error.

BURFORD, C. The gist of plaintiff's action was that he was the owner of 160 acres of land in Pawnee county; that he had executed an oil and gas mining lease thereon which had passed by various assignments thereof to one Turner and the Milliken Oil Company; that such lease provided that it should continue for a term of 2 years, or as long as oil or gas was found in paying quantities. By certain provisions it appeared that upon the payment of certain sums the life of the lease might be extended for a period of about 2½ years from the date of its execution; that a dry hole had been drilled upon the land by the Milliken Oil Company, and that no payments having been made and no oil or gas having been found within the 2 years, that the lease became forfeited by its terms; that thereafter a well was drilled near this land which caused its leasing value to become quite large, and that plaintiff had an opportunity to lease the same to one P. D. McConnell for the sum of $8,000 bonus and $3,000 rental, upon procuring an abstract of title to said land which "would show the same free and clear from any defect"; that the abstract of title was submitted and a release from the Milliken Oil Company and Turner requested by the examining attorney to perfect the title; that plaintiff requested the execution of such release, which was refused, and that by reason thereof the plaintiff could not complete his contract with McConnell, to his damage in the amount of the bonus and the rental. It was also alleged that shortly after the release was demanded and refused a dry hole was drilled near plaintiff's land, which caused it to entirely lose its leasing value. It was further pleaded that there was a general custom in the neighborhood of this land, known to defendant, to execute releases of oil and gas leases which had expired.

Upon the trial the evidence developed facts in relation to the execution and delivery of the lease assigned to the Milliken Oil Company; that such lease had become forfeited, and that the Milliken Oil Company claimed no interest in the land, but had refused to execute the release requested because both Turner, its assignor, and plaintiff, the original lessor, were each demanding that a release be made to them respectively; that plaintiff had entered into a contract, which, if it was in writing, is not contained in the record, with an agent of McConnell, to lease this land upon the terms and for the sums alleged in the petition; that the agent was orally authorized by McConnell to make such contract. A lease was executed by Rogers and wife and deposited in the bank, together with a draft for $8,000 drawn on McConnell and payable "upon approval of abstract." The abstract was made up and forwarded to McConnell at Tulsa and submitted to Benjamin Rice of the firm of Rice & Lyons, attorneys at Tulsa. Mr. Rice called the attention of Rogers to the lease to Turner and the Milliken Oil Company, and stated that a release of their interests must be obtained. No other objection was then made. Rice & Lyons, however, were not McConnell's attorneys, but represented some parties to whom McConnell was trying to sell the lease. After much correspondence the Milliken Oil Company refused to execute a release. It was shown that Turner would have released had the Milliken Oil Company done so. There was proof sufficient to go to the jury upon the question of McConnell's financial responsibility for the purchase price and rental prescribed in the new lease.

[1, 2] It is plaintiff's theory, based upon Campbell v. Harsh, 31 Okl. 436, 122 Pac. 127, and kindred cases in this court, that the lease held by defendants constituted a cloud upon his title for the reason that it would require evidence dehors the record to establish that no oil or gas had been found in paying quantities within the 2 years, and that the prescribed rental had not been paid; that a duty rested upon the defendants, after their rights under the lease ceased, to execute a release of record; and that by failing to perform this duty they had rendered themselves liable in damages. Assuming, without deciding, that all these propositions are sound, it remains to be seen whether or not plaintiff made proper proof of damage. He relied solely upon the special damage arising out of the failure of his contract with McConnell. To establish such damage it seems clear that he must prove

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either that he had a valid enforceable contract, had the release by defendant been executed when demanded, or that, had such release been so executed, McConnell would have completed the contract, regardless of its enforceability against him.

The second condition is eliminated by McConnell's undisputed testimony that he would not have paid the draft and taken up the lease had the Milliken release been properly obtained, for the reason that he only desired the lease to resell it, and that his prospective purchaser declined to buy. The plaintiff is then remitted to the theory of an enforceable contract. Again assuming, without deciding, the legal existence of all other elements of the validity of this contract with McConnell, it clearly appears from the exhibits filed in the cause that plaintiff, had the Milliken release been executed, did not under his own theory have a title "free and clear of any defect," the kind of title which his amended petition alleges he was bound to deliver to McConnell. The chain of title shows an unreleased oil and gas mining lease, dated March 11, 1904, to the Independent Oil & Gas Company, which, if the rentals therein provided had been paid and accepted, would not expire until 15 years from its date. Under plaintiff's theory it would require evidence dehors the record to establish nonpayment of these rentals, and therefore this lease would be a cloud upon his title.

There also appears an absolute grant of one-sixteenth of the oil and gas under 80 acres of the land described. This instrument has no drilling or rental terms, and is unreleased.

There also appears an unreleased oil and gas lease to the Big Wolfe Oil & Gas Company, which, under plaintiff's theory, is also a cloud on title and two unreleased mortgages all prior in date to the lease assigned to defendant, and, of course, to the lease tendered McConnell. Although the question was asked, it is not shown in the record that the abstract would have been approved in spite of these defects had the Milliken release been executed. True this was the only defect called to plaintiff's attention by Rice, but there is no evidence that had the abstract been finally submitted to him he would not have found other defects or that McConnell had agreed to be bound by his opinion. Under this state of fact it must be held that plaintiff failed to prove that he could have enforced his contract with McConnell except for the fault of defendant, and therefore failed to prove any damage resultant from defendant's failure to act. This cause arose prior to the passage of the act (Sess. L. 1915, p. 605) requiring the execution of a release of expired leases, and that act is not considered herein.

The judgment of the trial court sustaining the demurrer to the evidence was correct, and is affirmed.

PER CURIAM. Adopted in whole.

(62 Okl. 33)

In re COMBS' ESTATE. (No. 8224.)

(Supreme Court of Oklahoma. Dec. 12, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐643(3)—RECORD—AUTHENTICATION—AMENDMENT.

A certificate of the clerk of the district court to a transcript, which is attached to a petition in error and filed in this court, within the time limited for appeal, may be amended upon order of this court made prior to final decision, but after the time for filing such appeal has expired.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2793, 2794; Dec. Dig. ⇐643(3).]

2. APPEAL AND ERROR ⇐435—APPELLATE JURISDICTION—APPEARANCE—EFFECT.

Jurisdiction is not conferred upon this court by a general appearance of the sole defendant in error, made after the time for filing an appeal has expired.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2184–2190; Dec. Dig. ⇐435.]

3. APPEAL AND ERROR ⇐409—PROCEEDINGS FOR TRANSFER OF CAUSE—SUMMONS IN ERROR—DESIGNATION OF COURT.

A summons in error which described the judgment appealed from as rendered in the county court, when it should properly have described such judgment as rendered in the district court, will not be held so defective as to work a dismissal of the cause, unless it appear that the defendant in error so summoned was deceived thereby to his prejudice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2134; Dec. Dig. ⇐409.]

4. APPEAL AND ERROR ⇐532—RECORD—WHAT CONSTITUTES—EVIDENCE.

Evidence taken in the county court upon a petition to admit a will to probate, which is not introduced in evidence in the district court, by stipulation or otherwise, upon a trial of the issues de novo upon appeal to that court, is not part of the record in the district court, and will be stricken, upon motion, from a transcript of the record of such district court presented here upon appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2399–2401; Dec. Dig. ⇐532.]

5. APPEAL AND ERROR ⇐528(1)—RECORD—SCOPE AND CONTENTS—MOTION FOR NEW TRIAL.

A motion for new trial, not made a part of the record by bill of exceptions, is not a proper part of a transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2384, 2385, 2387; Dec. Dig. ⇐528(1).]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Muskogee County; Geo. C. Crump, Judge.

In the matter of the estate of Amanda M. Combs, deceased. From a judgment admitting the will to probate, contestants appeal. Heard on motion to strike and to dismiss appeal. Granted in part, and denied in part.

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J. B. Campbell, C. P. Gotwals, N. B. Maxey, and Kelly Brown, all of Muskogee, for plaintiff in error. Franklin & Carey, of Muskogee, for defendant in error.

BURFORD, C. This proceeding was instituted originally in the county court of Muskogee county, to effect the probate of an alleged lost will of Amanda M. Combs, deceased. The county court denied the probate, and the proponent of the will appealed to the district court, where the cause was heard de novo and the will admitted to probate. The contestants appealed to this court by petition in error and transcript. After the appeal had been lodged in this court more than 60 days, and after more than 8 months, from the date of the final judgment in the district court, the proponents of the will, defendants in error here, moved to dismiss the appeal, alleging both jurisdictional and nonjurisdictional grounds. Thereupon the contestants, plaintiffs in error here, asked leave to amend the transcript. Upon this motion this court granted an order "allowing the record to be withdrawn for correction, same to be made before the trial court on 5 days' notice to the adverse party, the record to be returned to this court within 25 days, the amendment so made to be without prejudice to question the right to make the same." The record has been returned to this court. It appears that the only amendment made is a new certificate to the transcript by the clerk of the trial court. It is admitted that the former certificate was defective. Proponents now renew their motion to dismiss upon the original grounds therein contained and the additional ground that the amendment was not made "before the trial court." They also move the court, in the event their motion to dismiss is overruled, to strike certain portions of the alleged transcript. These motions are before us for decision.

[1] Taking up the various questions in their logical order, it seems to be admitted that the original certificate to the transcript was so defective as to compel a dismissal of the cause, unless such certificate can be and is properly amended. It does not appear that contestants made the amendment before the trial court. While it is not our desire or purpose to sanction modification of the orders of this court by counsel, without our knowledge or consent, yet it is our desire to pass upon the cases presented to us upon their merits where counsel observe the settled rules of practice, the orders of this court, and the necessary jurisdictional requirements sufficiently to enable us to do so. In the press of business the original order allowing the amendment was made with the idea in mind that this appeal was by petition in error and case-made, that for such reason an amendment could only properly be allowed under the safeguard of the presence and approval of the trial court, and were such the case we would be disposed to hold counsel to a strict compliance with the order. However, the trial court has little or no functions to perform in relation to a transcript. It is properly certified by the clerk. It does not appear that the presence of the trial court would have served any useful purpose in making this amendment. Had our attention been called to the form of this appeal, the original order would have been modified. Such being the case we are disposed to pass over the noncompliance of counsel with the terms of the original order, and to consider the amendment as made.

The question then arises as to whether a defective certificate of the clerk may be amended so as to constitute a proper certificate after the time for lodging an appeal in this court has expired.

In Walcher v. Stone, 15 Okl. 130, 79 Pac. 771, the question here involved was directly decided, the court holding the certificate to the transcript in that case to be insufficient, and that it could not be amended after one year—the then period of limitation for filing appeals—had expired. Walcher v. Stone, however, was decided upon the statute then in force and the general principles applicable to amendments. Since that decision the statute now embodied in section 5243, Rev. L. 1910, was passed. That section provides, in part, as follows (italics ours):

"If, after any record or case-made is filed in the appellate court, in either matter a civil or a criminal cause, it shall appear that any motion which is of record in the court from which the appeal is taken, touching the cause appealed, or that any evidence heard on the trial of said cause, or that any statement *or certificate* or motion, or other matter *is omitted* from such record or case-made, *or are insufficiently stated therein*, the appellate court may, on its own motion, or on motion of any party to such cause * * * prepare such omitted parts, and file such corrections in the appellate court, with like force and effect as though such corrected or added parts had been originally incorporated in the record or case-made, when first filed * * * and such order to correct, or leave so to do, may be had any time before the cause is finally decided by the appellate court."

Since the passage of this statute, this court has dismissed cause for insufficient certificate to the transcript filed therein, but in these cases it does not appear that there was an application to amend. We have held that the amendment to be made must be an amendment as such, and that therefore a case-made could not be substituted for a copy thereof after the time for appeal had expired (Creek Realty Co. v. City of Muskogee, 153 Pac. 180); but the particular question here involved appears to be now before us for the first time since the passage of the statute above quoted. Counsel cite many cases, all of which, and many others, have been carefully examined. The case in this court coming nearest to sustaining the motion to dismiss is Jordon v. St. L. & S. F. R. Co., 42 Okl. 804, 143 Pac. 46. In that case, however, there was no certificate whatever, and the request to amend was first made upon re-

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hearing, and after a final decision dismissing the cause had been rendered by this court. By its own terms, therefore, the time within which section 5243, supra, might be invoked, had passed. Turning to the statute it seems that the present application is clearly within its terms. Amendment is sought prior to final decision of a "certificate" which is "insufficiently stated." But it is urged that jurisdiction in this court is only acquired by the filing within the time limited by statute of a petition in error attached to a case-made or transcript, and if there is no case-made filed here and the papers filed with the petition in error being insufficiently certified, they are not a transcript, and that therefore jurisdiction fails. The answer is found in the statute itself. As now amended there is a proper transcript attached to the petition in error. The amendment has "like force and effect" as though "originally incorporated" in the record before us. By the very terms of the statute the amendment relates back to the date of filing and makes perfect as of that date, that which was before imperfect. It is in effect an amendment nunc pro tunc, and the record being regarded as filed in its present form, as of the original date of filing, jurisdiction is acquired within the terms of the statute regulating appeals. We regard this statute as but one of the expressions of the modern tendency of both courts and lawmakers, a tendency both proper and just, to sweep away the barriers of technicality and to permit, within the necessary rules of jurisdictional procedure, causes to be reached and decided upon their merits. We therefore hold the amendment to be properly made.

[2] The final ground urged for dismissal is that the only summons in error issued was insufficient to confer jurisdiction. This contention is met by the argument that defendants in error, by filing their various motions upon grounds and seeking relief both jurisdictional and nonjurisdictional, entered an appearance in the cause, and thereby complete jurisdiction was conferred. This latter contention cannot be sustained. The motions were filed after the time for perfecting an appeal had expired. Jurisdiction of the parties may be conferred by consent, but jurisdiction of the subject-matter in this court cannot. Jurisdiction of the subject-matter itself is only conferred upon this court by the filing of a petition in error, accompanied by case-made or transcript, and the issuance of process to defendant in error, all within the time allowed by law. After that time consent of parties is of no avail. It was so held in Creek Realty Co. v. City of Muskogee, supra; Shaffer v. Remmers, 148 Pac. 841; Oberly v. Harris, 143 Pac. 663; American National Bank v. Merganthaler Co., 31 Okl. 533, 122 Pac. 507, and the numerous cases therein cited. Some support is found for the contention in the first paragraph of the syllabus in Hill v. Hill et al., as reported in 152 Pac. 1122. An examination of the facts of that case, however, shows that there was an appearance, either by waiver or by seeking jurisdictional relief, in this court by all parties *prior to the expiration of the time within which the appeal might have been filed.* The decision denying that motion to dismiss was therefore clearly right. The broad language of the syllabus, however, as related to these facts, was a clerical error which we are advised is to be corrected in the official reports.

[3] But we are of opinion that the original summons in error was sufficient. The object of process is to notify the party of the existence of the suit and the nature of the controversy involved. In the nisi prius court a certain strictness in process is necessary, as there, if the summons wrongly described the subject-matter, the defendant might see fit to default because he had no objection to a judgment for the purpose and amount recited in the summons issued to him. In this court appeals come only from judgments theretofore rendered, of which the defendant in error had notice and in which he was necessarily the successful party. A mere inaccuracy in the process is not so likely to deceive or to cause an injustice. We are therefore inclined to construe liberally questions in relation to process issued out of this court. The summons in error in the instant case properly describes the parties, and the cause here; it was issued and served in time. It described the judgment appealed from, however, as one of the county court when it should have read "district court." It is true that if the process is fatally defective jurisdiction is not acquired and the cause will be dismissed (Springfield Fire & Marine Ins. Co. v. Belt, 45 Okl. 49, 144 Pac. 606); but in our judgment the summons here issued was not so inaccurate in form as to be fatally defective. Here there was no reason for the party being misled. The original judgment in the county court was appealed to the district court, and the cause was there retried. So far as appears this was the only cause pending between the same parties. The petition in error here properly described the judgment appealed from. The defendant in error must have known that no appeal was being prosecuted to this court from the judgment of the county court, since the judgment there was wholly in favor of the plaintiffs in error here, and there could be no possible object in their appealing from that judgment or right so to do. On the other hand judgment in the district court was against plaintiff in error, and it must be apparent that it was the district court judgment brought here for review. An examination of the American cases touching upon the sufficiency of notices of appeal and process upon appeal shows that two views have been adopted; one that of strict construction requiring the process to be complete and perfect in all its details, the other a more lib-

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eral view to the effect that if the process be not wholly inaccurate or incomplete, if therefrom the party can reasonably ascertain the object of appeal, and especially where the object can be clearly ascertained from an examination of the record and petition in error in the appellate court, the process will not be held void unless it appears that the party has been misled to his prejudice. This latter doctrine is in consonance with the views of this court and without reviewing the cases from other states in detail, it suffices to say that such doctrine is here adopted.

It follows from these observations that the motion to dismiss must be overruled.

[4] Passing to the motion to strike. In considering the grounds of this motion we are of opinion that we are not to be concerned with questions as to what constitutes a proper record on appeal from the county to the district court, or what might properly be incorporated in a case-made upon appeal from the district to this court, but may only properly decide what may be embraced in a transcript—no bill of exceptions having been made—upon appeal to review a judgment of the district court. This is settled by statute and by numerous decisions of this court. Section 5146, Rev. L. 1910, provides, in part:

"The record shall be made up from the petition, the process, return, the pleadings subsequent thereto, reports, verdicts, orders, judgments and all material acts and proceedings of the court. * * * Evidence must not be recorded."

See, also, Callahan v. Callahan, 149 Pac. 135, and cases cited.

Under this statute it has been held by this court that the evidence, unless made so by bill of exceptions, is not a part of the record. U. S. ex rel. v. C., O. & G. Ry. Co., 3 Okl. 404, 41 Pac. 729; Grand Lodge v. Furman, 6 Okl. 649, 52 Pac. 932; Gill v. Haynes, 28 Okl. 656, 115 Pac. 790; Billington v. Grayson, 158 Pac. 433. There is incorporated in this record the evidence taken before the county court. As before stated, whether or not this evidence, or any part thereof, was a part of the record proper of the county court is immaterial. Evidence taken before the county court, and not used as evidence in the district court upon a trial de novo by stipulation or otherwise, is not a part of the proceedings of the district court, at all, unless made so by statute. If it be said that this evidence was before the district court for the purpose of determining, as a matter of law, the correctness of the decision of the county court sustaining a demurrer to the evidence there, still such evidence is not a part of the record proper in the district court unless made so by bill of exceptions or case-made. It must follow that pages 31 to 80, inclusive, of the transcript as filed, containing the evidence taken in the county court, must be stricken. The same result must follow as to pages 81 to 84, inclusive, which set out the judgment of the county court. This judgment is no part of the record of the district court, and it is a transcript of the record in the district court which is to be considered here.

[5] The motion for new trial in the district court, pages 101 to 103, inclusive, of the record must also be stricken. Motions, including those for new trial, are not a part of the record proper. Tribal Dev. Co. v. White Bros., 28 Okl. 525, 114 Pac. 736; University Realty Co. v. English et al., 41 Okl. 593, 139 Pac. 516; Davis v. Lammers, 23 Okl. 338, 100 Pac. 514; Ludwig v. Benedict, 33 Okl. 300, 125 Pac. 739; Jacobs v. Willie, 150 Pac. 709; Lewis v. Leitchfield Co., 149 Pac. 1135; Vannier v. Fraternal Aid Ass'n, 40 Okl. 732, 140 Pac. 1021; Billington v. Grayson, 158 Pac. 433, and cases therein cited.

The final prayer of the motion to strike relates to portions of the judgment of the district court which find certain facts, upon the ground that no findings of fact having been requested, anything said by the court amounts to but a general finding for the prevailing party. Such seems to be the rule laid down in U. S. ex rel. v. C., O. & G. Ry. Co., 3 Okl. 404, 41 Pac. 729, supra. Here, however, the district court was sitting as an appellate court. The questions of his powers and duties as such, and whether or not in hearing this cause he was governed by the statutes relating to probate procedure, and particularly section 6211, Rev. L. 1910, requiring the county judge to incorporate findings of fact in his judgment, appear to be involved in the cause upon its merits. We therefore prefer to reserve this question until the cause is finally briefed and before us for decision.

For the reasons given the motion to dismiss should be overruled; the motion to strike granted in part and denied in part as heretofore indicated, and the parties required to file their briefs upon the merits within the time heretofore granted.

PER CURIAM. Adopted in whole.

(62 Okl. 14)

LEE v. TONSOR et al. (No. 8194.)

(Supreme Court of Oklahoma. Dec. 5, 1916.)

(Syllabus by the Court.)

1. GUARDIAN AND WARD ⇐48 — MANAGEMENT OF ESTATE—CONTRACTS—VALIDITY.

In the absence of specific authorization of the county court so to do, the guardian of a minor has no power to bind the real estate of his ward, or to create a lien thereon, by contract for labor and material for improvements made upon such estate.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 101, 219–226; Dec. Dig. ⇐48.]

2. MECHANICS' LIENS ⇐61 — NATURE OF RIGHT—STATUTORY PROVISIONS.

The right to a lien for labor and material going into improvements placed upon real es-

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tate is statutory, and is dependent upon a binding contract with the owner of the real estate, or with some one lawfully contracting with him, for such labor and material. Section 3862, Rev. Laws 1910.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 77, 78; Dec. Dig. ⇐61.]

3. GUARDIAN AND WARD ⇐77—SALES UNDER ORDER OF COURT—POWER OF COURT—DEBTS OF ESTATE.

Under section 6364, Rev. Laws 1910, the power of the county court to authorize a guardian to mortgage the lands of his wards is limited to debts "for which such estate or any part thereof is then legally liable to be ordered sold."

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 327-329; Dec. Dig. ⇐77.]

4. GUARDIAN AND WARD ⇐77—SALES UNDER ORDER OF COURT—POWER OF COURT—DEBTS OF ESTATE.

An order of the county court purporting to authorize a guardian to mortgage the lands of his ward to secure debts that are not a lien against the estate, or for the payment of which the estate is not bound, is in excess of the power of the court and void, and a mortgage executed in pursuance thereof is a nullity.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 327-329; Dec. Dig. ⇐77.]

5. JUDGMENT ⇐489—COLLATERAL ATTACK—GROUNDS—INVALIDITY OF JUDGMENT.

Where it appears affirmatively from the face of the record that the court is without power to make the order that was made, such order is void and subject to collateral attack.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 924, 925; Dec. Dig. ⇐489.]

Commissioners' Opinion, Division No. 2. Error from District Court, Tillman County; T. P. Clay, Judge.

Action by J. E. Lee against Glen Tonsor and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Wilson & Roe, of Frederick, for plaintiff in error. Mounts & Davis, of Frederick, for defendants in error.

GALBRAITH, C. J. E. Lee, as plaintiff, commenced this action in the trial court against the defendants, Glen Tonsor, Estella Tonsor, and Mrs. Annie Tonsor, being the mother and two minor children, to recover judgment on a promissory note and to foreclose a real estate mortgage given to secure the same. There was no defense to the action by Mrs. Tonsor. The minors defended on the ground that the note and mortgage were void as to them because the execution thereof had not been legally authorized. It appears from the record that prior to the year 1906 the husband of Annie Tonsor, and the father of Glen and Estella Tonsor, died in Tillman county, Okl., and that at the time of his death he owned a quarter section of land located in that county, and that this land was inherited by the surviving widow and two minor children. A guardian was duly appointed for the minors, and some time during the year 1908 the mother and guardian contracted for and had a dwelling house and other improvements made upon this land, and, failing to pay for the same, the materialmen furnishing the lumber for such improvements and certain of the laborers who constructed the improvements filed lien statements claiming a lien against the land and the improvements; that the guardian, after these lien statements were filed, presented a petition to the county court of Tillman county praying an order authorizing him to mortgage the land to take up the amount of the indebtedness so claimed. The petition was in the following form:

"In the Matter of the Guardianship of Glenn Tonsor and Estella Tonsor.

"The petition of John W. Goodwine, the guardian of the estate of Glenn Tonsor and Estella Tonsor, minor heirs of Frank Tonsor, deceased, respectfully represents and shows to the court that the said Frank H. Tonsor died intestate on or about the 1st day of December, 1906, and left certain real estate in this county, as shown by the inventory filed herein, to wit: The southwest quarter of section 35, in township 2 south of range 17, west of I. M.; that the said Frank H. Tonsor left a surviving wife, namely, Annie Tonsor, also left two surviving children, to wit, Glenn Tonsor and Estella Tonsor, minors; that on or about January —, 1908, under contract with the guardian of said minor children and their mother, Anna Tonsor, certain improvements were made and material furnished for the improvements of said land, and work and labor performed and material furnished in the erection of a fence upon said land; that for said labor and material furnished as above specified the following mechanic liens were filed in the office of the clerk of the district court in and for said county of Tillman, to wit: On March 30, 1908, H. M. Marsh, for work and labor performed, the sum of $35.40; on March 31, 1908, N. W. Willinford, for work and labor, in the sum of $41.90; on March 22, 1908, Dascomb-Daniels Lumber Company for material furnished, in the sum of $476.55; on May 28, 1908, C. F. Adair, for work and labor and material, $687.

"Wherefore your petitioner prays the court to grant authority to John W. Goodwine, guardian, to mortgage said real estate in the sum of $1,100, for the purpose of satisfying said existing lien."

"Dated this the 26th day of August, 1908.

"John W. Goodwine."

After hearing on the petition the judge made an order authorizing the guardian to join the mother of the minors in executing a mortgage to take up this indebtedness. That order was as follows:

"John W. Goodwine, as the guardian of the estate of Glenn Tonsor and Estella Tonsor, minors, having on the 26th day of August, A. D. 1908, presented to this court and filed herein his verified petition in due form, praying for an order authorizing him to mortgage the southwest quarter of section thirty-five (35) in township two (2) south of range seventeen (17) west of I. M., and it appearing to the court upon satisfactory proof that a copy of the order of this court entered herein on the 26th day of August, 1908, appointing the time and place for hearing said petition, was published for two successive weeks in the Frederick Leader, a weekly newspaper published within said Tillman county, as provided in said order, now, on this 20th day of September, 1908, at the time appointed for the hearing of said petition, it being a day of the regular July term of said court, comes said John W. Goodwine,

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petitioner, and the matter of said petition coming on regularly to be heard, the court, upon due examination and consideration of said petition, and after a full hearing upon the same, and due examination and consideration of the proofs and allegations of the parties interested, find from the evidence that to mortgage the said real estate belonging to said minors as prayed for in said petition and hereinafter particularly described is necessary and for the best interest of the minors and of all parties concerned.

"It is therefore ordered, adjudged, and decreed by the court that the said John W. Goodwine, as guardian of the person and estate of Glenn Tonsor and Estella Tonsor, heirs of Frank H. Tonsor, deceased, is hereby authorized and empowered to execute a mortgage upon the S. W. ¼ of section 36 in township 2 south of range 17 west of I. M., to the amount of $1,100, and that said amount to be applied to liquidate the liens now existing thereon.

"Witness my hand and the seal of said court this the 26th day of September, 1908.

"T. E. Campbell, Judge of the Court."

In pursuance to this order the guardian joined the mother in executing a note for the amount of this indebtedness, and also in the execution of a mortgage on this 160 acres of land to secure the note. That note was duly assigned to the plaintiff in error, who was the owner and holder thereof at the time of the commencement of this action. Judgment was rendered against the mother by confession for the amount of the note, and a decree of foreclosure of her interest in the land was adjudged, but the court found that the mortgage was not binding on the minors for the reason that the guardian was not authorized to execute the note and mortgage, and that the order of the county court relied upon for such authority, being in excess of the power of the county court, was a nullity. To review that finding and judgment the plaintiff in error has brought the case to this court.

[3] The first question presented for consideration is whether or not the order of the county court authorizing the guardian to join in the execution of the note and mortgage was erroneous or absolutely void; it being conceded that this is a collateral attack upon that order, and that, if void, it may be rightfully challenged in this proceeding. It is contended on behalf of the plaintiff in error that the order is irregular and merely erroneous, and therefore is not open to collateral attack. Section 6364, Rev. Laws 1910, is relied upon for the authority of the county court to make the order in question. This statute reads as follows:

"The county judge may, upon petition supported by competent testimony showing that the best interests of the estate demand it, grant authority by order to administrators of * * * estates and to guardians of the estates of minors or insane persons to mortgage any real estate belonging to such estate: Provided, that in no instance shall authority be granted by such judge to any such administrator or guardian to mortgage such real estate for a greater sum than is necessary to pay the then existing debts and liabilities for which such estate, or any part thereof, is then legally liable to be ordered sold."

It will be observed that this statute limits the authority of the county judge in authorizing the real estate of the minors to be mortgaged to the amount that "is necessary to pay the then existing debts and liabilities for which such estate or any part thereof is then legally liable to be ordered sold." This limitation of the judge's authority raises the question as to whether or not the minors' interest in this estate was liable for any part of this indebtedness upon the showing made in the petition for the order under consideration.

[2] It does not appear from the facts set out in the petition for the order that the lien claimants had any lien against the interest of the minors in this land, or that any part of their land was subject to be ordered sold to pay any part of this indebtedness. The right to a lien for labor and material furnished for improvements is dependent entirely upon the lien statute. Section 3862, Rev. Laws 1910. This statute provides that:

"Any person who shall, under oral or written contract with the owner of any tract or piece of land, perform labor, or furnish material, * * * shall have a lien upon the whole of said tract or piece of land, the buildings and appurtenances. * * *"

The statute, it will be observed, makes the right to the lien depend upon a contract with the owner. Without a contract no such lien can be created. No materialman or laborer can create a lien against property in the absence of an enforceable or legal contract with the owner, or with one who has such contract with the owner, for furnishing such labor and material. Darlington-Miller Lumber Co. v. James Lobsitz, 4 Okl. 355, 46 Pac. 481; Weaver v. Sells, 10 Kan. 609; Clark v. Hall, 10 Kan. 81.

[1, 4, 5] It does not appear from the petition for the order that the guardian had any right to enter into a contract for the lumber and material in behalf of the minors. In fact, it appears from the face of the petition that he had no such authority. The guardian had no power to bind the estate of his wards in any manner or to create a lien thereon without specific authority from the county court so to do. In other words, he had no right to contract on behalf of the minors for the labor and material for the improvements without specific authority from the county court. It does not appear that he had this authority. It follows, therefore, that he had no right to bind the interest of the minors in the estate by such contract, and that no lien or enforceable obligation against such interest was created thereby. Donnell v. Dansby, 159 Pac. 317; J. H. Cox & Co. v. O. E. Fisher, 161 Pac. 171, Appellate Court Bulletin, Nov. 14, 1916, p. 546. It therefore appears affirmatively from the record that filing the lien statements created no lien against the minors' interest in this land, and that the same was not bound for any part of the indebtedness set out in the petition for

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the order, and that the order of the court attempting to so bind the estate of the minors was beyond the power of the court, and was therefore void and subject to collateral attack.

In No. 3830, Roth et al. v. Union National Bank of Bartlesville et al., 160 Pac. 505, not yet officially reported, Appellate Court Bulletin, Oct. 13, 1916, p. 218, in subdivision B of the syllabus, the court, considering this question, announces the following rule:

"Where the record in the case affirmatively discloses the facts to be such that such court is without [authority] to make the order or decree it assumes to make, the same is void, and therefore subject to collateral attack for want of jurisdiction to the extent, at least, that such court is without power to make the same."

For the reasons controlling the court in announcing the above rule, and the authorities upon which it is based, reference is here made to the opinion in that cause.

We therefore conclude that the judgment appealed from was right, and that the order of the county court in attempting to authorize the guardian to execute the note and mortgage, on the interest of the minors in this land, was beyond the power of the court to make, and therefore void, and that there was no error in the judgment appealed from, and that the same should be affirmed.

PER CURIAM. Adopted in whole.

(62 Okl. 12)

EOFF et al. v. ALEXANDER. (No. 8083.)

(Supreme Court of Oklahoma. Dec. 5, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⟸1001(1)—REVIEW—QUESTIONS OF FACT—VERDICT.

There being evidence reasonably tending to support the verdict in a case at law, this court will not set it aside upon the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928–3933; Dec. Dig. ⟸ 1001(1).]

2. APPEAL AND ERROR ⟸264—PRESENTING QUESTIONS IN TRIAL COURT—EXCEPTIONS—VERDICT.

A person desiring to raise the question of the sufficiency in form of a verdict, or of the omission of material elements therefrom, should, before the jury is discharged, object to the same in such manner that the grounds of his objection are made known to the court, and, if such objections are overruled, then properly save his exceptions to the ruling of the court. It is not ordinarily sufficient to merely except to the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1533–1535; Dec. Dig. ⟸ 264.]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Tillman County; T. P. Clay, Judge.

Action by J. A. Alexander against B. B. Eoff and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Wilson & Roe, of Frederick, for plaintiffs in error. Mounts & Davis, of Frederick, for defendant in error.

BURFORD, C. J. A. Alexander sued B. B. Eoff, as sheriff, and the National Bank of Commerce of Frederick, in replevin for certain mules, a wagon, and harness. There was a trial to a jury after issues joined, and verdict and judgment for plaintiff. Defendant appeals.

But two questions are presented by the brief: (1) The sufficiency of the evidence to sustain the verdict; and (2) the sufficiency of the verdict itself.

[1] Upon the first question it suffices to say that after an examination of the record we are satisfied that there was evidence upon all material issues, including the liability of the sheriff, sufficient to raise an issue of fact for the determination of the jury, and to reasonably sustain the verdict found by them. In such cases, under our repeated decisions, in a suit at law, we are not at liberty to set aside the verdict upon the weight of the evidence, even though we may disagree with it.

[2] Upon the second point the jury found for the defendant for the return of the property, or, in the event it could not be returned, for its value in the sum of $300 and interest. It is insisted that defendants, by deduction from the decision of this court in Leeper, Graves & Co. v. First National Bank, 26 Okl. 707, 110 Pac. 655, 29 L. R. A. (N. S.) 747, Ann. Cas. 1912B, 302, were entitled to have the jury find and set out in their verdict the separate value of the articles of property sought to be replevied. This question is not properly before us for review. If the defendants had such a right, they could waive it. The verdict would not necessarily be void, if it fixed no value at all. Ward v. Richards, 28 Okl. 629, 115 Pac. 791; Davis v. Gray, 39 Okl. 386, 134 Pac. 1100; Crisp v. Gillespey, 151 Pac. 196. In Dunlap & Taylor v. Flowers, 21 Okl. 600, 96 Pac. 643, this court passing upon the very question here raised, in a suit brought under the Arkansas practice, said:

"If the defendant does not demand a separate valuation before the verdict of the jury is returned, or object to the verdict in solido before the jury is discharged, he waives his right to have a separate valuation in the verdict."

So in Crisp v. Gillespey, supra, it was held that this question might be waived if no timely objection were made, and that to be timely the objection must be made before the jury is discharged and "when the error as to form could be corrected." Such seems to be the general rule. Hobbs v. Clark, 53 Ark. 411, 14 S. W. 652, 9 L. R. A. 526; Johnson v. Fraser, 2 Idaho (Hasb.) 404, 18 Pac. 48; Blake v. Powell, 26 Kan. 320; Avery v. Popper (Tex. Civ. App.) 45 S. W. 951; Wilson v. Barnes, 49 Ala. 134.

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In the case before us there was no request for a separate valuation, before the jury retired or afterward. The only objection or exception appearing in the record is the following recital in the case-made:

"The jury returned into open court their verdict herein, which was by the clerk duly read in their presence and hearing, filed, and made a part of the record herein. To the finding and rendering of which said verdict the defendants then and there duly and legally excepted at the time, and their exceptions were by the court allowed."

Construed either technically or broadly, this exception is not sufficient to raise the question of failure to find separate values. Technically an exception, as defined by our statute (Rev. L. 1910, § 5026), is "an objection taken to a decision of the court or judge upon a matter of law." Though an exception is often construed as an objection, it seems that, however regarded, the court's attention must in some way be challenged to some legal insufficiency or error, and a ruling invoked thereon, and if the ruling be adverse the proper office of an exception first arises, since then for the first time is there a decision of the court or judge upon a matter of law.

If the exception here taken can be construed as an objection to the sufficiency of the verdict, still we think it not sufficient. The object of an objection is to call the attention of the court to some error, that it may be corrected. It is not for the purpose of getting into the record on error upon which a reversal may be predicated. In all fairness the objection should be sufficient to advise the court what the error is of which complaint is made. Such is the rule generally and in this particular class of cases. See vol. 8 Ency. Pl. & Pr. 281; 38 Cyc. 1905, and cases cited. So much seems to be contemplated by our statute. It is provided (Rev. L. 1910, §§ 5028–5030):

"No particular form of exception is required. The exception must be stated, with so much of the evidence as is necessary to explain it and no more, and the whole as briefly as possible."

"Where the decision * * * is entered on the record, *and the grounds of objection appear in the entry*, the exception may be taken by the party causing to be noted, at the end of the decision, that he excepts."

"Where the decision is not entered on the record, or *the grounds of objection do not sufficiently appear in the entry*, the party excepting must reduce his exceptions to writing, and present it to the judge for his allowance. If true, it shall be the duty of the judge to allow and sign it; whereupon it shall be filed with the pleadings * * * but not spread at large upon the journal. If the writing it not true, the judge shall correct it, or suggest the correction to be made, and it shall then be signed as aforesaid."

The exception in the instant case does not in any way advise the court of the error alleged as to the verdict, and wholly fails to comply with the statute or proper practice in such cases. We therefore hold that the question of separate valuation in the verdict was not properly raised in the trial court and is not before us for review.

In discussing objections generally herein, we have not referred to objections to the introduction of testimony governed by section 5070 of the Code.

No error being found in the record, the cause should be affirmed.

PER CURIAM. Adopted in whole.

(61 Okl. 320)

ASHER v. STULL et al. (No. 7729.)

(Supreme Court of Oklahoma. Dec. 5, 1916.)

(Syllabus by the Court.)

1. GUARDIAN AND WARD ⟸182(2)—ACTIONS ON BONDS—CONDITIONS PRECEDENT—PRESENTATION OF CLAIM.

It is not necessary that a claim for a fund wrongfully misappropriated by a guardian be presented to the administrator of the surety of such guardian before an action for the recovery thereon can be maintained.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 627, 630–636; Dec. Dig. ⟸182(2).]

2. GUARDIAN AND WARD ⟸182(4)—ACTIONS ON BOND—SUIT BY WARD.

Where a guardian dies without an accounting and settlement of his affairs having been made in the county court, his ward may maintain an action in the district court against the personal representatives of the sureties on his bond for an accounting and settlement.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 640–643; Dec. Dig. ⟸182(4).]

3. GUARDIAN AND WARD ⟸182(7)—ACTIONS—SETTLEMENT OF ACCOUNT—JUDGMENT.

In such action the court has jurisdiction to adjust the account of the deceased guardian with the ward, and may hear evidence and allow credits and determine the balance due, if any, by said guardian, and render judgment therefor.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 659–662; Dec. Dig. ⟸182(7).]

Commissioners' Opinion, Division No. 3. Error from District Court, Grant County; W. M. Bowles, Judge.

Action by James H. Asher, as guardian of Elizabeth Miller, a minor, against A. J. Stull and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

Sam P. Ridings, of Medford, for plaintiff in error. J. B. Drennan, of Medford, R. E. Sullivan, of Pond Creek, and J. G. McKelvy and E. H. Breeden, both of Medford, for defendants in error.

HOOKER, C. This suit was instituted in April, 1914, by plaintiff in error against the defendants in error, to recover from them as sureties on three separate bonds executed by Julia R. Miller, as guardian of Elizabeth Miller, who was her daughter.

It appears that on the 6th day of October, 1908, Julia R. Miller filed a bond as such guardian in the sum of $500, signed by A.

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J. Stull as her surety, and thereafter, on the 31st day of May, 1910, she having intermarried with one Castor, she executed another bond in the sum of $3,000 signed by W. C. Caple and J. R. Goldsmith, as sureties; and on the 15th day of May, 1911, she filed in said court, as guardian, a bond in the sum of $3,000, signed by Richard K. Miller and O. J. Roberts, as her sureties.

It further appears that Julia R. Castor, who was the guardian aforesaid, died, and one William French was appointed administrator of her estate, and all the property belonging to said estate has been disposed of and distributed; and the said administrator of the estate of Julia R. Castor on the 23d day of January, 1914, presented and filed a report in the guardianship matter of Elizabeth Miller, showing an amount due by Julia R. Castor to her ward in the sum of $2,034.36, to recover which judgment is sought here.

It also appears that Richard K. Miller, who was one of the sureties upon the bond of Julia R. Castor, died before the institution of this suit, and that his administrator is made a party defendant here.

It also appears that Julia R. Miller was appointed administratrix of the estate of Wylie W. Miller, and that she qualified on the 1st day of February, 1908, as such administratrix, by executing a bond with M. M. Morrow and E. G. Palmer as her sureties, which bond was duly approved, and that on the 6th day of February, 1907, she filed an inventory of said estate, not including the homestead, at $887.09; that on February 21, 1907, she filed a suit as the administratrix of said estate, against the Chicago, Rock Island & Pacific Railway Company, for the wrongful death of said deceased; and that on August 5, 1907, the personal estate being less than $1,500, the judge of the county court of Grant county set all the same aside to the widow for the use and support of herself and her minor child; that in February, 1908, a judgment was rendered in her favor against the railroad company for the sum of $4,000, and it is shown by the evidence here that $3,000 of the same was paid to Julia R. Miller as the administratrix of said estate, for the use of herself and her child, Elizabeth Miller.

It further appears from the record that on the 4th day of March, 1908, the said Julia R. Miller loaned James W. Johnson and wife $2,800, taking a mortgage therefor to herself, which was money derived from the railroad settlement; that on the 8th day of September, 1909, the said Julia R. Miller assigned a one-half interest in the Johnson mortgage to O. S. Kelly, and that on the 24th day of May, 1910, she assigned the other one-half interest to the First State Bank of Pond Creek.

That in her first report as guardian on February 5, 1909, she mentions as the property of the minor a note and mortgage for $1,400, executed by J. W. Johnson, and on March 14, 1910, she again mentions the same note in her report, and shows a balance on hand in cash of $148.54. Again on May 5, 1911, she shows a balance due of $155.59, and under the head of "Notes and Accounts" she listed in her report one note of H. H. Castor and Julia R. Castor in the sum of $1,400.

The record further shows where J. H. Asher qualified as the guardian of Elizabeth Miller, after the death of Julia R. Castor, her mother, and that he executed bond about the 8th day of January, 1912, and on the 29th day of March, 1912, presented a claim to William French as the administrator of Julia R. Castor in the sum of $1,875.64. And it further appears that William French, as the administrator of the estate of Julia R. Castor, here attempts as such administrator to settle the account of Julia R. Castor, as guardian of her daughter, and shows an indebtedness to the ward of $1,875.64.

[1] In the petition filed in this cause, the plaintiff prays judgment for $2,070.86. Upon the trial hereof, the court released the estate of Richard K. Miller from any liability, for the reason that the suit was not instituted within three months after the date of the rejection of the claim filed by the guardian with the administrator of said estate, as the undisputed facts show that Richard K. Miller died, and Josephine V. Miller was appointed his administratrix, and on the 8th day of May, 1913, gave the statutory notice to creditors, and that the plaintiff herein, J. H. Asher, as guardian of Elizabeth Miller, filed a claim with her as the administratrix of said estate, which was received by the administratrix on the 30th day of May, 1913, but that she did not either allow or reject said claim, and this suit was filed on the 24th day of April, 1914, and it is the contention of the estate of Richard K. Miller here that, because the guardian failed to institute his suit upon said claim within three months after the expiration of 10 days of the date of the filing the same, the action cannot now be maintained against said estate. Section 6342 of the Harris-Day Code provides as follows:

"When a claim accompanied by the affidavit required in this article, is presented to the executor or administrator, he must indorse thereon his allowance or rejection, with the day and date thereof. If he allow the claim, it must be presented to the judge for his approval, who must, in the same manner, indorse upon it his allowance or rejection. If the executor or administrator, or the judge refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect is equivalent to a rejection on the tenth day."

And section 6344 thereof provides:

"When a claim is rejected, either by the executor or administrator, or the judge of the county court, the holder must bring suit in the proper court, according to its amount, against the executor or administrator, within three months after the date of its rejection, if it be then due, * * * otherwise the claim is forever barred."

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The contention of the defendants in error is that this provision of the statute is mandatory, and that a claim filed with the administrator of an estate is by operation of law rejected on the 10th day even though the administrator fails to take an affirmative action upon his part. The contention of the defendants in error is supported by Underwood v. Brown, 7 Ariz. 19, 60 Pac. 700, where the court said:

"That neglect or refusal of an administrator to indorse an allowance or rejection of a claim for 10 days after presentation is equivalent to a rejection on the tenth day."

The above authority is likewise supported by Boyd v. Von Neida, 9 N. D. 337, 83 N. W. 329, and by Farwell v. Richardson, 10 N. D. 34, 84 N. W. 558. But the California court, in construing the statute of that state with reference to the same matter in the case of Bank of Ukiah v. Shoemake, Executrix, 67 Cal. 147, 7 Pac. 420, said:

"The statute of limitations commences to run against a rejected claim on the estate of a decedent from the time of its actual rejection by the personal representative of decedent, and not from an implied rejection by failure or refusal of the decedent's representative to indorse a refusal or rejection within ten days after presentation, as such refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection after such time."

There are other authorities from that state supporting this contention, yet, however, there is some difference between the verbiage of the statutes of Oklahoma and the statutes of California construed by the decision above mentioned. This question, however, has been set at rest in this state by the decision of this court in the case of Donnell v. Dansby, 159 Pac. 319, wherein Mr. Justice Hardy said:

"Section 6346, Rev. Laws 1910, requires that all claims must first be presented to the executor or administrator before an action can be maintained thereon; and it is claimed by reason thereof plaintiffs' cause of action is barred. Plaintiffs were not creditors of deceased, but are seeking an accounting of a trust fund held by him, which he had wrongfully misappropriated. We are justified in saying this because it is shown that none of this fund came into the hands of his administrator. There was no contractual relation existing between them, but the relation was one created and governed by law. In Am. Trust Co. et al. v. Chitty et al., 36 Okl. 479, 129 Pac. 51, it was held that claims arising in tort or other wrongful acts of the deceased need not be presented to the executor or administrator before an action will lie thereon. A requirement that the claim here involved be presented to the administrator necessarily carries with it the proposition that the administrator has the power to allow or reject such claim, and that the county court in the administration proceedings would be authorized to state the account of the guardian with his wards, allowing or disallowing claims of the wards or the administrator in reference thereto, and in determining the balance due, which, we have seen, it cannot do. While the property of the ward may come into the hands of the administrator upon the death of the guardian, the trust does not descend to him, but is a personal trust reposed in the guardian; and the administrator merely takes possession of the property of the ward coming into his hands, for the purpose of holding and preserving it, until the persons entitled thereto can obtain a settlement of the guardianship affairs in the proper forum, when the rights of all parties may be definitely determined."

Under the authority just quoted we must hold that it was not necessary for this claim of the guardian to have been presented to the administrator of Richard K. Miller, as neither the administrator nor the county court had the authority to settle the accounts of the former guardian with his ward in the administration proceedings.

[2, 3] Second. Under the authority last quoted the lower court was correct in holding that the district court of Grant county had the authority to settle the account of the former guardian, Julia R. Castor; for it is the established law of this state that, where a guardian dies without an accounting and settlement of his affairs, as guardian, having been made to the county court, or with the ward, his former ward may maintain an action in the district court against the personal representatives of the former guardian and the sureties upon his bond as guardian for an accounting and a settlement; and in such action the district court has jurisdiction to settle the accounts of the deceased guardian, and to this end may hear evidence and allow the deceased guardian any credits to which he may lawfully be entitled, and may determine the balance due by him to his ward and render judgment against his sureties therefor.

The lower court held that, the sureties upon the bonds of the guardian were not liable for the $1,400 alleged to have been received by the guardian, as the ward's part of the judgment rendered against the railroad company for the death of her father, because the money had never come into the hands of the guardian from the possession of the administratrix.

Upon an examination of the record it is apparent that the guardian recognized this fund as the property of her ward, because on February 5, 1909, and on March 4, 1910, she sets forth in the reports filed by her, as guardian, certain sums of money due the ward which the evidence shows was the ward's part of the judgment collected from the railroad company.

As we view the law, if the guardian actually had this money in her possession and under her control, then the guardian and her bondsmen are responsible therefor. We do not believe that the sureties upon the guardian's bonds can be relieved from liability for the sole reason that the county court never made an order, directing the administratrix of the Miller estate to distribute or pay to the guardian of the Miller child the proportionate part of the estate due it, but the question of liability may be determined here solely by the fact whether the money was in the hands of the guardian or under her con-

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trol, and, if so, she and her sureties are responsible therefor.

The judgment of the lower court is therefore reversed, and this cause remanded, for proceedings consistent with this opinion.

PER CURIAM. Adopted in whole.

(62 Okl. 10)

FAIRBANKS CO. v. CITY OF SULPHUR.

(No. 5106.)

(Supreme Court of Oklahoma. Dec. 5, 1916.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS ⇐905—ACTIONS—BURDEN OF PROOF.

Where warrants and claims sued upon are prima facie valid, and the defendant city seeks to avoid payment on the ground that the contracts upon which such warrants and claims are based were incurred in excess of a constitutional or statutory limitation, the burden of showing that such debt limit had been exceeded is upon the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1891–1893; Dec. Dig. ⇐905.]

2. MUNICIPAL CORPORATIONS ⇐865(2)—INDEBTEDNESS—LIMITATION.

A city has no right to apply the revenue provided for the current year to the satisfaction of obligations of a preceding year, so long as there are or may be legal claims outstanding against the city for such current year; and, where the revenue provided for the current year is misapplied to the payment of obligations of a preceding year, the funds so misapplied will be considered as in the treasury in determining whether or not a constitutional or statutory limitation has been exceeded.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1837; Dec. Dig. ⇐865(2).]

Commissioners' Opinion, Division No. 4. Error from County Court, Murray County; Harry W. Fielding, Judge.

Action by the Fairbanks Company against the City of Sulphur. Judgment for defendant, and plaintiff brings error. Reversed, and remanded for new trial.

Broadbent & Rawlings, of Sulphur, for plaintiff in error. Ira M. Roberts, of Sulphur, for defendant in error.

DAVIS, C. Parties mentioned herein as in court below. Plaintiff sold defendant the following bill:

"New Orleans, Dec. 9th, 1907.

"Sold to the City of Sulphur, I. T. 6 Fairbanks hydrants, 2½ bury, 4" Universal joint connections 2–2½" hose nozzles, $27.50 each, $165.00."

Duly sworn to by F. A. Maddox, Mgr., state of Louisiana, parish of Orleans, before W. Morgan Gurley, notary public, with seal.

The following warrant was thereafter duly issued and delivered to plaintiff by defendant:

"City Warrant.

"No. 921. $165.00.

"The treasurer of the city of Sulphur, Oklahoma, will pay to Fairbanks Co. or order the sum of one hundred sixty-five dollars for account, out of water fund. By order of council 1st day of June, 1908. D. J. Kendall, Mayor.

"Attest: R. L. Merrill, City Clerk. [Seal.]"

Said warrant was duly presented by plaintiff to defendant for payment on May 17, 1909, and was by the city treasurer stamped, "Not paid for want of funds," and payment refused. Plaintiff sued on said warrant before justice of the peace U. A. Fox, Sulphur township, Murray county, Okl., on November 22, 1911, and on December 13, 1911, trial was duly had before said justice, resulting in a judgment for plaintiff and against the defendant in the sum of $165 with interest after May 17, 1909, at 6 per cent., amounting to $24.75 and costs. Defendant duly appealed to the county court of said county, and a trial was had to said court on October 22, 1912, a jury being duly waived, resulting in a judgment that plaintiff take nothing by its suit, and that the defendant go hence without day, and that the plaintiff pay all costs of the suit. Plaintiff has duly appealed from the judgment of said court by petition in error and case-made, and the cause is thus before us for review.

The debt was contracted after statehood. The warrant evidencing said indebtedness was issued after statehood. The record shows that Sulphur was a city located in the Indian Territory prior to statehood, and hence governed by the laws in force in said territory as to contracts, etc., arising thereunder prior to statehood.

The act of Congress of June 28, 1898, commonly known as the "Curtis Bill," section 14, provided, among other things, as follows:

"Such city or town governments shall in no case have any authority to impose upon or levy any tax against any lands in said cities or towns until after title is secured from the tribe; but all other property, including all improvements on town lots, which for the purposes of this act shall be deemed and considered personal property, together with all occupations and privileges, shall be subject to taxation. And the councils of such cities and towns, for the support of the same and for school and other public purposes, may provide by ordinance for the assessment, levy, and collection annually of a tax upon such property, not to exceed in the aggregate two per centum of the assessed value thereof, in manner provided in chapter one hundred and twenty-nine of said digest, entitled 'Revenue,' and for such purposes may also impose a tax upon occupations and privileges."

This was the only way said defendant herein could raise revenue to run the city by taxation.

The evidence in the case shows that the defendant passed the following ordinance:

"Ordinance No. 150, City of Sulphur, Ind. Ter., passed July 25, 1907, provides tax levy as follows:

General fund	2½	mills
Water fund	5	mills
School bond	2	mills
Street and bridge	½	mill
School	9	mills
Salary	1	mill,

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and it was stipulated and agreed by both parties that the assessed valuation of all taxable property within the city of Sulphur, Ind. Ter., at time of above levy was $1,000,000.00, and that a 5-mill levy would amount to $5,000.00."

This would provide $20,000 for all funds or purposes and $5,000 for the water fund of said defendant for the fiscal year 1907–08, under the provisions of said law and stipulation, ante.

[1, 2] The record shows that the fiscal year began July 1, 1907, and ended June 30, 1908. The record further shows that warrants had been drawn on the water fund of defendant prior to November 16, 1907, amounting to $5,067.02, and that the amount of the warrant indebtedness drawn on the water fund on the 1st day of June, 1908, was $8,363.78, and that the indebtedness of said defendant was on this date, June 1, 1908, $26,833.51; that the bonded indebtedness of the defendant was on November 16, 1907, and on December 9, 1907, $65,000. No especial means were provided by which to pay indebtedness of any of the municipalities of this state incurred after statehood and during the remaining portion of the fiscal year which began on July 1, 1907, and ended on June 30, 1908. Such indebtedness, as to its payment, falls under the Constitution and laws of the state of Oklahoma, with all other indebtedness of like kind, character, and description incurred after statehood. But the testimony in this case fails to show whether the above indebtedness of the defendant was all incurred and warrants issued therefor and charged against said funds, including the water fund, within the fiscal year of 1907–08, or not. This matter is vital to the proper determination of this controversy.

"The warrants and the claims being prima facie valid, as shown by the stipulation, when the city sought to avoid payment of the same on the ground that its debt limit had been exceeded, the burden of proof was upon the municipality to establish such fact. See Johnson v. Board, 7 Okl. 686, 56 Pac. 701; Board of County Com'rs v. De Lana, 8 Okl. 215, 57 Pac. 162. There was a total failure on the part of the city to show that the warrants and claims set out in the petition were in excess of 80 per cent. of the tax levied for city expenses during that current year, to wit, the fiscal year ending June 30, 1910." State Bank of Miami v. City of Miami, 43 Okl. 809, 144 Pac. 597.

"The object of the provisions of the Constitution and statute hereinbefore mentioned was to provide a method whereby municipalities could be maintained upon a cash basis, and the city authorities had no right to pay out any part of the levy of a specific year in satisfaction of indebtedness of a preceding year, before first meeting the obligations of the current year, and the fact that they did so could not render an obligation or contract within the limitation invalid. The city paid approximately $8,000 chargeable to the fiscal year ending June 30, 1909, out of the funds levied for and belonging to the fiscal year ending June 30, 1910, and if this had not been done, there would have been ample funds in the city treasury to meet all of the obligations for the fiscal year ending June 30, 1910. If there is a surplus to the credit of any account or fund after all claims against such fund for that year had been paid, such surplus may be transferred to any other fund having a deficit. State ex rel. v. Appelby, 136 Mo. 408, 37 S. W. 1122. * * * In Andrew County ex rel. v. Schell, 135 Mo. 31, 36 S. W. 206, the court, in construing the section of the Constitution almost identical with section 26, art. 10, Const. Okl., held: Revenues of the current year must first be applied to the payment of warrants drawn for the expenses of such year, and this although there is a statute providing that the warrants shall be paid in the order of presentation." State Bank of Miami v. City of Miami, 43 Okl. 809, 144 Pac. 597.

"In our judgment, the sole question herein is whether the indebtedness was valid at the time it was incurred. In determining the validity of such indebtedness, it will, of course, always be necessary to inquire whether, at the date of its assumption, there were unappropriated revenues to meet it, because, if there were not, there would be no liability resting upon the county, and the claimant would not be entitled to judgment. But if, at the time the contract was made, the indebtedness created thereby, together with all previous valid indebtedness, did not exceed the income and revenue of the county provided for such year, the claimant will be entitled to judgment for the amount of his claim. Johnson v. Bd. Co. Com'rs, 7 Okl. 686, 56 Pac. 701; Huddleston v. Bd. Co. Com'rs, 8 Okl. 614, 58 Pac. 749; Bd. of Education v. Bolton, 104 Ill. 220; New Orleans v. United States, 49 Fed. 40, 1 C. C. A. 148; Holzhauer v. City, 94 Ky. 396, 22 S. W. 752; Mountain Grove Bank v. Douglas, 146 Mo. 42, 47 S. W. 944; Higgins et al. v. San Diego Water Co., 118 Cal. 524, 45 Pac. 824, 50 Pac. 670." Buxton & Skinner Stationery Co. v. Board of Com'rs, 155 Pac. 215.

For the reasons stated, the judgment of the court below is reversed, and the cause remanded for a new trial, with directions to proceed in accordance with the views herein expressed.

PER CURIAM. Adopted in whole.

(62 Okl. 78)

McLAUGHLIN v. MEANS et al. (No. 7492.)

(Supreme Court of Oklahoma. May 9, 1916. Rehearing Denied Dec. 26, 1916.)

(Syllabus by the Court.)

BROKERS ⟸49(1)—RIGHT TO COMPENSATION —PERFORMANCE OF CONTRACT.

Where, pursuant to a contract providing that the second parties should furnish, secure, and deliver to the first party oil and gas leases covering an area of 3,500 acres in a designated locality, and that the first party should bear and pay all expense incident and necessary to the approval by the county court of leases on lands owned by minors, the second parties secured the proper execution of such leases and the approval thereof by the county court, and the same were transmitted to the first party through a bank, with draft attached for the expense, in the way of a reasonable attorney's fee incurred in procuring such approval, *held*, that there was a substantial compliance with the terms of said contract by the second parties.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 70; Dec. Dig. ⟸49(1).]

Commissioners' Opinion, Division No. 3. Error from District Court, Hughes County; John Caruthers, Judge.

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Action by B. H. McLaughlin against C. M. Means and others. Judgment for defendants, and plaintiff brings error. Affirmed.

H. B. Martin, A. F. Moss, and R. K. Dumbell, all of Tulsa, for plaintiff in error. J. F. McKeel, of Ada, and W. T. Anglin, of Holdenville, for defendants in error.

BLEAKMORE, C. This is an appeal from the district court of Hughes county. The parties appear and are referred to here as in the trial court. Plaintiff and four of the defendants entered into the following contract:

"This agreement, made and entered into in triplicate this 4th day of March, 1913, by and between C. M. Means, W. W. Barnett, T. W. Bell, and M. B. Donaghey, of Allen, Oklahoma, parties of the first part, and B. H. McLaughlin, of Tulsa, Oklahoma, party of the second part, witnesseth: That whereas, parties of the first part are the owners in fee of about three thousand acres of land, more or less, in the south half of township five north, range nine east, Hughes county, Oklahoma, on which said land there is at this time no lease for oil and gas mining purposes; and whereas, parties of the first part are in position to, have, can, and are able to secure oil and gas mining leases on about fifteen hundred acres of land in the immediate vicinity of the land owned by said first parties, in order that leases thereon may be blocked practically solid; and whereas, first parties desire to have said leases and lands developed for oil or gas; and whereas, second party desires to do said development provided suitable acreage can be secured:

"Now, therefore, for and in consideration of one dollar and the terms, agreements, stipulations, and conditions hereinafter set forth, it is agreed between the parties hereto as follows: Parties of the first part hereby agree to furnish, secure, and deliver in one block, as nearly as practicable, leases for oil and gas mining purposes in, on, to, and covering thirty-five hundred acres of land, all to be located in the south half of said township five north, range nine east, the title to which said leases shall be merchantable and acceptable to attorney of second party. Parties of the first part further agree to furnish, secure, and deliver to second party said leases, on the form hereto attached, on or before March 24, 1913, and second parties shall have ten days thereafter to accept or reject the title to same. Should any title be found, upon examination, not merchantable or acceptable to second party, first parties shall have twelve days thereafter to cure the defects therein, and if such defects are incurable, or if the title thereto cannot be perfected to the satisfaction of second party, then the first parties are to secure, furnish, and deliver to the second party leases covering a like amount of acreage to be located in the south half of said township five north, range nine east, in lieu of the amount covered by the leases, the title to which is rejected, to complete the amount of acreage agreed to be delivered, to wit, thirty-five hundred acres. The party of the second party agrees to commence operations to drill one well for oil or gas without cost or expense to the first parties at some location on the said leases, to be furnished, secured, and delivered as herein agreed, within ninety days from the 15th of April, 1913, and continue the drilling thereof with due diligence, and complete the same within nine months from the date of the commencement of said operations, or this agreement to be void. Should first parties fail, refuse, or neglect to furnish, secure, and deliver the full amount of acreage herein stipulated, this agreement shall be null and void and of no effect, at the option of the second party.

"Party of the second part has this day deposited in escrow in the First National Bank of Allen, Oklahoma, together with a copy of this agreement, the sum of five hundred dollars, conditioned as follows: That in the event the first parties comply with all the terms and conditions of this agreement and secure, furnish, and deliver said leases to the second party, and the second party refuses, neglects, or fails to comply with his part of this agreement, then and in that event this agreement, and all the leases hereby agreed to be secured, furnished, and delivered, shall be void and of no effect, and the said five hundred dollars this day deposited, as above set forth, shall be forfeited to the first parties. That in the event the first parties shall fail, refuse, or neglect to comply with the terms and conditions of this agreement, then the said sum so deposited by the second party in escrow, as above set forth, shall be returned and delivered by said bank to the second party; or, upon compliance with this agreement, the said sum so deposited by the second party in escrow, shall be returned to him by said bank, within ten days from the date of commencement of operations to drill said well. All expenses incident and necessary to the approval by the county court of any leases on land owned by minors that may be secured is to be borne and paid by second party. It is further agreed that second party is to furnish all take-offs on said land at his own expense. It is agreed that leases on all the land covered by the list hereto attached shall be furnished and delivered by first parties to the second party, as a part of the leases herein agreed to be furnished, secured, and delivered.

"In witness whereof, the parties hereto have hereunto set their hands this 4th day of March, 1913.

"C. M. Means,
"W. W. Barnett,
"T. W. Bell,
"M. B. Donaghey,
"First Parties.
"B. H. McLaughlin,
"Second Party."

On December 15, 1913, plaintiff commenced this action, alleging performance of said contract on his part as far as possible; that the defendant, parties to said agreement, prior to and including March 31, 1913, had procured the execution of certain oil and gas leases pursuant thereto, embracing 2,312.57 acres, which were accepted by him as a partial compliance therewith; that said defendants had failed and refused to furnish and deliver leases covering the remaining portion of 3,500 acres, as provided by the contract; that, notwithstanding the delay in the execution and delivery thereof, he has at all times been ready, willing, and able to accept all such leases, and to proceed with the drilling of a well in accordance with his agreement; that defendants had set up a claim that plaintiff had failed to comply with the terms of the contract on his part, by reason of which his rights in the leases theretofore executed had been forfeited, and that defendants had repudiated said contract and leases, and were attempting to again lease the lands covered thereby to other persons, and that the $500 deposited by plaintiff in the First National Bank of Allen had been wrongfully withdrawn therefrom; that subsequent to the execution of said contract, as the result of the exploration of others, oil and gas in large

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and profitable quantities had been discovered in proximity to the lands involved; and that the oil and gas rights under said contract had greatly increased in value, being worth more than $50,000. There was prayer that all of the defendants be permanently enjoined from interfering with plaintiff in the use of the lands for oil and gas mining purposes, and from executing other leases covering the same, and that the defendants who were parties to the contract be required to perform same by executing and delivering to plaintiff leases covering additional lands sufficient to embrace in the aggregate 3,500 acres, or, if said defendants were unable to furnish, secure and deliver such leases, that plaintiff have judgment against them in the sum of $50,000, and a further prayer for judgment against said defendants and the bank for the $500 deposit.

Simmons, Thomas, and Holmes were made parties defendant upon motion of the other defendants, on the ground that they were jointly interested with plaintiff in the transactions involved. Defendants answered, asserting that plaintiff had breached the contract, by reason of which they had been damaged in the sum of more than $80,000. The cause was submitted to the court and a jury, resulting in verdict and judgment for defendants in the sum of $500, the amount deposited in the bank.

It appears from the evidence that, in addition to the leases which were delivered to and accepted by plaintiff, the defendants, who were parties to the contract above set forth, procured to be executed to defendant certain oil and gas leases by guardians, on the lands of their minor wards, duly approved by the proper county court, all of which leases covered in the aggregate approximately 3,500 acres of land. Some of these leases were transmitted to plaintiff, by the attorney for the guardian, through a bank, with draft attached for his fee for services. Plaintiff refused to pay such draft and accept the leases. It is contended by plaintiff that the maximum acreage embraced by all the leases, including those of the guardians, procured by said defendants at any time to be executed to him, was at least 28 acres less than the 3,500 acres provided for in the contract; while defendants assert that the total acreage covered by all the leases executed to plaintiff included some 3,512.57 acres. The evidence in this regard is somewhat conflicting.

Plaintiff wrote the following letter to the defendant bank:

"Oil Exchange Drug Co., 120 South Main Street. Phone 1045. Tulsa, Okla., 7—22—13. First National Bank, Allen, Okla.—Gentlemen: You are hereby notified to at once return to me the $500 deposited by me in your bank as per agreement with C. M. Means et al. and myself under date of March 4, 1913, as the parties of the first part have failed to comply with their part of the contract, as said contract provides said leases shall be delivered on or before March 24, 1913, and said contract further provides that, if first parties refuse to comply therewith, this contract shall be null and void at my option; and I hereby exercise my option, and in case you fail to return said money I shall at once proceed in an action at law to recover same, and will look to you for same. Yours very truly, B. H. McLaughlin."

With reference to this he testified:

"Q. Mr. McLaughlin, after you had been down there, you and Mr. Thomas and Mr. Holmes, in the first part of June, and found that the Gerty well had shut down, you decided a little bit after that that you would exercise your option to revoke this entire contract, didn't you? A. Yes, sir. Q. And you did exercise it by writing a letter to the First National Bank of Allen? A. Yes, sir. Q. Revoking and refusing to live up to the contract? A. Yes, sir. Q. You wrote this letter of revocation on the 22d day of June, 1913, did you not? A. Yes, sir."

Plaintiff in his brief states:

"The 3,500 acres to be composed of leases on certain lands, which lands belonged to minors, and the contract provided that the plaintiff in error would pay all incidental and necessary expense in obtaining the approval of the county court for the making of the leases to the plaintiff in error. These minor leases covered about 1,000 acres, and were known and spoken of in the testimony as the Bell and Barnett leases. These leases were made, the court approved them, and they were sent, with draft attached, not only for the actual court costs, but the draft also covered a sum for attorney's fees. The plaintiff in error declined to accept the draft and pay it, and consequently the leases were never in his hands. The reason that the plaintiff in error did not pay the draft was, in the first place, because he contended that it was not his duty under the contract to pay counsel fees, as that matter had been discussed prior to the execution of the contract, and, in the second place, under the terms of the written contract between the parties to this litigation, the plaintiff in error had the right to the delivery of leases for the purpose of having the title thereto examined, and for this purpose the contract allowed him ten days from the date of the delivery of the leases. The question as to whether the record conclusively shows the shortage of acreage is the only question which the plaintiff in error desires to bring before this court, as it is contended that it was error to refuse motion for new trial. The question as to proper admission and rejection of testimony is waived by this plaintiff in error, and also the question as to whether the time limited to March 24, 1913, was of the essence of the contract is waived, as this plaintiff in error has at all times been ready and willing to comply with the terms of his agreement."

It is admitted that defendants had complied with the contract to the extent of furnishing and delivering leases covering at least 2,500 acres; but it is insisted that they failed to perform as to the remainder, for the reason that there was no such delivery of the minor leases as contemplated by the agreement. The contract provides that:

"All expense incident and necessary to the approval by the county court of any leases on land owned by minors that may be secured is to be borne and paid by the second party."

Plaintiff, according to his own statement, refused to pay the draft and accept leases on 1,000 acres of land owned by minors, on the theory (1) that he was not bound by the

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terms of his contract to pay for the services of an attorney in securing the approval of such leases by the county court; (2) that by virtue of the provisions of the contract he was allowed ten days after delivery of such leases to him within which to examine the title; and (3) the transmission of such leases under the circumstances did not constitute a delivery thereof.

It is not claimed that the attorney's fee was not a legitimate part of the expense actually incurred as an incident to the approval of the leases, or that such fee was excessive. Clearly, under the terms of the agreement, defendants were not chargeable with such expense, while, if plaintiff's theory is correct, they must be held primarily liable therefor. Again, there is no suggestion that, even under the attendant circumstances, plaintiff was denied the privilege of examining such leases, or that the lessors' title was in any way defective. It may be conceded that there was no technical delivery of the minor leases, but it is obvious that such leases were secured by defendants, who put it within the power of plaintiff to receive and have them examined upon payment of a certain expense incurred in procuring the approval thereof by the county court, which expense, under the provisions of the contract, was properly chargeable to no one else. We are of the opinion that there was a substantial compliance with the terms of the contract on the part of defendants.

Subsequent to his refusal to pay the draft and accept the minor leases (upon inspection of the premises with his associates, and after learning that work upon an oil and gas well in the vicinity had been suspended), plaintiff by his letter to the bank sought to relieve himself of liability under the contract, and specifically declared that he refused to be further bound thereby; and then, some five months later, when, as he alleges, other parties by their explorations had established the value of the lands in question for oil and gas mining purposes, he brought this suit.

Apropos of plaintiff's apparent attitude in this case, we quote the language employed by Justice Miller in Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 331:

"The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands to-day is worth nothing to-morrow; and that which would to-day sell for a thousand dollars as its fair value may, by the natural changes of a week, or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious, of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger, which is over, has been at the risk of another, to come in and share the profit."

We find no error in the proceedings, prejudicial to the substantial rights of plaintiff, and the judgment should therefore be affirmed.

PER CURIAM. Adopted in whole.

(62 Okl. 39)

GERMAN-AMERICAN INS. CO. v. HUNTLEY et al. (No. 7844.)

(Supreme Court of Oklahoma. Dec. 12, 1916.)

(Syllabus by the Court.)

1. LIBEL AND SLANDER ⟸34 — PRIVILEGED PUBLICATIONS—CLASSIFICATION.

By section 4958, Rev. Laws 1910, two classes of privileged publications are recognized: (1) Those where the occasions designated, regardless of malice, constitute an absolute privilege and preclude recovery of damages; and (2) those in which the circumstances of the defamatory publication, together with the testimony, rebut the presumption of malice, and afford a qualified privilege.

[Ed. Note.—For other case, see Libel and Slander, Cent. Dig. § 113; Dec. Dig. ⟸34.]

2. LIBEL AND SLANDER ⟸41 — PRIVILEGED PUBLICATIONS — STATUTORY PROVISION — "FACT."

The word "fact" is used in the fourth paragraph of said section in its ordinary sense to denote the act, the thing done, the circumstance, the publication itself.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 127–129; Dec. Dig. ⟸41.

For other definitions, see Words and Phrases, First and Second Series, Fact.]

3. LIBEL AND SLANDER ⟸123(8)—ACTIONS—QUESTION FOR JURY—PRIVILEGE.

Where the circumstances under which the publication was made are undisputed, it is exclusively for the court to determine whether the occasion on which it was made, or the "fact" and the testimony, render it either absolutely or qualifiedly privileged. Otherwise, it is a question of fact to be determined by the jury.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 362; Dec. Dig. ⟸123(8).]

4. LIBEL AND SLANDER ⟸101(1)—ACTIONS—PRESUMPTIONS—BURDEN OF PROOF.

In an action for libel, where plaintiff has established that defamatory matter has been published by the defendant concerning him, he is entitled to recover, unless the "fact" (the publication itself) and the testimony rebut the presumption of malice. The burden of adducing evidence to rebut such presumption is upon the defendant.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 273, 277, 278; Dec. Dig. ⟸101(1).]

5. LIBEL AND SLANDER ⟸101(1)—ACTIONS—BURDEN OF PROOF.

If the fact and the testimony rebut the presumption of malice, the burden then rests upon the plaintiff to show express malice in order to recover.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 273, 277, 278; Dec. Dig. ⟸101(1).]

6. CORPORATIONS ⟸423—LIABILITIES—ACTS OF OFFICERS AND AGENTS—LIBEL.

A corporation is liable in an action for libel published by its officers, servants, or agents whenever such publication is made in the per-

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formance, or within the scope of the general duties of such officers, servants, or agents.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1692–1695, 1903, 1906; Dec. Dig. ⊂⊃423.]

7. APPEAL AND ERROR ⊂⊃1066 — ACTIONS — INSTRUCTIONS.

Certain instructions examined, and *held* prejudicially erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. ⊂⊃1066.]

Commissioners' Opinion, Division No. 3. Error from District Court, Grady County; Will Linn, Judge.

Separate actions by W. M. Huntley and C. S. Huntley against the German-American Insurance Company. Judgment for plaintiffs, and defendant brings error. Reversed and remanded.

Scothorn, Rittenhouse & McRill, of Oklahoma City, for plaintiff in error. Bond, Melton & Melton, of Chickasha, and Bond & Sandlin, of Duncan, for defendants in error.

BLEAKMORE, C. W. M. Huntley and C. S. Huntley commenced separate actions in the district court of Grady county, each seeking recovery of damages against the German-American Insurance Company for libel based upon the publication of a certain letter written by the state agent to a local agent of said company. The issues in the two cases being identical, they were tried together in the court below, where several judgments were rendered against defendant company, each in the sum of $1,000, from which defendant has appealed; and by stipulation the cases are here consolidated for the purpose of review.

The plaintiffs were partners engaged in the mercantile business at Rush Springs, Okl. On March 31, 1914, their stock of goods and fixtures—to insure against the loss of which defendant had issued its policies of insurance—were totally destroyed by fire. Thereafter the loss thus occasioned was adjusted, plaintiffs accepting a less sum than claimed under the provisions of the policies. After such settlement had been effected and payment made by defendant, its state agent wrote to its local agent at Rush Springs the following letter:

"Referring to the loss on the Huntley risk, I beg to state that this matter has now been disposed of on a compromise basis, companies paying $4,500.00. This loss has been a most disagreeable affair, as there is more than a reasonable doubt as to the honesty of the assured, and I feel satisfied that both the Huntley brothers know more about the origin of the fire than it is to their interest to admit. The adjustment of this claim was very much complicated by affidavit furnished by you, which so weakened our defense that a compromise was deemed necessary, and I trust that hereafter, should any losses occur, that no action whatever will be taken by you in behalf of the assured unless you are duly authorized to do so. I am very confident that the affidavit secured from you was obtained under a misrepresentation as to existing facts, as I know that you would not knowingly embarrass either the companies or the adjusters. This experience with the Huntley boys is sufficient for us and I must ask that you please refrain from interesting the German-American on any property in which either C. S. Huntley or W. M. Huntley have any ownership, and if at this time we have other policies for these parties, I will ask you to please cancel same on a pro rata basis, returning the surrendered contracts to the Chicago office so that our files may be complete. Trusting you will accept this communication in the same spirit as intended, with kindest personal regards, I remain."

The local agent to whom this letter was addressed exhibited it to divers persons. By the petition it is alleged:

"That said letter, containing said false and defamatory matter, was received by said local agent, A. N. Murphy, and by said A. N. Murphy exhibited to various persons in the town of Rush Springs, Okl., where plaintiff and the said C. S. Huntley have resided for a number of years. That by said false and defamatory statements the defendant meant to charge that this plaintiff and the said C. S. Huntley had either set fire to their stock of merchandise and fixtures or had it done, and were therefore guilty of arson, a crime under the laws of the state of Oklahoma, and said statements were so understood by these persons to whom said statements and defamatory matter were exhibited, and it was intended by the defendant that the same should be so understood by persons reading said letter."

Defendant answered by way of general denial, and alleged:

"But this defendant specifically denies under oath that A. N. Murphy acted as its local agent or representative in the matter of exhibiting 'to various persons in the town of Rush Springs, Okl.,' said letter referred to in plaintiff's petition herein, if in truth and in fact the said A. N. Murphy did so exhibit said letter; and this defendant specifically denies under oath that the said A. N. Murphy was ever authorized by it to exhibit said letter to any person or persons whomsoever, and specifically denies under oath that the said A. N. Murphy as this defendant's local agent had any such authority, and states the fact to be that said letter was a confidential and privileged communication from this defendant's state agent, James Brundrit, to the said A. N. Murphy, as its local agent, and that as such local agent the said A. N. Murphy had no authority to publish or exhibit the same to any person or persons whomsoever, or in any manner whatsoever, and if he, the said A. N. Murphy, did so act in the premises, such act was not authorized or countenanced by this defendant, and was not within the scope of said A. N. Murphy's authority as this defendant's local agent."

Before the loss was adjusted, investigation in regard thereto had been made by a representative of the state fire marshal, the adjuster for the defendant company, and others, who had reported to the state agent of the company that the fire which destroyed the property of plaintiffs was of incendiary origin, and that the facts and circumstances surrounding it gave rise to suspicion that plaintiffs had burned or caused the burning of such property. The matter had also been investigated by the county attorney in connection with the fire marshal, and evidently it had been determined that the evidence was insufficient to warrant the prosecution of the plaintiffs for arson.

Relative to the letter in question the state

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agent of defendant, Mr. Brundrit, testified as follows:

"Q. And when you wrote that letter the policy had been settled and paid? A. The loss had. Q. It was a closed transaction? A. Yes, sir; in so far as the insured was concerned. Q. You took the policies up at Oklahoma City? A. Yes, sir. Q. It was a closed transaction so far as the company was concerned? A. Yes, sir; but not as between me and the agent; he had written me two or three letters wanting me to get that thing out of the way, and it was my business—to notify him that it was out of the way. Q. Settled and paid off? A. Yes, sir. Q. In telling him that was it necessary to tell him that the Huntley boys had burned up their store? A. The agent does not like to have policies canceled, and when a policy is canceled it is customary to let him know why, give him our reasons for not wanting to carry the business. Q. Why does the agent want to know? A. Because if he did not know he would probably put us on the risk again. Q. You instruct them to not take a risk, and they go ahead and take it anyway? A. No, but you have to give him instructions. Q. You could instruct him to not put any more risks on the Huntleys without telling him that they had burned up their goods? A. Yes, sir; but it was a good idea to let him know why. Q. You had circulated this report? A. No, sir. Q. You wrote this? A. Yes, sir. Q. You meant it? A. Yes, sir; my opinion. Q. You meant it was not an honest loss, and meant to tell him in that letter that the Huntley boys had burned up their goods? A. From the information I had I wanted him to know that I did not think the claim was an honest one, and that they knew more about the origin of the fire than they would admit. Q. You meant they burned it or had it burned? A. Yes, that is the opinion. Q. That is the way you wanted the agent to understand it? A. Yes. Q. Do you think it was necessary to say that when you told the agent to cancel the policies? A. That is my reason for canceling it. Q. You did not instruct the agent to exhibit the letter to any one? A. No, sir. * * * Q. I notice in that letter you give the agent a jacking up about making an affidavit? A. Yes, sir. Q. As a matter of fact you were not in very fine humor when you wrote that letter? A. No; I felt better. Q. You felt better after you got that out of your system? A. I don't know. Q. That is true? A. I suppose so. Q. After you got this out of your system you felt relieved? A. I wanted to give the agent instructions about what to do in the future. Q. You wanted to say something and said it to the local agent? A. That is the only one I could say it to. * * * Q. Will you tell the jury what interest the company had in communicating to Mr. Murphy the fact that the company or you believed that the Huntleys burned the stock of goods? A. It was my excuse for canceling the policies. Q. Couldn't you have told him that these policies have proven unsatisfactory, and do not take any more policies on the Huntleys' properties, and if you have any on their property at this time you can cancel them? A. I could have told him that. Q. And it would answer the same purpose and effect as telling him that you believed the Huntleys had burned up their stock of goods? A. He possibly would have written me back to find out the particulars. Q. Then he would have disobeyed your instructions? A. No, sir. Q. He would have canceled the policies? A. Yes, sir, possibly. Q. And would have kept off of the future business? A. Possibly."

[1] The communication is admittedly defamatory. Defendant neither pleaded nor attempted to prove the truth of the criminatory language employed, and does not contend that such communication was absolutely privileged, but relies upon the circumstances of the case as establishing conclusively that the occasion of its publication was one of qualified privilege, and asserts that there was no evidence of actual malice, without which it insists recovery could not properly have been had. In Newell on Libel and Slander (3d Ed.) it is stated:

"Sec. 505. *The Subject Classified.*—The occasion upon which privileged communications are made may be classified as those absolutely privileged and those in which the privilege is qualified.

"Sec. 506. First. *Absolute Privilege.*—In this class of cases it is considered in the interest of public welfare that all persons should be allowed to express their sentiments and speak their minds fully and fearlessly upon all questions and subjects; and all actions for words so spoken are absolutely forbidden, even if it be alleged and proved that the words were spoken falsely, knowingly and with express malice. This rule is, however, confined to cases in which the public service or the administration of justice requires complete immunity—for example, words spoken in legislative bodies, in debates, etc.; in reports of military officers on military matters to their superiors; words spoken by a judge on the bench and by witnesses on the stand. In all such cases the privilege afforded by the occasion is in law an absolute bar to any action for defamation. In these cases the plaintiff cannot be heard to say that the defendant did not act under the privilege, that he did not intend honestly to discharge a duty, but maliciously availed himself of the occasion to injure his reputation."

The statute (section 4958, R. L. 1910) provides:

"*Privileged Communication Defined.*—A privileged publication or communication is one made:

"First. In any legislative or judicial proceeding or any other proceeding authorized by law;

"Second. In the proper discharge of an official duty;

"Third. By a fair and true report of any legislative or judicial or other proceeding authorized by law, or anything said in the course thereof, and any and all expressions of opinion in regard thereto, and criticisms thereon, and any and all criticisms upon the official acts of any and all public officers, except where the matter stated of and concerning the official act done, or of the officer, falsely imputes crime to the officer so criticized.

"In all cases of publication of matter not privileged under this section, malice shall be presumed from the publication, unless the fact and the testimony rebut the same. No publication which, under this section, would be privileged, shall be punishable as libel."

It seems clear that the legislative intention was to recognize two classes of privileged publications, viz.: (1) Those where the occasions designated, regardless of malice, constitute an absolute excuse and preclude recovery of damages; and (2) those in which the circumstances of the defamatory publication, together with testimony, rebut the presumption of malice, thus affording a conditional excuse.

[2] The first three paragraphs of the foregoing section specifically enumerate those occasions upon which absolute privilege attends a defamatory publication, and in this respect may be said to be exclusive. The fourth paragraph however, is general in

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terms, comprehending "all cases" where the occasion of such a publication is not absolutely privileged, and provides that malice shall be presumed therefrom, unless the fact and the testimony rebut the same. The word "fact" is obviously therein used in its ordinary sense to denote the act, the thing done, the circumstance, the publication itself. Reasonably construed, the language employed in this paragraph may be said to provide that malice shall be presumed from the publication of defamatory matter on occasions not absolutely privileged, unless the inherent circumstances of such publication and the extrinsic evidence relative thereto rebut such presumption.

In actions for libel and slander the doctrine of qualified privilege has been recognized and established in this jurisdiction by the following cases: Tuohy v. Halsell, 35 Okl. 61, 128 Pac. 126, 43 L. R. A. (N. S.) 323, Ann. Cas. 1916B, 1110; Hubbard v. Cowling, 36 Okl. 603, 129 Pac. 714; Beshiers v. Allen (not yet officially reported) 148 Pac. 141, L. R. A. 1915E, 413. While in Tuohy v. Halsell it was held in effect that the publication was absolutely privileged, yet it was said:

"But let this be as it may, the communication or publication was a qualified privilege, as held by the trial court. This privilege 'extends to all communications made bona fide upon a subject-matter in which the party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty, and to cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation.' 13 Am. & Eng. En. of Law, p. 411. Or, as stated in the syllabus in Thomas S. Harrison v. Edwin Bush, 5 E. & B. (Q. B.) 344: 'A communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he had a duty to perform, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which, without this privilege, would be slanderous and actionable. And this, though the duty be not a legal one, but only a moral or social duty of imperfect obligation.'"

In Hubbard v. Cowling, the rule is stated:

"A 'conditionally privileged publication' is a publication made on the occasion which furnishes a prima facie legal excuse for the making of it, and which is privileged, unless some additional fact is shown which so alters the character of the occasion as to prevent it furnishing a legal excuse. A 'privileged communication' is one made in good faith, upon any subject-matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty, and which contains matter which, without the occasion upon which it is made, would be defamatory and actionable."

In Beshiers v. Allen it is held:

"Words actionable in themselves, because they charge the plaintiff with having committed a felony, spoken to a sheriff while engaged in hunting for the culprits actually guilty of the felony, are qualifiedly privileged if they are spoken in good faith, with an honest belief that they are true, with the sole intent of aiding justice, and with no motive or intent to injure the person spoken of."

In Newell on Slander and Libel (3d Ed.) § 493, the doctrine of privileged communications is stated as follows:

"The great underlying principle upon which the doctrine of privileged communications rests is public policy. This is more especially the case with absolute privilege, where the interests and the necessities of society require that the time and occasion of the publication or utterance, even though it be both false and malicious, shall protect the defamer from all liability to prosecution for the sake of the public good. It rests upon the same necessity that requires the individual to surrender his personal rights, and to suffer loss for the benefit of the common welfare. Happily for the citizen, this class of privilege is restricted to narrow and well-defined limits. Qualified privilege exists in a much larger number of cases. It extends to all communications made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty; and the privilege embraces cases where the duty is not a legal one, but where it is a moral or social character of imperfect obligation."

And again it is stated by the same author:

"Sec. 497. A communication, to be so privileged, must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or proper cause."

And again:

"Sec. 498. It is a legal defense to an action for defamation, if satisfactorily proven, that the circumstances under which the defamatory words were published were such as to render it right and proper that the defendant should plainly state what he honestly believed to be the plaintiff's character—to speak his mind fully and freely concerning him. Such an occasion is one of qualified privilege and the communication is said to be privileged; and though it may be false, still its publication on such an occasion is excused for the sake of the common convenience and welfare of society at large."

And further:

"Sec. 568. (1) It is often a difficult question to determine in what cases a party is privileged in going of his own accord to the person concerned and giving him information which is not asked for. In one class of cases it is clear that it is not only excusable but it is imperative on a person to do so; and that is where there exists between the parties such a confidential relation as to throw on the party the duty of protecting the interests of the persons concerned.

"Such a relationship exists between husband and wife, father and son, brother and sister, guardian and ward, master and servant, principal and agent, solicitor and client, partners or intimate friends, wherever any trust or confidence is reposed by the one in the other. It will be the duty of the one to volunteer information to the other, whenever the other could justly reproach him for his silence if he did not volunteer such information."

The common good, and a proper regard for the comity of business associates, such, in the instant case, as officers and agents of a corporation, and in general, demands that in communications between them opinions may be freely expressed, and reasons may be given for any action contemplated or taken in reference to matters in which they are correspondingly or mutually interested, even though such opinion or reason contains criminatory charges against third persons, if such charges are bona fide and believed to be true. But the element of good faith must be present in every instance, to confer upon the publication the privileged quality requisite to rebut the presumption of malice.

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[3] Where the circumstances under which the publication was made are undisputed, it is exclusively for the court to determine whether the occasion on which it was made, or the "fact," and the testimony render it absolutely or qualifiedly privileged. In Hubbard v. Cowling, supra, it was held:

"Where there is no dispute as to the circumstances under which a publication was made, it is a legal question for the court to determine whether the occasion is such as to bring the alleged defamatory publication within the protection afforded to privileged communications. But whether the facts * * * claimed for it are established by the evidence is a question for the jury. Accordingly, where the evidence is uncertain and conflicting, it is proper for the court to instruct the jury as to what facts constitute a privilege, and leave them to say whether those facts are proved." Spencer v. Minnick, 41 Okl. 613, 139 Pac. 130; Bodine v. Times-Journal Publ. Co., 26 Okl. 135, 110 Pac. 1096, 31 L. R. A. (N. S.) 147.

[7] Defendant complains of the giving of the following instructions:

"The court further instructs the jury that in order for the plaintiffs to recover in this action, it shall be sufficient to prove to your satisfaction that the alleged defamatory matter complained of by plaintiffs was written and published by the German-American Insurance Company, or by their legal authorized agent, of and concerning the plaintiffs, or either of them.

"The court further instructs the jury that if you find and believe from the evidence in this case that on or about the 19th day of August, 1914, the defendant, the German-American Insurance Company, acting through its state agent, James Brundrit, wrote a letter to the defendant's local agent at Rush Springs, Okl., A. N. Murphy, concerning the loss of the plaintiffs, W. M. Huntley and C. S. Huntley, or either of them, and in said letter composed, wrote, and published of and about the plaintiffs, or either of them, the alleged false and defamatory matter set out and alleged in the plaintiffs' petition, and that said A. N. Murphy, as local agent of the defendant company herein, acting within the scope of his authority as such local agent, exhibited to various persons in the town of Rush Springs, Okl., such letter containing such alleged false and defamatory matters as set out in plaintiffs' petition and complained of herein, then the law is for the plaintiffs, and you should so find for such sum as you may find and believe from all the facts and circumstances proven in the case that the plaintiffs, or either of them, have sustained by reason of such alleged false and defamatory matter in their business, if any, reputation, or standing in the community, as would be a fair, just, and reasonable compensation as you may find and believe from the evidence they have sustained, if any; and you are instructed if you find for the plaintiffs, or either of them, then in that event your verdict shall not be for less than $100 and costs in each case wherein you may find for the plaintiffs.

"The court further instructs the jury that in all cases of writing or publishing of false and defamatory matter of and concerning another, the law presumes that the writing and publishing of same was done with malice. Malice, gentlemen of the jury, in its legal sense, means a wrongful act done intentionally, without just cause or excuse. The presumption of malice though, gentlemen, may be overcome or rebutted by the defendant by showing such rumors, facts, and circumstances to exist at or prior to the time of writing the alleged false and defamatory matter complained of was so written or published in good faith, believing at the time that the alleged false and defamatory matter complained of therein were true, or were such as a reasonable and ordinary man, judging from all the facts and circumstances of the case, would believe to be true."

[4] While the general rule in other jurisdictions, in the absence of legislative enactment, is that where the occasion of a publication alone renders it qualifiedly privileged, the burden is upon the plaintiff to show actual malice, in the sense of oblique design, or bad faith, yet in this state, by special statute, it is provided (R. L. 1910, § 4959):

"In all civil actions to recover damages for libel or slander, it shall be sufficient to state generally what the defamatory matter was, and that it was published or spoken of the plaintiff, and to allege any general or special damage caused thereby, and the plaintiff to recover shall only be held to proof that the matter was published or spoken by the defendant concerning the plaintiff. As a defense, * * * the defendant may deny and offer evidence to disprove the charges made, * * * and in addition thereto, that it was published or spoken under such circumstances as to render it a privileged communication."

Thus it would seem that when plaintiff established that the defamatory matter was published by defendant concerning him, he had satisfied the requirements of the statute, and was entitled to recover, unless defendant, in addition to the circumstances of the publication (the fact), offered testimony showing that the criminatory charge was based upon reasonable cause and bona fide believed to be true; for without such testimony the presumption of malice was not rebutted. Notwithstanding the defendant failed to allege in its answer that the criminatory charge which it admitted publishing was made in good faith and believed to be true, yet it was permitted on the trial to adduce evidence of the circumstances surrounding the fire which destroyed the insured property, and of current rumors in regard to plaintiff's connection with such fire, for the purpose of rebutting the presumption of malice, and thus bringing the communication within the protection afforded publications qualifiedly privileged under the rule above announced. Whether such testimony established good faith, in that the charge was bona fide believed to be true, and thus rebutted the presumption of malice, was a question of fact, to be determined by the jury. By virtue of the statutory provisions, supra, the burden of evidence in this regard was upon the defendant. This requirement, it seems to us, provides the natural and logical order of proof in such a case, for otherwise plaintiff would be compelled to anticipate, and to establish his cause of action, disprove all the facts and circumstances upon which defendant could rely to show probable cause, bona fide belief in the truth of the charge, proper motive, and the use of the publication for the reason and purpose which alone render it privileged. In Hubbard v. Cowling, supra, it was held that:

"After it is shown that the alleged slander is privileged, the burden rests upon the plaintiff to show express malice."

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See Tuohy v. Halsell, supra.

[5] It is undoubtedly the correct rule, where the circumstances and the testimony rebut the presumption of malice, that then the burden is upon the plaintiff to show express malice in order to recover.

The "fact"—i. e., the circumstance of the publication in the instant case—was undisputed, but the good faith of defendant, being controverted, was a question for the jury to determine. If the testimony established that the defamatory matter was bona fide believed to be true from reasonable cause and the occasion was employed from a proper motive, then the publication was privileged, and such privilege afforded a complete defense to plaintiff's cause of action. In Newell on Slander and Libel it is stated:

"Sec. 500. When the court holds the communication to be entitled to the privilege, the jury should be instructed to consider and determine whether or not the defendant used the occasion for the sole purpose which conferred the privilege upon his statement; and if the jury find from the surrounding circumstances, as shown by the evidence, that he did so use it solely for such reason and purpose, the verdict will be for the defendant. But if, on the other hand, they find that he employed the occasion in bad faith, to gratify or to further some indirect or malicious motive, or for some improper reason, the verdict will be for the plaintiff. Where the communication is entitled to the privilege, the burden of proof is then upon the plaintiff to show actual malice in the sense of oblique design or bad faith."

The first instruction above quoted entirely ignores the sole controverted question presented by the testimony, viz., whether defendant bona fide believed the charge to be true and used the publication from a proper motive, and in effect directs a verdict for plaintiff upon the admitted fact that the criminatory matter was published by defendant concerning plaintiff.

The second instruction set forth is subject to the same criticism.

The third informs the jury that the presumption of malice may be rebutted, but fails to advise that in the absence of malice (that is, if the publication was made from a proper motive, upon reasonable grounds and with a bona fide belief that the charge contained therein was true), that the same was privileged and constituted a defense.

In neither of the foregoing instructions, nor elsewhere in the charge, did the court submit to the jury the single defense of qualified privilege which was clearly an issue and concerning which the testimony was conflicting. Under the instructions, as a whole, the jury were unauthorized in any event to find a verdict for defendant, but were left to consider only the question of the amount of the recovery.

"The question is not one of a failure or omission by the court properly to charge upon this point, or, in other words, of nondirection. * * * The mistake here, however, is one of misdirection, in that the court erroneously charged what the issues were, as made by the evidence, which necessarily misled the jury as to what they were to determine." C., R. I. & P. Ry. Co. v. Pitchford, 44 Okl. 197, 143 Pac. 1146.

In this respect we are of opinion that the instructions of the court were prejudicially erroneous. In Newell on Libel & Slander, § 448, it is said:

"But it [a corporation] will be liable to an action for libel published by its servants or agents, whenever such publication comes within the scope of the general duties of such servants or agents, or whenever the corporation has expressly authorized or directed such publication." 25 Cyc. 428.

[6] The state agent of defendant was clearly acting within the scope of his general duties when he wrote the letter in question. The publication thereof was complete when it reached, and its contents were disclosed to, the local agent; and while undue publicity of such communication, if attributable to defendant, might properly have been shown in evidence as a circumstance tending to establish malice, yet if the same was circulated by such agent without authority, or in direct disregard of the confidential relations existing between him and the writer, such conduct on his part would not destroy the privileged quality which might otherwise attend its publication.

It is thought unnecessary to advert to other assignments of error presented by the briefs. The judgment should be reversed, and the cause remanded.

PER CURIAM. Adopted in whole.

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(62 Okl. 138)

LEBRECHT v. LEBRECHT. (No. 8026.)

(Supreme Court of Oklahoma. Jan. 16, 1917.)

Commissioners' Opinion, Division No. 2. Appeal from County Court, Comanche County; R. J. Ray, Judge.

Action between Ella Lebrecht and Sol Lebrecht. There was a judgment for the latter, and the former appeals. Affirmed.

John R. Guyer, of Oklahoma City, for plaintiff in error. Chas. Mitschrich, of Lawton, for defendant in error.

BURFORD, C. This action was replevin for an automobile. But two questions are raised: (1) The sufficiency of the evidence to sustain the verdict; and (2) the refusal of a new trial sought upon the ground of newly discovered evidence.

As to the first ground, we have carefully examined the whole testimony, and are constrained to hold that there was testimony reasonably tending to support the verdict. As to the second specification of error, it suffices to say that the granting of a new trial is largely in the discretion of the trial court, and in the instant case we are not prepared to say that such discretion was abused. The evidence admitted upon the first trial, which it is alleged in the motion will be contradicted upon a new trial, was hearsay, and ought never to have been admitted in the first place, and doubtless no evidence of that character, either pro or con, would be admitted upon second trial. After an examination of the whole record, we are of opinion that the statement involved was of so little weight that a change in it would not affect the ultimate result.

Defendant in error has filed motion to dismiss for insufficiency of brief. That motion is overruled and denied.

The judgment appealed from should be affirmed.

PER CURIAM Adopted in whole.

(62 Okl. 299)

KING et al. v. PALMER et al. (No. 7711.)

(Supreme Court of Oklahoma. Dec. 19, 1916. Rehearing Denied Jan. 30, 1917.)

Commissioners' Opinion, Division No. 3. Error from District Court, Haskell County; W. H. Brown, Judge.

Action between Rachel King and others and N. W. Palmer and others. There was judgment for the latter, and the former brings error. Reversed and remanded.

G. A. Holley and E. D. Means, both of Stigler, for plaintiffs in error. A. L. Beckett, of Stigler, and J. E. Whitehead, of McAlester, for defendants in error.

HOOKER, C. Where the plaintiffs in error have briefed their cause, and the defendants in error have filed no brief, nor offered any excuse for a failure so to do, and the extension of time allowed them in which to file brief has expired, and the brief of plaintiff in error indicates that there are errors in the record, and the authorities therein cited seem to support their contention, the cause will be reversed and remanded for a new trial.

PER CURIAM. Adopted in whole.

(13 Okl. Cr. 133)

STATE v. JOHNSON. (No. A-2101.)

(Criminal Court of Appeals of Oklahoma. Feb. 3, 1917.)

Appeal from District Court, Nowata County; T. L. Brown, Judge.

J. T. Johnson was charged with perjury, and, a demurrer being sustained to the information, the State appeals. Affirmed.

J. E. Bennett, Co. Atty., of Tulsa, and F. A. Calvert, Asst. Co. Atty., of Nowata, for the State. W. D. Humphrey, of Oklahoma City, for defendant in error.

PER CURIAM. Information was filed in the district court of Nowata county, charging J. T. Johnson with perjury. A demurrer was filed, on the ground that the information did not state facts sufficient to constitute an offense against the laws of the state of Oklahoma. This demurrer was sustained, and the defendant discharged; and the state appeals from the order sustaining the demurrer.

An examination of the information shows conclusively that it is fatally defective, and that the demurrer was properly sustained. The information is based upon an instrument upon which perjury cannot be predicated. The instrument itself was only verified upon belief, and the information pleads conclusions, where facts are essential. We are unable to see how an elaborate opinion in this case would serve any good purpose.

Without going into details, therefore, the judgment is affirmed.

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(13 Okl. Cr. 109)

WARD v. STATE. (No. A-2688.)

(Criminal Court of Appeals of Oklahoma. Jan. 24, 1917.)

Appeal from County Court, Garvin County; W. R. Wallace, Judge.

H. B. Ward was convicted of violating the prohibitory law, and he appeals. Affirmed.

H. M. Carr, of Pauls Valley, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, H. B. Ward, was convicted on a charge of unlawfully selling intoxicating liquor to one George Hays, and his punishment fixed at a fine of $350, and confinement in the county jail for 120 days.

No briefs have been filed or oral argument made in support of the errors assigned. We have examined the record, and find there is testimony tending to support the allegations of the information, and further find that no objection was made or exception taken to the instructions as given by the court. Upon the whole record we have discovered no error which will warrant a reversal of the judgment.

The judgment of the lower court is therefore affirmed. Mandate forthwith.

(62 Okl. 2)

CHIVERS v. BOARD OF COM'RS OF JOHNSTON COUNTY. (No. 8074.)

(Supreme Court of Oklahoma. Dec. 5, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐113(1)—DECISIONS REVIEWABLE—ORDERS AFTER JUDGMENT.

An appeal lies to this court from an order of the trial court that plaintiff take nothing by reason of a former judgment and that the payment of the same be permanently enjoined.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 758; Dec. Dig. ⇐113(1).]

2. NEW TRIAL ⇐166(1)—NATURE OF REMEDY—FORM OF ORIGINAL PROCEEDING.

A petition for new trial is not proper or allowable, where there has been no issue of fact raised by the pleadings or determined by the verdict of a jury or its legal equivalent upon a former trial in the same court.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 238–244, 246, 249; Dec. Dig. ⇐166(1).

For other definitions, see Words and Phrases, First and Second Series, New Trial.]

3. NEW TRIAL ⇐½, New, vol. 9 Key-No. Series—"ISSUE OF FACT."

An issue of fact which may be re-examined upon a new trial arises only upon a material allegation in the petition controverted by the answer, upon new matter in the answer controverted by the reply, or upon new matter in the reply considered as denied without further pleading.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Issue of Fact.]

4. JUDGMENT ⇐18(2) — VALIDITY—JURISDICTION.

A judgment rendered in a cause in which defendant appears and pleads, and in which the petition brings before the trial court a subject-matter within the jurisdiction of the court, but states the plaintiff's cause of action defectively, or not at all, all parties being within the jurisdiction of the court, is erroneous, but is not void.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 36; Dec. Dig. ⇐18(2).]

5. JUDGMENT ⇐92—DEFAULT—REQUISITES—EFFECT OF APPEARANCE.

Defendant appeared in the cause, filed a demurrer, and was present at the final hearing, and joined in submitting the cause to the court. *Held*, that the judgment rendered was not a judgment by default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 151; Dec. Dig. ⇐92.]

Commissioners' Opinion, Division No. 2.

Appeal from District Court, Johnston County; J. H. Linebaugh, Judge.

Action by C. E. Chivers, guardian, against the Board of County Commissioners of Johnston County. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions.

Sam H. Butler, of Ardmore, for plaintiff in error. P. B. H. Shearer, Co. Atty., and J. J. Stobaugh, Asst. Co. Atty., both of Tishomingo, for defendant in error.

BURFORD, C. C. E. Chivers, as guardian of certain minors, sued the board of county commissioners of Johnston county to recover certain taxes paid by him. On October 24, 1914, after service and appearance and filing of a demurrer, by the county attorney, it seems, from the journal entry, both parties appeared and "the cause was submitted to the court," who thereupon heard evidence and rendered judgment for plaintiff and against defendants for a part of plaintiff's demand. No exception was taken to this judgment, and no appeal perfected. Some eleven months thereafter, to wit, on September 25, 1915, the defendants by the county attorney filed a petition in said cause setting out the judgment and alleging same was rendered "under chapter 152 of Laws of 1910–11, and that after the rendition of said judgment and on the 15th day of June, 1915, the Supreme Court of Oklahoma, in the case of Johnson v. Grady County, held that part of said chapter unconstitutional and void, and that said judgment at the time it was rendered was unconstitutional and void, and that said judgment at the time it was rendered was contrary to law, and that this fact could not with reasonable diligence have been discovered until the decision of the Supreme Court, but the same was discovered after the term at which said judgment was rendered and without fault of defendant herein." Prayer was that the court "set aside and hold for naught the said judgment in this case, and that the county treasurer of said county of Johnston be temporarily restrained

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from paying said judgment or any part of said judgment, and that the petitioner have a new trial in this cause and for all proper relief." This petition was verified and was filed after the term at which the original judgment was rendered, but prior to the next succeeding term. It will be noticed that the county treasurer was not a party to this proceeding. The plaintiffs then appeared specially and moved to "quash the service herein," alleging that "there has been no service," and that he "therefore asks that the same be quashed." Upon this motion being overruled, plaintiff filed a "demurrer to the petition for new trial" upon the ground that same was insufficient in law. This "demurrer" was by the court on October 4, 1915, overruled; said "defendant given ten days to plead." The court on the same day temporarily restrained the county treasurer from paying the judgment or any part thereof "until the further order of the court." On October 21, 1915, plaintiff filed a motion "to set aside and revoke the order made in this cause on October 4, 1915, which set aside the former judgment of this court and also granted defendant a temporary restraining order."

A careful examination of the various orders above referred to constrains us to hold that the trial court had not at this time "set aside" any former judgment. He had only ordered that the matter of payment by the treasurer be held in statu quo until his further order and had overruled plaintiff's "demurrer" and given him leave to plead. Inasmuch as the statute (section 5037) provides that "the facts stated in the petition shall be considered as denied without answer," it does not appear what pleading plaintiff might have filed; but, at any rate, he had the leave and clearly his original judgment had not yet been vacated or set aside. On the same day that plaintiff filed this latter motion, the same came on for rehearing. Two journal entries reciting the court's action appear in the record. Construing them together, it appears that the trial court overruled plaintiff's motion, found that the original judgment rendered on October 24, 1914, "was void and of no effect," and ordered that plaintiff "take nothing by his judgment rendered on October 24, 1914," and, without granting any new trial, made the temporary restraining order, theretofore issued against the county treasurer, a perpetual injunction, and rendered judgment for the defendant board for costs. Exception being taken, an extension of time to perfect an appeal was allowed, and within proper time the cause brought here for review.

[1] At the outset, we are confronted by the contention of defendant in error that no proper appeal is before us for consideration. This is based upon the contention that the judgment of October 24, 1914, was set aside on October 4, 1915; that plaintiff Chivers' motion to vacate of October 21, 1915, and the overruling thereof on that day, was insufficient to confer a right to review the judgment of October 4th, on appeal, the 15 days for appeal therefrom allowed by statute, no extension having been granted, having expired prior to the time plaintiff's motion of October 21, 1915, was filed. The fallacy of this argument is that, as above shown, the court did not make any final order in relation to the judgment of October 24, 1914, until October 21, 1915. We may leave out entirely plaintiff's motion and demurrer. The trial court on October 21, 1915, set aside, vacated, and perpetually enjoined the enforcement of his prior judgment. From this order clearly he had a right to appeal, having properly objected and excepted thereto. Sections 5236–5239, Rev. L. 1910.

The order in this case is clearly distinguishable from the order held not appealable in such cases as Town of Byars v. Sprouls, 24 Okl. 299, 103 Pac. 1038, Ætna Bldg. & Loan Ass'n v. Williams, 26 Okl. 191, 108 Pac. 1100, and Clapper v. Putnam Co., 158 Pac. 299. In those cases the court vacated the former judgment and ordered a new trial. Hence each cause was not finally determined until the new trial was had and a final judgment rendered. Here the judgment was set aside, held void, and its payment enjoined. Clearly there was nothing more to be done by the plaintiff in the trial court. His rights, if any he had, under his petition, were finally determined against him. Nothing was left but a right of appeal. Such order not only "grants an injunction," but "affects a substantial right" and determines the action "upon" summary application "after judgment," and brings the matter within the statute governing appeals.

[2] Upon the merits, the defendant seeks to justify his pleading under section 5037, Rev. L. 1910, authorizing in certain cases the filing after the term of a petition for new trial. This section of the statute contemplates only the granting of a new trial in proper cases. After an examination of the record in this case, we are convinced that if the defendant's application be construed only as a petition for a new trial under section 5037, supra, it could avail nothing by reason of the fact that a petition for new trial has no proper office and could not rightfully be granted in this cause. This for the reason that there never was an issue of fact presented or determined preceding the original judgment, and therefore there could not, in any proper sense, be a new trial. Under our statute (section 5033, Rev. L. 1910), "a new trial is a re-examination in the same court of an issue of fact, after a verdict by a jury, the approval of the report of a referee or a decision by the court." See Price & Miller v. Ratcliffe, 148 Pac. 153.

[3] In the original proceeding a petition and demurrer thereto were filed. The record then shows that the parties appeared and "the cause was submitted to the court." Ap-

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parently the only thing to be submitted was the petition and demurrer thereto. The journal entry of the judgment does show that the trial court heard "the evidence offered," but, so far as the record shows, there was no answer filed, and in no way were the facts alleged in the plaintiff's petition controverted. It is difficult to see, therefore, how an "issue of fact" arose upon the original trial which could be re-examined in a new trial. In Owen v. District Court, 43 Okl. 442, 143 Pac. 17, this court quoted and approved the language of the Supreme Court of Kansas in McDermott v. Halleck, 65 Kan. 403, 69 Pac. 335, as follows:

"We are of the opinion that the conclusions which naturally, logically, and inevitably result from an examination and comparison of the different Code provisions having reference to trials and new trials are these: First, the only pleadings possible under the Code are the petition, answer, reply, and demurrer; second, issues can only arise upon pleadings; third, a trial is had only of issues; fourth, a new trial is had only of issues of fact after such issues of fact have been * * * determined by a referee, a jury, or a court; fifth, the issues of fact so to be re-examined upon a new trial must have arisen upon a material allegation in the petition controverted by the answer, new matter in the answer controverted by the reply, or new matter in the reply denied without further pleading."

The language of this same case, upon the same propositions, is also adopted and approved by this court in Powell v. Nichols et al., 26 Okl. 734, 110 Pac. 762, 29 L. R. A. (N. S.) 886. The language used is but another statement of the statute. Sections 4989–4991, Rev. L. 1910.

In Cowart v. Parker-Washington Co., 40 Okl. 56, 136 Pac. 153, this court said:

"The purpose of a motion for new trial is to procure a re-examination of an issue of fact in the same court. Where there has never been any examination of an issue of fact, there can be no re-examination or new trial."

In Clapper v. Putnam Co., 158 Pac. 297, this court quoted and approved the language of the Supreme Court of Kansas in Wagner v. A., T. & S. F. R. Co., 73 Kan. 283, 85 Pac. 299 (referring to what is section 5033, Rev. L. 1910), as follows:

"From this language it is plain that a motion for new trial has no function to perform unless an issue of fact has been * * * determined and the determination has been embodied in one of three specified forms. Not only must there have been a trial, a judicial examination of the issues of fact, but these issues must have been definitely settled by the verdict of a jury, or its equivalent, final and conclusive upon the facts unless vacated. Until that stage of the proceedings in an action has been reached, the condition precedent to the filing of a motion for a new trial does not arise; the single circumstance capable of creating a field for its operation has not occurred; the only subject-matter vulnerable to its attack does not exist. There is no such thing as a new trial of issues of law."

[4] Under these decisions, which, upon examination, must be taken to be sound in principle, no issue of fact was raised by answer or other pleading prior to the rendition of the original judgment. No such issue could have been determined. There could therefore be no new trial. It is insisted, however, that the judgment rendered below was void, and that, this condition being shown to the trial court by defendant's petition, the court had power to set it aside. The trial court evidently took the view that the judgment was void, since he so declared it, vacated it, and enjoined its operation, without granting a new trial. If it be true that the judgment was wholly void, we have no doubt of the power of the court to vacate it. A "void judgment is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one. It can neither affect nor impair rights." Black on Judgments, § 170; Jefferson v. Gallagher, 150 Pac. 1071. Its operation may be enjoined (Rev. L. 1910, § 4881) or set aside upon motion at any time, whether during the term when rendered or thereafter, by any party affected thereby. (Rev. L. 1910, § 5741; Choi v. Turk, 154 Pac. 1000, and cases cited). It is not necessary to plead a meritorious defense in a motion to vacate such a judgment. Wheatland Grain & Lumber Co. v. Dowden, 26 Okl. 441, 110 Pac. 898. It may be attacked collaterally. Jefferson v. Gallagher, supra. Some courts have even held that a void judgment may be vacated after the term by the court upon its own motion. 23 Cyc. 948, and cases cited. But a void judgment is to be clearly distinguished from one voidable only. The distinction, says Mr. Black (Judgments, § 170), is almost universally to be made upon "the single case where there was a total want of jurisdiction to render it." A judgment may have been erroneous, voidable upon appeal, and yet not be void. If the court had jurisdiction of the parties and subject-matter, and rendered a judgment within the issues, though such judgment might have been erroneous and reversible for error of law committed by the trial court, the judgment is not void, and the statute relating to vacating void judgments is not applicable to it. Gray et al. v. Gray et al., 157 Pac. 730; Clark v. Roman, 151 Pac. 479; Gill v. Executive Committee, 152 Pac. 812; Kaufman v. Grow, 158 Pac. 300; Smith v. Finger, 15 Okl. 120, 79 Pac. 759. Jurisdiction, said this court in Jefferson v. Gallagher, supra, is based upon three things: (1) Jurisdiction of the parties. (2) Jurisdiction of the general subject-matter. (3) Jurisdiction of the particular matter which the judgment professes to decide.

Bearing these principles in mind, we come to the consideration of the record in relation to the present judgment. The original petition alleged, in substance, that plaintiff was guardian of certain minors, citizens of the Chickasaw Nation, who owned certain lands therein described as their allotted portions of the tribal lands; that the county authorities

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had attempted to levy taxes upon the lands for several years; that plaintiff refused to pay, alleging that the taxes so levied were illegal and void; that, finally, to effect a desired sale of the lands, being required to do so by the purchaser, he paid the taxes under protest, notifying the treasurer that he would seek to recover them back. Prayer was for the recovery of the taxes and interest. Judgment was for a portion of the amount demanded. Under the allegations of the petition and the decision in Choate et al. v. Trapp, Auditor, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941, there can be little doubt of the invalidity of the tax. At the time the case was filed and tried, chapter 152, Laws 1910–11, allowing the recovery of taxes voluntarily paid upon erroneous assessments, was on the statute books. In Johnson v. Grady County, 150 Pac. 497, this court held that the portion of that chapter above referred to was unconstitutional because not embraced in the title to the act. It may be conceded that the petition did not state sufficient elements of duress or oppression to constitute a cause of action. The court had admittedly jurisdiction of the subject-matter of suits against the county to recover taxes. This sort of action, brought under proper circumstances, existed long before and entirely independent of chapter 152 of the Laws of 1910–11. This was expressly recognized in Johnson v. Grady County, supra; Louisiana Realty Co. v. McAlester, 25 Okl. 726, 108 Pac. 391; and in prior cases. That act only broadened the previously existing right of action and extended it to taxes voluntarily paid. The particular subject of litigation was brought before the court by the petition, and the court rendered a judgment within the issues. The defendant's demurrer challenged the sufficiency of the petition, and the court found such petition adequate. For aught that appears here, the very question of the constitutionality of the statute may have been raised and the statute held constitutional by the trial court. No appeal was perfected from the judgment. Does the fact that the petition stated the cause of action defectively or not at all, the subject-matter referred to in it being within the jurisdiction of the court, alone render the judgment void? In considering this question we have considered as apposite cases decided upon collateral attack for the reason that it is universally conceded that a void judgment may be collaterally attacked, and the converse must be true that, if a collateral attack upon a judgment is not permissible, judgment is not void.

Mr. Black, in his work on Judgments (section 241), says:

"It would be impossible, on any rational theory, to make jurisdiction dependent upon the validity of the case stated by the plaintiff. For the court must pass upon the sufficiency of the declaration, and jurisdiction to proceed, at least so far, must be acquired by the mere filing of the pleading and service of process."

Again, he says (section 269):

"A judgment cannot be impeached collaterally on account of any illegality or insufficiency in the cause of action on which the suit is brought; these are matters which must be set up in defense to the action, and are concluded by the judgment."

In Winningham v. Trueblood, 149 Mo. 572, 51 S. W. 399, it is said:

"A judgment cannot be collaterally attacked for want of jurisdiction because the petition does not state a cause of action, since, if it states a case belonging to a general class over which the authority of the court extends, jurisdiction is conferred."

In North. Pac. Co. v. Thomas, 26 Or. 381, 38 Pac. 307, 46 Am. St. Rep. 636, the court said:

"If the object of the plaintiff can be ascertained from his complaint, and the court has power to grant the relief demanded and jurisdiction of the parties, the judgment rendered is not subject to collateral attack, although the complaint may in fact have been bad in substance. There is an important difference between a want of jurisdiction and a mere defect in obtaining it. In the former case, the judgment is absolutely void. In the latter case, it is simply erroneous and voidable, and can be attacked only by some direct proceeding authorized by law."

So in the instant case the judgment could have been attacked in any direct proceeding authorized by law, such as appeal, etc. But the motion under consideration is so framed that it can be considered only as a motion to vacate a void judgment, and is not a proceeding authorized by law to correct an erroneous one.

In Rowe v. Palmer, 29 Kan. 337, the Supreme Court of that state said:

"It is not necessary for us to decide whether the petition states such a cause of action as would be good if challenged by demurrer. If it contains sufficient matter to challenge the attention of the court as to its merits, and such a case is thereby presented as to authorize the trial court to deliberate and act, a judgment rendered thereon is not void."

In Taylor v. Coots, 32 Neb. 30, 48 N. W. 964, 29 Am. St. Rep. 426, it is said that:

"The sufficiency of the petition is not a test of jurisdiction."

In Head v. Daniels, 38 Kan. 1, 15 Pac. 911, it was said:

"If the petition sets forth facts sufficient to challenge the attention of the court with regard to its merits or authorize the court to deliberate with the respect thereto, then the judgment * * * rendered upon it is not void, but at most is only voidable."

The following cases will be found to sustain the doctrine above set forth: Edelstein v. U. S., 149 Fed. 636, 79 C. C. A. 328, 9 L. R. A. (N. S.) 236; Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Selby v. Pueppka, 73 Neb. 179, 102 N. W. 263; Frankfurth v. Anderson, 61 Wis. 107, 20 N. W. 662; Bitzer v. Mercke, 111 Ky. 299, 63 S. W. 771; Wood v. Blythe, 46 Wis. 650, 1 N. W. 341; Kalb v. German Savings Inst., 25 Wash. 349, 65 Pac. 559, 87 Am. St. Rep. 757; State v. Horton, 89 N. C. 581; Pierson v. Benedict, 5 Kan.

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App. 790, 48 Pac. 996; Altman v. School Dist., 35 Or. 85, 56 Pac. 291, 76 Am. St. Rep. 468; In re James, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60; Trumble v. Williams, 18 Neb. 144, 24 N. W. 716; Rich v. City of Chicago, 187 Ill. 396, 58 N. E. 306; Edmundson v. School Dist., 98 Iowa, 639, 67 N. W. 671, 60 Am. St. Rep. 224. Such is the practical effect of the holding of this court in Kaufman et al. v. Grow, 158 Pac. 300, supra; Edwards v. Smith et al., 42 Okl. 544–550, 142 Pac. 302; and Hill v. Persinger, 157 Pac. 745.

Movant relies upon Farris v. Henderson, 1 Okl. 384, 33 Pac. 380; Lewis v. Clements, 21 Okl. 167, 95 Pac. 769; and Clark v. Holmes, 31 Okl. 164, 120 Pac. 642, Ann. Cas. 1913D, 385.

In Farris v. Henderson, supra, it was said:

"A complaint which states no cause of action will not support a judgment by default; and such judgment will be rendered in the appellate court. If the complaint states no cause of action, the objection is fatal at every stage of the proceedings."

There is no conflict between this doctrine and that here announced. Farris v. Henderson, supra, was an appeal from the judgment rendered after demurrer overruled. The judgment was clearly eroneous. The court does not hold that it is void.

[5] In Lewis v. Clements and Clark v. Holmes, supra, this court said:

"A judgment by default, upon a complaint that does not contain allegations sufficient to constitute a cause of action, is void, and will be reversed on appeal."

These statements are likewise not in conflict with this opinion, for the reason that in those cases the judgment was by default, while in the instant case there was a demurrer filed and an appearance made by defendant at the final hearing when the judgment was rendered. In no true sense, therefore, could the judgment in the instant case be said to be by default. See Crossan v. Cooper, 41 Okl. 281, 137 Pac. 354; Black on Judgments, § 80.

We conclude that the judgment rendered was not void. City of El Reno v. Cleveland-Trinidad Paving Co., 25 Okl. 648, 107 Pac. 163, 27 L. R. A. (N. S.) 650. That by failure to exercise the right of appeal, or to have the judgment vacated within the term, no statutory ground for vacation after the term appearing, the judgment became binding upon defendant, that a petition for new trial was not applicable to the instant case, and the trial court was in error in vacating the judgment as void and in enjoining its payment.

It follows that the order of the trial court should be reversed, with directions to set aside and vacate the order of October 21, 1915, in all things, to vacate and set aside the restraining order and injunction granted against the county treasurer, to overrule and deny the defendant's petition for a new trial, and to render judgment for plaintiff in error for costs.

PER CURIAM. Adopted in whole.

(62 Okl. 84)

GALBREATH GAS CO. v. LINDSEY et al
(No. 6873.)

(Supreme Court of Oklahoma. Sept. 26, 1916. Rehearing Denied Jan. 2, 1917.)

(Syllabus by the Court.)

1. CONTRACTS ⟸6—CONSTRUCTION—CONSIDERATION—PAYMENT.

Where two parties enter into a written contract by the terms of which an easement in real estate is granted by the first party for a term of years, in consideration of certain things to be performed by the second party during said term of years, upon the execution of the contract, if the same is free from fraud, in its execution it becomes an executed contract, and the consideration a paid consideration, so far as the first party is concerned, and the contract becomes an executory contract as to the second party, and is binding upon said second party.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 8; Dec. Dig. ⟸6.]

2. APPEAL AND ERROR ⟸1010(1)—REVIEW—TRIAL TO COURT.

Where a cause is submitted to the court for trial, without a jury, by stipulation on questions of both law and fact, the judgment of the trial court will not be disturbed on questions of fact where there is any evidence to sustain such judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3981; Dec. Dig. ⟸1010(1).]

3. EQUITY ⟸39(1)—JURISDICTION—DETERMINATION OF ALL CONTROVERSIES.

While a trial court to which a cause in equity has been submitted has and should retain jurisdiction for the purpose of adjusting all differences between the parties, the court is not required to render a judgment on an alleged claim of one of the parties, where no evidence is introduced which will justify the court in rendering judgment for any specific amount, and in order to render a judgment at all, the court would be required to hazard a guess as to the amount due on the claim, if any.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104–109, 111, 114; Dec. Dig. ⟸39(1).]

Commissioners' Opinion, Division No. 5. Error from District Court, Tulsa County; L. M. Poe, Judge.

Action by Lila D. Lindsey and her husband, Lee Lindsey, against the Galbreath Gas Company for injunction. Judgment for plaintiffs, and defendant brings error. Affirmed.

See, also, 35 Okl. 235, 129 Pac. 45.

Haskell B. Talley and Shell S. Bassett, both of Tulsa, for plaintiff in error. Charles L. Fildes, of Tulsa, for defendants in error.

HAYSON, C. This was an action brought in the district court in and for Tulsa county, Okl., by Lila D. Lindsey and Lee Lindsey, defendants in error, against Galbreath Gas

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Company, a corporation, plaintiff in error, seeking to enjoin Galbreath Gas Company from cutting off the supply of natural gas from the premises belonging to the defendants in error, and to enjoin the plaintiff in error from seeking to collect a bill of $160 which plaintiff in error claimed to be due by reason of supplying natural gas to said premises.

The record discloses that on December 10, 1906, Lila D. Lindsey and Lee Lindsey and Galbreath Gas Company entered into a contract, by the terms of which the defendants in error, for the sum of $1 and certain covenants, agreements, and stipulations set out in the contract, let, leased, and demised to Galbreath Gas Company. the exclusive right for a period of 15 years to pipe for gas the streets and alleys in a certain tract of land designated the Lindsey's Second Addition. In consideration for such lease or demise, the plaintiff in error agreed to furnish for a period of 15 years all the gas that defendants in error might find it necessary to use for heating and lighting at their residence located in said Lindsey's Second addition, at a rate of $6 per annum, payable at the rate of 50 cents for each month on the first of each month.

In pursuance to this contract the defendants in error forthwith provided their premises with the necessary pipes for conveying gas into said premises, and for the use of same for heating and lighting, and the plaintiff in error thereupon connected said pipes on said premises and duly furnished the gas as the contract provided. A short time thereafter the plaintiff in error at the request of the defendants in error connected with the pipes a certain gas engine and boiler, which defendants in error had builded on their premises to be used to pump and force water from a well on their said premises into and through the tenements thereon.

The plaintiff in error continued to furnish gas under the contract till about May 16, 1909, when it presented a bill to defendants in error for $160 for the use of the gas in connection with engine and boiler, and threatened to disconnect its supply pipes for a refusal of defendants in error to pay the same. The record shows that the defendants in error had at all times complied with their contract and subsequent agreements in the payment of $6 per annum as provided in the contract. The defendants in error then filed their petition for an injunction. The plaintiff in error answered by general and specific denial, and as a special defense alleged that the defendants in error were estopped by reason of having used the gas for said engine and boiler, which consumed a large amount of gas, which was in addition to the purposes contemplated in the contract. Upon these issues the cause was tried, by stipulation, before the court without a jury. The court made certain requested findings of fact and conclusions of law, and rendered judgment for the defendants in error.

Plaintiff in error filed a motion for a new trial setting up 32 grounds for same, which was overruled by the court, and exceptions were allowed, and it now brings error here setting up 48 assignments of error. However, plaintiff in error states that:

"Synthesising these various assignments in error we may conveniently divide our brief into the following three divisions:"

(a) Did the Lindseys pay, under the contract of December 10, 1916, the real consideration which induced the gas company to agree to give the Lindseys gas at $6 per year, and if this consideration was not paid, was the gas company bound thereby?

(b) Would the cutting off of the supply of gas under the contract of December 10, 1906, have caused an injury to the Lindseys which could not have been measured in damages?

(c) The trial court having taken jurisdiction of this cause as a cause in equity, should it not have retained jurisdiction for the purpose of adjusting all differences arising out of the subject of action as between these parties?

These questions will be discussed in their order.

[1] "(a) Did the Lindseys pay under the contract of December 10, 1906, the real consideration which induced the gas company to agree to give the Lindseys gas at $6 per year, and if this consideration was paid, was the gas company bound thereby?"

While it is doubtful whether this question is squarely raised by the pleadings in this case, and whether it was the theory upon which the case was tried, yet in a way it involves the question of whether or not the court erred in refusing to admit certain testimony offered by the plaintiff in error, to which the plaintiff in error excepted. The question is divided into two sections: (1) Was the consideration paid by the Lindseys? (2) If the consideration was paid, was the plaintiff in error bound thereby? If the first section of the question is answered in the affirmative, it disposes of the second section.

The consideration which the Lindseys were to pay was the granting of the exclusive right to the plaintiff in error, for a period of 15 years, "to pipe for gas the streets and alleys in the Lindsey's Second addition" from December 10, 1906. Did the Lindseys at that time own and control the land known as Lindsey's Second addition? The record discloses that this land was adjacent to the city of Tulsa, I. T., and it was owned by the Lindseys; that it was surveyed into lots and blocks, and streets and alleys in April, 1905, and was dedicated some time during the spring of 1907; that from the time it was surveyed and platted that the defendants in error were selling lots to individuals. The contract shows that the plaintiff in error was fully aware of the character of the addition and knew that in the very nature of things that the lots would be owned by various individuals.

The contract provides:

"The contracts based hereon shall not be repealed or modified by any existing or subse-

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quent ordinance of the city of Tulsa, if the said Lindsey's Second addition should hereafter become a part of the incorporated city of Tulsa."

This shows that at the time the contract was entered into that the plaintiff in error was aware or should have been aware of existing ordinances of the city of Tulsa relating to franchises to gas companies, and was aware of the kind and character of the land known as Lindsey's Second addition, and that the same was likely to become an addition to the city of Tulsa and subject to the ordinances of that city. The record discloses that on the same day, December 10, 1906, a contract was entered into between plaintiff in error and the defendants in error, in which the plaintiff in error agreed to "furnish all premises in Lindsey's Second addition, for a period of 15 years, gas for heating and lighting purposes at not exceeding 20 cents per 1,000 cubic feet," etc. Both of these contracts were filed for record February 25, 1907, over 2 months after the same were executed by the parties. There is nothing in the record to disclose that the defendants in error had ever granted the right or privilege to any other gas company to pipe Lindsey's Second addition for gas; but upon the contrary discloses that the company who had piped a certain portion of said premises had done so without the knowledge or consent of the Lindseys and were trespassers upon the land. We therefore conclude that in view of this record that on the 10th day of December, 1906, the Lindseys, defendants in error, not having previously granted any right to any one to pipe Lindsey's Second addition for gas, had the right to grant the exclusive right to plaintiffs in error, and by the execution of the contract did so grant to the plaintiff in error the exclusive right to pipe for gas the Lindsey's Second addition for a period of 15 years. That upon the execution of such contract, the consideration became a paid consideration upon the part of the defendants in error. Especially is this true in view of the fact that the contract contains no covenant of warranty. We therefore conclude that the mass of testimony consisting of deeds, city ordinances, etc., offered at the trial as evidence by plaintiff in error, was properly excluded. The consideration having become a paid consideration and the contract an executed contract upon the part of defendants in error, and the consideration and contract being executory upon the part of plaintiff in error, to be performed during the ensuing 15 years, we conclude that the plaintiff in error was bound by the payment of such consideration by the Lindseys.

[2] "(b) Would the cutting off of the supply of gas under the contract of December 10, 1906, have caused an injury to the Lindseys which could not have been measured in damages?"

This is the second time this cause has been before this court. In Galbreath Gas Company v. Lindsey et ux., 35 Okl. 235, 129 Pac. 45, in the second paragraph of the syllabus, the court says:

"Petition examined, and held that a threatened irreparable injury for which the law affords no adequate remedy is disclosed on its face, and that the same properly invokes the aid of a court of equity in the absence of an allegation that defendant is insolvent."

This case was tried by the court, without a jury, upon stipulation of counsel. The court upon a consideration of the testimony found that an irreparable injury was threatened. There being ample evidence in the record to sustain this view of the trial court, his decision will not be disturbed here.

[3] "(c) The trial court having taken jurisdiction of this cause, as a cause in equity, should it not have retained jurisdiction for the purpose of adjusting all differences arising out of the subject of the action as between these parties?"

To this question we will say, "Yes," in so far as possible for the court to adjust such difference. But equity does not demand those things to be done which it is impossible to do. So far as we are able to determine from the record there was no way in which to determine the amount of gas used by the gas engine installed by defendants in error. There was nothing to have prevented the plaintiff in error from accurately measuring this gas as it was consumed. In its answer to the petition filed in the trial court, the plaintiff in error says:

"The defendant states that the plaintiffs have used on their premises the gas of the defendants for the purpose of running a gas engine which consumes a large amount of gas and an amount, in all probability, exceeding the gas consumed for all other purposes by plaintiff for heating and lighting purposes."

There is nothing in the testimony that clarifies the situation, and the court is not required to hazard a guess or conjecture upon the matter. It was incumbent upon the plaintiff in error to establish by the evidence the amount of gas used on account of the gas engine independent of the amount used for heating and lighting. Failing to do this, but on the contrary testifying in effect that it could not be done, it cannot complain because the court did not render judgment for its claim. The cause will not be reversed because the court did not hazard a guess upon the proposition, and did not render a judgment thereon.

Finding no error in the record, the judgment of the trial court will be affirmed.

PER CURIAM. Adopted in whole.

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(61 Okl. 309.

CATRON v. ALLEN. (No. 8091.)

(Supreme Court of Oklahoma. Nov. 28, 1916.)

(Syllabus by the Court.)

1. INDIANS ⟸15(1)—LANDS—CONVEYANCES—VALIDITY.

A deed to a part of the allotment of a Cherokee citizen of three-sixteenths blood, before attaining his majority, and after Act Cong. May 27, 1908, c. 199, 35 Stat. 312, 313, took effect, is absolutely void as violative of section 5 of said act.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 37, 38; Dec. Dig. ⟸15(1).]

2. INDIANS ⟸15(1)—LANDS—CONVEYANCES—VALIDITY.

A Cherokee allottee, April 1, 1910, while a minor, in consideration of the payment of the purchase price, executed a deed for a part of his allotment, and on March 14, 1914, after he became of age, executed a second deed to the same grantee, for a consideration of $26 "in hand paid," and "for the purpose of ratifying" the deed of April 1, 1910. *Held*, that such second deed was not violative of the provisions of the governing statute, section 5 of the act of Congress of May 27, 1908, and conveyed title to the grantee.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 37, 38; Dec. Dig. ⟸15(1).]

Commissioners' Opinion, Division No. 2. Error from District Court, Cherokee County; John H. Pitchford, Judge.

Action by Thomas Catron against G. W. Allen. Judgment for defendant, and plaintiff brings error. Affirmed.

W. A. Chase and A. B. Campbell, both of Nowata, and Geo. Paschal, of Muskogee, for plaintiff in error. J. I. Coursey, of Tahlequah, for defendant in error.

GALBRAITH, C. This action was commenced by the plaintiff in error, Thomas Catron, a Cherokee allottee, to recover the possession and quiet title to 50 acres of his allotment from his grantee, on the ground that his deeds were void, the one because made during his minority, and the other because made to ratify and confirm a void deed. The cause was tried on the following agreed statement of facts:

"That Thomas Catron, the plaintiff, had the rights of majority conferred upon him by the district court of Cherokee county, Okl., on the 19th day of March, 1910. That the enrollment records in the office of the Commissioner of the Five Civilized Tribes, at Muskogee, Okl., shows that Thomas Catron arrived at the age of 21 years on the 6th day of December, 1913. That on the 1st day of April, 1910, Thomas Catron and his wife executed two deeds covering the lands in controversy in this action, to the defendant, G. W. Allen, copies of which deeds are set out and attached to plaintiff's reply as Exhibits A and B. That on the 14th day of March, 1914, Thomas Catron and his wife executed another deed to the lands in controversy herein to the defendant, G. W. Allen. That Thomas Catron was paid an additional consideration for the execution of that deed. That the clause in said deed, showing the purpose for which deed was executed, is as set out in Exhibit A attached to defendant's answer. That Thomas Catron was over the age of 21 years at the time he executed the deed of March 14, 1914, as shown by the Enrollment Records."

Upon these facts the court found for the defendant, G. W. Allen, and against the plaintiff. As a basis for the finding the court made findings of fact as follows:

"The Court: Well, gentlemen, I think I am ready to pass on that question. I find that on March 19, 1910, the plaintiff in this action appeared in this court with his father and asked that majority rights be conferred upon him. The plaintiff appeared before the court and submitted himself to examination, and the court found that he was possessed of sufficient intelligence and discretion to justify the court in granting the rights of majority. In granting this right the court is well aware that it did not confer upon the plaintiff the right to dispose of his allotment of lands as a member of the Cherokee Tribe, until the rolls disclosed that he had reached his majority. However, I find that on the 1st day of April, 1910, soon after his majority rights were conferred, he executed deeds to the defendant. The enrollment record shows that on December 6, 1913, the plaintiff did reach his majority, and on March 14, 1914, he executed to the defendant a deed covering the lands sued for. The consideration expressed in the deed is $26. At that time the plaintiff could have disposed of these lands for that sum, and the deed would have been valid, in the absence of fraud. I find, however, in the body of the deed a statement that this deed is given for the purpose of ratifying the deed made by the plaintiff prior to his majority, as shown by the enrollment records. The court is in some doubt as to whether the $26 was the consideration paid at that time for the land and the clause in the body of the deed was for the purpose of showing that the plaintiff ratified his former deeds. Whether or not the statement in the deed following the conveying clause, to the effect that the deed is given for the purpose of ratifying the former deeds, would vitiate the deed, the court is not prepared to say. I do hold as a matter of law at the date of the execution of the last deed, to wit, March 14, 1914, the plaintiff having reached his majority, as shown by the enrollment records, and having received a consideration therefor, and having executed a deed to the defendant for the premises in controversy, he conveyed to the defendant all right, title, and interest the plaintiff had in said lands."

[1] There is no question that the first deed, that of April 1, 1910, was void on account of the allottee's minority, and was incapable of ratification. Truskett v. Closser, 236 U. S. 223, 35 Sup. Ct. 385, 59 L. Ed. 549; Nunn v. Hazelrigg, 216 Fed. 330, 132 C. C. A. 474; Welch v. Ellis, 163 Pac. 321. The second deed was a general warranty deed in form, and was executed at a time when the allottee was free of restrictions. It was recited in this deed that for and in consideration of $26 in hand paid, the receipt of which is hereby acknowledged, the grantors "do hereby grant, bargain, sell and convey unto G. W. Allen the following described land," describing the land by metes and bounds. Then follows a clause reading in part:

"This deed is given for the purpose of ratifying a certain deed executed by grantor and his wife to the same grantee on the 1st day of April, 1910," etc.

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[2] Now, it is contended by the plaintiff in error that the deed of April 1, 1910, was void because the grantor was under the restriction of minority at that time, and that the deed of March 14, 1914, is likewise void because it was made for the purpose of ratifying and confirming a void deed. That this reference in the deed of March 14, 1914, to the prior void deed shows the purpose and intention of the parties to be to ratify and confirm the prior deed in violation of the acts of Congress controlling such conveyances. This contention cannot be sustained under the decisions of this court.

In Ehrig v. Adams, 152 Pac. 594, there was a deed void because made during the period of restrictions, and a deed made to the same grantee after the removal of restrictions, and a reference in the second deed to the first. The second deed in that case recited a consideration of $1, and the reference clause as follows:

"This deed is made to correct a former deed made between the same parties, which was placed of record," etc.

One of the exceptions presented in that case was:

"That the deed from Hays Crockett to Henry Bratton, of date of July 4, 1910, was an attempted ratification of a prior void deed of date of October 31, 1906, and is itself invalid for want of power in Hays Crockett to ratify a contract made in violation of law."

The decision of the Supreme Court Commission, considering that case for decision, took the same view of the question now presented by counsel for plaintiff in error in the instant case, and held that the second deed was an attempt to ratify and confirm a prior void deed, and therefore the second deed was void also. However, the Supreme Court in a later case took a different view of the question, and specifically overruled that case, McKeever v. Carter et al., 157 Pac. 59, and in doing so said:

"In the opinion it was held that the last deed was void as to Adams and subsequent purchasers from him because in violation of the act of Congress of May 27, 1908, being the act that is controlling here. The opinion is based on the theory that the conveyance to Adams prior to the removal of restrictions was void and incapable of ratification, and that the second deed to the same grantee could not operate to pass the allottee's title, because tainted with the same illegality. This might have been true prior to the passage of the act of Congress of May 27, 1908, but, as we have seen, that act was intended as a revision of the entire subject of restrictions on the character of lands here involved, and operated as a repeal of the act of April 26, 1906 [34 Stat. 137, c. 1876]. The opinion in this case is in conflict with the opinion in Lewis v. Allen [42 Okl. 584, 142 Pac. 384]; Henley v. Davis [156 Pac. 337], and the views herein expressed, and is hereby overruled."

In Welch. v. Ellis et al., recently handed down by the court, and not yet officially reported (Appellate Court Bulletin, October 13, 1916, p. 197), and is the last announcement of the court on the question here presented. In that case the allottee made a deed during his minority, and after becoming of age made a second deed to the same grantee without the payment of any additional consideration, and the same contention was made there as here, and the court, denying the contention, held that the controlling statute (section 5 of the act of May 27, 1908), was not thereby violated. Chief Justice Kane, speaking for the court, said:

"It will be observed that none of the acts of Congress removing restrictions attempt to make the right to convey, after restrictions are removed, depend upon the adequacy of the consideration received by the grantor. In that respect, after the restrictions upon alienation are removed, the Indian citizen stands upon the same equality with the ordinary citizen of the state. Mere inadequacy of price or any other inequality in the bargain is not per se a ground to avoid his deed, either in equity or by the terms of the statute. Practically all the local authorities cited by counsel for plaintiff in support of their contentions construe section 16 of the Creek Supplemental Agreement [32 Stat. 500, c. 1323], and section 19 of the act of April 26, 1906. As we hold that section 5 of the act of May 27, 1908, is controlling in the case at bar, we do not deem the cases of that class cited by counsel to be in point. On the other hand, there is a line of cases wherein deeds executed subsequent to the act of May 27, 1908, were involved, in which unqualifiedly it is held that inadequacy of consideration alone does not constitute an equitable ground for setting aside such deeds, and that the provisions of section 5 of the act of May 27, 1908, does not affect a deed made after all restrictions upon the alienation of the lands therein described were removed. Lewis v. Allen, 42 Okl. 584 [142 Pac. 384]; Henley v. Davis, 156 Pac. 337; McKeever v. Carter et al., 157 Pac. 56. So we conclude that upon plaintiff attaining his majority the whole legal title to his lands vested in him; that thereafter he could dispose of it as he saw fit, give it away, or sell it for any consideration, either legal or moral, which seemed to him sufficient. As the plaintiff herein voluntarily conveyed his land after attaining his majority, he cannot now, after the lapse of many years, repudiate the conveyance upon any except the ordinary equitable grounds. This latest deed to his surplus allotment not being violative of any statute, and there being no equitable grounds for setting it aside alleged or proven, it must stand."

See Hope v. Foley, 157 Pac. 727, to the same effect.

The reference in the second deed to the first deed might be taken to show a purpose to ratify the prior void deed. Under the law such a purpose could not be effectual, and at most it was a vain attempt to do an impossible thing. The claim of title of the defendant in error was made under the deed of March 14, 1914. That deed was based upon a good consideration, and was made by competent grantors, and was sufficient in form to carry title, and no fraud, duress, or undue influence are claimed to have entered into the transaction.

It therefore appears that the trial court was right in its finding, and that the judgment appealed from should be affirmed.

PER CURIAM. Adopted in whole.

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(13 Okl. Cr. 25)

STATE v. CURLEY. (No. A-2190.)

(Criminal Court of Appeals of Oklahoma. Dec. 27, 1916.)

(Syllabus by the Court.)

1. FORGERY ⟸28(1), 34(3) — INFORMATION — SUFFICIENCY—VARIANCE.

Where an information charged that the defendant uttered, and passed a forged check, but did not plead the names of the indorsers on the back of the check, *held*, that it was error for the trial court to hold that the information was defective, because it did not plead the names indorsed on the back of the check. This was error, for the reason that these names did not constitute any essential of the crime charged. Also *held* that, when this check was introduced in evidence, it was error for the court to hold that, because the names indorsed on the back of it were not pleaded in the information, there was a fatal variance between the proof and the allegations of the information. This was error because the crime charged was that the forged check had been uttered and passed, and the only function that the names of the indorsers on the back of the check performed was to furnish evidence as to the identity of the parties who uttered and passed the check.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 66, 67, 90; Dec. Dig. ⟸28(1), 34(3).]

2. CRIMINAL LAW ⟸1024(7)—APPEAL—DECISIONS REVIEWABLE—GRANT OF NEW TRIAL.

The state is not allowed to appeal from an order of the trial court granting the defendant in a criminal action a new trial. The granting of a new trial in such cases is largely a matter of sound judicial discretion, and usually involves questions of both law and fact; and when such discretion has been exercised in favor of the defendant it is very much like the verdict of a jury in his favor, and the state should have no right to appeal from it, unless such right is unquestionably given by the statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2609; Dec. Dig. ⟸1024(7).]

Error from District Court, Pottawatomie County; Chas. B. Wilson, Jr., Judge.

Walter Curley was convicted of forgery, and from an order granting a new trial, the State appeals. Remanded for new trial.

S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

BRETT, J. In this case Walter Curley, the defendant in error, who was also defendant below, was tried in the district court of Pottawatomie county and convicted of the crime of uttering and passing a forged check. A motion for a new trial was filed by the defendant, Curley, and sustained by the court, as stated in the judgment and order setting aside the verdict and granting a new trial:

"Because there was a variance between the proof and the pleadings, in this: the information purported to and did set out a true and correct copy of the purported check which was alleged to have been uttered and passed, but did not allege and set up the indorsements on the back of said check of the two names which appeared on the back thereof, to wit, 'Walter Curley,' 'John Bertrand,' and a photograph of the purported check was admitted in evidence, both of the face and the back of the check, which showed the two names above mentioned in the order in which they appear above, to be and appear on the back of said check. For which reason the court holds that the check offered and admitted in evidence was not the check which was described in the information. For which said above reasons the verdict of the jury heretofore rendered in this case is set aside, and the defendant granted a new trial."

To this ruling and order of the court the state excepted, and appeals to this court.

[1] One question involved in this ruling and order goes to the sufficiency of the information, and this may upon appeal by the state be reviewed. Section 5990, Rev. Laws 1910.

The face of the check charged to have been uttered and passed is the following:

"Tecumseh, Okl. 2-22, 1913. No. 33.
"Farmers' National Bank:
"Pay to the order of Walter Curley $65.60, sixty-five dollars & sixty cents dollars.
"T. G. Cutlip."

On the back of the check two names were indorsed, that of the defendant Walter Curley, and one John Bertrand.

The evidence shows that Walter Curley and John Bertrand came together to the State National Bank Building in Shawnee, but on reaching the building Walter Curley remained on the outside and John Bertrand entered the building, cashed the check, returned to where Curley was waiting, and handed him a portion of the money he had received. There was no evidence or allegation that either the name of Walter Curley or John Bertrand, which appeared on the back of the check as indorsers, were forged. But the allegation was that the name of T. G. Cutlip, who appeared as the drawer of the check, was forged, and evidence was introduced to sustain this allegation.

If the payee in this check had been John Smith or some other person than Walter Curley, the defendant, and the defendant had forged the name of John Smith, or the payee, on the back of the check as indorser, that would have presented a different situation; for in that event the defendant, as held in Wells v. Territory, 1 Okl. Cr. 469, 98 Pac. 482, would then have been guilty of two separate and distinct offenses, that of knowingly uttering the check to which the name of T. G. Cutlip as drawer had been forged, and of also forging the name of John Smith, the payee, as indorser, and then uttering the same. But there was only one offense charged in the information, and only one attempted to be proved, and that was the crime of knowingly uttering and passing a check to which the name of T. G. Cutlip as drawer had been forged. And there could be no reason, we think, for requiring the pleader to set out and plead in the information that the check was indorsed by Walter Curley and John Bertrand, since their names as indorsers were not forgeries, and constituted no essential of the crime charged. We can see

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no more reason, under the facts in this case, for requiring their indorsement of this check to be pleaded, than there would be for requiring the name of the person to whom a stolen horse had been sold to be pleaded in an indictment for the larceny of a domestic animal. The fact that the horse was sold would be conclusive evidence that the accused intended to deprive the owner of the horse. But the sale, the conditions and circumstances of the sale, the consideration, and to whom it was sold would be matters of evidence, and not of pleading. And the fact that the defendant, Walter Curley, and John Bertrand indorsed this forged check, came together to cash it, and divided the proceeds, after it was cashed, are all only evidential facts tending to establish the one crime charged, which was that of knowingly uttering and passing a forged check. And the fact that the back of the forged check pleaded furnished one item of this evidence did not constitute "a variance between the proof and the pleadings"; for the allegation was that the forged check had been uttered and passed; and the only function that the names on the back of this check performed, since they were not forged, but genuine, was to furnish evidence as to the identity of the parties who uttered and passed the check.

[2] 2. But the state insists that this court should reverse the order granting a new trial, and remand the case, with directions to the trial judge to reinstate the verdict and pass sentence upon the defendant in conformity with the verdict. But it is our opinion that this cannot be done. The right of the state to appeal is unknown to the common law, and it is only by virtue of the statute that the right of the state to appeal exists at all. And we do not believe that our statute is broad enough to give the state the right to appeal from an order per se granting a new trial. And, had it not been for the manifest errors of law involved in the order in this case, this appeal would have had to have been dismissed. But since the errors in holding the information defective, and that there was "a variance between the proof and the pleadings," were so fatal to the rights of the state, and would necessarily recur in a retrial of the case, we think our statute justifies us in settling these legal questions for the guidance of the court in the next trial. But several states have passed upon the right of the state to appeal from orders granting a new trial, and none that we have been able to find which have statutes similar to ours uphold or allow such appeals. In fact, we know of no state that does allow such appeals, except California, and it has a statute specifically providing for such appeals. The general trend of the decisions is to the effect that the granting of a new trial is largely a matter of sound judicial discretion, and usually involves questions of both law and fact; and, when such a discretion has been exercised in favor of the defendant, it is very much like the verdict of a jury in his favor, and the state should have no right to appeal from it, unless such right is unquestionably given. People v. Beckwith, 42 Hun (N. Y.) 366; State v. Northrup, 13 Mont. 522, 35 Pac. 228; State v. Spencer, 92 Ind. 115; State v. Perry, 4 Baxt. (Tenn.) 438; State v. Padgett, 82 N. C. 544. This holding is based, not only upon long experience, but, as we believe, also upon sound reason.

There is therefore nothing left for this court to do but to remand the case for a new trial in compliance with the order of the district judge, with directions that such trial be in conformity to the views herein expressed upon the legal question passed upon in this opinion.

It is so ordered.

DOYLE, P. J., and ARMSTRONG, J., concur.

(94 Wash. 25)

STATE v. BUFFUM. (No. 13557.)

(Supreme Court of Washington. Dec. 26, 1916.)

1. CRIMINAL LAW ⟸1088(19) — APPEAL — STATEMENT OF FACTS—AFFIDAVIT.

An affidavit filed by accused in the court below to explain his delay in prosecuting an appeal from a conviction before a justice of the peace cannot be considered on appeal, where it is incorporated in the transcript of the record, not in the statement of facts, since it is only from the statement of facts that the Supreme Court can ascertain the evidence relied on in the lower court.

[Ed. Note.—For other cases, see Criminal Law, Cent.Dig. § 2802; Dec.Dig. ⟸1088(19).]

2. CRIMINAL LAW ⟸1069(6) — APPEAL — DUTY TO PROSECUTE—DISMISSAL.

A defendant who appeals from a conviction before a justice of the peace has the burden of prosecuting the appeal, so that it can be dismissed when he makes no effort to prosecute it within a reasonable time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2699; Dec. Dig. ⟸ 1069(6).]

3. CRIMINAL LAW ⟸1069(6)—APPEAL—DISMISSAL—WANT OF DILIGENCE.

Where there was an unexcused delay of five months in prosecuting in a court which was in session every day an appeal from a conviction before a justice of the peace, the record does not show an abuse of discretion in dismissing the appeal for failure to prosecute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2699; Dec. Dig. ⟸ 1069(6).]

Department 2. Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

W. E. Buffum was convicted in a justice court of cruelty to animals. From an order of the superior court dismissing his appeal to that court, defendant appeals. Order affirmed.

Frank G. Riley, of Tacoma, for appellant. Fred G. Remann and James Selden, both of Tacoma, for the State.

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FULLERTON, J. On September 1, 1915, the appellant, W. E. Buffum, was convicted in one of the justice's courts of Pierce county of the offense of cruelty to animals. On the pronouncement of the judgment of conviction he orally gave notice of appeal from the judgment to the superior court of Pierce county, perfecting the appeal on September 11, 1915, by filing a bond conditioned that he would prosecute the appeal and abide the judgment of the court thereon. Nothing further was done with the appeal by Buffum, and on February 23, 1916, the prosecuting attorney moved to dismiss it on the ground that it had not been diligently prosecuted. This motion the court granted and Buffum appeals to this court.

[1] There is in the transcript a copy of an affidavit filed by Buffum in which he sought to excuse his apparent want of diligence in failing to prosecute his appeal, but we have held in a long line of cases that matters of evidence introduced at a hearing or on a trial in the court below cannot be brought before this court by certification in the transcript or in any other manner than by a statement of facts; this on the principle that it is only from a statement of facts that this court can know what was before the trial court in the way of evidence. This affidavit therefore is not before us, and cannot be considered in the determination of the appeal. It follows from this that, if it was the appellant's duty to prosecute the appeal, and if the time elapsing between the date of the appeal and the date of the motion to dismiss it was longer than a reasonable time for such purpose, the court did not err in its order of dismissal.

[2] The appellant controverts both of these propositions, citing to the first the case of State v. Hall, 64 Wash. 99, 116 Pac. 593. But this case was rested on the facts shown, the court holding that the record showed that there was no intention on the part of the appellant to abandon the appeal. It was not held that the appellant owed no duty to prosecute his appeal. On the contrary, it was held that the state's motion to affirm the judgment of guilty entered in the justice's court should not be granted, conceding that it was the appellant's duty to bring the case to a hearing. On the other hand, we had theretofore decided in the case of State v. Parmeter, 49 Wash. 435, 95 Pac. 1012, that it was the duty of a defendant appealing from a judgment of conviction in a justice's court to diligently prosecute his appeal, saying that he was entitled to a trial in the superior court by reason of his appeal only if diligently prosecuted. The principle of the case was reaffirmed in the later case of State v. Jones, 80 Wash. 335, 141 Pac. 700. Since the burden of prosecuting the appeal is on the defendant, and not the state, it must follow that the state is entitled to a dismissal when a reasonable time elapses after the appeal is taken and no effort is made on the part of appellant to prosecute it to a final conclusion.

[3] As to the second question, an examination of the dates given will show that a period of over five months elapsed after the appeal was perfected without action being taken on the part of appellant, and no reason shown which we are permitted to consider which excused the delay. Seemingly this is ample time in which to bring the cause on for hearing before a court open on every judicial day and which sits with a jury once in every month.

On the face of the record, therefore, we cannot say that the court abused its discretion in dismissing the appeal, and the order of dismissal should stand affirmed.

It is so directed.

MORRIS, C. J., and MOUNT, HOLCOMB, and PARKER, JJ., concur.

(94 Wash. 35)

E. I. DUPONT DE NEMOURS POWDER CO. v. VIRGES et al. (No. 13642.)

(Supreme Court of Washington. Dec. 26, 1916.)

MORTGAGES ⇐514—SUCCESSIVE SALES.

Where different mortgages on the same property are foreclosed in one suit, the court need not order successive sales; the statute as to foreclosures, Rem. Code 1915, § 1118, providing only that in rendering judgment the court shall order the mortgaged premises, or so much thereof as may be necessary, sold to satisfy the mortgage and costs of the action.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1513; Dec. Dig. ⇐514.]

Department 2. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by the E. I. Dupont De Nemours Powder Company against William Virges and others. From a judgment, plaintiff appeals. Affirmed.

Daniel B. Trefethen, of Seattle, for appellant. Burkey, O'Brien & Burkey, of Tacoma, for respondents.

MOUNT, J. This appeal is from a judgment in foreclosure. The appellant insists that the trial court erred in refusing an order directing more than one sale of the mortgaged property. The facts are not disputed, and are, briefly stated, as follows: The defendant National Realty Company executed three mortgages upon two lots in the city of Tacoma. The first mortgage was in favor of the Metropolitan Life Insurance Company, for the sum of $375,000; the second mortgage was in favor of the respondent William Virges, in the sum of $20,000; and the third mortgage to the appellant Dupont Powder Company for $95,000. This action was brought by the Dupont Powder Company to foreclose its

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mortgage. William Virges, and other parties whose liens were alleged to be subsequent in time to the plaintiff, were made parties to the action. Virges answered by cross-complaint, alleging that his mortgage was prior to that of the plaintiff, and prayed for foreclosure. The Metropolitan Life Insurance Company, holding the first mortgage, was not a party to the action. Upon a trial of the issues, the court found that the Virges mortgage was prior to the plaintiff's mortgage, and entered a decree finding the amount due upon the Virges mortgage, the amount due upon the plaintiff's mortgage, and directed a sale of the mortgaged property to satisfy these mortgages; that the proceeds of the sale should be applied, first, to the payment of the costs and expenses of the receivership, second, to the payment of the amount found due to the cross-complainant, William Virges, and, third, the balance to be applied to the amount due to the plaintiff. The court refused to order the property sold, first, to satisfy the Virges judgment, and thereafter again sold upon the judgment in favor of the plaintiff. This appeal is from that order.

The appellant contends that there should have been successive sales of the property, in order that the right of redemption of the subsequent creditor might be enforced. It is not claimed by the appellant that there is a statute authorizing the trial court to order successive sales of property where there are successive mortgages. The statute (Rem. 1915 Code), at section 1118, provides that in rendering judgments the court shall order the mortgaged premises, or so much as may be necessary, sold to satisfy the mortgage and costs of the action. It is probably correct to say that, where successive mortgages are foreclosed in separate suits, separate sales may be made; but, where different mortgages are foreclosed in one suit, it is clearly not necessary that the court should make an order of successive sales. The prior mortgage has a prior right, and must be satisfied before subsequent mortgages may participate in the fruits of the sale. It is unnecessary to determine at this time the rights of the redemptioners. If a statutory right of redemption exists in favor of subsequent lienors, where a sale has been had of the mortgaged property, then the parties may protect themselves by such redemption. The record in this case does not disclose that there has been any offer of redemption, and, of course, that question is not before us upon this appeal. The trial court, not being required by statute to order successive sales upon a judgment of foreclosure, does not commit error when it refuses to make such an order.

For that reason the judgment must be affirmed.

MORRIS, C. J., and HOLCOMB, PARKER, and FULLERTON, JJ., concur.

(94 Wash. 32)

ZELLERS v. SEATTLE LODGE, NO. 92, B. P. O. E., et al. (No. 13624.)

(Supreme Court of Washington. Dec. 26, 1916.)

1. MUNICIPAL CORPORATIONS ⇐816(2)—LIABILITY OF OWNER AND LESSEE FOR INJURY ON SIDEWALK—COMPLAINT.

In a pedestrian's action against the owner and the lessee of property for injuries when he slipped on the sidewalk, the complaint, which charged that defendants "carelessly, negligently, and unlawfully" permitted snow and ice to accumulate, the facts alleged showing that the accumulation was in a short time and through natural causes, there being no allegation of any facts constituting negligence at common law, and no ordinance of the city making it the duty of abutting property owners to clear sidewalks being pleaded, was insufficient, since, in the absence of contrary statutory provisions, the owner or occupant of property owes no duty to pedestrians to keep the sidewalk free of snow and ice accumulating from natural causes.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1712; Dec. Dig. ⇐816(2).]

2. MUNICIPAL CORPORATIONS ⇐755(1)—CARE OF STREETS—LIABILITY OF CITY.

A city, as a general rule, is primarily liable for negligence in the care of its streets.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1587, 1589, 1590; Dec. Dig. ⇐755(1).]

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by Joseph Zellers against Seattle Lodge, No. 92, Benevolent and Protective Order of Elks, and another. From a judgment of dismissal, plaintiff appeals. Judgment affirmed.

J. P. Ball and Wm. T. C. Ball, both of Seattle, for appellant. Geo. H. Rummens, Geo. F. Aust, and Farrell, Kane & Stratton, all of Seattle, for respondents.

PER CURIAM. Action for personal injuries. It is alleged in the complaint, in substance, that the Elks' Investment & Construction Company, a corporation, is the owner of a lot and building located at the southwest corner of Fourth avenue and Spring street in the city of Seattle; that Seattle Lodge, No. 92, Benevolent and Protective Order of Elks, a voluntary unincorporated association, was the lessee in possession of the premises; that Fourth avenue and Spring street are public highways and principal thoroughfares of the city with a decided downward pitch from Fourth avenue on Spring street westward; that during the first three days of February, 1916, the city of Seattle was visited by a heavy snow storm with thaws and freezes, which covered the streets and sidewalks of the city with snow and ice to a great depth; that defendants "carelessly, negligently, and unlawfully" allowed such snow and ice to accumulate and be on the sidewalk adjoining their premises; that on February 4, 1916, plaintiff while walking along Spring street

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adjoining defendants' premises slipped on the snow and ice, fell, and sustained injuries for which he demands judgment in the sum of $10,700. The court sustained a general demurrer to the complaint. Plaintiff refusing to plead further, a judgment of dismissal was entered. Plaintiff appealed.

[1] Appellant argues that, because the complaint charged that respondents "carelessly, negligently, and unlawfully" permitted the snow and ice to accumulate, the court erred in sustaining the demurrer. This presents the sole question for our determination.

It will be noticed that the facts alleged show that the snow and ice accumulated in a short time and through natural causes. There is no allegation of any facts constituting negligence at common law. Griswold v. Camp, 149 Wis. 399, 135 N. W. 754. Nor is there pleaded any ordinance of the city making it the duty of the abutting property owner to keep the sidewalks clear of snow and ice so accumulating, and we have no statute imposing such duty. The general allegation that respondents carelessly, negligently, and unlawfully permitted snow and ice to accumulate is therefore unsupported by any specific allegation of fact. It is a mere conclusion not following from any of the facts alleged. The law is thus succinctly expressed in 13 R. C. L. p. 415, § 341:

"In the absence of a statutory provision to the contrary, the owner or occupant of property owes no duty to pedestrians to keep the sidewalk in front of it free from ice and snow coming thereon from natural causes, or to guard against the risk of accident by scattering ashes or using other like precautions, and will not be liable in damages to persons injured by reason of his failure to do so."

The text quoted is amply sustained in all of its breadth by the authorities. Hartford v. Talcott, 48 Conn. 525, 40 Am. Rep. 189; Kirby v. Boylston Market Ass'n, 14 Gray (Mass.) 249, 74 Am. Dec. 682; Dahlin v. Walsh, 192 Mass. 163, 77 N. E. 830, 6 L. R. A. (N. S.) 615; McGrath v. Misch, 29 R. I. 49, 69 Atl. 8, 132 Am. St. Rep. 798; City of New Castle v. Kurtz, 210 Pa. 183, 59 Atl. 989, 69 L. R. A. 488, 105 Am. St. Rep. 798, 1 Ann. Cas. 943, and note; Brown v. Wysong, 1 App. Div. 423, 37 N. Y. Supp. 281; Hunter v. Wanamaker (Pa.) 2 Atl. 507; 28 Cyc. 1438. No authority to the contrary has been cited, and we know of none.

[2] This is not a case involving an artificial turning of water onto a street which by freezing created a dangerous condition amounting to a nuisance produced through the agency of the property owner. Nothing of the kind is alleged. A city is, of course, as a general rule, primarily liable for negligence in the care of its streets, but even as against the city the facts here alleged would hardly sustain the conclusion of negligence. Calder v. Walla Walla, 6 Wash. 377, 33 Pac. 1054; Taylor v. Spokane, 91 Wash. 629, 158 Pac. 478; Griswold v. Camp, supra.

Even had we a statute requiring the property owner to remove from abutting sidewalks natural accumulations of snow and ice, or had a violation of an ordinance to that effect been pleaded, there would still be grave doubt whether under the authorities a neglect of that duty would of itself create a liability against it in favor of individuals. Hartsell v. City of Asheville, 164 N. C. 193, 80 S. E. 226; Griswold v. Camp, supra. See, also, note, 6 L. R. A. (N. S.) 616. We reserve the decision of that question until we meet a case presenting it.

In any view of the matter the complaint here failed to state a cause of action.

Judgment affirmed.

(94 Wash. 1)

GILMAN v. BRUNTON et ux. (No. 13404.)

(Supreme Court of Washington. Dec. 26, 1916.)

1. SPECIFIC PERFORMANCE ⊕=29(2) — ENFORCEABLE CONTRACTS — DESCRIPTION OF LANDS.

In an agreement for an exchange of lands, a description of property of one party as 48 acres bounded on the north by a creek and situated about one mile east of a certain town, "being the same property conveyed" to the owner by a third party, *held* too indefinite for specific performance, since parol evidence would be necessary to assist in determining what description was to be incorporated in the decree for specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 71–73, 75–82; Dec. Dig. ⊕=29(2).]

2. SPECIFIC PERFORMANCE ⊕=92(1)— PERFORMANCE BY PLAINTIFF.

In suit for specific performance where, when plaintiff tendered deed to the property from a third party, the property stood in plaintiff's name, and, although the contract called for delivery of abstract within 10 days, and time was of the essence, plaintiff had not furnished the abstract 10 months after the contract, his default in tendering due performance barred recovery.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 233–242½; Dec. Dig. ⊕=92(1).]

3. SPECIFIC PERFORMANCE ⊕=16—UNFAIRNESS OF CONTRACT.

A land exchange contract will not be specifically enforced where it appears plaintiff is seeking to compel defendant to carry out a contract inequitable as to him.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 29, 35, 36; Dec. Dig. ⊕=16.]

Department 1. Appeal from Superior Court, Clarke County; R. H. Back, Judge.

Action by D. E. Gilman against W. B. Brunton and wife. From decree for defendants, plaintiff appeals. Affirmed.

Walter G. Hayes, of Portland, Or., and Miller & Wilkinson, of Vancouver, for appellant. McMaster, Hall & Drowley, of Vancouver, for respondents.

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PER CURIAM. On November 1, 1913, the plaintiff and defendants entered into the following agreement:

"This agreement, made and entered into this 1st day of November, 1913, by and between W. B. Brunton and Opal M. Brunton, husband and wife, hereinafter known as the party of the first part, and W. L. Twitchell, hereinafter known as the party of the second part, witnesseth: Whereas, W. B. Brunton and Opal M. Brunton, parties of the first part, are the owners in fee simple of the following bounded and described property situated in the county of Clark, state of Washington, 48 acres, more or less, bounded on the north by Cedar creek and situated about one mile east of Etna, Wash., said property being the same property conveyed to the party of the first part by W. Tate and wife in 1912. Whereas, W. L. Twitchell, party of the second part is the owner in fee simple of the following described real and personal property, situated in the county of Morrow, state of Oregon: 360 acres of land in section 3, Twp. 3 south of range 26 east of the W. M. Also the following personal property: 4 horses, 2 sets of harness; 1 grain drill, 1 four section harrow; one 2 bottom plow; 1 walking plow; 1 header; 2 wagons; fanning mill. Whereas, the parties of the first part are anxious to, and have this day offered to exchange their land herein described, for the land and personal property of the party of the second part herein described, said property of the parties of the first part to be subject to a mortgage of $800.00 with interest paid up to date. Said property of the party of the second part herein described to be subject to an incumbrance of $8100.00 which the parties of the first part agree to assume; said incumbrance to be in the form of a contract note; said note to be paid as follows: One half of all the grain raised to be delivered to the Heppner Warehouse & Milling Co.'s Warehouse, at Heppner, Or., free and clear from all expense, and to be sold and the proceeds to apply on said note. First. The interest to be paid, and the balance applied on the principal. Said note to draw interest at the rate of 8% per annum on the sum of $3000.00 which is now a lien on said property, and at the rate of 6% per annum on the balance of $51.00.00. Whereas, the party of the second part is anxious to accept the terms of and exchange properties as offered by the parties of the part, to make such trade: In consideration of the premises and the agreements of the parties herein contained, and of ten ($10.00) dollars, paid by each of them to the other this day to bind the bargain, the receipt of which sum is hereby acknowledged, we do hereby undertake, promise and agree to exchange our respective properties as described herein, one for the other and the parties of the first part agree to furnish an abstract of title of their lands within 10 days from the date hereof, showing a fee-simple title, subject to the incumbrance herein mentioned, and they further agree to give a warranty deed to the party of the second part for said land, subject to said incumbrance to be assumed by the party of the second part. The party of the second part agrees to execute and deliver to the party of the first part a warranty deed for said above-described property conveying the same in fee simple, subject to the above-mentioned incumbrance to be assumed by the party of the first part. The party of the second part also agrees to furnish an abstract of title of his lands within 10 days from the date hereof, showing a fee-simple title, subject to the incumbrance herein mentioned. It is further understood and agreed by and between the parties hereto, that said deeds of the parties herein shall be executed and tendered to the other party within 30 days from the delivery of the abstracts, and each of the parties hereto undertake, promise and agree to fully consummate said exchange of properties within 30 days from the date of receiving said abstract, and neither party hereto shall have the right or authority to withdraw from, or refuse to complete said exchange of properties for any cause whatever, except where the title to some of the property to be exchanged shall be objected to as unmerchantable, and such objections, if any, shall be reduced to writing and personally served upon the other party, his agent or attorney, and if any objections are found to the title, the owner of the land is hereby given 30 days, in which to clear such objections, and if cleared the exchange of properties shall be consummated within 10 days thereafter, and this contract shall be fully consummated. The time in which each of the parties are to perform the acts and things herein agreed upon is hereby declared to be of the essence of this agreement. In witness whereof the parties have hereunto set their hands and seals in duplicate the day and year first above written.

"W. B. Brunton. [Seal.]
"Opal M. Brunton. [Seal.]
"D. E. Gilman. [Seal.]
"Witness: P. E. Alvord."

The parties did not exchange deeds nor do anything else in furtherance of the contract, except that about November 15, 1913, defendants entered into possession of the Morrow county land and undertook its cultivation. Coming to a realization that they had not received what they bargained for, the defendants, about September 1, 1914, abandoned the Oregon property, moved back to their Clarke county farm, and refused to carry out the contract of exchange. The plaintiff at once brought an action for specific performance. From a decree dismissing the action, plaintiff appeals.

[1] The contract was so indefinite and uncertain in some of its terms that appellant found himself under the necessity of including an action for its reformation as a preliminary to its specific performance. The agreement recites that one W. L. Twitchell, as the owner of the fee-simple title to the Oregon land, is one of the contracting parties, while the agreement with the Bruntons is executed by D. E. Gilman, instead of by Twitchell. The Oregon land is also described as 360 acres in "section 3, Twp. 3 south of range 26 east of the W. M.," while in fact but 120 acres of the land involved lie in section 3, and the balance of 240 acres lies in section 4 of the same township and range. It may be conceded that the appellant was entitled to a reformation in these particulars, since the evidence showed that respondents were put in possession of the right lands, and that they were informed that appellant was the real owner, although the record title was at the time in the name of Twitchell. But, conceding the foregoing defects to have been duly corrected so as to warrant specific performance, the agreement is still defective, in that the Brunton land is not sufficiently described to admit of its identification without resort to parol testimony. The description is as follows:

"The following described property situated in Clarke county, state of Washington, 48 acres more or less bounded upon north by Cedar creek and situated about one mile east of Etna,

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Wash., said property being the same property conveyed to the party of the first part by W. Tate and wife in 1912."

While it is the law that a reference in a contract or deed to another instrument which contains a description of the property justifies the examination of the two instruments together for the purpose of identifying the particular property referred to, the description herein does not come within the rule. The reference is not to an instrument containing a sufficient description, but merely declares the property is "the same property conveyed to the party of the first part [Bruntons] by W. Tate and wife in 1912." Parol evidence would be necessary to assist in determining what description was to be incorporated in the decree for specific performance. In Thompson v. English, 76 Wash. 23, 135 Pac. 664, in a case involving a somewhat similar description, this court said:

"The description of the property as contained in the contract was, 'Seventy-nine acres in section 30, township 2 M., range 3 E. W. M., Clarke Co., Wn. Owner, A. E. English.' It will be observed that this description does not specify which 79 acres in section 30 was intended. To ascertain this fact, resort must be had to oral testimony. The description given cannot be applied to any definite property."

The fact that appellant was in possession of the deed from the Tates to the Bruntons, in which the Brunton property was correctly described would be immaterial, in view of Brunton's testimony that he did not deliver the deed with the contract and Gilman's testimony that he did not know how or when he came into possession of the Tate deed. We hold that the description of the Clarke county land of the Bruntons was too indefinite for specific performance.

[2] Further, we do not think appellant showed any title in himself such as a court of equity would compel the respondents to receive. The respondents denied the allegation of the complaint that appellant was the owner of the property. Appellant testified he was the owner, but the court did not receive the evidence as proper proof of title. Appellant introduced in evidence an abstract of title to the property, which was admitted only for the purpose of showing tender of the abstract and not as proof of title. But if the fact were otherwise, the abstract would not aid the appellant. The appellant testified that he tendered a deed for the land from Twitchell to Brunton some time in August or September, 1913. According to the abstract of title, a conveyance of this land is shown as having been made by Twitchell to Gilman on March 19, 1913, thus showing that at the time Gilman tendered the Twitchell deed the property stood in the name of Gilman himself. This was not a valid tender. This abstract discloses further peculiarities. In March, 1913, Gilman conveyed the land in controversy to Twitchell for an alleged consideration of $9,000, and at the same time Twitchell gave a mortgage back for $3,000 as a part of the same transaction. On the same date Twitchell redeeded the property to Gilman subject to the $3,000 mortgage. Then on October 20, 1913, after the land had passed out of Twitchell's hands, the latter gave another mortgage to Gilman for $6,000. This latter mortgage was taken by Gilman at the time he was negotiating with respondents for an exchange of properties. The transactions with Twitchell hardly seem bona fide, but rather as if entered into for the purpose of giving the property a fictitious valuation. It is a significant fact also that the Twitchell $6,000 mortgage to Gilman was not satisfied until September 12, 1914, which was about two weeks after the tender and refusal of the Twitchell deed to Brunton. In this connection, we might add that an abstract of title was never furnished by appellant to respondents until the trial, although the contract called for such delivery within 10 days from date, and one provision of the contract was that:

"The time in which each of the parties are to perform the acts and things herein agreed upon is hereby declared to be of the essence of this agreement."

The appellant has failed to show that he was ready, able, and willing to perform. The evidence shows respondents demanded the abstract several times, in order to ascertain the condition of the title and close up the transaction. At the time the respondents abandoned the exchange of properties, some 10 months after entering into the contract therefor, the appellant had not furnished the abstract, and the deed tendered by him was insufficient as being without the chain of title. It is true the appellant, at the time of instituting this action, tendered in court a deed from himself to the respondents, but it came too late to constitute performance of a contract which made time of the essence.

[3, 4] As an affirmative defense to this action for specific performance, the respondents set up that they had been misled by the representations of appellant's agent that the Gilman farm was worth $30 per acre, that they were ignorant of values in that locality, and that they informed such agent they were relying on his knowledge and representations. Appellant replied that the lands were fully worth that value, and, further, that respondents went into possession after having made a full inspection of the lands. The evidence shows that respondent W. B. Brunton visited the lands and spent two days in the examination of them prior to signing the contract. At the time of his visit 10 acres were pointed out to him as rocky and unfit for cultivation, but nothing was said to him as to the rocky character of the remainder of the soil. After respondents went into possession and undertook to plow the land, they discovered that the land was full of rocks which were not apparent on the casual

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inspection of the land. Neighboring farmers testified as to the rocky character of the soil on this land that it was poor land and not suitable for farming purposes. The evidence on the part of appellant was to the effect that the land was worth from $20 to $30 per acre, the latter figure as a basis for trading purposes. The witnesses in behalf of respondents testified the land was worth only from $10 to $20 per acre. Accepting from this evidence $20 per acre as a fair valuation, the land could not have been worth more than $7,200, which, with $500 worth of personal property included in the trade, would give $7,700 as the consideration. Under the terms of the contract respondents were to pay $8,100, and also throw in their Clarke county farm, upon which they put a valuation of $3,500, but for which appellant had negotiated a sale at $3,000. Accepting the latter figure as a fair valuation, the contract shows that respondents were to give $11,100 for property worth at the most no more than $7,700. The evidence shows that the respondents were utterly ignorant of the value of the Oregon lands, and that they relied on the representations of appellant's agent as to such values, and so informed the agent. The agent represented that no lands in Morrow county could be bought for less than $30 per acre, and that worse lands than these had been sold for $30 and $35 per acre. The agent assumed to have a knowledge of the value of Morrow county lands, and his representations cannot be relegated to the category of mere opinions as to value. Nor can it be said that respondents are estopped by their examination of the lands to deny appellant's right to specific performance. This is not a case of rescission of an executed contract, in which courts are slow to grant relief where the proof of fraud is not clear and convincing and the complaining party has already consummated the contract after an inspection of the land. It is a case where resort is had to a court of conscience to enforce performance of an executory contract which would impose an inequitable burden upon one of the parties. If the contract is shown to be unconscionable, inequitable, and unfair, it is the duty of the court to deny enforcement, although the evidence might not be sufficient to justify rescission in the case of an executed contract. Taking the evidence most favorable to the appellant, it discloses that he is seeking to compel the respondents to pay for property more than $3,000 in excess of its fair value. Even if there may not have been actionable fraud on the part of appellant, still a court of conscience will not lend its aid to the enforcement of a contract which is manifestly unfair. If the appellant deems himself injured, there remains to him his remedy in an action at law for damages for breach of contract. The law on this subject is well expressed by one of the standard text books as follows:

"So a court of equity will not render its aid to enforce a contract which is in any way unfair, inequitable, or unconscionable. And gross inadequacy of consideration may be sufficient to justify the court in refusing a decree for specific performance, even though there is no such fraud or the like as would require a cancellation. The contract may be perfectly legal, and yet it will not be specifically enforced if it is unreasonable or unconscionable, or if its enforcement will work a hardship or injustice to one of the parties." Elliott on Contracts, § 2305.

We think that the contract here sought to be enforced is indefinite in its description of the Clarke county land, that the contract is unconscionable, inequitable, and unfair to the respondents, and that appellant was in default in tendering due performance on his part. Any one of the forgoing defects is sufficient of itself to defeat the action.

The decree of the trial court is affirmed.

(94 Wash. 21)

SEARLE v. BIRD et al. (No. 13511.)

(Supreme Court of Washington. Dec. 26, 1916.)

1. JUDGMENT ⇐779(2)—LIEN—PROPERTY AFFECTED—OPTION AGREEMENTS.

Where a landowner executes an option contract of sale, he continues to be the legal owner so long as any part of the purchase price remains unpaid subject to the equitable right of the purchaser, and is bound by the lien of the judgment duly docketed against him in the county where the land is situated.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1342; Dec. Dig. ⇐779(2).]

2. GARNISHMENT ⇐105—PROPERTY SUBJECT—FUNDS.

A garnishor can claim no other or greater interest in a fund than the judgment debtor could have claimed.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 216; Dec. Dig. ⇐105.]

3. JUDGMENT ⇐780(3)—LIENS—PRIORITIES.

The rights of judgment debtors are subject to the claims of their judgment creditors in the order of their priority.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1344; Dec. Dig. ⇐780(3).]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action for specific performance by F. P. Searle against John D. Bird and others, Snohomish Land Company, Pacific Coast Pipe Company, and Frederick & Nelson. Judgment for Pacific Coast Pipe Company and Frederick & Nelson, and the Snohomish Land Company appeals. Affirmed.

Wm. A. Johnson, of Everett, for appellant. A. W. Buddress and Wright, Kelleher & Allen, all of Seattle, for respondents.

CHADWICK, J. The respondent Pacific Coast Pipe Company and the Snohomish Land Company are judgment creditors of John D. Bird and wife. At the time the

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judgments were obtained, plaintiff, F. P. Searle, had, and held, an option agreement to purchase certain lands. The material parts of the agreement are as follows:

"This agreement made and entered into this 10th day of June, 1914, by and between John D. Bird and Ida M. Bird, husband and wife, parties of the first part, and F. P. Searle, party of the second part, witnesseth: That whereas, the parties of the first part, have by deed dated June 5, 1914, transferred and conveyed to the party of the second part, the following described real estate, to wit: [Omitting description]. And whereas, said transfer, although appearing on its face to be an absolute deed from parties of the first part to party of the second part, of the property therein described and heretofore described herein, was intended as a mortgage according to the following terms, conditions and stipulations, to wit:

"It is mutually agreed by and between the parties hereto, that coincident with the signing and delivery of this agreement, the Tolt State Bank has loaned to the parties of the first part on their promissory note, the sum of $2,000, and that the transfer to the party of the second part hereto, of [here description of same premises], by deed dated June 5, 1914, was made to said party of the second part, who is cashier of said Tolt State Bank, for the purpose of securing and as security for said loan of $2,000. That said party of the second part holds the title to said above-described property as evidenced by said deed, in trust, for the use and benefit of the Tolt State Bank, as such security.

"It is further mutually agreed by and between the parties hereto, that the party of the second part hereto has and he is hereby given an option to purchase said real estate during any time hereafter, on or before one year from date for the price here and now agreed upon, to wit: The sum of $4,000.

"It is further mutually agreed that if the party of the second part hereto exercises his option to purchase said premises, that they shall be delivered to him free and clear of all liens and incumbrances whatsoever, except the $2,000 mortgage thereon, which he hereby agrees to assume as a part of the purchase price.

"It is further mutually agreed by and between the parties hereto that this agreement nor any interest therein is not assignable by the parties of the first part hereto, without the written consent of the parties of the second part hereto first had and obtained, while there are any record liens against said property other than the mortgage to Tolt State Bank herein referred to."

Plaintiff, having decided to exercise his option, made tender and demanded a deed, which, being refused, he began this action to compel a specific performance, paying into the court the amount he admitted to be due, and thereafter, by supplemental complaint, making the appellant and respondent parties thereto. The respondent answered, setting up its judgment and claiming a lien upon the land to the extent of its judgment, and asking that the money paid into the registry of the court be given to it in the order of its priority in satisfaction of its judgment. There were other answering defendants claiming liens, but they do not appear in this court, and we will not discuss their rights or their interest.

Appellant assumed a different theory of the law governing the transaction between plaintiff and defendants, and accordingly caused a writ of garnishment to be issued, directed to plaintiff, claiming that he had in his possession and control moneys and property belonging to the defendants Bird. The garnishment is predicated upon the theory that an absolute deed had been made by Bird to Searle, and that the legal title was in Searle; that the Birds had no more than an equitable interest in the land to which—under the statute (Rem. Code 1915, § 445), providing that a judgment is a lien only upon the legal title or an estate of inheritance—no lien would attach (Phœnix Mining Co. v. Scott, 20 Wash. 48, 54 Pac. 777); and that appellant, being first in time with its garnishment, is entitled to recover.

[1] We have not been favored with a statement of facts. The case comes to us with the rights of the plaintiff Searle, and defendants Bird defined by the loan and the option agreement. The description in the option agreement of a deed theretofore executed as an "absolute deed" is a conclusion of the parties and, in the absence of a showing to the contrary, we will not say, in the light of other provisions in the option agreement which was recorded a few days after its execution, and the subsequent conduct of the parties, that it was their intent to pass the legal title to the lands, but hold, rather, that the legal title was, at all times, in the defendants Bird, and subject to the lien of any judgment obtained against them.

The deed may never have been delivered, or it may have been redelivered upon, or after, the execution of the option agreement. It was never recorded, and beyond all these things, the very subject-matter of the suit of plaintiff is to compel the execution of a deed. There was no showing that the rights of the parties did not rest in the option agreement and that alone. That they did, must necessarily be so for the lower court has found, as a fact, that the legal title was, at all times, in the defendants Bird.

The rights of the original parties to the transaction depending upon the option agreement, the case falls within the rule of Tieton Hotel Co. v. Manheim, 75 Wash. 641, 135 Pac. 658, Ihrke v. Continental Life Ins. Co., 91 Wash. 342, 157 Pac. 866, and cases there cited.

[2, 3] Furthermore it is a rule established in this state that a garnishor can claim no other or greater interest in a fund than the judgment debtor could have claimed. The rights of the judgment debtors in the land are subject to the claims of their judgment creditors in the order of their priority. The respondent is first in time, and therefore first in right. 20 Cyc. p. 1060; Bellingham Bay Boom Co. v. Brisbois, 14 Wash. 173, 44 Pac. 153, 46 Pac. 238; Beaston v. Portland Trust & Sav. Bank, 89 Wash. 627, 155 Pac. 162.

Much of the briefs is given up to the legal effect of certain deeds executed by defendants Bird to a brother, which are dated at a prior time, but recorded subsequently to the

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entry of the several judgments. These deeds were challenged and found by the court to be fraudulent as against the rights of the judgment creditors. Without a statement of facts, we cannot inquire into this phase of the controversy. We must accept the finding of the court as final.

Judgment affirmed.

MORRIS, C. J., and MAIN, MOUNT, and ELLIS, JJ., concur.

(94 Wash. 28)

FAIRBANKS v. SHADY BROOK MILLING CO. (No. 13621.)

(Supreme Court of Washington. Dec. 26, 1916.)

1. ABATEMENT AND REVIVAL ⇐4—ANOTHER ACTION PENDING—IDENTITY OF CAUSE OF ACTION.

Before an action will be abated on the ground of another action pending, it must appear that there is an identity of subject-matter, and that the relief sought in the second suit is the same as in the first suit, or that a judgment on the merits would be conclusive between the parties and could be pleaded in bar of the second action; a substantial difference in relief sought being sufficient to overcome the bar.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 25–38; Dec. Dig. ⇐4.]

2. ABATEMENT AND REVIVAL ⇐5—ANOTHER ACTION PENDING—REMEDIES AFTER JUDGMENT.

Where an action has been prosecuted to judgment, the remedy incident to the collection of that judgment, whether by garnishment or by creditor's bill, is not an independent action and the judgment creditor may lawfully pursue all available remedies to work a satisfaction of its judgment and neither one can be pleaded in abatement of the other.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 27–30, 99–104; Dec. Dig. ⇐5.]

3. ABATEMENT AND REVIVAL ⇐6—ANOTHER ACTION PENDING—EFFECT OF MOTION TO ABATE.

On motion to abate because of another action pending, the action first in time will stand as against the motion.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 32–34; Dec. Dig. ⇐6.]

4. ABATEMENT AND REVIVAL ⇐5—ANOTHER ACTION PENDING—IDENTITY OF CAUSE OF ACTION.

As a garnishment proceeding is a proceeding in rem, if treated as an original proceeding it could not conflict with an action in personam to reach property in the hands of a third person in fraud of the judgment creditor until satisfaction is obtained on one, and therefore neither can be pleaded in abatement of the other.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 27–30; Dec. Dig. ⇐5.]

Department 1. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by F. M. Fairbanks against the Garden City Milling Company. There was a judgment for plaintiff, who thereafter caused garnishment to issue. The garnishee defendant paid the fund into court alleging that the Shady Brook Milling Company, claimed an interest. Upon petition of plaintiff, the Shady Brook Milling Company was ordered to interplead for the fund. From a judgment directing that the fund be paid to plaintiff, the interpleading defendant appeals. Affirmed.

Benton Embree, of Seattle, for appellant. J. Grattan O'Bryan, of Seattle, for respondent.

CHADWICK, J. On May 10, 1915, respondent, Fairbanks, obtained a judgment against the Garden City Milling Company, a corporation. The Garden City Milling Company had, at some time prior to the rendition of the judgment, sold all of its assets, including outstanding accounts, to the Shady Brook Milling Company. In June, 1915, respondent began an action in the superior court of Walla Walla county against the Shady Brook Milling Company setting forth its judgment against the Garden City Milling Company, an execution returned nulla bona, and that the transfer of its assets, by the Garden City Milling Company to the Shady Brook Milling Company, was in fraud of the rights of creditors, and praying that the Shady Brook Milling Company be held to account for the property so conveyed to it to the extent of satisfying the judgment theretofore returned in the King county court.

Thereafter, and while the case was pending in the Walla Walla court, upon demurrer to the complaint, respondent caused a writ of garnishment to be issued upon his judgment theretofore obtained in the superior court of King county, and directed to the Western Produce Company of Everett, Wash. The Western Produce Company answered, admitting its liability to the Garden City Milling Company, and alleging further that the amount so owing by it was claimed by the Shady Brook Milling Company as the assignee of the Garden City Milling Company. Whereupon it paid the amount so owing into the registry of the court. Pending these proceedings, counsel for the Shady Brook Company either withdrew his demurrer, or permitted it to be overruled by the superior court of Walla Walla county, and thereupon answered to the merits.

When the answer of the garnishee in King county came in, respondent obtained an order of the court requiring the Shady Brook Milling Company to come into, and interplead, in the garnishment proceeding. It answered, pleading, among other things, that the action in King county should abate because of a prior action pending between the same parties in the same cause in Walla Walla county, that is, the action upon the judgment

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theretofore obtained against the Garden City Milling Company in King county.

The court below made findings that the assets of the Garden City Milling Company had been transferred in fraud of the rights of creditors, and directed that the amount paid into the registry of the court by the garnishee be turned over to the respondent in satisfaction of his judgment.

Appellant contends that there is another action—the Walla Walla suit—pending between the same parties in the same cause, and calls our attention to the fact that notwithstanding other findings and the judgment of the court below, it was there actually so held. Respondent contends that the garnishment proceeding is but ancillary to its former judgment and is not, in any sense, an action subsequent in time, or the same in character, as the Walla Walla action, or, if it be the same, the King county action is first in time. Notwithstanding the finding of the court that there was, at the time of the rendition of the judgment, another action pending, we are inclined to its conclusion, rather than to its finding, and to hold that respondent is entitled to recover.

[1] There are several familiar tests which are resorted to by the courts to determine whether a second action falls within the rule and is to be abated as "another action pending." It must appear that there is an identity of subject-matter, and that the relief sought in the second suit is the same as in the first suit, or that a judgment, if rendered on the merits, would be conclusive between the parties and could be pleaded in bar of the second action. A substantial difference in the relief sought is sufficient to overcome the bar. 1 Cyc. 27, 28.

Respondent had begun an action against the principal defendant, and had prosecuted it to judgment. The remedies incident to the collection of that judgment, whether by garnishment or by creditor's bill, cannot, in any sense, be regarded as independent actions notwithstanding respondent obtained what seems to have been an unnecessary order; that is, that appellant should interplead in the garnishment proceeding.

[2] After judgment obtained in the original action, respondent could lawfully pursue all remedies of which he might avail himself to work a satisfaction of his judgment. People ex rel. Granger v. Judge of Wayne Circuit Court, 27 Mich. 406, 15 Am. Rep. 195.

[3] It is the action first in time that must stand as against a motion to abate, where two actions are pending. Olson v. Seldovia Salmon Co., 89 Wash. 547, 154 Pac. 1107.

The motion might be directed to the action pending in Walla Walla county to the extent, at least, that it would affect the impounded money, but a motion under the statute would not be available to abate the action in King county which we regard as the one prior in time.

The action in Walla Walla county is not a prior action for the same cause and between the same parties. The action in King county is to recover money; the action in Walla Walla county is to reach property in the hands of a third party held in fraud of the judgment creditor. The one action established a right; the other is waged in the pursuit of a remedy. The original character or temporal standing of actions is not changed by subsequent proceedings had in either. It follows that appellant's contention, that its interplea in the garnishment proceeding and issue joined thereon, makes an original action second in time to the Walla Walla action, is not sound.

B. sued V. in ejectment. Pending the action V. died. After a time B. proceeded by scire facias to make V.'s administrators parties. At the time a former scire facias had been sued out. It was shown that the first scire facias had been dismissed since the issuing of the second, but this is not material to our inquiry as will be seen by reference to the case (Heath et al. v. Bates, 70 Ga. 633), for the court held that a scire facias to make parties (our statute, permitting the court to compel an interpleader, performs the same office) was a proceeding in the original action and not the commencement of a new action. See I. C. J. 49.

[4] Or, if we treat the garnishment and interpleader as an action independent of the original action in King county, appellant is in no better position. We have frequently held that a garnishment proceeding is, in nature, a proceeding in rem. The suit in Walla Walla is an action in personam. "Proceedings in rem and in personam do not necessarily conflict with each other, until satisfaction is obtained in one, and therefore cannot be pleaded in abatement of each other." 1 R. C. L. § 4; People ex rel. Granger v. Judge of Wayne Circuit Court, supra.

Affirmed.

MORRIS, C. J., and MAIN, MOUNT, and ELLIS, JJ., concur.

(93 Wash. 620)

CANYON LUMBER CO. v. SEXTON et al.

(No. 13293.)

(Supreme Court of Washington. Dec. 12, 1916.)

1. MECHANICS' LIENS ⇐246—FORCIBLE ENTRY AND DETAINER—LIENHOLDERS — REMEDY.

Under Rem. Code 1915, §§ 827, 830, regulating forcible entry and detainer proceedings by a landlord against a tenant, and authorizing a lienholder or person interested in the continuance of the tenancy, to pay the amount of the judgment into court within a stated time, and so continue the leasehold interest, a claimant for material or labor furnished a tenant in the construction of a building on leased prem-

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ises, whose lien attached only to the leasehold interest, cannot enforce his lien by action after ouster of the tenant, but can only obtain relief by proceeding in accordance with said sections.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 431; Dec. Dig. ⇐246.]

2. LANDLORD AND TENANT ⇐289—FORCIBLE ENTRY AND DETAINER—PARTIES—LIENHOLDERS—VALIDITY OF STATUTE.

Rem. Code 1915, § 816, providing that, in forcible entry and detainer proceedings, no person other than the tenant and subtenant in actual possession need be made a defendant, and sections 827, 830, providing that lienholders or others interested in continuing the tenancy may have relief from the judgment of forfeiture by petition within a stated time by paying the rent due, etc., are valid, and the proceedings conclusive against lienholders, though they are given no notice thereof.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1206; Dec. Dig. ⇐289.]

3. LANDLORD AND TENANT ⇐289—FORCIBLE ENTRY AND DETAINER—RESTORATION—STATUTE—"MAY."

The provision of Rem. Code 1915, § 827, that a party interested in continuance of tenancy "may" within a specified time pay into court the amount of a judgment in forcible entry and detainer proceedings, and the tenant be thereupon restored to tenancy, confers a right and is obligatory, not merely directory, as to time of payment.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1206; Dec. Dig. ⇐289.

For other definitions, see Words and Phrases, First and Second Series, May.]

4. PLEADING ⇐121(4)—DENIAL—MATTER OF RECORD—CONSTRUCTIVE NOTICE.

A party cannot plead ignorance of a public record to which he has access.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 248; Dec. Dig. ⇐121(4).]

5. PLEADING ⇐121(4)—DENIALS—MATTER OF RECORD—CONSTRUCTIVE NOTICE.

In an action to establish a lien against a leasehold interest for labor and material furnished in construction of a building, a denial by the plaintiff on information and belief of the judgment in forcible entry and detainer proceedings against the tenant is insufficient; the judgment being a public record to which plaintiff had access.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 248; Dec. Dig. ⇐121(4).]

6. APPEAL AND ERROR ⇐1042(2)—HARMLESS ERROR—PLEADING—MOTION TO STRIKE.

Error in striking portions of a complaint is not available, a sufficient statement of the material matters constituting the cause of action remaining.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4213; Dec. Dig. ⇐1042(2).]

7. APPEAL AND ERROR ⇐1042(2)—HARMLESS ERROR.

In an action to foreclose a materialman's lien against the interest of a tenant of real estate, where the claim of lien sought to charge the fee of the property and the complaint sought to charge the leasehold, there was such a fatal variance that an amendment of either the claim or the complaint was necessary, so that error in striking inconsistent portions of the complaint was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4213; Dec. Dig. ⇐1042(2).]

8. MECHANICS' LIENS ⇐158 — ENFORCEMENT—PLEADING—AMENDMENT.

In an action for the foreclosure of a materialman's lien, refusal of leave to amend the lien on ground that an amendment would be useless was justified, where the lien was originally filed charging the fee interest, and the amendment as sought to be made would charge the leasehold interest, which had been terminated by forcible entry and detainer proceedings.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 275–278; Dec. Dig. ⇐158.]

Department 1. Appeal from Superior Court, Snohomish County; Ralph C. Bell, Judge.

Action by the Canyon Lumber Company and others against C. W. Sexton and others to establish a lien. Judgment on the pleadings on the motion of defendants Sexton and wife, and plaintiffs appeal. Affirmed.

William Sheller, Howard Hathaway, and Louis A. Merrick, all of Everett, for appellants. Sherwood & Mansfield, of Everett, for respondents.

FULLERTON, J. On December 12, 1913, the respondents C. W. Sexton and Martha Sexton, his wife, leased to the defendants Wolf Michelson and M. J. Walker two certain lots in the city of Everett for a term of five years commencing on the 1st day of January, 1914, at a rent reserved of $25 per month, payable in advance on the 1st day of each and every month. The lease provided for a forfeiture of the term in case of a default in the payment of the rental, and also provided that any improvements made by the lessees should attach to and become a part of the realty. The lease was duly recorded. The lessees entered into possession of the premises, and while so in possession caused to be constructed thereon a building, for which they became obligated for material and labor. Among the persons to whom obligations were incurred was the appellant Canyon Lumber Company, which furnished material of the value of $1,081.47, the appellant Everett Shingle Company, which furnished materials of the value of $54, the appellant A. Strom, who furnished material and labor of the value of $73, and the appellant R. H. Carpenter, who furnished materials and labor of the value of $20.30. The obligations not having been paid, each of the materialmen filed a lien upon the buildings and lots. The lien of the Canyon Lumber Company was filed on April 16, 1914. In it C. W. Sexton was named as owner of the property, and the defendant Wolf Michelson as the lessee thereof; the lien being claimed against the leasehold interest of Wolf Michelson. The lien of the Everett Lumber Company was filed on April 16, 1914, naming the respondents C. W. Sexton and Martha Sexton, his wife, as owners of the property, and Wolf Michelson and M. J. Walker as lessees. The lien was claimed upon the interests of all of the parties named. The lien of A. Strom

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was filed on May 15, 1914, and that of R. H. Carpenter on May 28, 1914. Each of these liens also named C. W. Sexton and Martha Sexton as owners of the property, and Michelson and Walker as lessees, and claimed upon the interests of all of the parties.

The lessees failed to pay the rental for the months of April, May, and June of 1914, and on July 23, 1914, Sexton and wife instituted an action under the statute of forcible entry and detainer to oust them from the premises and to declare a forfeiture of the lease. Judgment was rendered in this action on August 5, 1914, forfeiting the lease and awarding possession of the property to the plaintiffs. Re-entry by the Sextons was made under this judgment, and the property subsequently leased to the Paddock-Fowler Auto Company, which took possession thereof and expended some $300 in betterments. None of the lien claimants were made parties to this proceeding.

On August 5, 1914, the appellant Canyon Lumber Company began an action to foreclose its lien. It made parties defendant to the action M. J. Walker and Wolf Michelson only, and sought a foreclosure upon their leasehold interest in the property described. On August 26, 1914, the other lien claimants asked leave to intervene in the foreclosure action and to make additional parties defendants thereto. On leave being granted, they filed a joint complaint, making additional parties defendant the wives of Walker and Michelson and the owners of the property, C. W. Sexton and wife, and sought foreclosure of their respective liens.

After the filing of the complaint in intervention the Canyon Lumber Company amended its complaint, making parties defendant the additional parties named in the intervening complaint. The amended complaint also sought foreclosure upon the leasehold interests of Walker and Michelson, averring that the interests of the other defendants were subsequent and inferior to its lien.

After service upon them, the defendants Sexton and wife appeared and filed an answer to the complaint of the Canyon Lumber Company, in which, after making certain denials, they set up affirmatively the lease to Walker and Michelson, their failure to comply with the terms of the lease, the judgment of forfeiture, the re-entry of the defendants thereunder, and the failure of the plaintiff, or any one on its behalf, to relieve from the judgment of forfeiture in the manner provided by statute. The defendants also moved against the complaint of the interveners, on the ground that the causes of action of the interveners were severable, and not joint, and were not separately set forth. This motion the trial court sustained, whereupon each of the interveners filed a separate complaint. These complaints were substantially the same. In each of them the pleader set forth the materials furnished and the work and labor performed, averred that the materials were furnished and the work and labor were performed at the request of Walker and Michelson, who were the lessees of the property, and set forth the lien by copy. The prayer was for a foreclosure of the lien upon the building, and the leasehold interest of Walker and Michelson, and so much of the land upon which the building stands as might be necessary for its convenient use, or for the use of the plaintiff in removing the building, with other relief appropriate to the facts alleged.

Sexton and wife moved to strike certain portions of the several complaints, which motions the trial court granted. They then demurred to the complaint, after the portion had been stricken, which the trial court sustained. The lien claimants thereupon asked leave to amend the lien notices and the complaints, supporting their several motions by affidavits. These were opposed by counter affidavits, and the leave denied. The claimants then announced that they would stand upon their complaints, whereupon a judgment dismissing their several causes of action was entered.

The Canyon Lumber Company replied to the answer of the Sextons, making certain admissions and certain denials. It denied on information and belief the allegation of judgment and ouster and forfeiture of the lease in the action between the Sextons and Walker and Michelson. On the reply being filed, the Sextons moved for judgment on the pleadings. This motion was granted, and a judgment entered to the effect that the plaintiff Canyon Lumber Company take nothing by its action. The lien claimants appeal.

Noticing first the appeal of the Canyon Lumber Company, the court sustained the motion for judgment against the company because of the judgment of forfeiture and ouster in the forcible detainer action, holding that, since the lien of the claimants could attach only to the leasehold interest of the lessees to whom it furnished the materials, the lien failed with the forfeiture of the lease evidenced by the judgment pleaded in the answer, and holding, further, that the denial in the reply, since it was made on information and belief, did not put in issue the allegation of forfeiture by the judgment.

[1] Our statutes relating to forcible entry and detainer provide (Rem. Code, § 816) that no person other than the tenant of the premises and subtenant, if there be one, in actual occupation of the premises when the complaint is filed, need be made a party defendant in any proceedings brought under the act, and further provide (section 827) that when the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of 5 days after

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the entry of judgment, "within which time the tenant or any subtenant, or any mortgagee of the term or other party interested in its continuance, may pay into court for the landlord the amount of the judgment and costs, and thereupon the judgment shall be satisfied and the tenant restored to his estate." It is also provided (section 830) that the court may relieve a tenant against a forfeiture and restore him to his former estate, as in other cases provided by law, where application for such relief is made within 30 days after the forfeiture is declared by the judgment of the court. The application may be made by the tenant or subtenant, or a mortgagee of the term, or by any person interested in the continuance of the term, but must be made upon petition of the person interested, and must be served on the plaintiff in the judgment who may contest the application. And it is provided that in "no case shall the application be granted except on condition that full payment of rent due, or full performance of conditions of covenants stipulated, so far as the same is practicable, be first made." The reply admitted, as we have stated, that the lien complaint did not comply with either of these conditions of the statute. Clearly, therefore, unless some reason intervenes rendering them inapplicable, the court did not err in granting judgment on the pleadings.

[2] The principal reason urged why the statutes are not applicable is that the lien claimant was not a party, but a stranger to the action against the tenants; hence, cannot be bound by the judgment of forfeiture and ouster rendered against them. But, as we have shown, the statute in express terms provides that only the tenant or subtenant in actual possession of the property need be made a party to the unlawful detainer proceedings, and with equal clearness prescribes the remedy for relief from a judgment entered therein by those claiming under or through the tenant. If these sections of the statute are valid, they are conclusive. While the appellant seems to question them, we have no doubt of their validity. It is within the power of the Legislature to declare one dealing with a tenant of real property to be in privity of estate with such tenant, and to provide that notice to the tenant shall be notice to the party so dealing. The Legislature has done no more than this in this instance, and we hold the statute valid.

[3] Again, it is said that the statute is not obligatory in its terms; that it uses the term "may" instead of "must," and is thus permissive and not directory. But the statute confers a right, and prescribes the time within which the right may be exercised. To say that the right "may" be exercised within the prescribed time is to preclude the idea that it may be exercised at some later time.

[4, 5] It is urged, also, that the court erred in ruling that the denial was insufficient But the ruling was in accord with the holdings of this court in the cases of Sumpter v. Burnham, 51 Wash. 599, 99 Pac. 752, and City of Olympia v. Turpin, 70 Wash. 581, 127 Pac. 210.

"A party cannot plead ignorance of a public record to which he has access, and which affords him all the means of information necessary to obtain positive knowledge of the fact." 1 Ency. Pl. & Pr. p. 813.

The case of Stetson & Post Mill Co. v. Pacific Amusement Co., 37 Wash. 335, 79 Pac. 935, is cited as expressing a view contrary to the holding which we here approve. But that case, in so far as it touches the question presented, supports rather than opposes our present holding. That was a case where a lien claimant of a leasehold interest had foreclosed his lien and acquired the interests of the tenant. Prior to such sale, however, the landlord had forfeited the lease and peaceably re-entered into possession of the premises. It was held that the lien claimant acquired by the foreclosure and sale only such rights as the tenant had; the court saying:

"By a foreclosure and sale, the appellant could acquire no greater rights in the leasehold estate than the persons against whom the foreclosure was had possessed therein (Shannon v. Grindstaff, 11 Wash. 536, 40 Pac. 123); and all such rights as the lessee, or her successors in interest, acquired by the lease, had been forfeited and terminated long before the sale under the judgment of foreclosure was made. Conceding that the appellant was not bound by the judgment of forfeiture, because not a party thereto, still its right to sell was barred by the peaceable re-entry of the lessors for a breach of the covenants of the lease. Such re-entry, being for condition broken, was lawful, as against all persons claiming under the lease, and operated as a forfeiture of the rights of all such persons. It was essential to the rights of the appellant that the leasehold estate be preserved, and if it desired to prevent a forfeiture of such estate, and the consequent forfeiture of its own rights, as a lien claimant against such estate, it was necessary that it perform, or tender a performance of, the condition of the lease, before the lessors re-entered for default of such performance. As it did not perform, or tender performance, before that time, it cannot now recover damages by way of rentals or otherwise, merely because the lessors refused to let it occupy the premises for the balance of the leased term."

We conclude, therefore, that the court did not err in granting judgment on the pleadings as against the Canyon Lumber Company.

[6, 7] The appellants Strom, Carpenter, and Everett Shingle Company first complain of the order of the court striking certain allegations from their second amended complaints. As certified in the transcript, these complaints appear as they were left after the stricken matters had been eliminated, and we are left to the motion to strike and the order granting the motion to ascertain the contents of the matters stricken. In so far as these disclose them, we find no error in the ruling. The allegations concerned matters of detail, in certain instances explanatory, perhaps, of the transaction, but contain nothing

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material to the cause of action attempted to be stated. Undoubtedly all of the matters could have been left in the complaints without seriously violating the rules of good pleading, but their elimination left a sufficient statement of the material matters constituting the cause of action. Again, the order was not harmful for another reason. With the matters remaining in the complaint, it would be as susceptible to a demurrer, which was afterwards sustained, as it was so susceptible with the matters eliminated. The action was to foreclose a materialman's lien. The lien was thus the foundation of the cause of action. The lien as filed sought to charge the fee of the property, while the complaint was based on the theory that it was a charge upon a leasehold interest therein. This was such a fatal variance as to require either an amendment of the complaint or an amendment of the lien, and the order sustaining the demurrer was right in either view. Since some form of amendment was finally required, error in ruling upon a preliminary motion does not require a reversal.

[8] What we have said disposes of the second assignment, which claims error upon the ruling on the demurrer. The third assignment is on the refusal of the court to permit an amendment of the lien. As we have said, this motion was supported by affidavits and opposed by counter affidavits. The trial court concluded from the facts thus shown that an amendment could not avail the lien claimants, even if allowed, and refused to permit an amendment for that reason; this because the leasehold interest had been forfeited by the judgment of a court at the suit of the respondents, and the lien claimants had not taken timely action to relieve themselves from the judgment of forfeiture. This finding was justified by the showing, and to allow an amendment and go through the form of trial would have been a useless act.

We find no error in the judgment of the trial court, and direct that it stand affirmed.

MORRIS, C. J., and MOUNT, ELLIS, and CHADWICK, JJ., concur.

(93 Wash. 682)

DORNBERG v. BLACK CARBON COAL CO.
(No. 13228.)

(Supreme Court of Washington. Dec. 26, 1916.)

INTEREST ⊜19(2) — ALLOWANCE — UNLIQUIDATED CLAIM.

In an action by the treasurer of defendant company to recover upon an open account for money advances to the company at different times, each being in the nature of a loan to the company for a specific purpose, interest was recoverable under the rule that interest is allowable upon an unliquidated claim when the amount thereof can be ascertained by mere computation, and that the claim should be treated as liquidated from the time when its certainty is so determinable.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 37; Dec. Dig. ⊜19(2).]

Department 1. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by I. Dornberg against the Black Carbon Coal Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Robertson & Miller and Danson, Williams & Danson, all of Spokane, for appellant. Voorhees & Canfield and Skuse & Morrill, all of Spokane, for respondent.

MORRIS, C. J. Respondent, the treasurer of appellant company, brought this action to recover upon an open account for money advances to the corporation at different times and used by it in payment of various claims against it. The respondent alleged that these advancements were made under an agreement to repay the sums advanced with interest from the date of such advancements. The lower court credited respondent with the various sums advanced by him and charged him with the amounts received by him, allowing interest on both debit and credit items from the respective dates of receipt. The balance in favor of respondent represents the amount of the judgment awarded him. It was also found that the appellant agreed to repay respondent all advancements made by him with interest when the mine was sold, and that, a reasonable time having elapsed since such promise was made, the account is now due, although the mine still remains unsold.

The sole question presented upon the appeal is the allowance of interest to respondent upon the sums advanced by him to the corporation from the time such advancements were made. Irrespective of the finding of the lower court as to the agreement to pay interest, which was made upon conflicting testimony, and which would of itself sustain the judgment, we think the error alleged as to the award of interest is without merit. Whatever may be the rule in other states, it is now well settled in this state that interest is allowable upon an unliquidated claim when the amount thereof can be ascertained by mere computation, and that the claim should be treated as liquidated from the time when its certainty is so determinable. Parks v. Elmore, 59 Wash. 584, 110 Pac. 381; Modern Irrigation & Land Co. v. Neely, 81 Wash. 38, 142 Pac. 458; Wright v. Tacoma, 87 Wash. 334, 151 Pac. 837; Angeles Brewing & Malting Co. v. Carter, 89 Wash. 335, 154 Pac. 601. Here there was no difficulty in determining when these various advances were made, nor the amount thereof. Each advancement was in the nature of a loan to the company, made at a specific date, for a specific purpose.

⊜For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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The principle of the above cases is controlling upon the facts here involved, and the judgment is affirmed.

MOUNT, CHADWICK, ELLIS, and FULLERTON, JJ., concur.

(94 Wash. 38)

MATSON v. PIERCE COUNTY. (No. 13652.)

(Supreme Court of Washington. Dec. 26, 1916.)

1. TRIAL ⟸296(4, 5)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

In an action for personal injury to plaintiff, who turned to the left side of a county road and stopped while an automobile passed, and who, on starting, struck a log the lower end of which was fixed in the ground at the side of the traveled way, and was thrown out and injured, an explanatory instruction that if the county was negligent it was liable if the plaintiff himself was free from negligence, if erroneous in not requiring plaintiff's negligence to have contributed to his injury or to have been the proximate cause of his injury, was not erroneous, where, taken in connection with other instructions, it was a fair exposition of the law of contributory negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709; Dec. Dig. ⟸296(4, 5).]

2. HIGHWAYS ⟸197(1)—OBSTRUCTIONS—PERSONAL INJURY—LAW OF ROAD.

The law of the road is meant to control the conduct of vehicles meeting or passing each other upon the highway, and does not control a case where plaintiff, after driving to the left of the road and stopping his team to let an automobile pass, ran against a log when he started.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 491–493, 498, 499; Dec. Dig. ⟸197(1).]

3. HIGHWAYS ⟸214—OBSTRUCTIONS—PERSONAL INJURY—INSTRUCTIONS.

In an action against a county for personal injury on a highway when plaintiff's team struck a log, an instruction that if any person driving any vehicle meets another on a public highway they shall seasonably turn to the right of the center of the road so as to permit the vehicles to pass was correct, as explanatory of plaintiff's right to turn either to the right or left according to the circumstances controlling.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 538–540; Dec. Dig. ⟸214.]

4. APPEAL AND ERROR ⟸1064(1)—HARMLESS ERROR—INSTRUCTION.

In an action against a county for injury when plaintiff's team ran against a log, the lower end of which was fixed at the side of the traveled way, as he was starting after having stopped on the left to allow an automobile to pass, an instruction on the law of the road *held* not prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. ⟸1064(1); Trial, Cent. Dig. § 475.]

5. APPEAL AND ERROR ⟸882(12)—INVITED ERROR—INSTRUCTION.

In such case, any error in an instruction on the law of the road was invited error, by reason of plaintiff's request for an instruction thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3602; Dec. Dig. ⟸882(12).]

6. HIGHWAYS ⟸192—OBSTRUCTIONS—PERSONAL INJURY—LIABILITY.

Where a county road was reasonably safe and convenient for ordinary travel but for the fact that plaintiff turned off the roadway into a bank and struck a log leaning upon the bank with the lower end fixed at the side of the traveled way, there was no negligence on the part of the county which would entitle plaintiff to recover for the injury.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 480, 483–485; Dec. Dig. ⟸192.]

Department 2. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by Leo Matson against Pierce County. Judgment of dismissal after verdict for defendant, and plaintiff appeals. Affirmed.

Bates, Peer & Peterson, of Tacoma, for appellant. Fred G. Remann and A. B. Bell, both of Tacoma, for respondent.

MOUNT, J. Action for personal injury. On the night of November 7, 1914, at about 8:30 o'clock, appellant was driving a one-horse wagon down a hill on one of the public county roads of Pierce county. The hill was long, and the road was cut into the side of the hill so that upon the left side the bank rose precipitously. On the right side there was a declivity of 30 or 40 feet down to a river. While the appellant was upon this road, he met an automobile coming up the hill. When the appellant, driving down the hill, saw the automobile coming up the hill toward him, he turned his horse to the left toward the bank above him, and stopped near the bank until the automobile passed. The night was dark, and appellant could only see enough to guide the horse in the road. When the appellant stopped his horse he must have been up to, or very close to, a log about 27 inches in diameter, which leaned upon the bank with the lower end fixed in the ground at the side of the traveled way. After the automobile had passed, the appellant started his horse again down the hill, when the wheels of his wagon struck the log, and he was thrown out and injured. In his complaint he alleged that the county was negligent in maintaining the road with the log upon the side of the bank in the position stated. The county, in answer to the complaint, denied the allegations of negligence, and pleaded contributory negligence. Upon these issues the case was tried to a jury, and a verdict was returned in favor of the defendant.

[1] Plaintiff has appealed from the judgment of dismissal entered upon the verdict of the jury, and alleges that the court erred in giving the following instruction:

"This action is based upon the alleged negligence of the county. If the county was guilty of negligence in its supervision or care of the road at the place where the accident occurred and that negligence was the cause of the accident, it is liable for the injury sustained by the plaintiff, if the plaintiff himself was free from negligence in using the road at the time of the injury. If the county was not negligent in its care of the road, it is not liable."

It is argued by the appellant that this instruction is erroneous: First, because it fails

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to state that appellant's negligence, to defeat a recovery, must have contributed to his injury; second, that such negligence on his part must have been the proximate cause of the injury; and, third, that it imposes a higher degree of care upon the appellant than the law requires. If this instruction stood alone, it would, no doubt, be insufficient, because it seems to require that the appellant himself should be free from negligence, but it is apparent from the reading of the instruction itself that it is merely a statement of the case, without an attempt to define either negligence or contributory negligence. It is a prefatory or explanatory statement. Further along in the instructions, the court defined what would constitute contributory negligence, and after stating to the jury what circumstances they might consider in order to determine whether the appellant was guilty of contributory negligence, said that the jury might consider—

"* * * all of the circumstances and conditions surrounding the situation at the time that should appeal to a man of ordinary prudence in deciding which was the reasonably safe and cautious thing to do; and, if you find that in doing so he acted as a reasonably prudent person, mindful of his own safety, would have done under the same circumstances, he is not guilty of contributory negligence in turning to the left. In determining whether the plaintiff could have avoided running over the end of the log by the exercise of the degree of care required of him at the time, you are to consider the length of time the plaintiff had personally known that the tree was there, and you are to take into consideration the number of times plaintiff had driven along the road, by the tree, and how familiar he was with the road and that locality, and with the circumstances surrounding the case; and if from all the circumstances you are of the opinion that, by the use of ordinary care he could and would have avoided the tree, then you would be justified in finding that he was guilty of negligence contributing to the injury, and in such case the plaintiff cannot recover."

So it is clear that the instruction complained of was not the only one upon the degree of care required of the appellant. It was merely explanatory. This court has held that where such instructions, taken in connection with the remainder, constitute a fair exposition of the law of the case, they do not constitute error. Wheeler v. North American Transportation & Trading Co. (Morrison v. North American Transportation & Trading Co.) 21 Wash. 704, 57 Pac. 1103. We think, taking the instructions as a whole, the court properly instructed upon the question of negligence. At the trial of the case, the court gave the following instruction:

"It is the law of the road in this state that if any person driving any vehicle meet another on a public highway in this state, the persons so meeting shall seasonably turn their vehicles to the right of the center of the road, so as to permit each vehicle to pass without interfering or interrupting the other. 'Seasonably turn' means that the travelers shall turn to the right in such season that neither shall be retarded in his progress by reason of the other occupying his half of the way, which the law has assigned to his use, when he may have occasion to use it in so passing. In short each has the undoubted right to one-half of the way whenever he wishes to pass on it, and it is the duty of each, without delay, to yield such half to the other. But a person may lawfully use what is to him the left-hand side of the road if there is no travel at that time upon that part of the way, or if the travel is not so heavy as to make his conduct a source of danger. But a person upon the wrong side of the way must always exercise a care commensurate with his position. This is usually a higher degree of care than that required of him while on the correct side of the way."

The court refused to give the following instruction requested by the appellant:

"The statute law of the road requiring the drivers of vehicles meeting on a public highway to turn to the right is intended for the safety and protection of such travelers themselves. In the present instance, this law would have governed the conduct of the plaintiff in his relation and duty to the automobile, and he would have been guilty of negligence had he collided with the automobile by reason of his having turned to the left. However, so far as this defendant is concerned, plaintiff was entitled to the use of any portion, or either side, of the highway which from the evidence you find the defendant may have improved, and which was reasonably necessary in meeting and passing vehicles at that point, and over which, for that purpose, the defendant had extended an invitation to travel. And you are instructed that the fact that the plaintiff turned to the left instead of the right was not of itself negligence on plaintiff's part, but was merely one of the elements or items of the incident, which, together with all the other circumstances and conditions surrounding the situation, you should take into consideration in determining whether or not plaintiff did as a reasonably prudent person would have done."

[2, 3] The giving of the first of these instructions and the refusal of the second requested by the appellant are assigned as error. The two are argued together in the brief to the effect that the law of the road had no application to the case. It is probably correct to say that the law of the road did not control this case, because the law of the road is meant to control the conduct of vehicles meeting or passing each other upon the highway. It was apparently given by the court to explain the right of appellant to turn either to the left, or to the right, controlled by the circumstances which confronted him at the time. The first instruction was, we think, a correct instruction, under the rule in Segerstrom v. Lawrence, 64 Wash. 245, 116 Pac. 876.

[4, 5] Conceding that the law of the road, as determined by statute, was not applicable to the case, we are satisfied that the giving of the instruction here complained of and the refusal to give the one requested were not prejudicial error, and we are of the opinion that, if it was error to give the instruction upon the subject of the law of the road, it was invited error, by reason of the request of the plaintiff for an instruction upon that subject.

[6] Whether there was error in the instructions or not, we are satisfied that there could be no recovery in any event. According to the appellant's own evidence, he was familiar with the road. The road was in good condition. It was 13 feet wide at the point where this log lay upon the bank. The night

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was dark. The appellant did not carry a light. He drove out of the main traveled way to the side of the road as near to the bank as he could get. He stopped his horse until the automobile went by. He then started his horse, ran against this log, and was thrown to the ground. In Blankenship v. King County, 68 Wash. 84, 122 Pac. 616, it was said:

"This court has heretofore held, and it is the general rule, that counties are not obligated to open highways to travel for their full located width, but that their duty in this regard is accomplished by opening the way for a sufficient width to make it reasonably safe and convenient for ordinary travel; that it is not compelled to keep the sides of the prepared way free from obstructions, nor is it obliged to erect barriers where there is no unusual danger to be encountered."

The only evidence of negligence on the part of the county, shown in this case, is that it permitted this log to lie upon the bank, with one end buried near the traveled roadway. It is not, and cannot be, claimed that the roadway was not of a sufficient width to make it reasonably safe and convenient for ordinary travel. It was reasonably safe for such travel, and but for the fact that the appellant turned out of the roadway into the bank, on a dark night, there could have been no injury. It is clearly not negligence for counties in this state to permit logs of the character of this one, lying as this one did, to remain at the side of the road. We are satisfied that there was no negligence on the part of the county sufficient to submit to the jury.

The judgment must, for this reason, if for no other, be affirmed.

MORRIS, C. J., and FULLERTON, HOLCOMB, and PARKER, JJ., concur.

(93 Wash. 692)

GOLDEN EAGLE MINING CO. v. IMPERATOR-QUILP CO. et al. (No. 13492.)

(Supreme Court of Washington. Dec. 26, 1916.)

LIMITATION OF ACTIONS ⟸100(2)—FORM OF ACTION—TRESPASS ON REALTY—STATUTE—"ACTION FOR RELIEF UPON GROUND OF FRAUD."

Under Rem. Code 1915, § 155, providing that actions can be commenced only within the periods prescribed after the cause of action shall have accrued, section 159, subd. 1, requiring actions for waste or trespass upon real property to be brought within three years, and subdivision 4, providing that a cause of action for relief upon the ground of fraud shall not be deemed to have accrued until the aggrieved party's discovery of the facts constituting the fraud, an action for the wrongful entry into plaintiff's mining claim and the removal of ore therefrom, brought more than three years from the time of such wrongful removal, but within three years after its discovery, was not an action for relief upon the ground of fraud, but an action for trespass on realty, and hence barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 481; Dec. Dig. ⟸100 (2).]

En Banc. Appeal from Superior Court, Ferry County; E. K. Pendergast, Judge.

Action by the Golden Eagle Mining Company against the Imperator-Quilp Company and others. Judgment of dismissal on demurrer to the complaint, and plaintiff appeals. Affirmed.

A. J. Langhon and Le Roy McCann, both of Republic, for appellant. Voorhees & Canfield, of Spokane, for respondents.

PARKER, J. As we proceed we think it will appear that this is nothing more than an action to recover damages resulting from trespass upon real property, though counsel for the plaintiff insist that it is, in substance, an action for relief upon the ground of fraud. The defendants demurred to the plaintiff's complaint upon the ground that it appears from the allegations thereof that the action has not been commenced within the time limited by law. This demurrer being sustained by the trial court and the plaintiff electing to not plead further, judgment of dismissal was rendered, from which it has appealed to this court.

The facts as alleged in the complaint may be summarized as follows: Appellant and respondents are the owners of adjoining mining claims in the Eureka mining district of Ferry county. Between September 15, 1910, and August 20, 1912, in their mining operations upon their claim respondents exposed and developed their vein or lode of ore to a point of intersection of the same with the boundary line between the two claims to a depth of between 300 and 500 feet below the surface of the ground, and knowingly, wrongfully, entered upon and into appellant's claim at that point, and extracted and removed ore therefrom of the value of several thousands of dollars. There were no underground workings of any character upon appellant's claim, and it did not discover, nor have any means of discovering, respondents' wrongful removal of the ore until December 15, 1912. On December 3, 1915, over three years after the wrongful removal of the ore from appellant's mine, but less than three years after its discovery thereof, appellant commenced this action in the superior court for Ferry county, seeking recovery of the value of the ore so wrongfully removed.

The only question here presented is as to when the statute of limitations commenced to run against appellant's right to recover; that is, when did appellant's cause of action accrue within the meaning of our statute? The portions of our statute here necessary for us to notice read as follows:

"Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued, except when in special cases a different limitation is prescribed by statute. * * *

"Within three years.—1. An action for waste or trespass upon real property. * * * 4. An action for relief upon the ground of fraud, the

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cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. * * *"

Sections 155, 159, Rem. 1915 Code.

We have a number of other special provisions providing for suspension of the statute in certain specified cases, but none of such provisions come as near touching the question of such suspension of the commencement of the running of the statute in this case as does subdivision 4 of section 159, above quoted, relating to actions for relief upon the ground of fraud. The fact, however, that there are these several special provisions limiting the commencement of the running of the statute in certain cases to a time after the actual accrual of the cause of action is of interest in our present inquiry, in that they evidence a legislative intent to do away with all other exceptions to the general rule that statutes of limitation commence to run upon the accrual of the cause of action, that is, upon the arrival of the time when the plaintiff has a right to sue regardless of his knowledge of such right.

It is argued in appellant's behalf that this is an action for relief upon the ground of fraud, and that therefore the statute did not commence to run against appellant's right to sue until it discovered its loss caused by respondents' wrongful removal of the ore. It seems to us that this contention has been logically answered in our recent decisions in Cornell v. Edsen, 78 Wash. 662, 139 Pac. 602, 51 L. R. A. (N. S.) 279, and Thomas v. Richter, 88 Wash. 451, 153 Pac. 333. The Edsen Case was one for damages against an attorney for wrongfully voluntarily dismissing an action, concealing the fact and leading his client to believe that his case had been decided against him upon the merits. This was held not to be an action for relief upon the ground of fraud, in that fraud was not the gravamen nor an essential element of the cause of action, and that therefore it was barred at the expiration of three years from its accrual regardless of the knowledge of the client. The Richter Case was one in which damages were sought against a trustee of a corporation for the benefit of creditors because of the unlawful diminution of the capital stock of the corporation by the trustee, in violation of a statute making such act unlawful and rendering the trustee personally liable to creditors therefor. This was also held not to be an action for relief upon the ground of fraud, and that therefore it was barred regardless of the stockholders' knowledge of the wrong, at the expiration of three years. These decisions, it is true, do not deal with underground mining trespass, but they do, we think, deal with cases in which there would have been fully as much reason for holding the action to be for relief upon the ground of fraud as in this case. The wrongs there involved could as well be characterized "fraudulent" as the wrong here involved. In the Richter Case, at page 455 of 88 Wash., page 335 of 153 Pac., Judge Fullerton, speaking for the court, said:

"To constitute an action for 'relief on the ground of fraud,' the fraud must be the substantive cause of the action, the cause without which the action would not exist; the fraud must have been practiced upon the complaining party, causing him to assume some obligation or liability or suffer some loss which but for the fraud he would not have assumed or suffered."

This, it seems to us, is the key to the solution of the problem here involved. Nothing seems plainer to us than that appellant's cause of action in this case does not rest upon the fact that there was wrongdoing on the part of respondents which could, in a sense, be characterized as fraud or deceit. An ordinary theft and the concealing of it is no less wrongful or fraudulent, yet plainly one who is deprived of his property by another by any such wrong has no more complete or perfect right of action for its recovery or damages for its loss than when his property is taken by some method unattended by wrong of this character. In other words, such fraud and deceit, if one chooses to so characterize the wrong, adds nothing to the completeness of the injured person's cause of action.

Our attention has been called to two decisions which apparently hold that the secret taking of ore from beneath the surface of the ground is, in effect, a fraud upon the rights of the owner of the property trespassed upon, such as gives him a cause of action for relief upon the ground of fraud. Such, in substance, was the holding of the Pennsylvania Supreme Court in Lewey v. Fricke Coke Co., 166 Pa. 536, 31 Atl. 261, 28 L. R. A. 283, 45 Am. St. Rep. 684, which holding, however, seems to have been without reference to any statute controlling the question. Such, also, was the holding of the Supreme Court of California in Lightner Mining Co. v. Lane, 161 Cal. 689, 120 Pac. 771, Ann. Cas. 1913C, 1093, under a statute apparently the same as our own. These appear to be the only American decisions holding that underground trespasses in mining cases constitute such an exception to the rule of the statute of limitations relative to waste or trespasses upon real property. Mr. Lindley, apparently resting his conclusion upon these decisions, seems to regard the rule they announce as the correct rule. Lindley on Mines (3d Ed.) § 867. We are, however, unable to assent to this doctrine, and adhere to the views expressed in our own recent decisions above noticed, which we regard as controlling in this case. Much argument is indulged in by counsel for appellant touching the justice of the rule they contend for. This, however, it seems to us, as plausible as it is, has to do with the policy of the law only, which opens a wide field for discussion and difference of opinion. It is easy to argue, relative to any statute of limitations as applied to a particular case, that it works injustice. But it must be

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remembered that these are statutes of repose, and, as said in Thomas v. Richter, supra:

"It is believed that it is better for the public that some rights be lost than that stale litigation be permitted."

We conclude that the judgment must be affirmed. It is so ordered.

MORRIS, C. J., and MOUNT, MAIN, ELLIS, FULLERTON, HOLCOMB, and CHADWICK, JJ., concur.

(93 Wash. 700)

LONE PINE-SURPRISE CONSOL. MINING CO. v. INSURGENT GOLD MINING CO. et al. (No. 13737.)

(Supreme Court of Washington. Dec. 26, 1916.)

En Banc. Appeal from Superior Court, Ferry County; E. K. Pendergast, Judge.

Action by the Lone Pine-Surprise Consolidated Mining Company against the Insurgent Gold Mining Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Wakefield & Witherspoon, of Spokane, for appellant. G. V. Alexander, of Republic, for respondents.

PER CURIAM. This case involves the same question of limitation of an action to recover for underground trespass as in Golden Eagle Mining Co. v. Imperator-Quilp Co., 161 Pac. 848, which we have just decided. Upon the authority of that decision, the judgment in this case is affirmed.

(94 Wash. 10)

STATE ex rel. PUGET SOUND & W. H. RY. CO. v. NORTHERN PAC. RY. CO. et al. (No. 13464.)

(Supreme Court of Washington. Dec. 26, 1916.)

1. RAILROADS ⇐90 — GRADE CROSSINGS — SAFETY DEVICE — APPORTIONMENT OF EXPENSE—STATUTE.

Under Rem. Code 1915, § 8733—2, forbidding grade crossings without authority from the Public Service Commission, and section 8733—3, relating to the procedure to establish a new crossing and damages, etc., and section 8733—6, subd. "c," providing that, where railroads of different companies cross each other at grade, the part of the expense of making the crossing not chargeable to any municipality shall be apportioned between the railroad companies unless they mutually agree thereon, and that, if an apportionment is necessary, the commission shall hold a hearing thereon, a railroad in course of construction permitted to cross defendant's road at grade and declared liable for the entire expense of the crossing was not liable for the entire expense of the safety appliances ordered by the commission, which should be apportioned equally between the two railroads.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 249–259; Dec. Dig. ⇐90.]

2. STATUTES ⇐188—CONSTRUCTION.

The real meaning of a statute is to be ascertained and declared, even though it seems to conflict with the words of the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 267, 276; Dec. Dig. ⇐188.]

3. EMINENT DOMAIN ⇐2(8)—COMPENSATION—RAILROAD CROSSING—COMPELLING SAFETY DEVICE.

Rem. Code 1915, § 8733—2, and section 8733—6, subd. "c," construed as requiring a railroad in course of construction, after order of the Public Service Commission for a grade crossing, and the senior road to sustain their proportionate cost of the expense of installing and maintaining a safety device ordered by the commission, was not unconstitutional, as permitting a taking of the property of the senior road for the benefit of the junior road without any corresponding benefits, and hence a taking without compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 4; Dec. Dig. ⇐2(8).]

4. EMINENT DOMAIN ⇐47(2) — RAILROADS — CROSSING BY OTHER RAILROADS—RIGHT.

The right of one railroad to construct its tracks across the tracks of another company, while guaranteed by the Constitution and statutes, exists without such guaranty as the right to cross other property could be condemned.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 109–113, 116–120; Dec. Dig. ⇐47(2).]

5. COURTS ⇐107—RULES OF DECISION—LANGUAGE OF COURT.

The language of a court contained in its opinion must be construed with reference to the question actually before it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 169; Dec. Dig. ⇐107.]

6. EMINENT DOMAIN ⇐85—RAILROAD RIGHT OF WAY—CROSSING BY OTHER ROAD—COMPENSATION.

A railroad which has procured a right of way for its line and laid tracks thereover has a vested property right therein, and any other railroad crossing such right of way is bound to make compensation for the property actually taken and damaged, regardless of any contrary statutory provisions.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 221–226; Dec. Dig. ⇐85.]

En Banc. Appeal from Superior Court, Lewis County; A. E. Rice, Judge.

Petition by the State of Washington, on the relation of the Puget Sound & Willapa Harbor Railway Company to the Public Service Commission for leave to cross the Northern Pacific Railway Company's track at grade. From a judgment of the superior court affirming an order that the expense of installing the safety devices, and their maintenance should be borne by the petitioner, it appeals. Reversed and cause remanded, with instructions.

F. M. Dudley, of Seattle, for appellant. W. V. Tanner and Scott Z. Henderson, both of Olympia, and Geo. T. Reid, L. B. da Ponte, and J. W. Quick, all of Tacoma, for respondents.

FULLERTON, J. The appellant, Puget Sound & Willapa Harbor Railway Company, in the construction of a line of railway through Lewis county found it necessary to cross in two places the existing railway of the respondent Northern Pacific Railway Company. It desired to make the crossings at grade, and to that end petitioned the Public Service Commission for leave so to do. A hearing was had on the petition, at which leave was granted to make the crossings as petitioned for on condition that suitable in-

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terlocking devices be installed and maintained at the crossings. After the entry of the order granting the leave by the commission, the railway companies agreed upon the character of the device to be installed, but failed to agree on an apportionment of the expense for installing the same; the respondent refusing to bear any portion of the expense whatsoever. The appellant thereupon petitioned the Public Service Commission to apportion such expense, and a hearing was had before that body upon this petition. At the conclusion of the hearing the commission decided that the expense of installing the devices as well as their subsequent maintenance should be borne by the appellant company, and entered its order to that effect. The appellant caused the order to be reviewed in the superior court of Lewis county, where it was affirmed. This appeal is from the judgment of affirmance.

The provisions of the statute material to a consideration of the questions involved are found at sections 8733—2, 8733—3, and subdivision "c" of section 8733—6 of Remington's Code, and are quoted in full:

"All railroads and extensions of railroads hereafter constructed shall cross existing railroads and highways by passing either over or under the same, when practicable, and shall in no instance cross any railroad or highway at grade without authority first being obtained from the commission to do so. All highways and extensions of highways hereafter laid out and constructed shall cross existing railroads by passing either over or under the same, when practicable, and shall in no instance cross any railroad at grade without authority first being obtained from the commission to do so: Provided, that this section shall not be construed to prohibit a railroad company from constructing tracks at grade across other tracks owned or operated by it within established yard limits. In determining whether a separation of grades is practicable, the commission shall take into consideration the amount and character of travel on the railroad and on the highway; the grade and alignment of the railroad and the highway; the cost of separating grades; the topography of the country, and all other circumstances and conditions naturally involved in such an inquiry." Section 8733—2.

"Whenever any railroad company desires to cross any highway or railroad at grade, it shall file a written petition with the commission setting forth the reasons why the crossing cannot be made either above or below grade, and whenever the county commissioners of any county, or the municipal authorities of any city or town, or the state officers authorized to lay out and construct state roads, desire to lay out or extend any highway across any railroad at grade, they shall file a written petition with the commission, setting forth the reasons why the crossing cannot be made either above or below grade. Upon receiving such petition the commission shall immediately investigate the same, giving at least ten days' notice to the railroad company or companies and the county or municipality affected thereby, of the time and place of such investigation, to the end that all parties interested may be present and be heard. If the highway involved is a state road, the state highway commissioner shall be notified of the time and place of hearing. The evidence introduced shall be reduced to writing and be filed by the commission. If the commission finds that it is not practicable to cross the railroad or highway either above or below grade, it shall make and file a written order in the cause, granting the right and privilege to construct a grade crossing. The commission, in its discretion, may provide in the order authorizing the construction of a grade crossing, or at any subsequent time, that the railroad company shall install and maintain proper signals, warnings, flagmen, interlocking devices, or other devices or means to secure the safety of the public and its employés. If upon investigation the commission shall find that it is impracticable to construct an overcrossing or undercrossing on the established or proposed highway, and shall find that by deflecting the established or proposed highway a practicable and feasible overcrossing or undercrossing or a safer grade crossing can be provided, it shall continue the hearing on the petition and hold a supplemental hearing thereon. At least ten days' notice of the time and place of such supplemental hearing shall be given to all land owners that may be affected by the proposed change in location of the highway. At such supplemental hearing the commission shall inquire into the propriety, advisability and necessity of changing and deflecting the highway as proposed for the purpose of securing an overcrossing, under crossing, or safer grade crossing. If the proposed change in route of the highway involves the abandonment and vacation of a portion of an established highway, the owners of land contiguous to the portion of the highway to be vacated and abandoned shall, in like manner, be notified of the time and place of the supplemental hearing. At the conclusion of the hearing on the petition, the commission shall make and file its findings of fact in writing concerning the matters inquired into, and shall determine the location of the crossing which may be constructed, and whether the same shall be an undercrossing, overcrossing, or grade crossing, and shall determine whether or not any proposed change in the route of an existing highway, or the abandonment of a portion thereof is advisable or necessary to secure an overcrossing, undercrossing, or safer grade crossing. If the commission shall find and determine that a change in route of an existing highway, or abandonment and vacation of a portion thereof is necessary or advisable, it shall further find and determine what private lands, property, or property rights, if any, it is necessary to take, damage, or injuriously affect, for the purpose of laying out and constructing the highway along a new route, and what private lands, property or property rights, if any, will be affected by the proposed abandonment and vacation of a portion of an existing highway. The lands, property, and property rights found necessary to be taken, damaged, or affected shall be described in said findings with reasonable accuracy, and the right to take, damage or injuriously affect the same shall be acquired as hereinafter provided. In any action brought to acquire the right to take, damage, or injuriously affect any such lands, property, or property rights, the findings of the commission shall be conclusive as to the necessity for taking, damaging, or injuriously affecting the same. A copy of said findings shall be served upon all parties to the cause." Section 8733—3.

"Whenever two or more lines of railroad owned or operated by different companies cross a highway, or each other, by an overcrossing, undercrossing or grade crossing required or permitted by this act or by an order of the commission, the portion of the expense of making such crossing not chargeable to any municipality, county, or to the state, shall be apportioned between said railroad companies by the commission unless said companies shall mutually agree upon an apportionment. If it becomes necessary for the commission to make an apportionment between the railroad companies, a hearing for that purpose shall be held, at least ten days' notice of which shall be given." Section 8733—6, subd. c.

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It is the contention of the appellant that these statutes require an apportionment of the expense of installing and maintaining such crossing devices as the commission may require to be installed for the protection of the public, and hence that the order of the commission in this instance, since it required the appellant to bear the whole expense of installing and maintaining the interlocking device required by its order, is in violation of the statute, and is otherwise unjust and inequitable. On the other hand, it is contended by respondent that the statute, properly construed, relates only to the expense of the actual crossing, of which an interlocking device is not a necessary part, and, further, that to construe the statute in such a way as to compel the senior road to pay any part of the expense of constructing a crossing, or the devices required to be installed in connection therewith, is to render the statute unconstitutional, since it is to permit a taking of the property of the senior road for the benefit of the junior without any corresponding benefit, and hence a taking without compensation.

[1] Noticing first the question of construction, it must be confessed that the statute is not entirely clear as to its meaning. The language used, giving it a literal construction, seems to support the respondent's contention. It will be noticed that section 8733—3 appears to refer to the interlocking and other devices which the Public Service Commission may in its discretion require to be installed by the "railroad company" for the protection of the public as something in addition to the actual construction of the crossing, while subdivision "c" of section 8733—6 makes no reference to these devices, but refers to the "expense of making such crossing" only. The railroad company named in the first section must from the context refer to the railroad company desiring to make the crossing, not to the railroad company whose tracks are crossed, and the requirement that it shall install and maintain the protective devices means, in the absence of explanatory words, that it shall install and maintain them at its own expense. But to construe the language thus literally seems to conflict with the spirit and intent of the act, and we think that the later section, in its reference to the expense of the crossing, means not only the expense of constructing the actual crossing, but the expense of constructing and maintaining such protective devices as the commission may require to be constructed and maintained therewith. The expense of constructing and maintaining the actual crossing is, the record shows, but nominal when compared with the cost of installing and maintaining the protective devices. It is, moreover, wholly for the benefit of the crossing road, while the protective devices can be said to be for the benefit of both roads, since they lessen the danger of accidents and permit a more economical operation of both. It is not therefore to be supposed that the Legislature, in providing for an apportionment of the expense, referred to this lesser consideration to the exclusion of the one of so much greater importance, and we cannot so hold.

[2] "The real meaning of a statute is to be ascertained and declared, even though it seems to conflict with the words of the statute." Landers v. Smith, 78 Me. 212, 3 Atl. 463; Orono v. B. R. & E. Co., 105 Me. 428, 74 Atl. 1022; Railroad Co. v. Railway Co., 123 Iowa, 543, 99 N. W. 181.

[3] Passing to the constitutional question, it must be remembered when considering it that the appellant does not seek to have the expense of constructing the crossing proper apportioned between itself and respondent, but seeks only to have so apportioned the expense of installing and maintaining the interlocking device required by the Public Service Commission. It must be remembered also that an interlocking device is no part of the crossing proper. Crossings at grade existed long prior to the invention of such devices, and many grade crossings now exist and are in use in this state where no such device is installed. The device is a safety device, having for its primary purpose the protection of the public from accident, and a secondary purpose of enabling the crossing roads to operate their trains more economically, in that it does away with the necessity of stopping before crossing the opposing track other than when signaled so to do. Rem. Code, § 8626—69.

[4] The right of one railroad company to construct its tracks across the tracks of another company, while guaranteed by the Constitution and statutes of this state, exists without such guaranty. The right to cross could be condemned in the same manner the right to cross other property was condemned. The great weight of authority is, however, in the absence of a statute to the contrary, to the effect that the crossing company must bear the expense of the crossing. This includes not only the cost of constructing the grades and laying the tracks, but the cost of installing and maintaining such safety devices as the necessities of the particular case might require. Toledo, A. A. & N. M. Ry. v. Det., L. & N. R. R. Co., 62 Mich. 564, 29 N. W. 500, 4 Am. St. Rep. 875; State ex rel. Minneapolis v. S. P., M. & M. Ry. Co., 98 Minn. 380, 108 N. W. 261; Chicago, M. & St. P. R. Co. v. City of Milwaukee, 97 Wis 418, 72 N. W. 1118; State ex rel. Northern Pac. R. Co. v. Railroad Commission, 140 Wis. 145, 121 N. W. 919; F. & P. M. R. R. Co. v. D. & B. C. R. R. Co., 64 Mich. 350, 31 N. W. 281; Butte, A. & P. Ry. v. M. U. Ry., 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508; West Jersey & S. R. R. Co. v. Atlantic City Trac. Co., 65 N. J. Eq. 613, 56 Atl. 890; Winona & S. W. Ry. Co. v. C., M. & St. P. Ry. Co., 50 Minn. 300, 52 N. W. 657; El-

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kins E. Ry. Co. v. W. M. R. Co. (C. C.) 163 Fed. 724; Chicago & W. I. R. R. Co. v. E. C. Ry. Co., 115 Ill. 375, 4 N. E. 246, 56 Am. Rep. 173.

In our own case of State ex rel. North Coast R. v. Northern Pac. R. Co., 49 Wash. 78, 94 Pac. 907, a proceeding brought by the relator to cross the track of the defendant at grade, we held it to be the duty of the relator to bear the expense of making and maintaining the crossing, as well as an interlocking device found necessary to be installed for protective purposes. Announcing the same principle, although presenting different states of facts, are the cases: State ex rel. Union Lumber Co. v. Superior Court, 70 Wash. 540, 127 Pac. 109; Northern Pacific R. Co. v. Union Lumber Co., 76 Wash. 563, 137 Pac. 306; Spokane v. Spokane & Inland Empire R. Co., 75 Wash. 651, 135 Pac. 636.

[5] The grounds upon which the principle was rested in some of these cases lend strong color to the contention of the respondent, but it must be remembered that the cases were determined in the absence of statutes requiring an apportionment of costs and without that thought being in the mind of the court when the opinions were framed. The language of the court must be construed with reference to the questions actually before it, and, since the question now before us was not presented in any of them, they cannot be said to be conclusive of it.

[6] A railroad company which has procured a right of way for its line and laid tracks thereover clearly has a vested property right therein, and any other company crossing such right of way is bound to make compensation for the property actually taken and damaged, regardless of any statutory provision to the contrary. But a railway company first in time acquires no exclusive right to the territory through which it passes or exclusive right to operate its road in any particular manner. Both under the principles of the common law and by the express provisions of the Constitution and statutes of this state, its line was subject to being crossed by the line of another railroad company. The language of the Supreme Court of the United States in Chicago, Burlington & Q. R. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979, is applicable. It is there said:

"The plaintiff in error took its charter subject to the power of the state to provide for the safety of the public, in so far as the safety of the lives and persons of the people were involved in the operation of the railroad. The company laid its tracks subject to the condition necessarily implied that their use could be so regulated by competent authority as to insure the public safety. And as all property, whether owned by private persons or by corporations, is held subject to the authority of the state to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people, it is not a condition of the exercise of that authority that the state shall indemnify the owners of property for the damage or injury resulting from its exercise. Property thus damaged or injured is not, within the meaning of the Constitution, taken for public use, nor is the owner deprived of it without due process of law. The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the state by reasonable regulations to protect the lives and secure the safety of the people. In the recent case of N. Y. & N. E. Railroad v. Bristol, 151 U. S. 556, 567 [14 Sup. Ct. 437, 38 L. Ed. 269], this court declared it to be thoroughly established that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. 'The governmental power of self-protection,' the court said, 'cannot be contracted away, nor can the exercise of rights granted, nor the use of property be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury.' See New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 671 [6 Sup. Ct. 252, 29 L. Ed. 516]."

It is therefore within the power of the state, whenever it deems the public safety may so require, to impose upon railway companies whose tracks cross each other at grade the duty of installing and maintaining at such crossing such safety devices as the conditions may require. And since such devices are not necessary to the successful operation of the road, but are required for the safety of the public, it would seem to follow that the state might provide, without violating the constitutional inhibition against the taking of private property for a public use, that the expense of installing and maintaining such devices could be apportioned between two railway companies, even though the installation is required to be made at the time when the one is constructing a new track across the existing track of another. We so hold, and, while we think the rule applicable to any form of safety device, we think it particularly applicable to the one in question, since it has, as we say, the double purpose of protecting the public and enabling each of the roads to more economically operate its trains.

It follows from this that the Public Service Commission and the trial court were in error in imposing the entire obligation of installing and maintaining the required interlocking device upon the appellant, unless it can be said that the power to apportion the expense between the companies includes the power to impose it all upon one of the companies. In Railway Co. v. Traction Co., 79 Ohio St. 136, 86 N. E. 515, the court held that an apportionment of the costs did not necessarily mean an equal apportionment, and, in a subsequent appeal of the same case, said that to require one company to bear all of the expense was not an apportionment; the true rule appearing to be that a substantial apportionment is required.

So interpreting the statute, we cannot conclude in this instance that the order of the commission can stand. The record shows no

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equity in favor of the one road over the other. The order was based entirely on the principle that one was first in time, and, since we conclude that this is not sufficient under the statute to relieve it from a share of the expense, it follows that the burden of installing and maintaining the interlocking device should be divided equally between the companies.

The judgment appealed from is reversed, and the cause remanded, with instructions to direct the Public Service Commission to apportion the expense of installing and maintaining the interlocutory device mentioned equally between the railroad companies interested.

MOUNT, MAIN, ELLIS, PARKER, and CHADWICK, JJ., concur.

HOLCOMB, J. I concur in the result, assuming that the Public Service Commission will apportion the cost as suggested in Railway Company v. Traction Co., 79 Ohio St. 136, 86 N. E. 515. I do not agree that the railroad first occupying a right of way had no superior right or equity as against a subsequent occupier of the right of way for the purpose of crossing. As against it I think the first occupier has a very superior position and right. As against the sovereign, of course, it has not, but in apportioning the costs involved here the superior and prior position of the first occupier should be given very great advantage.

(29 Idaho, 438)

NORTHERN PAC. RY. CO. v. HIRZEL et al.

SAME v. NEUKAM et al.

(Supreme Court of Idaho. Oct. 9, 1916. On Petitions for Rehearing, Dec. 13, 1916.)

1. BOUNDARIES ⇐14—CONSTRUCTION.
Held, under the United States survey, as appears from the field notes and plats thereof, the Newell grant of 5.05 acres of land borders on Snake river.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 102–107; Dec. Dig. ⇐14.]

2. BOUNDARIES ⇐14—CONSTRUCTION.
Held, that block 2 of the city of Lewiston borders on Snake and Clearwater rivers.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 102–107; Dec. Dig. ⇐14.]

3. NAVIGABLE WATERS ⇐37(7) — BEDS — RIGHT TO.
The title to beds of navigable streams of this state does not pass to the patentees of the United States by the sale of lots or lands bordering on such streams.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 212–215; Dec. Dig. ⇐37(7).]

4. NAVIGABLE WATERS ⇐36(1)—BED—TITLE TO.
The state holds the title to the beds of the navigable streams below the natural or average high-water mark, for the use and benefit of the whole people.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180–182, 184, 200; Dec. Dig. ⇐36(1).]

5. COMMON LAW ⇐12—ADOPTION—EFFECT OF.
Section 18, Rev. Codes, by which is adopted the common law of England, so far as it is not repugnant to, or in conflict with, the laws of the United States or the Constitution and laws of this state, adopts only so much of the common law as is applicable to the conditions of this state.

[Ed. Note.—For other cases, see Common Law, Cent. Dig. § 10; Dec. Dig. ⇐12.]

6. NAVIGABLE WATERS ⇐39(2)—RIPARIAN OWNERSHIP—RIGHT TO.
The reason for the common-law rule of riparian rights does not exist in this state; therefore that common-law rule does not exist and the common law of England under such conditions would find another rule which would fit the case.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 239, 241, 242; Dec. Dig. ⇐39(2).]

7. NAVIGABLE WATERS ⇐39(2)—RIPARIAN RIGHTS—COMMON LAW.
There never was a common-law doctrine in England in regard to such rivers as we have in the United States, for the reason that no such streams exist in England. That being the case, there could be no common-law doctrine in England as to the conditions that did not exist there.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 239, 241, 242; Dec. Dig. ⇐39(2).]

8. NAVIGABLE WATERS ⇐1(4)—NAVIGABILITY—STATUTES.
In this country the ebb and flow of the tide is not a true test of the navigability of a river, and so far as this state is concerned, the common-law rule in regard thereto was merely an arbitrary one and not applicable here. The real test of the navigability of a stream in this country is whether it is in fact navigable.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 8; Dec. Dig. ⇐1(4).]

9. NAVIGABLE WATERS ⇐36(3)—RIPARIAN OWNERS—RIGHTS OF.
The state holds the title to the beds of all navigable streams in this state for the benefit of the public, and the riparian owner's right only extends to the high-water mark.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 186; Dec. Dig. ⇐36(3).]

10. PUBLIC LANDS ⇐4—"PUBLIC DOMAIN"—CONSTRUCTION OF TERMS.
The terms "public lands" and "public domain" are used in the United States statutes and decisions to designate such lands as are subject to sale or other disposal under the general laws of the United States or the states, and are habitually used by the Legislature to describe such lands as are subject to sale or other disposal under the general laws of the state.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 5; Dec. Dig. ⇐4.

For other definitions, see Words and Phrases, First and Second Series, Public Land; Public Domain.]

11. NAVIGABLE WATERS ⇐37(7)—GRANTS OF LAND BORDERING ON—EFFECT OF.
Grants by the United States under the public land laws of the government of lands bordering on or bounded by navigable waters do not

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convey, of their own force, any title or right below high-water mark.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 212–215; Dec. Dig. ⊂⊃ 37(7).]

12. NAVIGABLE WATERS ⊂⊃36(2)—RIPARIAN OWNERS—RIGHTS OF.

We have no statute law granting a riparian owner on a navigable stream the bed of such stream or any portion thereof.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180–183, 185, 187, 196; Dec. Dig. ⊂⊃36(2).]

13. NAVIGABLE WATERS ⊂⊃36(3)—BED OF NAVIGABLE WATER AS "PUBLIC LANDS."

The "public lands" referred to in article 9 of the state Constitution, and which are subject to disposal by the state land board under laws to be enacted by the Legislature, do not include the beds of navigable waters or lands thereunder below high-water mark.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 186; Dec. Dig. ⊂⊃36(3).]

14. PUBLIC LANDS ⊂⊃148½, New, vol. 9 Key-No. Series—STATE LAND BOARD—POWERS OF.

The rights of the state land board, under our present law, so far as the public lands of the state are concerned, are confined to lands expressly granted by act of Congress and to such lands as are subject to settlement and sale.

15. PUBLIC LANDS ⊂⊃148½, New, vol. 9 Key-No. Series—DISPOSAL—PUBLIC LAND BOARD.

Under the provisions of sections 4, 6, 8, 9, 10, and 11 of the Admission Bill, admitting Idaho as a state, a grant of a designated number of acres of land for specific purposes was made, and the constitutional provisions found in article 9 of the Constitution, granting to the state board of land commissioners control over and disposal of all public lands, relates only to the lands granted to the state for specific purposes.

16. NAVIGABLE WATERS ⊂⊃36(1)—BEDS—TITLE TO.

The title to the beds of navigable streams passed to the state on its admission into the Union, without any special grant, for the benefit of the public, and the state acquired absolute property in, and dominion and sovereignty over, all soils under the navigable waters within its borders.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180–182, 184, 200; Dec. Dig. ⊂⊃36(1).]

17. NAVIGABLE WATERS ⊂⊃36(1)—DUTY OF LEGISLATURE.

It is the duty of the Legislature to enact proper laws for the management and control of the beds of such waters.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180–182, 184, 200; Dec. Dig. ⊂⊃36(1).]

18. NAVIGABLE WATERS ⊂⊃36(3)—RIPARIAN PROPRIETORS—RIGHTS OF.

Wherever a city, town, or village is a riparian owner on navigable waters, it takes title to the lands owned by it to high-water mark.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 186; Dec. Dig. ⊂⊃36(3).]

19. NAVIGABLE WATERS ⊂⊃37(4)—STREAMS—RIGHTS OF PARTIES.

Held, under the various acts passed by the territorial and state Legislatures, granting to the city of Lewiston certain rights in regard to said rivers and the right to sell or lease any property dedicated to any specific public use, the state did not part with its title to the beds of said waters, since the Legislature could not thus alienate such title, and such acts of the Legislature must be construed so as not to permit the city to unreasonably interfere with the use of such rivers by the public.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 211, 218–222; Dec. Dig. ⊂⊃37(4).]

20. QUIETING TITLE ⊂⊃52—JUDGMENT—RIGHT TO.

Held, that the title to the beds of said streams should not be quieted in either the appellant or respondent.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 99, 102, 103; Dec. Dig. ⊂⊃52.]

On Petitions for Rehearing.

21. RAILROADS ⊂⊃75(3)—RIGHT OF WAY—EASEMENTS.

Held, that under the provisions of ordinance No. 218 of the city of Lewiston, granting to the Northern Pacific Railway Company, its successors and assigns, the use of A street in said city, said corporation is granted an easement which is irrevocable as long as said Railway Company or its assigns occupy said street for railway purposes, and that said Railway Company is entitled to a decree in the lower court, decreeing to it and its assigns the right to the use of said A street for railway purposes, with the rights of a riparian owner from the intersection of said A street with Fifth street to the easterly end of block 1.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 185; Dec. Dig. ⊂⊃75(3).]

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Actions by the Northern Pacific Railway Company against D. C. Hirzel and another and the City of Lewiston and others, and by the Northern Pacific Railway Company against Casper Neukam and the City of Lewiston and others. From judgments quieting title in the Mayor-Trustee for the City of Lewiston, plaintiff appeals. Reversed and remanded, with directions.

Actions to quiet title to certain parts of the beds of the Snake and Clearwater rivers bordering on the city of Lewiston. Judgment quieting title in the mayor-trustee for the city.

James E. Babb, of Lewiston, for appellant. Chas. H. Chance, Fred E. Butler, and McNamee & Harn, all of Lewiston, for respondents.

SULLIVAN, C. J. This appeal involves two actions brought by the appellant, the Northern Pacific Railway Company (which will, for convenience, hereafter be called the Railway Company), one against D. C. Hirzel and wife, and the other against Casper Neukam. The action against Hirzel is to quiet title against Hirzel and wife to land between the banks of Snake river and the center of the main stream, including an unsurveyed island occupied by respondent Hirzel at the confluence of the Clearwater and Snake rivers at the city of Lewiston, and may for convenience be referred to as the Snake River Case. The suit against Neukam is to quiet title to land between the bank of Clearwater river and the center of the stream at the foot and west of Fifth street and north of block 6 and from A street north of said block in

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said city of Lewiston, and may be referred to as the Clearwater Case.

John B. Morris, as mayor-trustee of the city of Lewiston, filed a complaint in intervention in each case, whereby he claimed for the city as mayor-trustee, the land claimed by the plaintiff and prayed that title be quieted in him as trustee for the city. Hirzel filed his answer and Neukam defaulted and thereafter made a motion to open the default, which was denied, and his answer, filed after default was entered, was stricken from the files, and he did not thereafter answer.

Upon the issues made, judgment and decree in each case was entered in favor of the mayor-trustee and the title to the land involved quieted in him.

The plaintiff, the Railway Company, appealed from the judgment entered in both of said cases. Neither of the defendants, Hirzel or Neukam, appealed, and the controversy in this court is now between the Railway Company and the mayor-trustee alone. It appears that the Railway Company claims the title of the state as well as title under the patents from the United States and by vacation of streets from the city; the mayor-trustee in both cases claims title by virtue of a townsite patent, by adverse possession, by deed, by relinquishments, by grant from the state, and perhaps through some other sources.

Numerous errors are assigned, a number of which involve the sufficiency of the evidence to support the findings of the court, and some involve questions of law wherein it is claimed the court erred in the trial of the case, and a reversal of the judgment is demanded.

In order that the issues involved in the two cases under consideration may be more readily understood, a brief history of the city of Lewiston and of the title to the land involved will here be given.

[1, 2] The land upon which the city is situated is at the junction of the Clearwater and Snake rivers; Snake river being on the westerly side of the city, and the Clearwater on the northerly side thereof. There was some settlement made there as early as 1861. When first settled, it was a part of the territory of Washington and the city of Lewiston was incorporated as a city by a legislative act of that territory early in 1863. See Loc. & Priv. Laws, Wash. 1863, p. 43. In that act the western boundary of the city was fixed as the middle channel of the Snake river and the northern boundary was the middle channel of Clearwater river. Idaho was organized as a territory on March 3, 1863, and in 1907, by legislative act, the Lewiston city boundary was extended across and beyond the Clearwater river. Sess. L. 1907, p. 349. When said city was first settled it was a part of the Nez Perce Indian reservation. It appears that the Indians executed an agreement in writing with one Robert Newell on the 9th day of June, 1861, which agreement was signed by the chiefs of the Nez Perce tribe, granting to Newell a tract of land bordering on the easterly bank of Snake river within the present limits of the city of Lewiston, consisting of 5.05 acres. The treaty between the government and the Indians extinguishing their title to the land on which the city is located was concluded on June 9, 1863, and was ratified April 17, 1867, and thereafter the survey of the Newell tract was made on September 28 and 29, 1868. Said tract is described by metes and bounds, being 250 yards on the easterly side, 100 yards at the northerly end, and 90.75 yards on the southerly end, the westerly line bordering on Snake river. It is the contention of the interveners in the Hirzel Case that the westerly side line of said Newell grant limits the ownership of the lands within the exterior boundary lines of said grant, and that the ownership does not extend to the thread of said river. The land included in said grant is owned by the appellant Railway Company.

Patent from the government was not issued to Newell until nearly 12 years after the Indians had executed said instrument in writing to Newell, and nearly 10 years after said treaty was entered into.

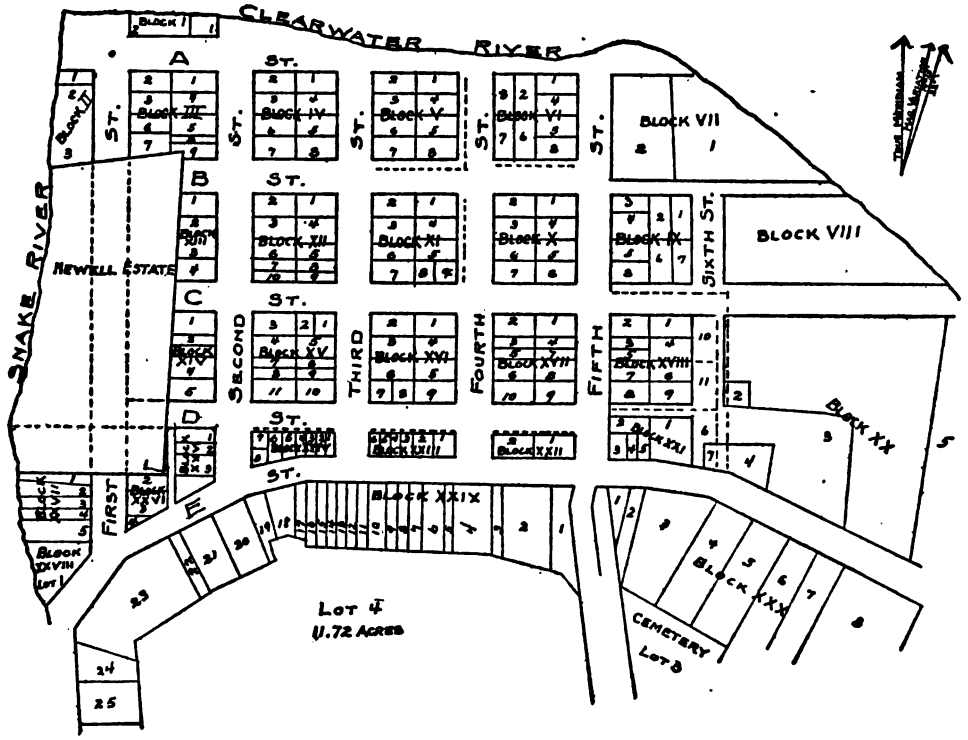
The survey of the Newell grant was made prior to the survey by the government of the other lands involved in this case, and at the time the Newell grant was surveyed the government had not run the meander line of Snake river. It appears that the government ran said meander line September 26, 1870, and that on September 3, 1873, the government made a survey of the legal subdivisions now included in said city, and on June 1, 1874, such government survey was approved.

In August, 1874, E. B. True made a survey and plat of the Lewiston town site, and on April 10, 1875, patent for the Lewiston town site was issued by the government to the mayor-trustee of said town. The defendant Hirzel was a squatter on a sandbar in Snake river immediately west of the Newell tract and of block 2 of said city as surveyed by said True. The land claimed by Hirzel at ordinarily high water is an island, in very high water it is entirely submerged, and in very low water it is a peninsula. The government has refused to make a survey of this peninsula or island.

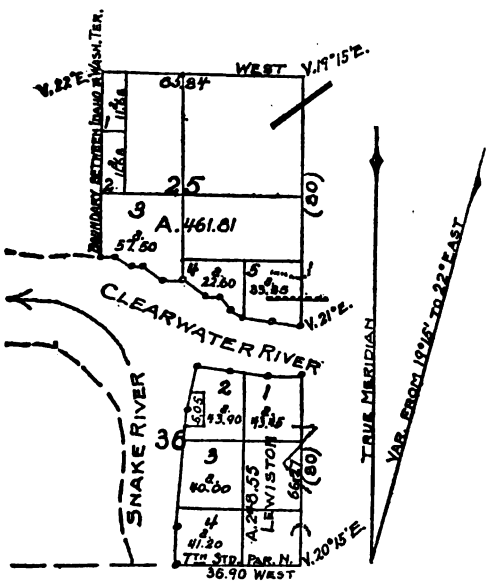
The land bordering on the Clearwater, squatted on by defendant Neukam, is entirely submerged during high water, except perhaps that portion on which buildings are situated, and they are in what was platted by True as A street of said city. However, since judgment and decree was entered against Hirzel and Neukam, and they have not appealed, their rights are not involved in this controversy between the appellant and the mayor-trustee.

We herewith insert a copy of a portion of the official plat of True's survey of said town site showing the land in controversy:

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The following is a plat of the government survey of a part of section 36, township 36 N., range 6 W. B. M.



A part of the town site of Lewiston is located on said section 36. Surveyor True surveyed and platted only a part of the land patented to the mayor-trustee, and the patent includes 561.31 acres for which the mayor-trustee paid $701.51¼ that being at the rate of $1.25 per acre. The said Newell grant of 5.05 acres is in lot 2 of said section, as shown by the government survey. Said lot contains 43.90 acres including said Newell grant. Deducting the 5.05 acres included in the Newell grant from the 43.90 acres contained in said lot, leaves 38.85 acres in said lot for which the said mayor-trustee paid at the rate of $1.25 per acre. It will be observed from the government plat that said Snake river borders on the westerly side of said lot 2, and the Clearwater river borders it on the north. While there is some contention as to whether the Newell grant bordered on Snake river, the government survey, as shown by said plat, settles that matter in favor of the contention that said lot 2 and the Newell grant border on said Snake river on the west and is coterminous with the government meander line of said rivers along said lot. The United States survey field notes of the Newell grant show that said grant borders on Snake river. The field notes read in part as follows:

"To determine the course of the east boundary of the tract, I ran a temporary line north from the place of beginning 250 yards, and commenced at the right bank of Snake river due west of this point, and measured east 100 yards, and set up an object. * * * The bank being nearly perpendicular, I set a witness corner 3 feet east of the line corner. * * * S. 7½ degrees W. from true corner, along the right bank of Snake river upstream, * * *

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being 40.70 yards, set the S. W. corner on bank of Snake river."

It appears from the field notes and plats introduced in evidence that it was intended that the Newell grant should border on Snake river and it did border on said river. Plaintiff's Exhibit N, above inserted, shows that lots 1 and 2 on the north border on Clearwater river. However that may be, it cannot change the main question here presented for determination, and, as we understand the case, both parties desire to have the question settled—that is, whether the city or the Railway Company has the title to the bed of said streams bordering on the city of Lewiston below high-water mark, from the bank to the center of said streams.

Counsel for respondents lays considerable stress upon the survey and plat made by one Guilland, which plat shows the meander line of Snake river considerably west of the west boundary of the Newell grant. This plat was not put in evidence. According to Guilland's testimony and his plat, the government meander line extended out into Snake river. He claimed there was some mistake in the government survey, and that in order to correct it, under the rules established by the Interior Department, it threw the greater part of the meander line out into Snake river. His testimony is so at variance with the government plat it should not be given much weight, since he testified that he did "not know" the west line of the Newell tract was coterminous with the bank of Snake river.

[3-5] This court held in Callahan v. Price, 26 Idaho, 745, 146 Pac. 732, that a patent from the United States for land bordering on a navigable lake or stream extended no further than the natural high-water line, and at page 754 of 26 Idaho, page 734 of 146 Pac. of said opinion the court said:

"It is therefore, we think, the settled law of this state, that no title to islands, lakes or the bed of navigable streams passes to the patentees of the United States by the sale of border lots, and that the state holds the title to the beds of navigable lakes and streams below the natural high-water mark for the use and benefit of the whole people, and that the right, title or interest of riparian proprietors or owners of uplands, to such shores are determined by the laws of the state, subject only to the rights vested by the Constitution of the United States."

In that case the court expressly overruled Johnson v. Hurst, 10 Idaho, 308, 77 Pac. 784, Lattig v. Scott, 17 Idaho, 506, 107 Pac. 47, Johnson v. Johnson, 14 Idaho, 561, 95 Pac. 499, 24 L. R. A. (N. S.) 1240, and Ulbright v. Baslington, 20 Idaho, 539, 119 Pac. 292, 294, in so far as said cases conflict with the doctrine laid down in the Callahan-Price Case.

Counsel for the respective parties have filed exhaustive briefs in which are reviewed many of the cases pro and con upon the question here involved. It is contended by counsel for appellant that by the provisions of section 18 of our Revised Codes, this state adopted the common-law doctrine of England, to the effect that the ownership in fresh water streams, or the beds thereof, extends to the thread of the stream. Said section is as follows:

"The common law of England, so far as it is not repugnant to, or inconsistent with, the Constitution or laws of the United States, in all cases not provided for in these Revised Codes, is the rule of decision in all the courts of this state."

By the adoption of that section this state did not adopt the common law of England when such common law was inapplicable to the conditions of the state. The territory and state of Idaho, following the lead of other states having similar statutory provisions, only adopted such provisions of the common law as were applicable to the conditions of the state. The English doctrine of riparian rights has been repeatedly held not applicable to this country, especially as to navigable, nontidal rivers and lakes, since such rivers and lakes did not exist in England. The Nevada statute in regard to adopting the common law of England is substantially the same as our own, and in Reno Smelting M. & R. Works v. Stevenson, 20 Nev. 269, 21 Pac. 317, 4 L. R. A. 60, 19 Am. St. Rep. 364, the court held that:

The "Nevada General Statutes, 3021, adopting 'the common law of England so far as it is not repugnant to or in conflict with the * * * laws of the United States, or the Constitution and laws' of that state, adopts only so much of the common law as is applicable to the condition of that state."

[6-8] Only such portions of the common law of England as were applicable to the conditions of this country have been adopted by the several states of this country. Boyer v. Sweet, 4 Ill. (3 Scam.) 120; Stuart v. People, 4 Ill. (3 Scam.) 395, 404; Poultney v. Ross, 1 Dall. (Pa.) 257 (238), 1 L. Ed. 117; Seeley v. Peters, 10 Ill. (5 Gilman) 130, 150.

It was stated by the court in Shewel v. Fell, 3 Yeates (Pa.) 17, that it was the province of the courts to judge in what cases the rules of the common law should be relaxed, owing to the difference in the conditions existing in this country; and in People v. Canal Appraisers, 33 N. Y. 461, 482, the court said:

"I think no doctrine better settled than that such portions of the law of England as are not adapted to our condition, form no part of the law of this state. This exception includes not only such laws as are inconsistent with the spirit of our institutions, but such as were framed with special reference to the physical condition of a country differing widely from our own."

"The common law of England," said Judge Story, "is not to be taken, in all respects, to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted, only that portion which was applicable to their situation." Van Ness

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v. Packard, 27 U. S. (2 Pet.) 144, 7 L. Ed. 374.

The common law of England as to riparian rights has not been adopted by this state. In McManus v. Carmichael, 3 Iowa, 1, we think the court correctly solved the question as to whether or not the common-law doctrine of England, as to the ownership of the beds of navigable fresh-water streams, should be applied to large rivers of the United States, by stating in substance that there never was any common-law doctrine in England in regard to such streams, for the simple reason that such streams did not exist in England; that therefore there could be no common-law doctrine in England as to conditions that did not exist there. It was there held that the ebb and flow of the tide is not a real and virtual test of the navigability of a river, and that that rule is merely an arbitrary one and is not supported by reason; that the real test of the navigability of a stream is whether it is in fact navigable; that that fact is the foundation for navigability in law.

From the decisions it will be observed that those states which have no navigable waters other than those where the tide flows or whose rivers are small and their effectual navigability is limited, or nearly so, to the tidal waters, have held more nearly to the usual common-law test and have applied the consequences as inferred at common law; while those states which have less relation to the salt waters or whose rivers are large and depend less upon tidal waters for their navigability in fact have been inclined to depart from the common-law rule.

The court in McManus v. Carmichael, supra, very pertinently asks the question whether the rules and tests which are applicable enough to the rivulets of England shall be taken to measure those waters whose flow is through the climates and zones of the earth, and navigable, in fact, hundreds and in some cases thousands of miles above the flow of the tide.

[9-16] We therefore hold that the beds of the Snake and Clearwater rivers, they being navigable rivers, belong to the state and are held for the benefit of the public. The state holds the title for the benefit of the public and is not limited in its right or title to the easement or right of way over such beds. As held in Bowman's Devisees & Burnley v. Wathen et al., 2 McLean, 376, Fed. Cas. No. 1,740, on navigable streams the riparian right does not extend beyond high-water mark.

Some question is raised as to whether the beds of the navigable streams of the state come within the terms "public lands" or "public domain." Those terms are used in the United States statutes and decisions to designate such lands as are subject to sale or other disposal under the general laws of the United States or states, and are not held back or reserved for any special or governmental purpose. 32 Cyc. 775.

In Newhall v. Sanger, 92 U. S. 761, 23 L. Ed. 769, the court said:

"The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." Leavenworth R. R. Co. v. U. S., 92 U. S. 760, 23 L. Ed. 634; Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. 1228, 31 L. Ed. 844; Mann v. Tacoma Land Co., 153 U. S. 273, 14 Sup. Ct. 820, 38 L. Ed. 714; Barber Lumber Co. v. Gifford, 25 Idaho, 654, 139 Pac. 557; Moss & Bro. v. Ramey, 25 Idaho, 1, 136 Pac. 608.

It will not be seriously contended that the lands below high-water mark of the navigable streams of the state are subject to sale or disposal under any existing general laws of the state as "public lands," regardless of the fact that this court in its early decisions endeavored to establish a law, which was clearly a legislative act and not judicial.

In Barber Lumber Co. v. Gifford, 25 Idaho, 654, 139 Pac. 557, this court held:

"We have no statute law whatever granting a riparian owner the bed of the stream." Moss v. Ramey, 25 Idaho, 1, 136 Pac. 608.

In Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, it was held that grants by the United States under the public land laws, of lands bordering on or bounded by navigable waters, do not convey of their own force any title or right below high-water mark.

"Public lands," such as are referred to in article 9 of the state Constitution, and which are subject to disposal by the state land board under the laws enacted or to be enacted by the Legislature, do not include the beds of navigable waters or lands thereunder below high-water mark. The rights of the state land board are confined to lands expressly granted by act of Congress and to such lands as are subject to settlement and sale. Section 4 of the Idaho Admission Bill is a grant of sections 16 and 36 in each township for the support of the common schools. Section 6 grants certain lands for the construction of public buildings. Section 10 grants 90,000 acres of land for an agricultural college, and section 11 is a grant of a designated number of acres for specific purposes, and our constitutional provision granting to the state board of land commissioners control over and disposal of all public lands relates only to these lands granted to the state by the act of Congress above mentioned, for specific purposes. We find nothing in the Idaho Admission Bill or in the Constitution that makes any mention of the beds of streams of navigable waters. The title to the beds of navigable waters passes to the several states on their admission as states, without any special grant, for the benefit of the public, and no general law has been made by the Legislature in regard to the disposition or proper

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control of such lands for the benefit of the public.

In the Emma S. Peterson Case, 39 Land Dec. 566, it is said:

"Upon the admission of a state into the Union it acquires absolute property in and dominion and sovereignty over all soils under the navigable waters within its borders." (See decisions of the Supreme Court of the United States cited in the above case.)

[17-20] Upon the admission of Idaho into the Union, it acquired absolute property in, and dominion and sovereignty over, the beds of the navigable waters, and it is the duty of the Legislature to enact proper laws for the management and control of the beds of such waters. But the state should retain the title for the benefit of the general public and enact proper legislation for the control of such lands for the benefit of all the people.

We will next consider the source and extent of the trustee's title to the water front bordering on said rivers.

Wherever the municipality is a riparian owner on this water front, it would take title, under the late decisions of this court, to high-water mark. However, the city and mayor-trustee base their title also upon other grounds. By territorial statute passed in 1881, the city was authorized to lease the water front on said streams. This statute was the law of the territory until the admission of Idaho as a state, when it became validated under the provisions of section 21 of the Idaho Admission Bill. It was also incorporated in the statutes of the state by section 17, Rev. Codes, in regard to special territorial laws. In 1879, by ordinance, the water fronts of the city of Lewiston were declared to be public highways, which ordinance constituted a dedication of such water fronts for that purpose. In section 238 of the 1907 Lewiston Charter (Sess. Laws 1907, p. 349), it is provided that:

"The mayor and council may by ordinance vacate and sell or lease any property dedicated to any specific public use."

This provision of the charter, which was enacted by the Legislature in 1907, is claimed by respondent to have the effect of an absolute grant from the state to the city of all its interest in the shores of the Snake and Clearwater rivers, subject, of course, to rights of navigation, and respondent cites 28 Cyc. p. 607, and authorities there cited. It is stated in Cyc. as follows:

"Among the muniments of title in fee of municipal corporations are legislative grants in charters or other acts; and a municipal corporation may acquire title by prescription or adverse possession." 28 Cyc. 607.

The rule there laid down no doubt applies to many legislative grants, but it has no application to attempted grants of title by the Legislature to beds of navigable streams; and a municipality cannot procure title as against the state to the beds of navigable streams either by prescription or adverse possession. The title to such lands must remain in the state for the benefit of the public. The state may, by legislation, grant certain rights or easements to corporations or private persons for the use of such beds of streams, but such easements or rights must not interfere with the navigation of such streams. The evidence shows that the entire water front upon said rivers adjoining the city of Lewiston has been used at one time or another as a public or common water front, to which access was free to all comers, and the ordinance passed by the city in 1879 dedicated said water front as a highway, and it is contended by counsel for the mayor-trustee that the act of February 10, 1881 (Sess. L. p. 407), empowered the city of Lewiston to lease the water front of the city, and that that act is a recognition by the state of the right of control in the city, if not the ownership of the water front.

Under our view of the case, these several legislative acts make no difference, so far as the real question involved in the case is concerned, since we hold that the title to the beds of said navigable rivers is in the state to be held and controlled by the state for the benefit of the public and for public use.

The title being in the appellant Railroad Company to the Newell tract bordering on the Snake and to said block 2 bordering on the Snake and Clearwater rivers, the Railroad Company has the right of access to said rivers, and such right precludes any unreasonable obstruction of its access to the navigable waters, and precludes any title of a private or proprietary nature between it and the center of said streams. The appellant company has the legal title to the Newell tract and said block 2 and is the riparian owner wherever those tracts touch the banks of said rivers. Appellant has the right of a riparian owner as well as the right of other citizens of access to and egress from said navigable waters, subject to the right and easement of other citizens of the state to a navigation of said waters.

The title to the beds of said streams, referred to as the water front, is still in the state of Idaho, and therefore the judgment and decree of the district court quieting the title to the beds of said streams to the center thereof in the mayor-trustee for the benefit of the inhabitants of the city of Lewiston must be reversed and the cause remanded to the court with directions to make new findings of fact and enter judgment and decree in accordance with the views expressed in this opinion, since the parties are not entitled to a decree quieting the title to the beds of said streams in them or either of them.

Costs are awarded to appellant.

BUDGE and MORGAN, JJ., concur.

On Petitions for Rehearing.

SULLIVAN, C. J. Both the Northern Pacific Railway Company and the city of

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Lewiston have filed petitions for rehearing in this case. It would appear that the court in its former opinion apparently left a few points a little obscure. However, we do not think it necessary to grant a rehearing in this matter.

1. Counsel for the Northern Pacific Railway Company first contends that in so far as the case against Hirzel is concerned, it might be urged before the trial court in making other findings, as required by the former opinion of this court, that there was an intention to hold that said island contained land that might be subject to entry under the land laws of the United States. It was not intended to so hold. The opinion of the court was that the island claimant not having appealed, the findings of the court below to the effect that the island contained no land proper, nor anything other than river bed material, will be accepted and found in any new findings that may be hereafter made by the trial court.

2. Under the provisions of Ordinance 218, which ordinance vacated a street for the use of the Railway Company, its successors and assigns, the Railway Company is granted an easement and not a mere license, which easement is not revokable so long as the Railway Company, or its assigns, occupy said street for railroad purposes, and the trial court erred in holding that the grant to appellant was a license only.

3. The court intended to hold, and holds, that the westerly side of the Newell grant and block 2 of the town site of Lewiston is bordered by Snake river.

4. In regard to riparian rights along the Clearwater river. As we understand the evidence and the plat of the city of Lewiston made by E. B. True, quite a portion of said street opposite block 6 has been washed away by the Clearwater river, and Neukam has squatted on or near a part of that street, but that he has no rights there as against the Northern Pacific Railway Company. The Railway Company occupies the entire width of that street west from Fifth street. It appears that all of block 1 was washed away some years ago, although title to it is still claimed by a corporation not a party to this suit. The Northern Pacific Railway Company accordingly has riparian rights along said river up to the easterly end of said block 1.

When the Northern Pacific Company came to Lewiston, it was granted the use of A street. That grant fixed the limit of the right of way to the entire width of said A street, to wit, 80 feet. Therefore the appellant has the use of A street on the Clearwater river so long as it occupies said street for railway purposes, and that carries with it the right of access from said street from its intersection with Fifth street to the easterly end of block 1, to the navigable water and a freedom thereof from any intervening private right.

5. The court did not intend to hold in said opinion that there had been no general legislation in this state in regard to railways along the shores of navigable waterways, and the court did not intend to deny the effect of subdivision 5 of section 2796, Rev. Codes, and where the court stated, "and no general law has been made by the Legislature in regard to the disposition or proper control of such lands for the benefit of the public," we should have added, "except subdivision 5 of section 2796, Rev. Codes." This exception should also include section 872, Rev. Codes, which section prohibits the construction of dams or booms unless they are constructed as provided by section 872, supra.

[21] 6. Counsel for the city suggest that as they read the former decision of this court, there is no direct holding to the effect that block 6 borders on Clearwater river, or that the Railway Company is a riparian owner of land north of block 6.

"A" street lies bordering on and north of said block 6, and the northerly side of said street borders on Clearwater river. The city of Lewiston having granted an easement of said entire street to the Railway Company, the Railway Company has the riparian rights which attach to the northerly side of said street which borders on said river, the intention being to hold that the Northern Pacific Railway Company has riparian rights on Clearwater river from Fifth street westerly to the easterly end of said block 1.

7. It was contended by counsel for respondent that the legislative assembly of the territory of Idaho in 1881 (Laws 1881, p. 407) amended the city charter of Lewiston (Sess. L. 1881, p. 384), whereby the power was conferred upon the city to sell or lease the property of the city; also to lease the water front to any person, steamboat, or railroad company, for the purpose of erecting warehouses, wharves, or wharf boats, or for any other purpose which they might deem proper, and that said act has never been repealed and is still in force.

It appears that in 1907 (Sess. L. 1907, p. 349), said act of 1881 was amended. By that act all of the provisions of the Lewiston charter and the provisions of said act of 1881, authorizing the sale or lease of water fronts in said city, are entirely omitted. The regulation of wharfage is retained in section 66 of said act of 1907, but said act does not give the city power to sell or lease the water front, and only gives such city the power of sale and lease of the real property of the city and streets and highways and property dedicated to any specific public use. While a river is a highway, the term "highway," as used in said act, does not include a waterway. Grice v. Clearwater Timber Co., 20 Idaho, 70, 117 Pac. 112. The water front on those rivers was not property dedicated to any specific public use by the city, and as the title to the beds of all navigable streams

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is in the state, the city would not have the right to dedicate it to any particular public use that would in any way interfere with the navigation of the rivers, since a dedication of property to a public use must be made by the owner or by his authority. The appellant is entitled to a decree, decreeing to it and its assigns the right to the use of A street, so long as it uses the street for railway purposes, with rights of a riparian owner from the intersection of said A street with said Fifth street to the easterly end of said block 1.

With the foregoing additions, the original opinion is affirmed, and a rehearing denied.

It is contended by counsel for respondent that under all of the facts of this case, each party should pay its own costs on appeal. Upon a reconsideration of this matter, the court has concluded that it will be only right and proper for each party to pay its own costs on this appeal; and it is so ordered.

BUDGE and MORGAN, JJ., concur.

(29 Idaho, 618)

ALAMEDA MINING CO. v. SUCCESS MINING CO.

(Supreme Court of Idaho. Nov. 22, 1916. Rehearing Denied Dec. 29, 1916.)

1. APPEAL AND ERROR ⇐100(1)—DECISIONS REVIEWABLE—FINALITY.

On motion to dismiss this appeal on the ground that the judgment was interlocutory and not final, *held*, that the judgment was final so far as the principal issue involved in the action was concerned, and that a perpetual injunction was granted, and an appeal from an order granting or dissolving an injunction is appealable, under the provisions of section 4807, Rev. Codes, as amended by Laws 1915, p. 193.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 670–674; Dec. Dig. ⇐100(1).]

2. MINES AND MINERALS ⇐38(24)—MINING CLAIMS—QUIETING TITLE—FINDING.

Held, that findings 7, 11, and 13 amount in law to a finding that the Granite claim vein or lode apexes within the surface boundaries of the claim.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 110; Dec. Dig. ⇐38(24).]

3. MINES AND MINERALS ⇐16 — MINING CLAIMS—"LODES, VEINS, AND LEDGES."

As the terms "lodes, veins, and ledges," are used in the acts of Congress in regard to mines and mining claims, it was not intended to make distinctions based upon genetic principle; but, when precious metals occur in tilted beds in places associated with subsequent fissuring and mineralization, they are subject to location as veins and lodes within the meaning of said acts.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 21–23; Dec. Dig. ⇐16.]

4. MINES AND MINERALS ⇐30 — MINING CLAIMS—"APEX."

An "apex" may be defined as that portion of a terminal edge of a vein from which the vein has extended downward in the direction of the dip, as that involves the elements of a terminal edge and downward course therefrom. It is a point from which the vein has a dip as well as a strike.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 73, 74; Dec. Dig. ⇐30.]

5. MINES AND MINERALS ⇐38(18)—MINING CLAIMS—QUIETING TITLE—EVIDENCE.

Held, that the evidence clearly shows that the Granite vein has both a strike and a dip.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 104; Dec. Dig. ⇐38(18).]

6. MINES AND MINERALS ⇐31(3)—MINING CLAIMS—EXTRALATERAL RIGHT.

Held, that the fact that the vein terminates against granite or monzonite on the west end does not affect the extralateral rights of the appellant given by the provisions of section 2322, Rev. St. U. S. (U. S. Comp. St. 1913, § 4618).

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 77; Dec. Dig. ⇐31(3).]

7. MINES AND MINERALS ⇐31(1)—MINING CLAIMS—EXTRALATERAL RIGHT.

Held, that the statement by this court in the Stewart-Ontario Case, 23 Idaho, 724, 738, 132 Pac. 787, 792, to wit, "To pursue a vein in the direction of its strike at an angle of less than 45 degrees to the course thereof would clearly not be following the vein on its 'downward course' as authorized by the statute," is obiter and not the law, since extralateral rights under the provisions of section 2322, Rev. St. U. S., must be determined by the apex on the surface, and not upon the levels disclosed by the working of the mine.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 75; Dec. Dig. ⇐31(1).]

8. MINES AND MINERALS ⇐31(1)—MINING CLAIMS—EXTRALATERAL RIGHT.

The course of a vein is not determined by its direction at any given point where the vein is a crooked one. An extralateral right must be determined by the course of a vein at its apex at the surface of the claim, or at the nearest point to the surface to which the apex extends.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 75; Dec. Dig. ⇐31(1).]

9. MINES AND MINERALS ⇐31(1)—MINING CLAIMS—EXTRALATERAL RIGHT.

It is rudimentary that extralateral rights to a vein depend upon the position of its top or apex.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 75; Dec. Dig. ⇐31(1).]

10. EVIDENCE ⇐574 — MINING CLAIMS — EXPERT TESTIMONY—WEIGHT.

The workings of a mine made in mining operations, and not in support of litigation, should be given more weight as evidence of facts concerning a vein than the mere opinion of expert witnesses.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2400; Dec. Dig. ⇐574.]

11. MINES AND MINERALS ⇐38(24)—MINING CLAIMS—QUIETING TITLE—FINDINGS.

The main issue tendered by the cross-complaint and answer thereto in this case was as to whether the apex of the Granite vein is within the exterior boundaries of that claim, and the court ought to have made a direct finding on that issue.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 110; Dec. Dig. ⇐38(24).]

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12. MINES AND MINERALS ⇐38(18)—MINING CLAIMS—ACTIONS—EVIDENCE.

Held, that the evidence shows continuity of the Granite vein on its dip from the apex to the 1,200-foot level.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 104; Dec. Dig. ⇐ 38(18).]

Appeal from District Court, Shoshone County; Wm. W. Woods, Judge.

Action by the Alameda Mining Company against the Success Mining Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Action to obtain a perpetual injunction and to determine the extralateral rights of the defendant to certain mining ground and to recover damages for the value of ores alleged have been removed from the Cardiff mining claim, and to quiet title of plaintiff in said Cardiff claim. Judgment for plaintiff.

James F. Ailshie, of Cœur d'Alene, and A. G. Kerns, of Wallace, for appellant. John P. Gray, of Cœur d'Alene, and Walter H. Hanson, of Wallace, for respondent.

SULLIVAN, C. J. This action was brought by the Alameda Mining Company, respondent, against the Success Mining Company, appellant, praying for a perpetual injunction enjoining the Success Mining Company from entering upon or into or excavating and removing ore from the Cardiff mining claim owned by the plaintiff, and for $30,000 damages alleged to be the value of ores removed from the said Cardiff claim, and to quiet the title of plaintiff in said Cardiff claim.

The Success Company answered, denying the allegations of the complaint, and filed a cross-complaint, alleging the ownership of the Granite mine and of the vein, lode, or ledge thereunder, and that the Granite vein apexes within the exterior boundaries of the Granite claim, and that the said vein crosses the east end line of said Granite claim, and that, in pursuing said vein on its dip and downward course between vertical planes extending downward through its parallel end lines, the said vein passes under and beneath the south side line of said Granite claim into and beneath the surface of the said Cardiff lode claim, and based such claim or right upon the provisions of section 2322, U. S. Rev. Stats. This case involves the question of extralateral rights.

Upon the issues made by the pleadings, the case was tried by the court without a jury. By permission of the court the question of extralateral rights was tried first, and it was understood and agreed that, if that question were decided in favor of the plaintiff, then the question of accounting should thereafter be tried. After trying the question of extralateral rights, the court made its finding of facts and conclusions of law and entered judgment denying the Success Company the right to pursue said vein under and beneath the surface of the Cardiff claim, and denying the Success Company any extralateral rights whatever underneath the Cardiff claim.

The question of the value of the ore extracted from the Cardiff claim had not been tried and determined at the time this appeal was taken.

The appeal is from the judgment quieting the title to the Cardiff lode claim in the plaintiff and perpetually enjoining the defendant from asserting any right, title, or interest in and to any extralateral rights under said Cardiff lode claim or the ores and minerals therein, adverse to the plaintiff.

[1] In limine, respondent has made a motion to dismiss this appeal on two grounds: First, that the appeal is from an interlocutory judgment and not from a final judgment; second, that said appeal is from a decision that is not appealable and is premature.

There is nothing whatever in either of the grounds above stated. The judgment entered is a final judgment, so far as the rights of the Success Mining Company are concerned, in extracting any ore from beneath the surface of said Cardiff claim, and the only matter remaining for determination is the value of the ore which the Success Company has extracted therefrom. The judgment decreed that "the defendant be forever enjoined from asserting any right, title, or interest in or to the said Cardiff lode claim or the ores and minerals therein, adverse to the plaintiff," thus holding that the Success Mining Company had no extralateral rights within the boundaries of the Cardiff mining claim. The judgment of the court, in part, is as follows:

"It is now ordered, adjudged, and decreed that the title to the Cardiff lode claim be and the same hereby is quieted and confirmed in the Alameda Mining Company against the Success Mining Company, and the defendant be forever enjoined from asserting any right, title, or interest of, in, or to the said Cardiff lode claim, or the ores or minerals therein, adverse to the plaintiff.

"It is further ordered, adjudged, and decreed that the plaintiff do have and recover of and from the defendant the value of the ores and minerals heretofore mined by the defendant from beneath the said Cardiff lode claim as the same shall be hereafter, by a further judgment, fixed and determined, and said matter is continued until the next term of court, and that such further proceedings shall thereupon be taken thereon as are customary in equity and judgment be entered therefor."

That is a final judgment so far as the principal issue involved in this action is concerned. Again, under the provisions of section 4807, Rev. Codes, as amended by the Laws of 1915, p. 193, an appeal may be taken to the Supreme Court from the district court "from an order granting or dissolving an injunction."

Here a perpetual injunction was granted against the Success Company, whereby that company was forever enjoined from assert-

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ing any right, title, or interest in or to said Cardiff lode claim or the ores and minerals therein, adverse to the plaintiff.

The question of an accounting for the ores extracted by the Success Company from said Cardiff lode claim is the only question that was left in the case for trial, and, regardless of how that accounting may result, it can in no manner affect in any way the judgment already entered in said case. The motion is denied.

[2] Counsel first discusses errors Nos. 2 to 15, inclusive, and states that said assignments involve questions so intimately related that the discussion of one will naturally blend in the others, and proceeds to discuss said assignments under two general propositions: First, that the findings of fact in this case, when reduced to their final analysis, do not support the conclusions of law and judgment in the case; and, second, that if it should be held that those findings of fact are sufficient to support the conclusions of law and judgment, then they are clearly contrary to all the substantial evidence in the case.

It is contended that the essential and important paragraphs of the findings of fact bearing on the issues presented by the cross-complaint are 7, 11, and 13, which are as follows:

"(7) The court further finds: That there is within the Granite mining claim, and extending from the Granite claim into the Cardiff claim upon its onward course or strike, a lode containing lenses or lenticular bodies of ore or ore chutes. That the said ore chutes or lenses are irregular in form and of various sizes, representing replacement along shrinkage fissures or cracks. A number of said ore chutes or fissures have an easterly and westerly direction and cut the bedding planes of the sedimentary rocks. That the foot wall of the area so mineralized is represented by a hard foot wall of quartzite, which is disclosed for its longest distance upon the 300 foot level of the Success property, and upon said level, as shown upon the defendant's exhibits, has a course of approximately north 10 degrees west, which represents the extreme easterly limit of the mineralization and fissures. That the area which is mineralized, and which contains said ore-bearing fissures or lenses or chutes, terminates on its westerly side against granite or monzonite more irregular than the beds of quartzite representing the foot wall quartzite. Within the said area are a large number of lenses or ore chutes variously called the 'North' vein or spur, the 'Dorsey,' the 'South,' and the 'Peterson.' In addition to the fissures, chutes, or ore bodies having an easterly and westerly direction between the said foot wall quartzite and monzonite, there is one long ore body or chute having a course of north 30 degrees west, which more nearly conforms to the bedding and extends for a long distance in a northeasterly and southerly direction, and which has been developed and followed upon its strike on the 400, 450, and 700 foot levels into the Cardiff lode claim by the defendant. Said ore chute has been developed and mined for several hundred feet upon its strike. That the said ore chute or ore body which has the said course of north 30 degrees west dips southwesterly at an angle of approximately 60 degrees from the horizontal."

"(11) The court further finds: That at least three of the lenses or ore chutes which cut the bedding and have an easterly and westerly course reach to or near the surface within the Granite lode, and the principal of which extends from certain stopes which come to the surface near the 4,400 contour in a course slightly north of east to a stope which comes to the surface near the elevation 4,475. That the south ore chute is disclosed at the surface having a northeasterly and southwesterly course at elevation 4,492. Extending from the said stope at elevation 4,475, the ore body or ore chute which follows the bedding planes extends easterly and is disclosed on the surface at the top of a raise at elevation 4,487. From that point to the east end line of the Granite claim the vein is not disclosed upon the surface, but near the top of raise 4,587 a tunnel has been extended called the 'Apex' tunnel along what the court finds to be the extension of the said vein or ore chute, easterly, which said tunnel follows the same and has a course of approximately north 28 degrees west. That the same ore body has been followed by a raise up to the Granite State tunnel, where the said vein is also disclosed, but in the said Granite State tunnel has a course of approximately north 15 degrees west and which has been followed thence upward in a raise to a point where it crosses the east end line of said Granite State tunnel at the elevation of 4,687 feet. The court finds that from the top of the stope at elevation 4,475 running easterly the mountain rises very rapidly in an easterly direction. That the lode terminates on its northwesterly course within the said Granite lode claim."

"(13) The court further finds that the portion of the lode hereinbefore referred to as extending from the stope at elevation 4,475 to the raise at elevation 4,687 represents an exposure of a portion of the lode partially upon the line of strike and partially upon the line of its dip."

It is contended that the last three quoted findings of fact amount, in law, to a finding that the Granite claim vein or lode apexes within the surface boundaries of the claim, and that it crosses the east end line of the Granite State tunnel at the elevation of 4,687 feet. That elevation, it appears, is the surface elevation at the point of the east end line of the Granite claim where the vein crosses said line on its southeasterly course.

By said seventh finding, the court finds that there is within the Granite mining claim, and extending from the Granite claim into the Cardiff claim upon its onward course or strike, a lode containing lenses or lenticular bodies of ore or ore chutes. The court also finds that these various ore bodies or chutes or lenses extend upward to the surface at various points and thence downward into the depths of the earth, and that they have been followed and mined downward into the depths of the earth.

It also appears that the first evidence of any entry of the Granite vein under the surface of the Cardiff claim is on the 400-foot level, which it appears is at a distance of about 609 feet below the elevation at which the vein at its apex crosses the east end line of the Granite claim. From the evidence there can be no doubt of the existence of the Granite vein and its location, course, and apex.

So far as the apex of the Granite claim is concerned, during the trial the Success Company offered to adduce further testimony in regard to the apex, and objection was made

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by opposing counsel that such evidence was cumulative, and the court said:

"It is cumulative. * * * I think I have heard enough evidence. I think any court would be perfectly satisfied in regard to the claim of the apex within the boundaries of the Granite claim."

Here, apparently, the trial court recognized that the Success Company had established the apex to the vein in said claim.

[3] There can be no doubt as to the definition of a "vein" or "lode," as those words are used in the statutes of the United States, in the face of the multitude of judicial expressions on that subject. See Book v. Justice Mining Co. (C. C.) 58 Fed. 106; Jupiter Mining Company v. Bodie Con. Min. Co. (C. C.) 11 Fed. 666; 1 Lindley on Mines (3d Ed.) §§ 286–289.

In 1 Lindley on Mines, the author states in a note at the bottom of page 649, as follows:

"The acts of Congress are so construed as to include in the category of lodes, veins, and ledges certain deposits which would not fall under the above definition. As, for example, certain tilted beds or sedimentary strata containing ores as original constituents, and not formed by subsequent fissuring and mineralization. The geologist would call these beds, and not lodes, but we understand that the intent of the law is not to make distinctions based upon the genetic principle. It is doubtless true that a very small percentage of the ore deposits of the precious metals occur as tilted beds in place, unassociated with subsequent fissuring and mineralization; but, when such are found, they are undoubtedly subject to location as veins or lodes within the meaning of the statutes."

In 2 Lindley on Mines, § 615, p. 1479, the author says:

"A vein to be followed must be continuous only in the sense that it can be traced by the miner through the surrounding rocks. Continuous ore is doubtless the best evidence, but it is not essential. Many veins carry only small 'shoots' of ore, and the intervening spaces are represented only by a continuous fissure with or without gangue and gouge material."

Tilted beds of sedimentary strata containing ore the geologist would call beds and not lodes, but as suggested by Mr. Lindley, as above quoted, we understand that the intent of the law is not to make distinctions based upon genetic principle. The geologists who testified as witnesses for plaintiff in this case have attempted to draw the distinction suggested by Mr. Lindley; but, from our view of the evidence, it is very conclusive that there is a vein in the Granite claim with an apex within the boundaries of said claim, and that said vein has a strike and a dip.

A vein or lode comes within the meaning of the law so long as there is a fissure, seam, or gouge, or any evidence of mineralization which will lead the practical miner from one ore body to another and which does in the course of his work so lead him. Such evidence of mineralization of said lode or vein clearly appears from the evidence contained in the record.

[4] In Stewart Mining Co. v. Ontario Mining Co., 237 U. S. 350, 35 Sup. Ct. 610, 59 L. Ed. 991, in referring to the apex of the vein, the court said:

"An 'apex' is, on cited authority, defined to be 'all that portion of the terminal edge of a vein from which the vein has extension downward in the direction of the dip.' And it is further said that the definition has been approved in Lindley on Mines, because as therein expressed it 'involves the elements of terminal edge, and downward course therefrom.' We may accept the definition."

In the same case (23 Idaho, 724, 132 Pac. 787) this court held that an apex must be the top or terminal edge of the vein on the surface or the nearest point to the surface, and must be the top of the vein proper rather than of a spur, and must be a point from which the vein has a dip as well as a strike.

As to the course of the vein, in its finding of facts the court found the "lenses or ore chutes * * * have an easterly and westerly course reaching to or near the surface within the Granite lode and * * * comes to the surface near the 4,400 contour in a course slightly north of east to a stope which comes to the surface near elevation 4,475," and also that the "ore body or ore chute, which follows the bedding planes, extends easterly and is disclosed on the surface at top of raise at elevation 4,487" and is again disclosed "at the top of raise 4,587." Those findings are clearly equivalent to a finding that the apex is within the surface boundaries of the Granite claim.

The thirteenth finding of the court is that:

"The portion of the lode hereinbefore referred to as extending from the stope at elevation 4,475 to the raise at elevation 4,687 [which is the apex raise at the east end line] represents an exposure of a portion of the lode partially upon the line of strike and partially upon the line of its dip."

[5] The evidence clearly shows that the vein has both a strike and a dip; a strike to the southeast, and a dip to the southwest. The fact that the vein terminates against the granite or monzonite on the west end does not affect the extralateral rights given by the provisions of section 2322, U. S. Rev. Stats. Under a uniform line of authorities, the Success Company, under the evidence in this case, would be entitled to have the west end vertical plane of the Granite claim pass through the point where the vein terminates against the monzonite and parallel with the vertical plane of the east end line, thus giving it the extralateral right of the pursuit of the vein between those planes beneath all other mining claims which it dips.

The trial court apparently clearly recognized that the evidence of the appellant was amply sufficient to establish the fact that the apex of said vein was within its boundary lines, since when further evidence was offered the court stated:

"It is cumulative. * * * I think any court would be perfectly satisfied in regard to the claim of the apex within the boundaries of the Granite claim."

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And it would seem that the decision of the court that in the levels 400, 450, and 700 the vein of the Granite claim passed under the south side line thereof and beneath the Cardiff claim more upon the strike than upon the dip, or, in other words, that the angle was less than 45 degrees and that for that reason the appellant could not pursue the vein under the Cardiff claim, was evidently based upon the decision of this court in the Stewart-Ontario Case, 23 Idaho, 724, 132 Pac. 787, wherein it was stated that:

"To pursue a vein in the direction of its strike at an angle of less than 45 degrees to the course thereof would clearly not be following the vein on its 'downward course' as authorized by the statute."

That statement was clearly obiter in that case and is not the law, since the extralateral right conferred by the provisions of section 2322, Rev. Stats. of the U. S., is determined by the apex on the surface upon which the prospector makes his location and the dip of the vein, and not upon the levels in the depths of the earth opened and disclosed in the working of the mine.

[8] It is clear from all the decisions that the course of a vein is not determined by its direction at any single given point where the vein is a crooked one. The vein in the Granite claim crosses the east end line thereof. The appellant's extralateral rights must be determined by the course of the vein at its apex at the surface of the claim.

It was held in Flagstaff S. M. Co. v. Tarbet, 98 U. S. 463, 25 L. Ed. 253, that the most practicable rule is to regard the course of the vein as that which is indicated by surface outcrop, or surface explorations and workings. It is on this line that claims will naturally be laid, whatever be the character of the surface, whether level or inclined.

Mr. Lindley, in commenting upon that case, in volume 1, § 318, Lindley on Mines, says:

"In addition to this, the lower levels of a mine frequently show a different direction from that which guided the miner in making his location, and are at variance with conditions shown in opening nearest to the surface."

[8] It appears from the evidence that the vein at its westerly end, where it terminates against the monzonite, is nearly vertical, and that it extends downward in its course to the east and dips to the southwest, and on the lower levels it passes out to the southeast under the south side line of the Granite claim. On the surface of the location, the vein crosses the mountain within the surface boundaries of the Granite location, and the east end line of said location crosses the vein. If the mountain were cut down so as to make a horizontal plane struck at about elevation 4,375 feet, which plane would strike the most westerly outcroppings of the vein, the easterly end of the vein, so far as exposed on that horizontal, would pass out on the south side of the Granite claim, instead of the east end line of the claim.

It was said by Judge Beatty in Carson City G. & S. M. Co. v. North Star Min. Co. (C. C.) 73 Fed. 597:

"As ledges may, in their depths, change their course, and as the surface course or the course of the apex is to govern the miner's rights, the workings nearest the surface are better guides to the course of the apex than those far below."

Mr. Lindley, in commenting upon the case in section 318, Lindley on Mines, says:

"The true method of determination is found in the rule laid down by the Supreme Court of the United States in the Flagstaff Case, and followed by Judge Beatty in the North Star case, that the workings nearest the surface are better guides to the course of the apex than those far below."

In Penn. Con. Min. Co. v. Grass Valley Exploration Co. (C. C.) 117 Fed. 509, the court said:

"It is contended that the strike of the vein at this point is such that it cannot be the same vein as the one found at or near the surface. This fact would be of some importance if the vein was an ideal one, maintaining a uniform strike and dip throughout its entire course. But it is not an ideal vein, and there are very few such to be found."

The evidence shows that the vein of the Granite claim is not an ideal one.

In Last Chance Mining Co. v. Bunker Hill & Sullivan M. & C. Co., 131 Fed. 579, 66 C. C. A. 299, it is held that, where the end lines of a lode claim cross the surface outcroppings of a vein, they determine the extralateral right of the claim, without regard to the angle at which they cross the general course of the vein, its course for that purpose being fixed by the course of the apex on the surface of the claim; and it is said:

"The extralateral right to a vein or lode outcropping at the surface, where it exists, is fixed by the course of the vein or lode at the surface, and not by its course on a level."

[9] The Supreme Court of the United States, in the Stewart-Ontario Mining Case, 237 U. S. 350, 35 Sup. Ct. 610, 59 L. Ed. 989, said:

"It is rudimentary that extralateral rights to a vein depend upon the position of its top or apex."

See, also, 2 Lindley on Mines, § 364.

[10] Geologists, who testified for the appellant, testified very clearly as to the course or strike of the Granite vein on every level commencing with the apex of the vein, extending down to the 1,200-foot level; and, as we understand their testimony, it shows that the general course or strike of said vein crosses the plane of its end line at an angle greater than 45 degrees, and that appellant is not pursuing the vein in the direction of its strike. We think that the plats of the various levels and the model of the workings of said mine, which were introduced in evidence, support that proposition.

One of said experts testified as follows, referring to the Granite claim:

"I found ore bodies in place in that lode claim. I found a vein on the 700-foot level, and I also found a vein on the surface. I think there is complete continuity from the apex on the surface through the mine workings gener-

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ally. The ore has been stoped out down to the 700-foot level. The same ore body is one and the same, identical."

Referring to the 200-foot level, he said:

"All the fissures that form the vein have come together on this level and seem to be part and parcel of the same vein system."

Referring to the 400 and 450 foot levels and the vein therein, he testified:

"This is the same vein we have traced from the surface downward, and the various spurs are the same spurs that we have described, and the connection and the junctions between the different veins are on this level just as they have been described previously."

And as to the location of said claim he testified:

"The Granite lode claim was a very well located claim with reference to the apex of the vein. The claim is located lengthwise of the formation, as shown on the ground."

As to the proper method to ascertain the course of a vein on a strike, he testified:

"To ascertain the course of a vein on its strike, you take the mathematical mean of all the different short courses which go to make up the full length of the vein, and that would be mathematically represented by a line drawn from between the extremities of the vein."

[7] Counsel for respondent lays special stress upon a sentence contained in the Ontario Case to the effect that you cannot pursue a vein in the direction of its strike at an angle of less than 45 degrees to its course. As we view it, that statement in that opinion was mere dictum, and we concur in what is said in 1 Lindley on Mines (3d Ed.) p. 730, at section 319, as follows:

"We know of no legal principle to support this latter deduction, that an extralateral right cannot be exercised where the angle the extralateral planes form with the line of strike of the vein is less than 45 degrees. The adoption of an arbitrary angle beyond which such rights may not be exercised is hardly within the province of the courts. In a subsequent section we have pointed out that the locator may place his end lines at an angle so long as they cross the apex of the vein."

Respondent tried this case upon the theory that the vein or lode in question was composed of lenses or separate ore bodies; but the evidence is very conclusive that the Granite lode involved was one vein or lode, and was not composed of separate ore bodies without any connection whatever between them.

Mr. Searls, the expert geologist for the plaintiff, admitted on cross-examination that he believed that all of the veins, spurs, and fissuring system of the Granite claim were formed contemporaneously and constitute a "one fissuring system."

Expert geologists for the plaintiff endeavored to introduce by their testimony a new theory to the effect that the ore bodies to be found in the mines in the Cœur d'Alene region are not entitled to be dignified by the name of veins, but that they should be known as "lenticular ore bodies" and "tabular ore shoots," and to thereby show that no extralateral rights would attach to said ore bodies under the provisions of section 2322, U. S. Rev. Stats. The great weight of testimony in this case is against that theory.

One of the experts for defendant testified that the ore of the Success mine contained such minerals as are characteristic of contact metamorphic deposition, and said:

"This has nothing to do with the question whether there are veins in the mine or not. That is a matter purely of the shape of the ore bodies and the mineralization of the fissures."

And again:

"The bend in the Granite vein indicated on the various levels, as separating a segment which has an easterly and westerly course, from a segment that has a southwesterly course, is not unusual in places we have the Prichard formation—in fact, the Cœur d'Alene district, as a whole. In fact there are very few straight veins in the district, but crooked veins are the rule."

It was said by the court in Carson City G. & S. M. Co. v. North Star M. Co. (C. C.) 73 Fed. 597:

"The workings of a mine, made in mining operations, and not in support of litigation, are generally important as evidence of any facts which may be legitimately inferred from them."

In the case at bar, it is proper to consider that the proof of the actual working of the mine, the way it was worked, what was found therein, and the condition of the many open stopes and veins, since many of those stopes have been worked out and from some of them thousands of tons of ore taken, as shown by the evidence, is certainly better evidence of the course, dip, angles, spurs, and character of the vein than any expert testimony that could be given.

Mr. Elton, one of the witnesses for the appellant, was a metallurgical engineer, and in 1911 opened up and developed the Success mine. Prior to his employment the principal levels in said mine had been worked out for lead and silver and the zinc ore had been left in the mine. He testified in part as follows:

"There were various holes designated 'ore bodies' that were not then connected from one level to the other. I connected up the open places I have described to the court and found them continuous all the way. I never found an isolated ore body in any place. I either found continuous ore, or I would have something to follow. Some places would have a gouge, and other places would have a mineralized streak of vein. * * * I went from the point marked (stope) easterly. I always went in both ways, and it is open clear up above here. It extended up to the grass roots. * * * So far as I know, those spurs always united with the Granite vein. I never knew a separate ore body to show up. There was always a connection with the main vein. * * * I went through the drift, and the ore vein matter shows up the same ore on out to here. I wanted to stope through to the surface there, but they stopped me. I considered that the apex of the vein at that time and asked Mr. Samuels to let me drive it through at that time. * * *"

This witness showed that he was familiar with every part of the workings of said mine, and that he never discovered any separate veins or two-segments or anything that would justify the theory that said ore bodies in

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said mine were lenticular or tabular ore shoots without any vein whatever. His testimony shows that all ore bodies found within the mine were connected at some place and united with the main Granite vein and were a part of said vein.

Other witnesses testified, who had worked in the mine, to the taking out of commercial ore at various places in the apex tunnel and in following the vein from the portal of the tunnel to its face at the vertical plane of the east end line.

Sacks of commercial ore were introduced as exhibits. Theories sometimes must give way to actual facts. Petajaniemi v. Washington Water Power Co., 22 Idaho, 20, 124 Pac. 783. The positive testimony of miners who mined the ore and developed the mine and the engineers, and others who made actual surveys of the mine, must be taken for more than the speculative theories of the experts of the geology and formation of ore bodies and the mineralization of veins. Physical facts should be given greater weight than mere expert opinions and speculative theories.

[11] The court erred in not making a direct and positive finding as to whether the apex of the Granite vein is within the exterior boundaries of the claim. This was the main issue tendered by the cross-complaint and answer thereto, and under the provisions of section 2322, Rev. Stats. of the U. S., the court should have made a finding thereon. The findings of the court, however, clearly infer that the apex of said vein is within the boundaries of the Granite claim.

[12] It is not necessary for us to especially review all of the errors assigned. But we conclude that under the evidence said Granite vein has its apex within the boundaries of the Granite claim, and that such vein crosses the east end line of the claim, and its westerly end terminates against granite or monzonite, and at that point the vein is nearly vertical, and that it extends down into the earth at a slight dip to the southwest. Simply because the vein is cut off at that point by granite or monzonite is no reason why it may not be followed on its dip downward within the vertical planes between the east end line and the point where the vein ends against the granite.

Under the provisions of section 2322, U. S. Rev. Stats., the appellants are given the right to pursue the veins, lodes, and ledges throughout their entire depth, the top or the apex of which lies inside of the surface lines of said claim extended downward, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of the surface location. Appellant has pursued the vein within the vertical planes of the end lines and has not passed beyond them, and the evidence clearly shows the existence of a vein or lode in the Granite claim and establishes its identity and continuity from the surface downward to the 1,200-foot level.

The case will be remanded to the trial court to make findings of fact and enter judgment in favor of appellant in accordance with the views expressed in this opinion, decreeing appellant's right to pursue the Granite vein downward between the vertical planes of its end lines indefinitely beneath the surface of the Cardiff claim or any other claim or claims under which the said vein may extend within the plane of such vertical lines in its downward course.

The judgment is therefore reversed, and the cause remanded. Costs in favor of the appellant.

BUDGE and MORGAN, JJ., concur.

(29 Idaho, 647)

IDAHO TRUST & SAVINGS BANK, Limited, et al. v. RIDENBAUGH et al.

(Supreme Court of Idaho. Dec. 9, 1916.)

1. JUDGMENT ⊂=585(5) — JUDGMENT FOR COSTS—CONCLUSIVENESS.

Where the right to costs has become vested in the parties entitled thereto by reason of the performance and completion of services rendered under a valid order of the trial court pursuant to the provisions of section 37, Sess. Laws 1903 (p. 249), and such right had accrued prior to the enactment by the Legislature of the act of March 9, 1905 (Laws 1905, p. 357), amendatory of the act of 1903, and where it further appears that the trial court prorated said costs under the provisions of section 37, Sess. Laws 1903 (p. 249), and judgment for costs was thereupon entered, and upon appeal to this court from such judgment the same was affirmed, the judgment will not be disturbed by this court upon an action subsequently brought because of the amendment of the law.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062–1064, 1067, 1073; Dec. Dig. ⊂=585(5).]

2. JUDGMENT ⊂=911—ACTION UPON — PERSONS ENTITLED TO SUE.

It being conclusively established upon the trial that the plaintiffs below (respondents here) were the sole owners of all the outstanding, unpaid certificates of indebtedness issued by the state engineer in pursuance of a valid order of the trial court, made under the provisions of section 37, Sess. Laws 1903 (p. 249), said certificates of indebtedness so issued representing the judgment entered for costs, the holders of such certificates are the legal owners of said judgment and are entitled to sue thereon in their own name.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1738, 1739; Dec. Dig. ⊂=911.]

3. JUDGMENT ⊂=911 — ACTIONS UPON — PAYMENT.

Held, where parties who are beneficially interested in a judgment for costs are paid in full during the pendency of an action upon a judgment, they are no longer proper or necessary parties to such action, and the right to maintain said action would be limited to such parties as were the beneficial owners of said judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1738, 1739; Dec. Dig. ⊂=911.]

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4. APPEAL AND ERROR ⟸1099(1)—JUDGMENT —CONCLUSIVENESS.

Where the priorities of the several litigants to the right to the use of the waters of a stream, and the costs apportioned to such litigants, were definitely determined by the trial court, and the judgment of the trial court was affirmed by this court upon appeal, the issues thus determined are final and binding upon this court, and the judgment of the trial court will not thereafter be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370, 4374; Dec. Dig. ⟸ 1099(1).]

Appeal from District Court, Ada County; Charles P. McCarthy, Judge.

Action by the Idaho Trust & Savings Bank, Limited, and others, against W. H. Ridenbaugh and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Wood, Driscoll & Wood, of Boise, for appellants. Cavanah & Blake and N. Eugene Brasie, all of Boise, for respondents.

BUDGE, J. On January 18, 1906, a judgment was rendered by the district court of the Third judicial district (now the Seventh judicial district) in and for Canyon county, in the case of Farmers' Co-operative Ditch Company, Plaintiff, v. Riverside Irrigation District, Limited, W. H. Ridenbaugh, et al., Defendants, by which judgment there was assessed against defendants W. H. Ridenbaugh and A. Rossi the sum of $962.50, as the pro rata share to be borne by them of the total expense incurred by the state engineer of Idaho in making surveys under authority of the act of the Legislature of March 11, 1903 (1903 Sess. Laws, pp. 223–252), in connection with said action, for use in determining the priorities of the users of water on the Boise river and for the purpose of fixing the duty of water.

The state engineer in the course of making these surveys, and prior to the rendition of the judgment above mentioned, from time to time issued some 73 so-called certificates of indebtedness to persons furnishing services or supplies in connection with the surveys, and at the time of the commencement of the trial of this cause in the lower court plaintiff Idaho Trust & Savings Bank was the owner and in rightful possession of some 59 such certificates which had been assigned to it by the original holders thereof; plaintiff Carl Maughmer was the owner and in rightful possession of 3 certificates, which had been issued to him; and the remaining 11 certificates were held by other parties.

[1] The judgment of January 18, 1906, was appealed from by the Nampa & Meridian Irrigation District, and affirmed in the case of Farmers' Co-operative Ditch Co. v. Nampa & Meridian Irrigation District et al., 14 Idaho, 450, 94 Pac. 761. Thereafter certain other defendants moved for a new trial, and their motion was denied, and they appealed, and were granted a rehearing by this court for the "sole and only purpose of determining the duty of water on the two classes of land involved, * * * namely, bench and bottom lands." Farmers' Co-operative Ditch Co. v. Riverside Irrigation District et al., 16 Idaho, 525, 102 Pac. 481.

On January 17, 1912, the Idaho Trust & Savings Bank, being the owner of 59 certificates assigned to it as aforesaid, brought suit against the defendant, who is the appellant here, to recover the amount of the judgment for costs entered against him for $962.50, with interest thereon. During the course of the trial of the action, 9 of the 11 unpaid certificates held by other parties than the respondent were paid by the state engineer to the respective holders thereof. The amount of the 2 remaining certificates, held by other parties, together with interest thereon, was paid by the state engineer into court for the holders thereof, and 23 of the 59 certificates held by the Idaho Trust & Savings Bank were paid by the state engineer to said bank, so that at the termination of the action in the trial court 35 certificates were held by the Idaho Trust & Savings Bank and 3 certificates were held by Carl Maughmer, who were subsequently joined as plaintiff, and were the only remaining unpaid certificates representing indebtedness incurred by the state engineer covered by the judgment of January 18, 1906. The total amount of these certificates was $2,207, and interest thereon, while the judgment against the defendant was for $962.50 and interest.

The trial court found, in its findings of fact, among other things, that the parties to this action are the only parties in interest; that they were properly joined; that the pending hearing for the determination of the duty of water upon bench and bottom lands does not affect this action in any manner; that the parties plaintiff are the legal and equitable owners of the judgment of January 18, 1906, and entitled to sue thereon; that the cause is not barred by the statute of limitations; and that the defendant Ridenbaugh is liable for the amount of the judgment of January 18, 1906, with interest thereon at 7 per cent. per annum from the date thereof. Accordingly, on January 18, 1915, judgment was entered in favor of plaintiff and against defendant for $962.50, with interest at the rate of 7 per cent. per annum from January 18, 1906, amounting in all to the sum of $1,568.88, together with interest on said sum from January 18, 1915, until paid, and plaintiff's costs and disbursements amounting to $16.50. This is an appeal from the judgment and order overruling a motion for a new trial.

For a reversal of this judgment, appellant assigns and relies upon 30 assignments or error. These assignments will be considered and discussed so far as is deemed necessary

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in connection with the 4 following contentions, which they are designed to support:

(1) That the judgment sued upon is absolutely and ab initio void as it runs in favor of no one, at best to no one who is a party to the action in which it was rendered.

(2) That, granting the judgment is valid, the plaintiffs were neither parties to the judgment nor showed in themselves any interest therein by assignment or otherwise.

(3) That there is a defect of parties, in that all persons holding state engineer's certificates or otherwise having an interest in the judgment sued upon are not joined as parties in this action, or, if joined, have never been served with process.

(4) That no action can be maintained upon the judgment sued upon, for the reason that it has been set aside by an order of this court sustaining the motion for a new trial in the action wherein it was entered.

The judgment of January 18, 1906, above mentioned, was for money due for services rendered by and under the directions of the state engineer, in accordance with the provisions of the act of the Legislature of March 11, 1903 (1903 Sess. Laws, pp. 249, 250, § 37).

The second paragraph of section 37, supra, provides:

"Whenever the state engineer shall make such examination at the request of the court or a judge thereof, the actual cost of making such examination by the state engineer or his assistant, and of preparing such maps and statement as shown by sworn statement of such costs prepared by such state engineer, shall be paid by the persons interested in such suit for the determination of such priorities, the amount of such costs to be prorated by such court to the persons whose rights have been adjudicated by such suit. * * *"

An examination of the record discloses the fact that the state engineer, acting under the order of the court made in pursuance to the above section of the Session Laws of 1903 had actually made an examination of the Boise river and the works diverting water therefrom. Said examination included the measurement of the discharge of said stream and the carrying capacity of the various ditches and canals diverting water therefrom, an examination of the irrigated lands and an approximate measurement of the lands irrigated, or susceptible of irrigation, from the various ditches and canals, and prepared maps and plats, showing such stream, canals, and ditches, and the lands thereunder, their capacity and the amount of the land irrigated from each of such canals, ditches, and other works, as required by the order of the trial court, and had furnished the necessary information for the purpose of assisting the trial court in reaching a determination of the priorities of the various parties litigant to the right to the use of the waters of the Boise river, which costs and expenses were all incurred and the right to the costs and expenses had become vested prior to the enactment by the Legislature of the act of March 9, 1905. It further appears that the last certificate of indebtedness issued by the state engineer in payment for labor performed was issued by him on February 15, 1904, more than a year prior to the enactment of the Session Laws of 1905, amendatory of section 37 of the Session Laws of 1903. We think it may therefore be assumed that the trial court in prorating the costs incurred to the various litigants and in rendering its judgment therefor was governed by the act of 1903, under the provisions of which act the costs had been incurred and the right to the costs vested, and not under the provisions of the act of 1905.

The power of the court to make the order directing the state engineer to perform the services heretofore mentioned, and to incur the indebtedness under the provisions of section 37, pp. 249, 250, Session Laws 1903, was upheld by this court in the case of Boise Irrigation Co. v. Stewart, 10 Idaho, 38, 77 Pac. 25, 321, and the validity of the judgment for costs sued upon in this action was upheld in the case of Farmers' Co-operative Ditch Co. v. Nampa & Meridian Irrigation District et al., 14 Idaho, 450, at page 460, 94 Pac. 761, and again affirmed in the case of Farmers' Co-operative Ditch Co. v. Riverside Irrigation Dist. et al., 16 Idaho, 525, 102 Pac. 481. In the former case, in addition to other contentions made by counsel for appellant in their brief, it was strenuously insisted that the judgment for costs had not been entered in favor of any person, and therefore the judgment was void ab initio. The same contention is made in this case. The question having once been decided is no longer open to discussion. As we read the opinion, which we think governs, and not the order of this court, the method used by the trial court in taxing costs was not the only question before this court; but this court also affirmed the action of the trial court wherein it assessed in dollars and cents the amount of costs to be charged against each and every party to the litigation. Any party dissatisfied with any part of the costs and expenses assessed against him by the trial court had a right to appear and move against such assessment, and upon a proper showing procure a retaxing of such costs. This was not done by the appellant, and since this court has said in the case of Farmers' Co-operative Ditch Co. v. Nampa & Meridian Irrigation Dist. et al., supra, that "the expenses of the survey was a proper charge against all the litigants, and it was entirely proper and clearly within the jurisdiction and authority of the trial court to apportion these costs as he did, and enter judgment against the several parties to the action as was done, * * *" and again in the case of Farmers' Co-operative Ditch Co. v. Riverside Irrigation Dist., supra, where the same costs that make up this judgment were involved, this court said, "We conclude that the court

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properly taxed the costs of making this survey and the maps and plats to the several litigants in the case." These decisions of this court conclusively settle the validity of the judgment sued upon in this action.

The second contention made by counsel, namely, that the plaintiffs were not the owners of the judgment or any interest therein by assignment or otherwise, is without merit under the facts of this case; it being conclusively established that the plaintiffs are the owners of all of the now outstanding certificates of indebtedness issued by the state engineer upon which this judgment for costs is founded, and that all other holders of certificates issued by the state engineer have been paid or the money deposited in court for their use and benefit, all of which being true, the respondents are the real and beneficial owners of the judgment upon which this action is brought and were proper parties plaintiffs in whose names the action must be prosecuted. Tally v. Reynolds, 1 Ark. 99, 31 Am. Dec. 737. It is a firmly established rule that such owners are entitled to sue in their own names (Sammis v. Wightman, 31 Fla. 45, 12 South. 536), that the assignee of a right of action must prosecute the suit in his own name, and that such assignee alone has the right to control the judgment and sue upon it (Bond v. Carter [Tex. Civ. App.] 73 S. W. 45).

[2] In this case the statutes provided that the costs incurred by the state engineer should be assessed as costs against the various parties to the litigation. The costs were incurred under a valid order of the court (Boise Irrigation Co. v. Stewart, supra), and after the completion of the work the right to the costs became vested in the state engineer subject to distribution to the parties who had performed work and labor under his directions. He became the nominal owner of the judgment with authority to make valid assignments of the same or any part thereof, prior to the actual entry of the judgment, and, as appears from the record, all parties beneficially interested in the judgment have been paid in full, except respondents, who are the only persons now beneficially interested in the judgment.

[3] Referring now to the third assignment of error, namely, that there is a defect of parties, in that all persons holding state engineer's certificates were not joined as parties to the action, or, if joined, were not served with process at the time of the filing of the amended complaint, it appears that all of the parties who were joined, either as parties plaintiffs or defendants, subsequent to the filing of the original complaint as heretofore stated, were paid in full the amount of their certificates, together with interest, either personally or the amounts due them upon their certificates were deposited in court for their use and benefit.

[4] We come now to the last assignment of error, namely, that no action can be maintained upon the judgment for the reason that the same was set aside by an order of this court sustaining a motion for a new trial, in the case of Farmers' Co-operative Ditch Co. v. Riverside Irrigation Dist., supra. It is insisted by counsel for appellant that when this court in the latter case affirmed the priorities to the right to the use of the waters of the Boise river in favor of the several claimants as found and determined by the trial court, and granted a new trial for the purpose of determining the question of the duty of water on bench and bottom lands, it set aside and vacated that portion of the judgment of the trial court assessing costs against the various litigants, and that since the duty of water for bench and bottom lands has not yet been fixed or determined, and that a determination of the duty of water for bench and bottom lands might lessen or increase the quantity of water as prorated to the several claimants on the Boise river, it would necessarily follow that it would change the amount of costs to be apportioned to each of the parties litigant. As stated above, the question of the apportionment of costs is no longer open to discussion, the same having been definitely determined by the trial court and approved in unequivocal terms by this court in its decisions in 14 Idaho, 450, and 16 Idaho, 525, supra. While a reduction of the duty of water would not, it is believed, change to any appreciable extent the relative amounts of water to be received by the various litigants in this action in which the judgment sued upon was rendered, it is to the interest of justice and the prevention of a multiplicity of actions that the apportionment of the costs, having been determined by the trial court and twice passed upon and approved by this court, should not be disturbed.

It may also be pointed out that while this court, in 16 Idaho, 525, at page 538, 102 Pac. 481, granted a new trial for the sole and only purpose of determining the duty of water on the two classes of lands involved in the action, namely, bench and bottom lands, it affirmed the respective rights and priorities of the several claimants and appropriators whose rights had been litigated, and concluded that the lower court had properly taxed the costs of making the survey and the maps and plats to the several litigants in the case. While this court did in terms grant a new trial for a specific purpose, yet as a practical matter it remanded the case to the lower court for modification, if the evidence to be thereafter submitted touching the question of the duty of water for the proper irrigation of the bench and bottom lands should warrant such modification.

With reference to the item of costs, $468.88, which it is claimed was a part of the costs included in the judgment but not rep-

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resented by the state engineer's certificates, and was for expenses incurred in preparing findings of fact, conclusions of law, and the decree, and in filing and recording the same in the counties of Ada and Canyon, this amount should be withheld out of the first moneys paid to the clerk of the court in satisfaction of the judgment, and applied in payment of said costs. This item of costs was disposed of by this court in the case of Farmers' Co-operative Ditch Co. v. Nampa & Meridian Irrigation Dist., supra, and is binding and conclusive upon this court. No objection having been urged against the amount of costs incurred for the purposes above mentioned, or the manner of the payment of the same, when this case was before this court in the case of Farmers' Co-operative Ditch Co. v. Nampa & Meridian Irrigation Dist., supra, it cannot be urged at this time.

From what has been said it follows that the judgment of the trial court, and the order overruling a motion for a new trial, should be affirmed, and it is so ordered. Costs are awarded in favor of respondents.

SULLIVAN, C. J., and MORGAN, J., concur.

(29 Idaho, 658)

IDAHO TRUST & SAVINGS BANK, Limited, et al. v. NAMPA & MERIDIAN IRR. DIST. et al.

(Supreme Court of Idaho. Dec. 9, 1916.)

1. LIMITATION OF ACTIONS ⇐118(2)—TOLLING OF STATUTE—FILING OF COMPLAINT.
The running of limitations against an action is tolled upon the filing of the original complaint.
[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 528; Dec. Dig. ⇐118(2).]

2. LIMITATION OF ACTIONS ⇐125—RUNNING OF STATUTE—INSTITUTION OF SUIT.
Where before the running of limitations the original complaint was filed, new parties plaintiff may after running of the statute be substituted; the cause of action or claim not being substantially changed.
[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 542; Dec. Dig. ⇐125.]

3. INTEREST ⇐22(9) — ALLOWANCE — JUDGMENT FOR COSTS.
Where a judgment for costs was twice upheld, it constitutes a liquidated claim which bears interest as allowed from the date of entry.
[Ed. Note.—For other cases, see Interest, Cent. Dig. § 53; Dec. Dig. ⇐22(9).]

Appeal from District Court, Ada County; Charles P. McCarthy, Judge.

Action by the Idaho Trust & Savings Bank, Limited, and others, against the Nampa & Meridian Irrigation District and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Hugh E. McElroy, of Boise, for appellants. Cavanah & Blake and N. Eugene Brasie, all of Boise, for respondents.

BUDGE, J. This is an appeal from a personal judgment entered in favor of the respondents for the sum of $1,318.97, and is a companion case of Idaho Trust & Savings Bank, Limited, v. W. H. Ridenbaugh et al., 29 Idaho, ——, 161 Pac. 868, and was, by order of the trial court and by agreement of counsel, consolidated with and tried at the same time and upon the same evidence as that case. We have carefully examined the additional assignments of error relied upon by appellants and do not deem it necessary to discuss them at length.

[1] We may say in passing, with reference to the bar of the statute of limitations, urged by appellants against the right of respondents to sue upon the judgment, that the contention made by counsel for appellants, namely, since it does not appear that the original complaint was filed within six years from the entry of said pretended judgment that as a question of law said statute of limitations ran until the filing of the second amended complaint, is untenable. The judgment upon which this suit was brought was entered on January 18, 1906, and the original complaint was filed on January 17, 1912, which is within six years from the entry of said judgment, and the statute of limitations would cease to run upon the filing of the original complaint.

[2] In answer to appellants' next contention, which is extremely technical, that even though it be conceded that the right to recover by the Idaho Trust & Savings Bank is not barred by the provisions of section 4051, Rev. Codes, the cause of action set out in the amended complaint is barred by said section of the statute as to additional parties plaintiffs. The rule, however, which appears to be supported by the weight of authority, is set forth in the case of Hucklebridge et al. v. Atchison, Topeka & Santa Fé Ry. Co., 66 Kan. 443, 71 Pac. 814, wherein the court held that the substitution of a party plaintiff in a case wherein the cause of action or claim was not substantially changed, the cause of action was not barred by reason of the fact that the new party or parties were not brought in until the statute of limitations otherwise would have run, and that bringing in new parties would relate back to the date of the commencement of the original action.

This rule is supported by the following authorities: Green v. Clifford, 94 Cal. 49, 29 Pac. 331; Kain v. Arizona Copper Co., Ltd., 14 Ariz. 566, 133 Pac. 412; Vunk v. Raritan River Railroad Co., 56 N. J. Law, 395, 28 Atl. 593; Bradford v. Andrews et al., 20 Ohio St. 208, 5 Am. Rep. 645; Suber et al. v. Chandler et al., 36 S. C. 344, 15 S. E. 426.

In the case of Hougland v. Avery Coal & Mining Co., 246 Ill. 609, 93 N. E. 40, the Supreme Court of Illinois held that the addition of a necessary party plaintiff would not be the commencement of a new suit or state-

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ment of a new cause of action. El Paso & S. W. R. Co. v. Harris & Liebman (Tex. Civ. App.) 110 S. W. 145; McArdle v. Pittsburg Rys. Co., 41 Pa. Super. Ct. 162.

[3] There is no merit in appellants' contention that the judgment for costs sued upon does not constitute a liquidated claim in favor of respondents, and therefore they would not be entitled to interest. The judgment for costs upon which respondents' action is based has been twice passed upon by this court and held to be valid in both cases, and it necessarily follows that it would bear interest as provided by law from the date of its entry.

For the reasons herein stated, and upon the authority of the case of Idaho Trust & Savings Bank, Limited, v. W. H. Ridenbaugh et al., supra, the judgment of the trial court is sustained. Costs are awarded to respondents.

SULLIVAN, C. J., and MORGAN, J., concur.

(18 Ariz. 356)

STATE v. BROSHEARS. (Cr. No. 409.)

(Supreme Court of Arizona. Dec. 19, 1916.)

1. PERJURY ⟸19(1)—INFORMATION—SUFFICIENCY.

Under Pen. Code 1913, § 950, an information for perjury is sufficient if it sets forth the substance of the controversy or matter in respect to which the offense was committed, the court in which the oath was taken, and that the court or the person before whom the oath was taken had authority to administer it, with the proper allegations of the falsity of the matter on which perjury is assigned.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 65, 71; Dec. Dig. ⟸19(1).]

2. PERJURY ⟸19(2)—INFORMATION—SUFFICIENCY.

An indictment for perjury alleged to have been committed in a civil action in justice court *held* insufficient under Pen. Code 1913, §§ 936, 950, in that it failed to set forth the particular circumstances of the offense charged which were necessary to constitute the complete offense.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 66, 71; Dec. Dig. ⟸19(2).]

Appeal from Superior Court, Graham County; A. G. McAlister, Judge.

Teller Broshears was indicted for perjury, and demurred to the indictment. From an order sustaining a demurrer, the State appeals. Affirmed.

Wiley E. Jones, Atty. Gen., G. W. Harben, Asst. Atty. Gen., and John McGowan, Co. Atty., of Safford, for the State.

CUNNINGHAM, J. On February 2, 1916, the county attorney of Graham county filed in the superior court of said county an information purporting to charge the respondent with perjury under paragraph 111, Penal Code of Arizona 1913. The defendant demurred to the information upon the grounds "that said information does not substantially conform to the requirements of paragraphs 934, 935, and 936 of the Penal Code of Arizona," and "that the facts stated in said information do not constitute a public offense known to the laws. * * *"

Upon a trial of said demurrer the same was allowed and sustained, and the court ordered the cause resubmitted and another information filed by the county attorney. From which order the state appeals.

The information involved is as follows, omitting the formal portions:

"The said Teller Broshears on or about the 18th day of January, 1916, and before the filing of this information, at and in the county of Graham, state of Arizona, willfully, knowingly, unlawfully, maliciously, and feloniously did take an oath that he would testify truly before a competent tribunal, to wit, the justice court and justice of precinct No. 1 of said county, in a case in which such an oath might by law be administered by said court and justice, and willfully and contrary to such oath stated as true a material matter which he knew to be false. Said perjury was committed more particularly as follows: In a civil action then on trial in said justice court, wherein B. F. Foster was plaintiff and L. J. Broshears was defendant, for $125 damages as the value of a horse of plaintiff claimed to have been killed by said Teller Broshears as the agent of said L. J. Broshears on the 23d day of August, 1913, it became and was a material issue if said killing was on said date; for, if it was on an earlier date, said $125 was barred by statute of limitation, and evidence had been adduced by said B. F. Foster that said killing was on said August 23d, which evidence was and is true; whereupon said Teller Broshears appeared therein as a witness for said L. J. Broshears, and took his oath that he would testify truly before said justice, and then and there willfully and contrary to such oath testified that said killing was in the month of April, A. D. 1913. In thus testifying that said killing was in the month of April, 1913, and not in August, 1913, said Teller Broshears stated as true that which was then and there false, and which he then and there knew was false. * * *"

The statute defining perjury is as follows:

"Every person who, having taken an oath that he will testify, declare, depose or certify truly before any competent tribunal, officer or person, in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury." Paragraph 111, Penal Code of Arizona 1913.

[1] In an information for perjury:

"It is sufficient to set forth the substance of the controversy or matter in respect to which the offense was committed and in what court and before whom the oath alleged to be false was taken, and that the court, or the person before whom it was taken, had authority to administer it, with the proper allegations of the falsity of the matter on which the perjury is assigned." Paragraph 950, Penal Code of Arizona 1913.

In setting forth the "substance of the controversy or matter in respect to which the offense was committed," the information must show that the statements alleged to be false were material to the controversy. If the controversy is a judicial proceeding, the

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materiality of the alleged false statements may be shown in criminal pleadings:

"First, by setting forth the nature of the issue, and the evidence given thereon, so that, as a matter of law, it may be said the testimony upon which the perjury is assigned is material to the issue; second, by showing an action at issue in a court of competent jurisdiction, the testimony given, its willful and felonious falsity, coupled with the averment that it was material to the issue." People v. Ah Bean, 77 Cal. 12, 18 Pac. 815.

In that case the court says:

"The difference in the two methods consists in showing the materiality of the testimony in the one case and merely averring it in the other. In People v. Kelly, 59 Cal. 372, it was held the materiality of the evidence need not be expressly averred, where it appears from facts stated; and in People v. Brilliant, 58 Cal. 214, it was held that an express averment of materiality is sufficient, unless the contrary appears from other averments."

The information may fairly be regarded as setting forth an action at issue, viz. a civil action between B. F. Foster as plaintiff against L. J. Broshears as defendant, wherein the plaintiff seeks to recover from the defendant $125 as damages for the wrongful killing of plaintiff's horse by the defendant's agent; the nature of the issue, viz. that the defendant resists such recovery upon the grounds that the cause of action is barred by the statute of limitations; that the action was pending in a court of competent jurisdiction, viz. the justice court of precinct No. 1 of Graham county; the evidence given, viz. the evidence introduced by the plaintiff that the horse was killed on August 23, 1913, and the evidence given by this accused, as a witness for the defendant, viz. "that said killing was in the month of April, A. D. 1913," followed by the averment, "In thus testifying that said killing was in the month of April, 1913, and not in August, 1913, said Teller Broshears stated as true that which was then and there false, and which he then and there knew was false," thereby fairly showing the willful and intentional falsity of the statements made. If the false statements fixing the date upon which the horse was killed as in the month of April, 1913, were material to the issue raised by the defense of the statute of limitations, such evidence was so material because the action was commenced at some date more than two years after the month of April, 1913, and the period in which the plaintiff is allowed to commence his action to recover in such case had expired before he commenced the action. The date upon which the plaintiff, Foster, commenced his action is not set forth in the information, and it follows that the court cannot say, as a matter of law, that the testimony upon which the perjury is assigned is material to the issue, within the above-mentioned first method of setting forth the materiality of the alleged false statements in criminal pleadings. Likewise the second method of setting forth the materiality of the alleged false statements is not followed, in the particular of expressly averring that such statements were material to the issue. It follows that the information fails to state facts sufficient to constitute a public offense, in that it fails to show by sufficient averments of specific facts or by express allegations that the statements alleged to be false upon which perjury is assigned were material to the issue on trial.

The information is faulty in a further particular in failing to show by specific facts or by general averments the person before whom the oath alleged to be false was taken. The facts show that the oath was taken to the effect that he would testify truly before the justice court and justice of precinct No. 1 of Graham county, and that the accused appeared in such court and took the oath "that he would testify truly before said justice," but the information does not otherwise refer to the person before whom the oath was taken nor to the authority of such person to administer such an oath. The justice of the peace had authority to administer such oath, and could administer such oath in his court while in session as the court, or while not in session, in the capacity of justice of the peace; and the oath may have been administered by some other officer with equal effect, at a time before or during the progress of the trial. The information does not directly and certainly show the materiality of the statements alleged to be false, nor the person before whom the oath alleged to be false was taken, as required by paragraph 950, Penal Code of Arizona 1913.

The order allowing and sustaining the demurrer was no error, and the same ought to be affirmed.

FRANKLIN, J. [2] I concur in affirmance because the information does not comply with paragraph 936 of the Penal Code, and is therefore obnoxious to the special demurrer interposed. The particular circumstances of the offense charged to the extent required by paragraph 950 of the Penal Code are necessary to constitute the complete offense of perjury, and such particulars are not directly and certainly alleged.

ROSS, C. J. I concur in the observations of FRANKLIN, J.

(18 Ariz. 361)

LOPEZ v. STATE. (Cr. No. 392.)

(Supreme Court of Arizona. Dec. 19, 1916.)

1. CRIMINAL LAW ⇐1186(4)—APPEAL AND ERROR—REVIEW—HARMLESS ERROR.

In an information for murder, the commencement recited that "F. L. accused," etc., omitting the word "is" before the word "accused." *Held*, the omission was at most a technical error, for which reversal is prohibited by Pen. Code 1913, § 1170, enacted pursuant

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to Const. art. 6, § 22; it appearing that substantial justice had been done by the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215, 3219; Dec. Dig. ⊂⊃ 1186(4).]

2. INDICTMENT AND INFORMATION ⊂⊃79—SUFFICIENCY.

An information for murder, the commencement of which recited "F. L. accused," etc., omitting the verb "is" before the word "accused," *held* sufficient, under Pen. Code 1913, § 943; the defect, if any, being one that could be cured by amendment, if timely objected to, and which is otherwise deemed cured by reference to the record.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 209–214; Dec. Dig. ⊂⊃79.]

3. INDICTMENT AND INFORMATION ⊂⊃30—SUFFICIENCY.

While a sufficient accusation of the commission of a crime is essential to jurisdiction, and to sustain a conviction, yet the mere recital in the commencement of an information that the defendant "is accused" is not essential, if the information properly charges the offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 120; Dec. Dig. ⊂⊃30.]

Appeal from Superior Court, Cochise County; A. C. Lockwood, Judge.

Felix Lopez was convicted of murder in the first degree, and he appeals. Affirmed.

The appellant, Felix Lopez, was tried and convicted of the willful, deliberate, and premeditated murder of Rosendo Lugo, committed by stabbing with a knife. The jury fixed the punishment at imprisonment for life. On the 10th day of July, 1915, the court duly pronounced sentence and judgment in accordance with the verdict, and refused a new trial. From the judgment and order refusing a new trial, the defendant appeals.

Doan & Doan, of Douglas, for appellant. Wiley E. Jones, Atty. Gen., and Geo. W. Harben and R. Wm. Kramer, Asst. Attys. Gen., for the State.

CUNNINGHAM, J. The information upon which the appellant was tried, convicted and sentenced, is as follows:

"In the name and by the authority of the state of Arizona, Felix Lopez accused by the county attorney of Cochise county, state of Arizona, by this information, of the crime of murder committed as follows: The said Felix Lopez, on or about the 24th day of June, 1915, and before the filing of this information, at the county of Cochise, state of Arizona, did then and there willfully, unlawfully, feloniously, premeditatedly, and deliberately, with his malice aforethought, kill and murder one Rosendo Lugo, a human being, by then and there stabbing him, the said Rosendo Lugo, with a knife, contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the state of Arizona."

Upon the information is the following indorsement:

"Filed in the superior court in and for Cochise county, state of Arizona, by the county attorney thereof, as a record of this court, this 6th day of July, A. D. 1915." (Signed by the clerk.)

The defendant pleaded not guilty, and upon a trial of the issue the jury returned a verdict of guilty of murder of the first degree, and fixed the punishment at imprisonment for life. The appeal is from the order denying a motion for a new trial, and from the judgment.

The appellant now assigns as error the following:

"Assignment I. The court erred in proceeding to trial upon the information as presented in the case, as such information is fatally defective in that no accusation is presented.

"Assignment II. The court erred in overruling the motion for a new trial, since the verdict was contrary to law."

Appellant argues both of such assignments of error together, for the asserted reason:

"* * * The real point in issue is the fatal defect of the information in not directly accusing the defendant of any crime."

I understand, from further statements in the brief, that appellant means to contend that because the information fails to use the word "is," or some other variation of the verb "to be," after the name of the defendant and before the word "accused," that the information is fatally defective and accused the defendant of the commission of no crime, and because "it is senseless." The omission complained of occurs in that portion of the information which immediately precedes the statement of the facts constituting the crime —the statement which directly accuses the defendant of the commission of the criminal acts, and therefore the commission of the crime.

The commencement is made up by the pleader from the record of the cause as that record exists at the time of preparing the information. The object of the commencement is to show that the cause is prosecuted in the name and by the authority of the state, acting through its legally constituted agent, the county attorney of the proper county, and that the prosecution is carried on in a court having jurisdiction to hear and determine the matter. Paragraph 943, Penal Code 1913. The recital of facts in the commencement is largely a matter of convenience in pleading, so that the information may be looked to for a recital of the existence of facts, which otherwise would require an examination of the record to determine.

The commencement is no part of the body of the indictment or information, but the commencement of the prosecution is a substantial part of the record, because it must appear upon the face of the record, while the cause is in the court, where the information is filed, and from the record, after its removal into this court upon appeal, not only that the information is sufficient in substance to charge the commission of a public offense by the accused, but also that it was

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preferred by the legally constituted agency of the state, in the name of the state, and the proceeding was instituted in the court having jurisdiction of the cause, within the limit of time prescribed after the examining magistrate has ordered the defendant held to answer the charge.

[1] "The indictment or information is sufficient," paragraph 943, Penal Code 1913, provides, "if it can be understood therefrom: (1) That it is entitled in a court having authority to receive it. * * * (2) If * * * an information, that it was returned and presented to the court by the county attorney of the county in which the court was held. (3) That the defendant is named, or if his name cannot be discovered, * * * then described with the allegation that his name is unknown. (4) That the offense was committed at some place within the jurisdiction of the court, except * * *. (5) That the offense was committed at some time prior to the time of * * * filing the information." And the sixth and seventh requirements, which relate to the statement of the criminal acts. All of the matters declared requisite to a sufficient information can be understood from the information before us in this case.

Upon the whole case presented by the record, and now under consideration, it clearly appears that the defendant at the time of the trial was accused by the county attorney of Cochise county, state of Arizona, by the information of the crime of murder, and the failure of the information in its commencement to recite that fact in the present tense, by using the words "is accused," but instead omitting the word "is," and using the word "accused" alone, was a mere omission or clerical error in pleading, and was easily supplied or cured by the body of the information and by the record. At most the omission is a technical error in pleading, as clearly appears from the whole case, and this court is prohibited from reversing a judgment in a criminal case for technical error in pleading, when upon the whole case it appears that substantial justice has been done. Paragraph 1170, Penal Code 1913, following section 22 of article 6 of the state Constitution.

[2, 3] No rights of the defendant appear to have been denied to him because the information omitted to recite that he "is accused by the county attorney of Cochise county, state of Arizona, by this information, of the crime of murder," but recited that the defendant, naming him, "accused" by the same officer and instrument of the commission of that crime. The mere omission of the word "is" did not have the effect of depriving the superior court of Cochise county of jurisdiction to entertain the cause. The omission may have been cured by amendment, if timely objected to, and it is deemed to have been cured by reference to the record, in the absence of timely objection. The mere recital in the commencement of the information of the fact that the defendant therein named *is accused* of a certain named offense is not made essential to the jurisdiction of the court, but a sufficient accusation of the commission of an offense is essential to jurisdiction and to a conviction; but whether the defendant "is accused" of crime need not be recited as a conclusion in the caption, in order to sufficiently charge the commission of a crime. The information legally accuses the defendant named of the crime of murder of the first degree. He was tried and convicted of the crime charged.

I find no error in the record; consequently the judgment is affirmed.

ROSS, C. J., and FRANKLIN, J., concur.

(18 Ariz. 365)

VALLEY BANK OF PHŒNIX v. JOSTEN.

(No. 1505.)

(Supreme Court of Arizona. Dec. 19, 1916.)

1. VENDOR AND PURCHASER ⟸334(2)—FRAUD AND DECEIT.

One who is induced to purchase land by fraud and deceit is entitled to recover purchase price, not only from the persons to whom the money was paid, but from others who received it and into whose hands it can be traced.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 959½; Dec. Dig. ⟸ 334(2).]

2. VENDOR AND PURCHASER ⟸341(3)—FRAUD AND DECEIT.

In an action by the purchaser of land against defendant bank for the recovery of money paid for the purchase of lands on the ground of fraud and deceit, the evidence showed that the bank received no portion of the purchase price, but that the money was paid to other persons; *held*, that plaintiff could not recover against the bank, but only against those who received the money.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1012–1014; Dec. Dig. ⟸ 341(3).]

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Action by August Josten against the Valley Bank of Phœnix. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

C. F. Ainsworth, of Phœnix, for appellant. M. T. Phelps, of Phœnix (J. M. Jamison, of Phœnix, of counsel), for appellee.

CUNNINGHAM, J. The appellee commenced this action against the appellant to recover $812.96, alleged to have been obtained by defendant by false and fraudulent representations. The circumstances in which the defendant is alleged to have acquired the money are alleged to have been as follows: On the 1st day of March, 1913, the defendant as the owner of certain lands in Maricopa county, Ariz., made and entered into a contract with the plaintiff, by the terms of which

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contract the defendant agreed to sell to plaintiff a certain described tract, piece or parcel thereof, with certain water rights for the agreed sum and price of $3,600, payable, the sum of $900 thereof at the time of making the contract; the balance in installments at designated times. The negotiations leading up to the agreement were conducted in Los Angeles, Cal., between the plaintiff, in his own behalf, and by certain alleged agents, in behalf of the defendant. The agreement reached was reduced to writing and signed by the vendee, and later signed by the vendor-defendant. The plaintiff paid in cash $760 to the said agent, and made a note for $60, delivering the note to the agent. The plaintiff alleges that he was induced to enter into the said agreement and to pay said sum of money as a part of the purchase price by reason of certain representations made by the said agent regarding the quality of the land, its adaptability to agricultural crops, the quantity of available water supply, for irrigation purposes, belonging to the land, and other matters of fact, all of which were false, and known to be false when made, and made with the fraudulent intent and purpose of wrongfully depriving plaintiff of his property. That by reason of the false and fraudulent representations made by defendant, and relied upon as true by plaintiff, plaintiff was induced and did pay over to defendant the said sum of $760 in money, and delivered his note for $60. He sues to recover the money so paid, and to have the note canceled.

[1] The well-settled rule is that money obtained in such circumstances of deceit may be recovered, for the reason the law implies a promise from the person so obtaining it to return it to the lawful owner, whose title to it cannot be annulled by the fraudulent or unjust dispossession. 27 Cyc. 863, as supported by the authorities cited in note 65.

In this case the defendant admits that it signed the contract pleaded as an exhibit to the complaint, but alleges the facts to be that said contract was entered into on its part as trustee for the true owners, and denies that it ever received the money referred to in said contract, or any part thereof, or any other sum, and alleges and states that said moneys mentioned in said contract were paid to the true owners of said property, and receipted for by this defendant in the contract at the request of the true owners of said property and the said plaintiff.

The rule is recognized in Cole v. Bates, 186 Mass. 584, 72 N. E. 333, Bank v. Sloman, 121 App. Div. 874, 106 N. Y. Supp. 508, Gray v. Ellis, 164 Cal. 481, 129 Pac. 791, Victer v. Fagin (Sup.) 145 N. Y. Supp. 47, and 27 Cyc. 869, that an action lies against one into whose hands money actually belonging to plaintiff can be traced, as well as when he received the money in the first instance.

The plaintiff concedes that he delivered the money claimed to one Hall, as the agent of the Avondale Land Company, and Hall made no representations of his agency relation to the defendant bank. Plaintiff states in his evidence that he signed a note, but does not know to whom it was payable. He does not, in his testimony, claim to know whether the defendant bank ever got any part of the money paid by him for which he sues. The evidence is that in making the contract, the defendant bank acted solely in the capacity of trustee or agent for Melczer, who had obtained title to the land involved, and Hall, who was purchasing the lands of Melczer, and the company represented by Hall, known as the Avondale Land Company and the Arizona Irrigated Land Company. Hall testified that he never attempted to represent the bank, but represented the Arizona Irrigated Land Company. When a sale was made, part of the proceeds went to Melczer, and the Arizona Irrigated Land Company always kept the rest. No part of the proceeds went to the defendant bank. Plaintiff's attorney was informed by the officers of the bank of the exact relation of the bank to the other parties, at a time prior to the commencement of this action, and at a time when such attorney made demand upon the bank for payment. The officers of the bank testify that the bank never received any part of the money.

[2] Under these facts appearing in the case, about which no controversy exists, but one conclusion can be drawn, viz.: That the defendant bank is shown by all of the evidence not to have had and received any money belonging to the plaintiff as a fact. In other words, the plaintiff has by his evidence failed wholly to trace the money claimed to the possession of the defendant, but on the other hand the evidence points out conclusively that the money paid by the plaintiff to Hall, in the circumstances alleged in the complaint, never reached the possession of the defendant, but was by Hall paid, a portion to Louis Melczer, and the balance to the Arizona Irrigated Land Company. Hence, from the evidence, these parties, Melczer and the Arizona Irrigated Land Company, obtained plaintiff's money through wrongful means, and they, and not the defendant bank, are the persons liable to return it to him.

The plaintiff by his evidence wholly failed to support his cause of action. For this reason the judgment ought to be vacated and the cause remanded, with instructions to render judgment for the defendant.

ROSS, C. J., and FRANKLIN, J., concur in result.

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(18 Ariz. 369)

CARTER v. STATE. (Cr. No. 389.)

(Supreme Court of Arizona. Dec. 19, 1916.)

1. HOMICIDE ⇐157(4)—EVIDENCE—ADMISSIBILITY—PREVIOUS QUARRELS.

While, as a general rule, evidence of prior difficulties are inadmissible, yet evidence of difficulties or quarrels so closely connected with the homicide as to be fairly regarded as a contributing feature is admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 291; Dec. Dig. ⇐157(4).]

2. CRIMINAL LAW ⇐364(2)—HOMICIDE—EVIDENCE—RES GESTÆ—PREVIOUS QUARRELS.

In a prosecution for homicide, the evidence showed that defendant, a negro soldier, after escaping arrest by police officers, returned to his quarters, procured his rifle, and thereafter killed one of police officers. *Held*, that evidence of the circumstances of the first affray were admissible as part of the res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 808, 813; Dec. Dig. ⇐364(2).]

3. HOMICIDE ⇐254 — EVIDENCE — SUFFICIENCY.

Evidence *held* sufficient to support a verdict of murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 533-538; Dec. Dig. ⇐254.]

4. HOMICIDE ⇐112(1)—SELF-DEFENSE—EVIDENCE—SUFFICIENCY.

The plea of self-defense is not available to one who was at fault in provoking the difficulty that resulted in the homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 145; Dec. Dig. ⇐112(1).]

Appeal from Superior Court, Santa Cruz County; W. A. O'Connor, Judge.

Manning Carter was convicted of murder in the second degree, and he appeals. Affirmed.

Duffy & Purdum, of Nogales, for appellant. Wiley E. Jones, Atty. Gen., for the State.

FRANKLIN, J. The defendant was charged with the murder of one Robert Heflin. He was convicted of murder in the second degree. His motion for a new trial was denied, and he appeals from the judgment and order.

The homicide was committed in Nogales on a moonlight night about 11 o'clock in the month of February, 1915. The defendant is a negro soldier, and one of a troop of United States cavalry stationed on the border at Nogales. The defendant admitted the killing, and sought to justify it on the ground of necessity. The evidence tends to show that the defendant and some companions were in the habit of having a rendezvous with Mexican women from across the border line; that on the evening in question, the defendant and another negro soldier belonging to the same troop by the name of Edgar Williams were out for a frolic, and within less than half an hour of the homicide were following and annoying two Mexican women. The women, when they got near the gas plant in Nogales, becoming frightened by the conduct of the two men, called for help. George Raphael, who was working in the gas plant at the time, heard the call of the women and coming out found the two men, Williams and defendant Carter, and inquired what was the matter. A heated altercation took place between Carter and Raphael, in the course of which defendant used bad language and made some threats toward Raphael. The latter retreated into the gas plant, and telephoned for a police officer, saying if he did not get help immediately there would either be a dead negro or he would be dead. Policeman Conway quickly responded in an automobile driven by the deceased, Heflin. Conway and Heflin were both armed, Heflin having a 25 automatic pistol. Finding the defendant Carter and his companion Williams there, Policeman Conway called to them, and fired his pistol up in the air. Williams stood and was arrested, but defendant Carter began moving away. Conway and Heflin tried to rush Williams along on a run so that they could capture Carter, and Conway, in an effort to do this, hit Williams on the head with his gun. Williams, refusing to move fast enough, was placed in the custody of Heflin, and Conway then began to pursue the defendant Carter, but lost clue of him in a patch of brush a short distance away. Conway, with his gun and a searchlight in hand, searched around for the defendant, and after eluding the officer, Carter, in an ugly and vicious mood, evidenced by his remarks on the way, went directly to the cavalry barracks and got his army rifle and returned with it. The action of Carter in taking his rifle and going to town with it was reported to the captain of the troop, who ordered a detail to make his arrest, bring him back to camp, and put him in the guardhouse. While Officer Conway was still searching for defendant Carter, the latter returned in a roundabout way to the place where the deceased, Heflin, had his companion, Williams, in custody, claiming that he did so in order to avoid any possibility of meeting Raphael and having any further trouble with him. Just before arriving on the scene of the killing defendant Carter stopped, loaded and cocked his rifle, carrying it at a hip position with the barrel slanting upwards. So far as known there are only two persons living, the defendant Carter and his companion, Williams, who saw the killing. When defendant got close to the deceased, three shots were fired almost simultaneously, two pistol shots and one from defendant's rifle. The ball from Carter's rifle shattered Heflin's skull, exposing the brains, and Heflin was instantly dead. Policeman Conway, hearing the shots, returned from his search, and, coming upon the scene, was covered with Carter's rifle, ordered to throw his hands up and keep moving, which order he obeyed. Defendant Carter then returned to the mili-

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tary barracks and hid his rifle under one of the houses, and, proceeding into camp unarmed, the military detail placed him under arrest and put him in the guardhouse. The captain of the troop found Carter with the odor of mescal liquor strong upon his breath, but cold sober from the tenseness of events. After questioning Carter and finding his rifle, the captain turned him over to the sheriff of Santa Cruz county.

The testimony of Williams and the defendant as to what took place when the killing was done present many omissions, obscurities, and inconsistencies, and to believe those parts of it favorable to the innocence of the defendant would somewhat tax the credulity of a court and jury. The defendant knew that the women he had been with earlier in the evening lived across the Mexican border and had gone home, yet he claims to have returned to the barracks and armed himself with a high-power army rifle, loaded and cocked it solely for the purpose of looking for the women, because he had been molested on other occasions at the place where he expected to find them; that he returned to the place of the homicide in a roundabout way in order to evade the man with whom he had the trouble at the gas works. He says:

"I went around a ways to avoid him, and after I got around a piece I heard some one talking. I got around a little further and recognized the voice as Williams.' I went right up close and asked what was the matter, and he said, 'I am arrested;' and I says, 'Arrested?' and he says, 'Yes;' and he says, 'This fellow did not do it, the policeman did it, and he went over there.' I says, 'Over where?' And this dead man said, 'He went right over there,' and took two steps to the front, pointing at the same time, and I looked around, and then he shot at me. I whirled around right quick, and he shot again, and I pulled the trigger at the same time."

Although he went right up close to the deceased, he was unable to recognize the two men, except by the sound of Williams' voice, and could not tell whether the deceased was a white or black man. He said afterwards the reason he could not distinguish the men was because he never got nearer than 30 feet from them. Yet this man, according to his testimony, had the most marvelous powers of sight. Though he could not distinguish a man at a distance of 30 feet, yet he could see the bullet from Heflin's pistol coming right on a line with his eyes.

"Q. At the time you turned your body to look in the direction in which Williams and the officer had told you the other officer had gone, and you heard the shot, then you turned your body back again? A. Yes, sir. Q. Did you hear or see any other shot? A. Yes, sir. Q. Did you see it or hear it? A. I heard it, and I saw the flash of fire. Q. And that shot was coming towards you? A. Yes, sir; right on the line of my eyes."

Williams testified:

"I was standing about 4 feet of the fellow that had me, this chauffeur, and Private Carter came up with his rifle, and he hollered just about as he got there, and asked who was there, and I told him, and he asked me what I was doing there, and I said, 'I am under arrest;' and he said, 'Who arrested you?' and I said, 'This officer did not, but the other one out there;' and as I said that I pointed in the direction he was in, and this gentleman, this chauffeur, pointed too, and Carter sort of made a turn in the direction he pointed, and this gentleman snatched his revolver out and fired at him. At the first shot he fired Carter staggered and turned to face him, and then both fired again the same time, and I don't know which one of the guns went off first. The first shot went like that (indicating by snapping his fingers), and the next two just like that (indicating), both at the same time. When he fired this gentleman fell. After he fired I moved on away and got to camp, and I leave Carter there."

The witness testified that when Carter came up, and during all the time afterwards, Carter was holding his rifle against his hip with the barrel slanting upward, "and I pointed the way this officer had taken and this man did also, and he (Carter) turned, and when the gentleman shot he (Carter) turned like this (indicating). He (Carter) did not raise the gun up. He was standing 'ready' all the time." Carter said that he had never seen anybody shoot that way before he did. When Officer Conway found the body of Heflin, it was lying flat on the back with the hands extended.. About one-quarter of the left part of the skull was shattered, the brains oozing out upon the ground. The automatic pistol was at his right knee, with the barrel pointing towards his feet and the handle towards his right hand.

[1] It is claimed that the court committed prejudicial error in allowing testimony concerning the altercation between the defendant and George Raphael, and also evidence of the conduct of the accused prior to the killing of deceased. The defendant would restrict the evidence to the facts and circumstances immediately attending the homicidal act. Prior circumstances or difficulties, under the general rule governing the trial of homicidal cases, are inadmissible, one of the reasons being that the accused does not forfeit his right to defend himself against an assault because he has been guilty of a wrongful act in the past. But the rule has important exceptions, and is not to obtain where faults, which, although not occurring at the precise time of the homicide, but previously, may have been so closely connected with it in time and circumstances as to be fairly regarded as operating to bring it on. A learned author says:

"In order for evidence of previous quarrels or of particular acts which constitute no part of the res gestæ to be admissible against the defendant, it must not be a separate, distinct, and independent act, but there must be some link of association, something which draws together the preceding and subsequent acts, something which gives color of cause and effect to the transaction, and sheds light upon the motive of the parties." Michie on Homicide, vol. 1, p. 790.

And again:

"Matters so closely connected with the difficulty in time and circumstances as to be fairly regarded as operating to bring it on * * * may be considered to render any act or decla-

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ration occurring at the time significant." Id. 344.

Cyc. vol. 21, at page 929, states the rule thus:

"Evidence of difficulties of defendant with or threats by him against persons other than the deceased is not admissible unless there is a direct connection between the facts sought to be proved and the homicide."

[2, 3] It is apparent that no connected and intelligent statement of the facts and circumstances of this case could be given by the witnesses without disclosing the difficulty accused had with Raphael, his attempted arrest by Officer Conway and the deceased, his flight, and the hasty preparations and return to the scene of the homicide for the perpetration of the wrongful act. Such matters give light upon the motive and intent of the accused; they "give color of cause and effect to the transaction"; they constitute a continuous transaction, forming a link of association culminating in the homicidal act. There is no error here. Defendant urges that the evidence is insufficient to support the conviction, because such facts clearly present a case of self-defense. In stating the facts we do not pretend to give at large every particular circumstance of the matter that might appear favorable to the contention, but rather have we epitomized the more essential parts of it, and presented what, in our judgment, an impartial trial court and dispassionate jury might properly deduce from all the facts and circumstances in a conscientious effort to administer the justice of the land. The jury may have very properly found that when the frolic of the accused with the Mexican women was interrupted and his companion arrested and knocked on the head with a gun, and he pursued and made to run away, all this naturally filled his heart with bitterness and resentment, and in the light of his flight and immediate return to the scene of the difficulty that his purpose and intent was to wreak his malice upon Officer Conway and the deceased, Heflin; that coming back from the military barracks in the roundabout way he states was rather for the purpose of not being surprised by the officer who was looking for him than to avoid meeting Raphael; that if there subsequently arose a necessity to kill Heflin to save his own life, he brought it upon himself by his own fault. The learned counsel for appellant, in their able presentation of the law of self-defense have, we are persuaded, overlooked this important feature of the doctrine. The right of self-defense may be tersely stated as the law of necessity. Before one may shield himself on the ground of necessity for taking the life of a fellow being he must be without fault in occasioning it. The accused cannot intend to produce the occasion and then shield himself on the ground of necessity. In Haynes v. State, 17 Ga. 465, the court said:

"Before the law of necessity can exist, a cause of necessity must exist."

And in People v. Hunt, 59 Cal. 430, 435, it is observed:

"The plea of necessity is a shield for those only who are without fault in occasioning it, and in acting under it."

"Whenever an assault is brought upon a person by his own procurement, or under an appearance of hostility which he himself creates, with a view of having his adversary act upon it, and he so acts and is killed, the plea of self-defense under such circumstances is unavailing." People v. Glover, 141 Cal. 233, 74 Pac. 745; Henry v. People, 198 Ill. 162, 65 N. E. 120; State v. Ballou, 20 R. I. 607, 40 Atl. 861.

"Where any pretext, design, contrivance, fraud, or excuse is resorted to, to bring on a difficulty, or to provoke the occasion for one, the person using it will be regarded as the aggressor therein. And any act of a person by which he puts himself in the way of being assaulted, in order that, when hard pressed, he may have a pretext for taking the life of his assailant, amounts to bringing on a difficulty." Wharton on Homicide (3d Ed.) § 323.

The case of Erwin v. State, 29 Ohio St. 186, 23 Am. Rep. 733, is quoted in Modern American Law, 3, page 578, as a leading case. In that case it is said:

"It is true that all authorities agree that the taking of life in defense of one's person cannot be either justified or excused, except on the ground of necessity, and that such necessity must be imminent at the time; and they also agree that no man can avail himself of such necessity if he brings it upon himself."

[4] If appellant provoked the difficulty with the intention of killing Heflin, then he was guilty of murder in the first or second degree according to the facts, or, if he provoked the difficulty without such apparent intention, he would be guilty of manslaughter. The question then is simply this, What was appellant's intent? In other words the matter turns upon appellant's intent, and the results of his intent.

Although in some aspects the evidence of the only persons who witnessed the killing, the defendant and Edgar Williams, is favorable to the defense of self-defense, yet there are other facts and circumstances in the case amply sufficient to support the verdict. The weight and credibility to be given the testimony of a witness is in the province of the jury. In Quock Ting v. U. S., 140 U. S. 417, 420, 11 Sup. Ct. 733, 734, 851 (35 L. Ed. 501), it is said:

"Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced."

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In Blankman v. Vallejo, 15 Cal. 639, it is said:

"We do not understand that the credulity of a court must necessarily correspond with the vigor and positiveness with which a witness swears. A court may reject the most positive testimony, though the witness be not discredited by direct testimony impeaching him or contradicting his statements."

How much weight has the jury given to the testimony of the defendant? How has his credibility been affected in their minds by his appearance when testifying, the manner in which he testified, and the improbability of his story? These are considerations that properly influence and move the verdict of a jury. As we observed in the case of Losano v. State, 15 Ariz. at page 118, 136 Pac. at page 865:

"The jury may have made a mistake, but they are more apt to be right in their deductions and conclusions than an appellate court. They see and hear the witnesses and have the advantage of observing their conduct and demeanor—psychological aids of inestimable worth never found in the cold records submitted to an appellate tribunal."

We have given most careful consideration to the record which discloses that defendant has had a fair and impartial trial, with every substantial right preserved. While the appellate court is not in the atmosphere of the trial court, nevertheless a consideration of the obscurities, inconsistencies, omissions, and the very inherent improbability of defendant's story convinces us the jury was right. The evidence would have to be much clearer in favor of the defendant upon the question involved in order to justify this court in setting aside the verdict of the jury against the decision of the trial judge refusing a new trial upon that ground. Indeed the accused is fortunate in not having a verdict of murder in the first degree against him, which we are persuaded was not given because of the ability and persuasive eloquence of counsel in his behalf rather than the merits of his case.

The judgment is, in all things, affirmed.

ROSS, C. J., and CUNNINGHAM, J., concur.

(18 Ariz. 378)

AARON v. STATE. (Cr. 399.)

(Supreme Court of Arizona. Dec. 22, 1916.)

1. INTOXICATING LIQUORS ⟸169—OFFENSES —INTRODUCING LIQUOR INTO STATE.

Under the constitutional amendment prohibiting the introduction of whisky into the state for sale, one aiding and assisting the principal in the commission of the offense by driving an automobile hired by the principal, if knowing that he was assisting the principal in bringing the whisky into the state, or if having reason to know and making no investigation or inquiry, would be guilty of an offense; as, though it might be impossible for him to definitely ascertain the purpose for which the principal was bringing liquor into the state, he should at least have made some inquiry into such purpose.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 187, 188; Dec. Dig. ⟸ 169.]

2. INTOXICATING LIQUORS ⟸224—OFFENSES —INTRODUCTION INTO STATE.

Where the state has shown an introduction of intoxicating liquors in violation of the constitutional prohibition amendment, it has made out a prima facie case authorizing a conviction of the person or persons introducing it, and such person, to escape conviction, must successfully and satisfactorily show that the liquor was introduced for a lawful purpose.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 275–281; Dec. Dig. ⟸ 224.]

Cunningham, J., dissenting.

Appeal from Superior Court, Cochise County; Alfred C. Lockwood, Judge.

Francis Bert Aaron was convicted of introducing whisky into the State of Arizona, in violation of the constitutional prohibition amendment, and he appeals. Affirmed.

R. N. French and J. C. Erwin, both of Douglas, Reese M. Ling, of Phœnix, and W. G. Gilmore, of Tombstone, for appellant. Wiley E. Jones, Atty. Gen., Geo. W. Harben, Asst. Atty. Gen., John F. Ross, Co. Atty., and Bruce Stephenson, Deputy Co. Atty., both of Douglas, for the State.

CUNNINGHAM, J. The appellant is charged with having introduced whisky into the state of Arizona from the state of New Mexico, in violation of the constitutional prohibition amendment, and was convicted. From the judgment of conviction the defendant has appealed.

The facts disclosed by the evidence are as follows: That on the afternoon of October 22, 1915, one Henry J. Brown employed Benson & Moody to carry him by automobile from Douglas, Ariz., to Rodeo, N. M., for an agreed fare of $35; that the accused was an automobile driver in the employ of said Benson & Moody, and as such driver and employé made the said agreement for his employers, Benson & Moody, with said Brown; that before said agreement was made the accused approached Brown in a pool room at Douglas and, whispering, suggested that that night would be a good time to go after liquors, for the reason three of the local officers were out of town (accused denies that he made any suggestion whatever, at any time or place, to Brown); that immediately after the accused made the alleged suggestion aforesaid the accused went with Brown to a bank in Douglas and assisted Brown to get into the bank, the time being after banking hours, and the doors of the bank being closed; that in the bank Brown received for his personal check on the bank $150 in cash, and, with the money in his possession, the trip to Rodeo, N. M., was commenced. Arriving at Rodeo, the machine was stopped near the front door of a saloon. The parties travel-

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ing in the machine, including the accused, a friend of his, and Brown, left the machine, and Brown bought 12 cases of whisky. Brown and Al Moore, an employé of the saloon, carried the cases from the warehouse to the machine, and the accused packed the cases in the machine. The accused denies that he packed the cases in the machine, and testifies that he had no knowledge that the cases were in the machine until he went from the saloon to the machine preparatory to starting on the return trip to Douglas. The cases of whisky were covered with a lap robe, and the friend of the accused lay down on the boxes and went to sleep. Brown occupied a seat in the car beside the driver, but did not inform the accused of his (Brown's) intention to bring whisky in the automobile from Rodeo to Douglas. The accused drove the automobile from Douglas to Rodeo and return. The route followed on this entire trip was the "Borderland Highway." This highway crosses the Arizona-New Mexico state line about 2 miles west from Rodeo. On the return trip, and at a point in Arizona known as Silver Creek, about 15 miles east from Douglas, and between 12 and 1 o'clock that night, the officers stopped the automobile, and, finding the 12 cases of whisky in the machine, arrested the occupants of the car, charging them with having unlawfully introduced intoxicating liquors into the state. To this charge Brown entered a plea of guilty.

After Brown had entered his plea of guilty, he testified for the state in this cause. He testined that he bought the whisky in question, and was taking it to Douglas for the purpose of selling it; that the accused had no interest whatever in the whisky; and that witness would not swear that the accused was informed by witness that he was going after whisky. The whisky was in the car, but under the care of Brown all the time from the time it was loaded at Rodeo until the officers took it at Silver Creek. The accused was occupied in driving the car.

This evidence, considered in the most favorable light possible to the prosecution, resolving all doubts in favor of the state, may be said to establish the following facts: That Henry J. Brown made a trip from Douglas, Ariz., to Rodeo, N. M., for the purpose of buying whisky, and to return with the whisky to Douglas for the purpose of selling it in violation of law; that in driving the automobile conveying Brown from Douglas to Rodeo, and returning from Rodeo to Silver Creek conveying Brown and Brown's whisky, the accused was aiding Brown to introduce whisky into the state; and that the accused knew Brown's purpose in making the trip was to purchase whisky and bring it back with him in the automobile to Douglas.

The introduction of whisky into Arizona from the state of New Mexico for the purpose of selling such whisky is an offense against the laws of Arizona, because the sale of whisky in Arizona is a violation of law. In order that the act of introducing whisky into Arizona be criminal, the act must be accompanied by a criminal intent or intention to make an unlawful use of the liquor introduced within Arizona.

"In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence." Paragraph 20, Penal Code of 1913.

In the offense of the introduction of intoxicating liquors into this state, the criminal intent essential to the crime, the intent that must jointly operate with the act of passing the liquors into the state, is the purpose for which the liquors are intended to be used in the state. Such intent or intention must be determined by the jury from the circumstances connected with the act of passing the prohibited liquors into the state. This court has decided that the importation of intoxicating liquors into the state for a lawful purpose is no crime (Sturgeon v. State, 17 Ariz. 513, 154 Pac. 1050), and that the question whether the accused brought the intoxicating liquors into the state for a lawful purpose is one of fact for the jury to determine (Stansbury v. State, 17 Ariz. 535, 155 Pac. 301). Consequently the knowledge possessed by one who aids and assists another in bringing intoxicating liquors into the state, as to the purpose for which the liquor is brought into the state, is the controlling factor connecting such accomplice with the crime, if crime it be. His knowledge of the fact that he is aiding and assisting to bring intoxicating liquors into the state at the time he renders aid and assistance may or may not be important. If he has no fair means of knowing the nature of the articles he assists to bring into the state, then he cannot be charged with entertaining a criminal intent. If he knows he is aiding and assisting to bring intoxicating liquors into the state, the jury must determine from all the circumstances connected with the act whether his intention in so aiding and assisting was to aid and assist another to take the liquors into the state for an unlawful purpose. The intention to simply aid and assist another to transport whisky into Arizona is in itself no criminal intention, but the acts of aiding and assisting another to transport whisky into Arizona for the purpose of selling it, with a knowledge or means of knowledge that the other intended to use the whisky for such purpose, charges the accomplice with participation in the criminal intent entertained by the principal, and makes the accomplice a principal in the offense.

With this understanding of the law of the offense involved, and the duties of the jury in such cases, I will examine the instructions of the court to ascertain whether the court committed any prejudicial error in such instructions.

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The court, among other things, instructed the jury as follows:

"The jury are further instructed that under the prohibition laws and the Constitution of the state of Arizona a defendant found in the possession of liquors, the sale or importation of which is prohibited under the said laws and Constitution of the state of Arizona, is presumed by law to have legally acquired possession of said liquor, and in order to convict such defendant of a violation of the said prohibition laws and Constitution of the state of Arizona the burden is on the state to prove that the defendant came into possession of said liquors in a manner contrary to law and with intent to commit the offense charged in the information.

"The jury are further instructed that in this case, in order to convict the defendant of the criminal offense charged in the information, they must believe from the evidence, to the exclusion of a reasonable doubt, that the defendant introduced the liquor in the information specified, contrary to law and with intent to commit the offense with which he is charged in the information.

"The court further instructs the jury that while, under the laws of the state of Arizona, all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid or abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals, the defendant, in order to be convicted as such principal for aiding and abetting the commission of the offense in the information charged, must have known at the time of his aiding and abetting the commission of said offense that said offense was being or would be committed, and that the defendant knowingly aided and abetted in the commission of said offense with intent that the said offense be committed. * * *

"You are instructed that, if you believe from the evidence, beyond a reasonable doubt, that the defendant, at the time he brought said liquor into the state of Arizona, knew that he was so bringing in liquor, he is guilty of the offense charged in the information, regardless of the question as to whether he owned the liquor, or purchased it or suggested its being brought into the state, but if, as a matter of fact, he did not know the contents of the automobile and that it contained intoxicating liquor at the time he drove said automobile from the state of New Mexico into the state of Arizona, you must find him not guilty. You may judge as to whether or not the defendant did actually know the contents of the automobile so far as intoxicating liquor is concerned from all the evidence in the case. * * *"

The jury, having been instructed, retired, and later returned into court for the purpose of having read to them the evidence of a certain witness, and for further instructions. The desired evidence was read to the jury from the reporter's notes. Then the court asked:

"What was the other question? The Foreman: The jury desire to know in regard to assisting in bringing liquor into the state of Arizona knowingly and willingly. The Court: The court will instruct the jury on that point that, if a man assists in bringing the liquor into the state of Arizona, knowing what he is bringing in, it is a violation of the law. If, as a matter of fact, he does not know what it actually is he is bringing in, does not know that it is intoxicating liquor, he does not violate any law. In other words, the mere bringing in or assisting in bringing in is not sufficient unless the man knew what he was bringing in. On the other hand, if he did know what he was bringing in, then, if he renders any assistance whatever to the bringing, it would be a violation of law, * * * and it is for you to decide, as a matter of fact in this case, whether the defendant knew what he was bringing in, and you may decide that he knew that from any one of a dozen different things, or you may decide that he did not know. The knowledge is purely a question of fact for the jury, and you are to answer that question after taking all of the evidence into consideration, and state whether you are satisfied beyond a reasonable doubt and to a moral certainty that the defendant did know that he was bringing in intoxicating liquor into the state of Arizona. If you are satisfied beyond a reasonable doubt in your own mind that the defendant knew it, no matter how he got that knowledge, then you would find him guilty. On the other hand, if you are not satisfied beyond a reasonable doubt that the defendant knew that he was bringing whisky in, then you would find him not guilty."

When the court had given the jury the last-mentioned instructions, in answer to the jury's request, the jury again retired, and thereafter returned their verdict finding the defendant guilty.

These instructions clearly make the existence of a mere conscious act all that is required in law to constitute the offense charged. The motive prompting the act is not included as at all essential to crime. In other words, the instructions, fairly understood, say that the mere act of bringing whisky into the state for any purpose is a violation of law, unless it is unconsciously brought in, and that the purpose for which the whisky is brought in is not in the least important. Such view of the law is erroneous.

Under the rule mentioned in Stansbury v. State, supra, the defendant, by these erroneous instructions, was deprived of the right of having the jury determine the intent, the purpose, for which the whisky was introduced into the state.

Under the conceded facts the accused was concerned in the commission of the alleged offense only by reason of the assistance he gave to Brown. This assistance must have been rendered by the accused with an intention to carry out Brown's unlawful purpose. Such intent or intention must be determined from the circumstances connected with the offense. Paragraph 21, Penal Code of 1913. If the circumstances in evidence justified the inference that Brown and the accused performed the act with a community of unlawful purpose, the existence of which fact is essential to a conviction of the accused (12 Cyc. 188, and cases cited in the notes thereto; People v. McMurray, 4 Parker Cr. R. [N. Y.] 234), the instructions did not permit the jury to determine that fact, but required a conviction in the absence of that fact. In this respect the instructions are erroneous.

The foregoing instructions contain other patent defects in stating the law, but in view of the errors pointed out further discussion becomes unnecessary.

I am of the opinion that the judgment

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should be vacated, and the cause remanded, with instructions to grant a new trial.

ROSS, C. J. (dissenting). I regret that I cannot agree with the reasoning set forth nor the conclusions of Justice CUNNINGHAM in the foregoing opinion.

The evidence conclusively establishes the status of defendant's employers, Benson & Moody, as that of common carriers for hire. The defendant was the active agent in making the contract of carriage with the owner Brown, as also in its execution. The evidence also conclusively shows that Brown introduced 12 cases of whisky from Rodeo, N. M., into Arizona, under such contract of carriage, for the purpose of selling it in Arizona, and that he thereafter pleaded guilty to the charge of unlawfully introducing it. The defendant aided and assisted the principal, Brown, in the commission of the offense. The only question, it seems to me, is: Did he knowingly participate in its commission, or was he, as he would have one believe, ignorant of the character of his load from Rodeo, N. M., into Arizona? It certainly would strain to the breaking the credulity of the most gullible juror to ask him to believe defendant's story that he did not know that his automobile was loaded with whisky at Rodeo to be conveyed thence into Arizona. But, be that as it may, the court told the jury if they found such to be the fact they should acquit.

[1] Under the prohibition amendment, as it existed at the time, it was not unlawful for Brown to bring into Arizona from New Mexico intoxicating liquor for his personal use. This batch was not, however, for his personal use, and the defendant would have to be more confiding and unsophisticated than the record shows him to be before I would believe he thought so. If his story is to be believed, he simply shut his eyes, suppressed his smell, and likewise failed to "use a little wine for his stomach's sake." He exercised no care nor circumspection; he asked no questions. I think if defendant knew that he was assisting Brown to bring the whisky into Arizona, or that he had reason to know and made no investigation or inquiry, he broke not only the letter of the law but its spirit. Adams Express Company v. Commonwealth, 160 Ky. 66, 169 S. W. 603. As is said in one case:

"Common carriers ought to obey the law just like other people, not in merely keeping its letter while breaking its spirit, but keeping both letter and spirit under such circumstances as other people are expected to do." Adams Express Company v. Commonwealth, 129 Ky. 420, 112 S. W. 577, 18 L. R. A. (N. S.) 1182.

This language was used in reference to an express company and its duty to exercise care in accepting shipments of intoxicating liquor into dry territory. I think it equally applicable to individuals and to agents of express companies. While it might be impossible for a carrier to definitely ascertain the purpose for which the shipper was introducing intoxicating liquors into Arizona, he could at least make some inquiry into the purpose. This the defendant did not do.

[2] In the Sturgeon Case, 17 Ariz. 513, 154 Pac. 1050, it was decided that one who would escape criminal punishment for introducing intoxicating liquors into the state must successfully and satisfactorily establish that the liquor was introduced for a lawful purpose. It was there decided that it was not necessary in the information or indictment to allege that it was not brought in for personal use; that being a matter of defense. Under this rule, when the prosecution has offered proof of an introduction of intoxicating liquors into the state, it has made out a prima facie case authorizing a conviction of the person or persons who introduced the liquor, and, it having been proved that defendant and Brown acted together in the introduction of the liquor in question, a prima facie case was made, and that prima facie case was not overcome. Defendant's only defense was that he unconsciously participated in the transportation of the liquor from Rodeo, N. M., into Arizona, and this issue was submitted to the jury under instructions as favorable as he was entitled to, according to my view.

I think the judgment of the lower court should be affirmed.

FRANKLIN, J. I concur in affirming the judgment and in the views expressed by Chief Justice ROSS.

(18 Ariz. 386)

BACA v. NOYES-NORMAN SHOE CO. et al.
(No. 1553.)

(Supreme Court of Arizona. Dec. 22, 1916.)

1. APPEAL AND ERROR ⟸787—DISMISSAL—GROUNDS—WANT OF PROSECUTION.

Where judgment was rendered July 12th, and appellant gave notice of appeal, and on July 15th filed his costs and supersedeas bond, but took no further steps to prosecute his appeal, the motion of appellee, filed October 16th, to dismiss it, will be granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3129, 3130; Dec. Dig. ⟸787.]

2. COSTS ⟸260(1) — ON APPEAL — DAMAGES FOR DELAY.

Where an appeal is taken solely for delay and without any sufficient cause, damages will be awarded to the appellee.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983, 986, 996; Dec. Dig. ⟸260(1).]

Appeal from Superior Court, Apache County; George H. Crosby, Jr., Judge.

Action by D. B. Baca against the Noyes-Norman Shoe Company and others. From a judgment for defendants, plaintiff appeals. Dismissed.

George Estes, of Deming, N. M., for appellant. Thorwald Larson, of Holbrook, for appellees.

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PER CURIAM. [1, 2] Appellant brought an action to enjoin and restrain the execution of a judgment against his property in favor of the appellees. The injunctive relief prayed for was denied by the court on July 12, 1916, whereupon appellant gave notice of appeal to the Supreme Court, and thereafter on, to wit, the 15th day of July, 1916, filed his cost and supersedeas bond. The appellant has done nothing whatever to prosecute his appeal.

On October 16, 1916, the appellees filed a motion to dismiss the appeal with proof of service of the same upon the appellant. Accompanying the motion to dismiss is the authenticated proof of the facts above stated. The appellees also ask that they be allowed damages.

It appearing that the appeal was taken solely for the purposes of delay and without any sufficient cause, following the rule laid down in Willis v. Ivy, 16 Ariz. 120, 141 Pac. 570, and Nienstedt v. Dorrington, 16 Ariz. 121, 141 Pac. 569, it is hereby ordered that said appeal be dismissed, and that the appellees recover their costs. It is further ordered and adjudged that the appellees be and they are hereby awarded damages in the sum of $50, said amount being deemed proper in this case as damages for a manifestly frivolous appeal.

(18 Ariz. 388)

REYNOLDS v. STATE. (Cr. 406.)

(Supreme Court of Arizona. Dec. 22, 1916.)

1. INTOXICATING LIQUORS ⟸139 — OFFENSES —BRINGING INTO STATE—"INTRODUCE."

Intoxicating liquors are introduced into the state, within Const. art. 23, § 1, providing that intoxicating liquor shall not be introduced into the state under any pretense, when the liquors have been intentionally transported into the state as the result of a transaction set on foot by a single impulse, and operated by an uninterrmittent force, no matter how long a time it may occupy, nor the distance over which it may be exerted, either within or without the state, so long as the transaction results in bringing the liquor within the territorial jurisdiction of the state.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 149; Dec. Dig. ⟸139.

For other definitions, see Words and Phrases, First and Second Series, Introduce.]

2. CRIMINAL LAW ⟸112(1)—VENUE—PLACE OF OFFENSE.

The offense of introducing liquors into the state is not completed till they reach their destination, but the offense is committed in every portion of the state over which they are transported, and if the route is in part in one county and in part in another, the offense is committed in part in each county, and may be prosecuted in either county under Pen. Code 1913, par. 812, providing that when a public offense is committed in part in one county and in part in another, or the acts or effects thereof requisite to consummation of the offense occur in two or more counties, the jurisdiction shall be in either county.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 220, 221, 230; Dec. Dig. ⟸112(1).]

3. WORDS AND PHRASES—"CONTINUING OFFENSE."

A continuing offense is a transaction or a series of acts set on foot by a single impulse and operated by an unintermittent force, no matter how long a time it may occupy (quoting 2 Words and Phrases, p. 1510).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Continuing Offense.]

4. INTOXICATING LIQUORS ⟸236(5)—CRIMINAL PROSECUTIONS—SUFFICIENCY OF EVIDENCE—CORPUS DELICTI.

In a prosecution for introducing liquor into the state, evidence *held* sufficient to establish the corpus delicti, independent of admissions and statements by accused.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. ⟸236(5).]

5. CRIMINAL LAW ⟸1144(13)—APPEAL—PRESUMPTIONS—MATTERS NOT IN RECORD.

Where the record shows that a portion of the evidence is not included, the Supreme Court will presume that it is sufficient to cure defects in the evidence brought up to establish corpus delicti.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2901, 3031; Dec. Dig. ⟸1144(13).]

6. INTOXICATING LIQUORS ⟸236(5)—CRIMINAL PROSECUTION—EVIDENCE—CORPUS DELICTI.

The corpus delicti of the offense of introducing liquor into the state may be established by circumstantial evidence.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. ⟸236(5).]

7. INTOXICATING LIQUORS ⟸239(1)—PROSECUTIONS—INSTRUCTIONS.

In a prosecution for introducing liquor into the state, a charge that under the law, if the evidence warrants it, the jury may find defendant guilty, for any person who introduces into the state any ardent spirits, etc., shall be guilty of a misdemeanor, is not objectionable as requiring the jury to convict even if the liquor were introduced for a lawful purpose, where no issue as to the purpose of introducing the liquor was raised at the trial.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 331, 333, 341, 347; Dec. Dig. ⟸239(1).]

8. CRIMINAL LAW ⟸1173(2) — APPEAL — HARMLESS ERROR—INSTRUCTIONS.

In a prosecution for introducing liquor into the state, the defendant could suffer no injury from the failure to instruct as to the defense of lawful purpose of the introduction, when the purpose he was shown to have admitted was unlawful.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3165; Dec. Dig. ⟸1173(2).]

Ross, C. J., dissenting.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

W. A. Reynolds was convicted of unlawfully introducing whisky into the State, and appeals. Affirmed.

G. P. Bullard, of Phœnix, for appellant. Wiley E. Jones, Atty. Gen., and R. Wm. Kramer and G. W. Harben, Asst. Attys. Gen., for the State.

CUNNINGHAM, J. The county attorney of Maricopa county filed an information in the superior court of Maricopa county charg-

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ing the appellant with unlawfully introducing whisky into the state of Arizona. The appellant demurred upon the grounds that the court had no jurisdiction of the offense charged in the information, for the reason, the offense, if committed, at all, was necessarily committed in Yuma county. The demurrer was overruled. He thereupon entered a plea of not guilty, and upon the trial objected to the introduction of any evidence upon the same ground urged in his demurrer to the jurisdiction of the court. This objection was overruled.

The facts developed by the evidence, according to appellant's statement of the facts in his brief, are:

"That appellant and his wife were found in an automobile at Agua Caliente, Maricopa county (the defendant driving and in full charge of the machine and contents); that said automobile was upon the road leading from Yuma to Phœnix; and that in said automobile was two barrels of whisky and several bottles of whisky."

Preceding such statement, appellant says in the brief:

"* * * The various witnesses for the prosecution questioned appellant as to where he got the whisky, and that appellant stated 'that it was loaded in his automobile at El Centro in the Imperial Valley, Cal., and that he had brought the same into Arizona via Yuma across the railroad bridge at Yuma, said whisky having been transported all the way in his automobile; that he was carrying the whisky in the barrels for Jack Elliott, and that said Elliott had given him the whisky in the bottles as pay for the carriage of the whisky in the barrels.'"

The record bears out such statements as the evidence.

The further facts appear from the record that the appellant was stopped while traveling east along the Arizona-California highway at about 9 o'clock in the morning, and at the time he was stopped the whisky in barrels found in the machine was covered up with bedding or canvass, and the bottles were in every part of the machine where space permitted. The whisky was contained in 2 kegs or barrels, and in 50 or 60 bottles. The jury were permitted to make an examination of the appearance of the kegs or barrels, as to the condition of labels and marks thereon. Some of the bottles were received in evidence. The condition of the labels and markings on such kegs or barrels does not appear in the record as a part of the evidence. The appellant was convicted and sentenced to punishment, from which judgment he has appealed.

The motions and objections made, and exceptions reserved by the appellant to the court's rulings duly present for our consideration three dominant questions, viz.: (1) Whether the offense of the unlawful introduction of intoxicating liquors into the state may be tried in an interior county of the state. (2) Whether the evidence is sufficient in law to sustain a conviction. (3) Whether the court erred in its instructions to the jury or failed to give a necessary instruction. These questions will be discussed in the order in which they are above set forth.

[1, 2] The appellant contends that every element necessary to constitute the offense of the unlawful introduction of intoxicating liquors into the state is complete the moment the intoxicating liquor crosses the state line. He argues that the offense is not in its nature a continuing offense, for the reason the law is not violated by transporting intoxicating liquors from one county of the state to another county of the state, and that as Maricopa county is an interior county, intoxicating liquors cannot, in the very nature of things, be transported into Maricopa county from without the state without necessarily crossing some other county of the state. And, as the act of introduction is complete the moment the liquor crosses the state line, the offense is necessarily committed in the county into which it enters the state, and is triable only in such county. If we concede that the mere act of passing intoxicating liquors over the state line completes the "introduction" of liquors into the state within the meaning of section 1, article 23 (Prohibition Amendment), of the state Constitution, then, certainly, appellant's contention is correct. But this we cannot concede. In Sturgeon v. State, 17 Ariz. 513, 527, 154 Pac. 1050, 1055, we said:

"That the word 'introduce' as used in the law is not a technical word. It is one of ordinary meaning and common acceptation, and is used as such in the constitutional amendment" (giving the definition of the word from the approved dictionaries of the language).

The constitutional amendment reads as follows:

"Ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall not be manufactured in or introduced into the state of Arizona under any pretense."

In Gherna v. State, 16 Ariz. 344, 361, 146 Pac. 494, 501 (Ann. Cas. 1916D, 94), we suggest in relation to the purpose of the amendment as follows:

"It is perfectly obvious, to the mind of candid inquiry: That the prohibition of the manufacture and traffic in liquor in Arizona is the main purpose sought to be accomplished by the amendment, and that the prohibition concerning the introduction of liquor into Arizona is rather an auxiliary or as an incidental to the better accomplishment of the main design. That the prohibition of its introduction will be contributory to the accomplishment of the main object, to wit, the suppression of the liquor traffic."

To this last expression we may very properly add: "The suppression of the liquor traffic in the entire state," for such is the meaning. The evil intended to be corrected by the prohibition amendment, then, was the evil wrought by the liquor traffic carried on in every county in the state. The transportation of such liquor into the state would make it accessible for traffic, and its accessibility to use in traffic is present in any county into which it is transported. The law must have been intended by the legislative power enacting it, to operate co-extensive with the evil

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sought to correct, and giving effect to the legislative intent, the provision must be interpreted to mean that the liquors mentioned shall not be transported into any part of the state, without regard to county lines. That the offense is committed when any of the liquors are brought into any part of the state of Arizona, and thereby made accessible to be used in violation of law, there can be no question.

Where one has the control over the whisky, as by having it loaded in his automobile in an adjoining state, for the purpose of transporting it to a specified point in this state as a single transaction, and in carrying out such transaction he brings, leads, carries, puts, conducts, ushers, or hauls such liquors into the state, any distance, a few feet or a few hundred miles, as contemplated, then he has introduced the whisky into the state. The distance into the state which he succeeds in transporting the whisky is of no effect other than requiring greater or less time and power for its accomplishment. Such time and power, if devoted to the accomplishment of the single purpose of carrying out the original transaction, as a part of the one transaction, are parts of the original transaction. If the transaction had in contemplation the mere passing of the whisky over the invisible state line, and it was passed over the line, then the transaction commenced, for the single purpose, was completed, and the result is, the whisky was thereby introduced into the state. And, if such introduction of the whisky was for an unlawful purpose, the offense was complete and triable in the county into which it was introduced, viz. the border county. If, however, after the whisky was passed over the state line, in accordance with the original transaction, and reached its destination in the border county, and thereupon another or the same person entered upon another transaction by which he undertook to transport the same whisky into another county of the state, as a new and separate enterprise, wholly independent of the original transaction of passing the whisky over the state line, then, such second transaction would not amount to the introduction of the whisky into the state, because the transaction would have been commenced and ended wholly within the state. If by such supposed second transaction the whisky is transported from one county into another county of the state for the purpose of sale or other unlawful purpose, the transaction may properly be denominated an introduction of the whisky into the latter county, but such transaction, whatever the purpose, is not denounced as a public offense.

Intoxicating liquors are introduced into the state, within the meaning of the said amendment, when the liquors have been intentionally transported into the state as the result of a transaction set on foot by a single impulse, and operated by an unintermittent force, no matter how long a time it may occupy, nor the distance over which such force may be exerted, either within or without the state, so long as the transaction as carried out results in placing the liquors within the territorial jurisdiction of the state. And, when such transaction is commenced and prosecuted with the intention to use such liquors in the state for any unlawful purpose, the offense is committed by the acts of transporting the whisky in consummation of the original transaction. When the whisky, so transported into Arizona as a part of the original transaction, is carried into an interior county of the state, the acts of transporting the whisky committed in every county through which it may be passed are parts of the original transaction, and therefore parts of the offense. The original transaction is not completed until the whisky reaches its destination, but the offense is committed in every portion of the state over which the whisky is transported. If it was transported in part of the route in one county, and in part of the route in another county, then the offense was committed in part in each county, and under paragraph 812 of the Penal Code of 1913 may be prosecuted in either county.

[3] But the appellant contends that the offense is not a continuing offense, and cannot be committed in other than a border county.

"A continuing offense is a transaction or a series of acts set on foot by a single impulse, and operated by an unintermittent force, no matter how long a time it may occupy." Words and Phrases, vol. 2, p. 1510.

Assuming this is a correct definition of such offense, it is quite clear that this offense falls within the class defined.

We are not left entirely without precedent in the consideration of this question of place of trial. The Supreme Court of Wyoming, in Patrick v. State, 17 Wyo. 260, 98 Pac. 588, 129 Am. St. Rep. 1109, has considered and decided the question for that jurisdiction. No statute is cited in the opinion of the court fixing the place of trial at all, and I am constrained to believe, from my slight examination of the Compiled Statutes of Wyoming 1910, that no statute similar to our statute (paragraph 812, Penal Code of Arizona 1913) exists as a law of that state.

In the opinion that court says:

"It is further contended that the district court of Natrona county had no jurisdiction of the offense for the reason that Natrona is an interior county and that the offense, if committed at all, must have been committed in the county which the sheep first entered. We think the point is not well taken. It is stated by counsel in argument that the sheep were shipped by rail to a station in Natrona county, that being their destination, and there is nothing in the record to the contrary. The statute does not attempt to prohibit shipments in that manner of such sheep through the state or through any county, but prohibits the bringing into any part of the state diseased sheep, the effect of which would be to endanger the health of its domestic sheep."

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Thus placing the decision upon the completed original transaction, as a continuing offense. The means of transportation by rail is not an element.

In Brown v. State, 17 Ariz. 314, 152 Pac. 578, this court expresses the impression that our prohibition amendment is closely modeled after section 2139 of the Revised Statutes of the United States (Comp. St. 1913, § 4137). The portion of our law here involved is in the exact words of said section 2139, with the exception that the "state" is substituted for the words "Indian country." The portion of section 2139 has been interpreted by the courts but in one case, so far as a search has revealed. In United States v. Twenty-Nine Gallons of Whisky, 45 Fed. 847, the United States District Court for the District of Montana, Knowles, J., said on page 849:

"In construing the statute under consideration, we should look at the object of the same, and the evil sought to be remedied thereby. The purpose of the statute was undoubtedly to prevent the placing of whisky, or ardent or spirituous liquors, in such a place as would make it accessible to Indians."

Giving reasons not here important, he continues:

"* * * For these reasons I hold that the proper construction of the above statute, as to the terms, 'no ardent spirits shall be introduced, under any pretense, into the Indian country,' is as follows: Whenever such liquors are taken into an Indian country, as their place of destination or use, then they have been introduced into such country. In other words, when such liquors reach an Indian country, as the end of their journey, they have, within the meaning of that statute, been introduced into such country."

This construction by that court is not binding on this or any other court, but it has reason in its support, as giving effect to the legislative intent and purpose for enacting the law and thereby correcting and preventing an evil existing or threatened, and undoubtedly places the decision on the original transaction as a continuing offense.

[4] Appellant's second contention is that the evidence is insufficient to support a conviction, in the particular that aside from the extrajudicial admissions and confessions of the accused, the corpus delicti is not established by evidence. The appellant says:

"The corpus delicti in this case was not the possession of the liquor, but the introduction of the same into the state of Arizona."

And:

"The offense was the introduction into the state of Arizona of intoxicating liquor."

The great weight of authority is against the sufficiency of an uncorroborated extrajudicial confession to warrant a conviction. See Commonwealth v. Killion, 194 Mass. 153, 80 N. E. 222, 10 Ann. Cas. 911, and note to Nolan v. State, Ann. Cas. 1912B, p. 1249, for citations.

The weight of authority is to the effect that the corpus delicti need not be established beyond a reasonable doubt by evidence other than an extrajudicial confession. The courts have differed as to the application of the rule, and in the extent to which the corroborating evidence must go to support a conviction.

In this case the evidence, independent of the defendant's admissions, tends to show that the accused was on the direct road from the state of California into Arizona; that he was driving an automobile in an opposite direction from California, into Arizona; that the automobile was loaded with two kegs or barrels and 50 or 60 bottles, all filled with whisky; and that the defendant while so traveling along the highway in the direction mentioned was stopped by the officers early in the morning on the highway and placed under arrest. The question is: Did the defendant introduce the whisky found in his exclusive possession into the state, as understood above? Immediately the question will arise: What physical evidence the labels and marks on the kegs or barrels and bottles furnished as indicating the place or places in which they were filled?

The record furnishes no evidence of the exterior condition of these barrels or kegs and bottles. The jury properly inspected the barrels and some of the bottles received in evidence, but what evidence the inspection disclosed nowhere appears in the record. If an inspection would disclose that the labels show evidence of the barrels and bottles having been filled in California or other state or foreign country, this would be a circumstance, and when taken into consideration with the fact that no whisky is authorized to be manufactured lawfully in Arizona, the inference may be justly drawn therefrom that such vessels were filled with whisky in the place the labels claim, and since they were filled they have been transported into the state. Such circumstance, with the circumstances mentioned above—the hauling of the whisky from the direction of another state into Arizona; the large quantity of whisky being hauled, and the manner of hauling it—all these circumstances and others shown in the record, when considered together, impel but one rational conclusion, and that is, that the whisky was brought from California into Arizona by the person in possession of it for an unlawful purpose.

[5] By the circumstances disclosed by the record, taken into consideration with the circumstances, we must presume the inspection of the barrels and bottles disclosed to the jury, the corpus delicti was reasonably established independent of the admissions and statements made by the accused at and shortly after his arrest. These circumstances, in so far as appear in the record, corroborate the accused's statements. We presume the evidence disclosed by the inspection also corroborated his statements, for we cannot indulge a presumption operating against the validity of a judgment. In the absence of the evidence mentioned, we must presume it was sufficient for the purpose of curing de-

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fects in the evidence before us, otherwise in sufficient to establish the corpus delicti.

[6] I have no doubt of the sufficiency of circumstantial evidence alone to establish the corpus delicti of the offense charged. The circumstances in evidence presented by the record alone may not be sufficient for that purpose, but when, as here, evidence of other circumstances was considered by the jury and we are left wholly to the fields of conjecture as to what facts such evidence tended to establish, the law requires us to go no further afield than to presume that such omitted evidence completes the chain and sufficiently sustains the judgment. The record as presented with the indisputable presumptions accompanying it, on appeal, must be considered as presenting sufficient evidence of a corpus delicti established to support a conviction independent of the extrajudicial statements and admissions made by the accused, consequently the contention of the appellant is not borne out by the record.

[7] The last complaint of appellant deemed worthy of serious discussion is that of an instruction given the jury, as follows:

"I charge you, gentlemen of the jury, that under the law of the state of Arizona, if the evidence warrants it, you may find the defendant guilty, for the law is that any person who introduces into, or who attempts to introduce into, the state of Arizona any ardent spirits, ale, beer, wine, or intoxicating liquor of any kind, shall be guilty of a misdemeanor."

The reason appellant assigns why this instruction is erroneous is:

"That by said instruction the jury were told it was their duty to convict the appellant even if he introduced said liquor into the state for a lawful purpose, i. e., for the personal use of himself and for the personal use of Jack Elliott."

The instruction quoted will bear no such construction. The court simply told the jury "that under the law of the state of Arizona, if the evidence warrants it, you may find the defendant guilty," and sets forth the law in the language of the constitutional amendment. The instruction does not intimate, as contended, what effect the jury must give to the evidence, but clearly states that under the law he may be convicted if the evidence warrants. The use of the word "law" instead of the words "'under the information' if the evidence warrants it," which it was the evident purpose to use, was an unhappy selection of words. The instruction in no manner is dealing with the evidence, but it is dealing with the charge and with the law upon which the offense set forth in the information rests. The jury were not in effect told it was their duty to convict the appellant if he introduced the liquors into the state for a lawful purpose. The jury were told that he may be convicted of the offense, "if the evidence warrants it," which, of course, must be understood as meaning that if the evidence did not warrant a conviction they could not convict him, but must acquit. The purpose for which the 50 or 60 bottles of whisky claimed by the appellant were brought into the state was not an issue at the trial. The appellant admitted that Elliott bought all of the whisky in California and employed defendant to deliver it in Arizona. That as compensation to him for carrying the whisky to the point of delivery, the agreement to be inferred from such statement is that he should receive the whisky in bottles as his pay for carriage, at the point of delivery. The effect of this is that appellant was engaged for a consideration to deliver whisky in Arizona to Jack Elliott for the purpose of selling 50 or 60 bottles of whisky in Arizona, to the accused, to pay the consideration of carriage and delivery. Under the law the payment of a debt or discharge of a promise by paying in property is a sale of such property so used in payment or discharge.

The record is not at all clear whether the contract mentioned was reached in Arizona or in some place outside of Arizona. The record discloses that Jack Elliott had lived at Phœnix, Ariz., and that the appellant was seen at Phœnix a short time prior to the date of his arrest. The defendant had the whisky in bottles and in the barrels in his automobile as a single load at the time of his arrest, and at that time no delivery of the bottles of whisky had been made to him other than the same delivery of the barrels, at the place of purchase in California. Such delivery was a delivery by the seller to the purchaser, and the appellant received the goods from the seller for and in behalf of the purchaser. The whisky was carried from the point of receipt into Maricopa county as the purchaser's property, nothing to the contrary appearing, and so carried, his purchase of the whisky in bottles was not complete until delivery was made. Under his agreement with Elliott, no evidence to the contrary appearing, his purchase of the whisky was not complete nor intended to be complete until the entire load reached its destination in Arizona, notwithstanding appellant says Elliott gave him the whisky. Hence the admitted purpose of bringing the whisky into the state was to sell and deliver 50 or 60 bottles of whisky in discharge of the agreed cost of carriage of 2 barrels of whisky into Arizona.

So far as the necessities of this case go, it is immaterial what use Jack Elliott intended to make of the 2 barrels of whisky. The law was violated when he caused the 50 or 60 bottles of whisky to be brought into the state for the unlawful purpose of completing a sale in Arizona or of completing a gift of such whisky. The person who aided him to so bring said whisky into the state knowing the unlawful purpose is equally guilty as a principal. The purpose for which the whisky, at least, a portion of it in bottles, was introduced into the state was not a fact in issue, and was not required to be submitted as a special issue for that reason. The instruction complained of is not subject to

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the complaint made, nor for the reasons advanced. If the issue existed at all it was not raised at the trial by evidence or otherwise, but is first suggested on this appeal. It now comes too late.

We are referred to Sturgeon v. State, 17 Ariz. 513, 154 Pac. 1050, as an authority sustaining appellant's contention in this respect. In that case we said, in speaking of the sufficiency of the indictment because of its failure to negative any exemption of a lawful use to which the intoxicating liquor was intended when brought into the state, that:

"The information is not objectionable on this ground. If the point is available at all, it is a matter of defense to be taken advantage of by evidence on the trial of the case."

While this was said by way of argument in the Sturgeon Case, it so clearly expresses the necessary manner of raising the question that it cannot be successfully disputed. The accused may, by offering evidence tending to show that he introduced the intoxicating liquors into the state for the honest purpose of applying such liquors to a lawful use, and if the evidence so offered raises a reasonable doubt in the minds of the jury, when considered with all the other evidence in the case, as to the lawful purpose intended, then it is the duty of the jury to give such defendant the benefit of such doubt, and acquit him. This is what we refer to in the Sturgeon Case in speaking of the manner of asserting the defense at the trial. In this case the appellant failed to assert such defense as therein suggested he had a right to do.

In Stansbury v. State, 17 Ariz. 535, 155 Pac. 301, we had the question before us in passing on an instruction given and on an instruction refused. The court gave the jury an instruction to the effect that even though they should "believe from the evidence that the defendant introduced the liquor for the sole purpose of drinking it, or using it for his own personal use, and without any purpose or intent whatever to dispose of, give away, barter, exchange or sell the said liquor in any manner whatsoever," still the jury would be justified in finding the defendant guilty. The court refused a requested instruction which was the converse of the instruction given. We said:

"The question as to whether the appellant brought the liquor into the state for his personal use is a question of fact to be submitted to and passed upon by the jury, and, if sustained by the evidence in the case, is a proper and legal defense. The jury should have been so informed by the instructions of the court."

The court having given the instruction condemned, was sufficient reason for assuming that the defendant offered some evidence on the trial tending to show the purpose for which the liquor was introduced was a lawful one, otherwise the necessity of instructing at all would not have existed. The necessity to instruct also requires a substantially correct instruction, hence the failure of the court to perform its duty.

The instruction here complained of did not have the effect of either presenting to, or withholding from, the consideration of the jury the question of defendant's purpose for introducing the whisky into the state. He did not raise that question at the trial by offering evidence in support of such defense, or otherwise, but on the other hand the state introduced evidence tending to prove that he had admitted that he brought a portion of the whisky into the state for the purpose of paying his charges for transporting two barrels of whisky into the state, which was certainly an unlawful purpose.

[8] The appellant could suffer no injury from the court's failure to instruct the jury of the defendant's right to interpose the defense of lawful purpose, when the purpose for which he was shown to have admitted was unlawful, and the jury would have been compelled to disbelieve defendant's own claims as untrue, in order to give him the benefits of the possible defense. The instruction given does not have the effect of misstating the law for the reasons urged. These reasons are not applicable to such instruction. They are applicable to a question of failure of the court to submit by instruction such special defense. Such failure to instruct is not the subject of complaint. No such defense was interposed by evidence or otherwise at the trial, and so far as the record discloses was not attempted to be raised other than on appeal in this court. No error was committed by the court's failure to submit such defense by special instructions, under the facts of this case.

The other questions raised by appellant, not specially noticed, all depend upon the decision of the above questions, and require no discussion in detail.

I find no reversible error in the record. The whole case considered, I am of the opinion the conviction is in accordance with the law, and therefore the judgment should be affirmed.

FRANKLIN, J., concurs.

ROSS, C. J. (dissenting). The information lays the venue of the charge in Maricopa county, state of Arizona, and whether this is correct or not is the important and serious question, as I view it. Stripped of formalities, the information accused the appellant—

"of the crime of introducing intoxicating liquor into the state of Arizona, * * * committed as follows, to wit: The said W. A. Reynolds on or about the 23d day of December, 1915, and before the filing of this information, at and in the county of Maricopa, state of Arizona, did then and there willfully and unlawfully introduce into the county of Maricopa, state of Arizona, certain intoxicating liquor, to wit, whisky, contrary to the form, force, and effect of the Constitution and the statute in such cases made and provided, and against the peace and dignity of the state of Arizona."

It is the contention of the appellant that the venue of the alleged crime is in the county bordering the state line into which he first brought the liquor. If I understand the con-

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tention of the Attorney General correctly, it is that the venue of the alleged offense is in the county of the state which the appellant intended as the destination of the liquors.

The contentions, it will be seen, revolve around the word "introduce," as it appears in the constitutional amendment, and the decision depends upon the construction that shall be given to that word.

The amendment says:

"* * * Intoxicating liquor * * * shall not be * * * introduced into the state of Arizona," and "every person who * * * introduces into * * * the state of Arizona * * * intoxicating liquor * * * shall be guilty," etc.

The language of the prohibition amendment left out of the above quotation forbids the manufacture and traffic in intoxicating liquor, and is an unquestioned rightful exercise of the police power of the state. Following the uniform line of decisions of all the courts of this country, we so held in Gherna v. State, 16 Ariz. 344, 146 Pac. 494, Ann. Cas. 1916D, 94, and in Sturgeon v. State, 17 Ariz. 513, 154 Pac. 1050. In the last case this court said:

"Three crimes are defined and denounced by this section: (1) The traffic in intoxicating liquors; (2) the manufacture of intoxicating liquors; and (3) the introducing or attempt to introduce into the state of intoxicating liquors. The offense with which the appellant is charged falls within the third class. It is his contention that the provision of the constitutional amendment making it a crime to introduce into the state intoxicating liquors is unconstitutional, as an attempt to regulate interstate commerce."

We accordingly, in that case, treated the phase of the prohibition amendment affecting the introduction of intoxicating liquors into the state as an attempt to regulate interstate commerce, and held it unconstitutional, except in so far as it received aid from the Webb-Kenyon Act (Act March 1, 1913, c. 90, 37 Stat. 699 [Comp. St. 1913, § 8739]) an act of Congress which prohibited "the shipment or transportation * * * of * * * intoxicating liquor * * * from one state * * * into any other state, * * * which * * * intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state."

In that case we used the word "introduce," or rather its derivative "introduction," as synonymous with the words "shipment" and "transportation" found in the Webb-Kenyon Act, and those words, it is readily seen, pertain to intoxicating liquors going "from one state * * * into any other state." We said, at page 519 of 17 Ariz., page 1053 of 154 Pac.:

"It being settled that traffic in intoxicating liquor in this state is a crime, it follows that the shipment, transportation or introduction of intoxicating liquor into the state with the intention to sell, barter, exchange, give away or dispose of, divests, under the Webb-Kenyon Act, such intoxicating liquor of its interstate commerce character, and leaves the state free in the exercise of its police powers to denounce such introduction as a crime and to prescribe penalties for its commission. In other words, one who introduces intoxicating liquor into the state with the purpose and intention of violating the laws of the state by disposing of the same may not now interpose the defense that he is engaged in interstate commerce, for the reason that the article that he is handling has been divested of its interstate character by the Webb-Kenyon Act."

And again, at page 520 of 17 Ariz., page 1053 of 154 Pac.:

"We are of the opinion that, when any person introduces * * * intoxicating liquor into this state with the purpose and intention of violating any law of the state, * * * such person may be punished for his act as of a crime."

The legal status of intoxicating liquors was made to depend upon the purpose for which it was brought or introduced into the state, that is, if it was brought in for a lawful purpose, no offense against the laws of Arizona was committed, but if it was brought in for an unlawful purpose, that is, for the purpose of traffic, the act became an introduction and a crime.

Upon the construction given to the prohibition amendment by this court in the Sturgeon Case all intoxicating liquor introduced into Arizona "from any other state or territory or foreign country" to be and remain as a part of the property of the state, when introduced for an unlawful use, by virtue of the Webb-Kenyon Act, lost its interstate commerce character and became, at the instant that it crossed the state boundary line, subject to the police power of the state. In that case we held that the introduction of intoxicating liquor into the state from without the state constituted a crime under the prohibition amendment when the introduction was for an unlawful purpose. The effort of the constitutional amendment was to stop intoxicating liquor at the boundary line of the state. The endeavor was to make it impossible for it to enter the state, and we held, in a modified sense, that the popular edict was successful. This construction of our prohibition amendment was made possible only through the aid of the Webb-Kenyon Act, which prohibited the shipment or transportation of intoxicating liquors from one state into any other state to be there used in violation of some law of the state. But for the federal legislation, or in the absence thereof, intoxicating liquors could have been shipped or transported or introduced into Arizona and the state would have been impotent to prevent it. It seems to me that the crime of introducing intoxicating liquors into the state of Arizona is committed at the boundary line of the state, where it is first brought into the state, and that the proper venue of the crime is the county bordering on the state line at that point. Paragraph 806, Penal Code, among other things, provides:

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"Except as herein otherwise provided, the jurisdiction of every public offense is in the county where it is committed."

The facts of this case do not constitute an exception permitting the prosecution of the offender outside of the county in which the crime is committed. The offense is not committed partly in one county and partly in another. Neither do the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties. One act, as defined by the prohibition amendment and explained by the court in the Sturgeon Case, constitutes the offense, and that act is the introduction of intoxicating liquor into the state from outside the state for the purpose or with the intention of violating some law of the state. If intoxicating liquor is introduced into the state from without the state for a lawful purpose, the introduction in that instance is no offense, and while one may thus lawfully introduce intoxicating liquors into the state of Arizona from without the state, he may not thereafter traffic in such liquors and claim immunity from prosecution. If any one should lawfully bring intoxicating liquor into Arizona and proceed to traffic in it, he would be guilty of a very different offense than that of introducing liquor.

Under a federal statute that made the importation into the United States of any alien woman or girl for the purpose of prostitution, or for any other immoral purpose a felony, the Circuit and District Courts of the United States have held that the jurisdiction of the offense is at the port where the alien woman or girl is first landed, as at the moment of such landing the offense is fully consummated. This has been the holding, notwithstanding the destination of such alien woman or girl may have been into some interior state of the Union and into another federal district than the one where she was first landed. United States v. Krsteff (D. C.) 185 Fed. 201; United States v. Lair, 195 Fed. 47, 115 C. C. A. 49.

In United States v. Capella (D. C.) 169 Fed. 890, the defendant was charged with having violated the federal statute which made it an offense "that any person who shall attempt, by himself or through another, to bring into or land in the United States by vessel or otherwise, any alien not duly admitted by an immigration inspector or not lawfully entitled to enter the United States." The facts were that the defendant brought a minor child to the United States who was not entitled to enter the United States, landing her first at the port of New York; thereafter he removed her to San Francisco, where he was indicted and tried. It was the contention of the prosecution that the offense with which the defendant was charged was begun in one judicial district and completed in another and therefore he could be tried in either district, the federal statutes so providing. Answering this argument, the court said:

"The offense charged in the indictment was not one begun at the port of New York, and completed in this district, but it was entirely committed at the port of New York. It was there that the minor child, Pasqualina Ranzoni, was landed in the United States, in violation of the act of February 20, 1907, and the subsequent act of the defendant in bringing the said minor within the jurisdiction of this court is no part of the offense of illegally bringing her into or landing her in the United States."

It seems to me that the offense here charged against the appellant is begun and completed in the county bordering the state line into which the intoxicating liquor is first introduced into the state. It is not committed partly in one county and partly in another. The appellee cites one case from Wyoming which he claims supports the view that the venue was properly laid in Maricopa county. Patrick v. State, 17 Wyo. 260, 98 Pac. 588, 129 Am. St. Rep. 1109.

Patrick was informed against for violating this statute:

"It shall be unlawful for any person to bring into this state any sheep infected with scab or any other infectious or contagious disease, or that have in any manner been exposed to such disease."

The proceedings against Patrick were had in an interior county of the state and, against the contention of the defendant, the court held that the interior county had jurisdiction. It may be doubted whether the language of the statute will permit such a construction, but granting the correctness of the court's decision on that point, I do not think it authority in this case. The Wyoming statute was clearly within the police power of the state, which power authorizes the state to pass sanitary laws for the protection of life or property within its borders and to prevent persons or animals suffering from contagious or infectious diseases from entering the state. Reid v. Colorado, 187 U. S. 137–151, 23 Sup. Ct. 92, 47 L. Ed. 108; Railroad Co. v. Husen, 95 U. S. 465–472, 24 L. Ed. 527.

The Wyoming law is not an attempt to regulate interstate commerce, nor does it do so, "but," as is said in the Patrick Case, "is rather a reasonable and necessary exercise of the police power of the state to exclude from its borders diseased sheep, the introduction of which would endanger the sheep industry of the state." Whereas, the act of introducing intoxicating liquors into Arizona can become an offense only by reason of an interstate shipment being divested of its interstate commerce character by an act of Congress. The Wyoming act finds sanction in the police power of the state only. Ours is dependent for vitality upon coordinating congressional legislation.

It is well-settled law that the acts and things alleged in an indictment or information characterize and identify the offense rather than the name ascribed to those acts

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in the informal part of such instruments. Indeed the name given is unimportant and may be entirely disregarded. People v. Phipps, 39 Cal. 326. The information in this case names the offense charged against the appellant as "the crime of introducing intoxicating liquor into the state of Arizona." That, however, is the only expression in the information that tends affirmatively or otherwise to show that the intoxicating liquor was introduced into the state from without the state. There is no positive or affirmative allegation that the whisky which the appellant is charged to have introduced "into the county of Maricopa, state of Arizona," was brought, shipped, transported, or introduced into the state from without the state. If the pleader intended by the allegations of the information to assert that the whisky was introduced into Maricopa county from some point outside of the state, the court would be compelled to take judicial notice that it was first introduced into some other county of the state before it was introduced into Maricopa county. I think that the language of the information fails to show that the liquor was an interstate introduction. Therefore it does not conform with the requirements of section 936 of the Penal Code, in that it is not direct and certain as regards "the particular circumstances of the offense charged," and fails to show facts "necessary to constitute a complete offense." On the other hand, should it be considered that the information states facts sufficient to constitute a public offense, it clearly shows that the offense was committed in some other county than Maricopa county, and that, therefore, the venue is not properly laid.

For these reasons, I am of the opinion that the judgment of conviction should be reversed, and the cause remanded, with directions that the case be dismissed.

(18 Ariz. 408)

McCALL v. STATE. (Cr. 402.)

(Supreme Court of Arizona. Dec. 22, 1916.)

GAMING ⟸98(4)—EVIDENCE.

In a prosecution under Pen. Code 1913, § 321, for conducting a gambling device known as "pari mutuel," conviction set aside.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 294; Dec. Dig. ⟸98(4).]

Franklin, J., dissenting.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

S. W. McCall was convicted of a crime of carrying on a banking or percentage game, in violation of section 321 of the Penal Code of Arizona of 1913, and adjudged to pay a fine of $50 as punishment therefor. From the judgment of conviction, and from an order refusing a new trial, he now appeals. Judgment vacated, and cause remanded, with instructions.

G. P. Bullard and Lewis T. Carpenter, both of Phœnix, for appellant. Wiley F. Jones, Atty. Gen., Leslie C. Hardy and Geo. W. Harben, Asst. Attys. Gen., and C. M. Gandy, Co. Atty. of Maricopa County, of Phœnix, for the State.

CUNNINGHAM, J. Appellant contends that the information fails to state facts sufficient to charge a public offense, and the court erred in overruling appellant's demurrer based on that ground.

Omitting the formal allegations, the charging portion of the information is as follows:

"The said S. W. McCall, * * * on or about the 9th day of November, 1915, and before the filing of this information, at and in the county of Maricopa, state of Arizona, did then and there willfully and unlawfully carry on, open, conduct and cause to be opened a certain banking and percentage game commonly known as French pool or pari mutuel, which said game was then and there played with a certain device, to wit, a betting machine commonly known and called by the name of French pool or pari mutuel machine, which game was then and there played for money, checks, credits and other representatives of value. * * * Contrary to the form," etc.

The information is drawn under section 321, Penal Code of Arizona of 1913, which is as follows:

"Every person who shall deal, carry on, or open, or cause to be opened, or who shall conduct, either as owner, proprietor, or employé, whether for hire or not any banking or percentage game whatsoever played with cards, dice or any other device, whether the same be played for money, checks, credits, or any other representatives of value, * * * shall be guilty," etc.

The information substantially charges the offense of conducting a banking or percentage game played with a device commonly called a "French pool," or "pari mutuel," machine. The information, though inartificially drawn, is probably sufficient, if sustained by the evidence. The machine is described by the name by which it is commonly known. The manner of playing the game by the use of the machine mentioned is not apparent from the information. The court, as a legal proposition, may not take notice of the game referred to and of the method of using such machine in playing the game, in the absence of allegations setting forth such facts, and therefore the court cannot say, as a matter of law, that a banking or percentage game condemned by the statute could not be played with a pari mutuel machine such as the accused is charged by the information with opening. After conviction I will consider the information sufficient to charge a public offense under the statute and put the accused upon his defense. I do not wish, however, to be understood as approving the form of the information for a precedent for general use.

The appellant complains that the court erred in denying his motion to dismiss the charge upon the grounds that the evidence was insufficient to warrant a conviction.

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The cause was tried by the court without a jury, upon an agreed statement of facts; consequently, the evidence is without conflict, and if substantial evidence in support of the material allegations of the information appears in the record the judgment of conviction must be sustained on this appeal. With the weight of the evidence this court has nothing to do. That question is for the lower court.

The facts shown by the record are: That on the 9th day of November, 1915, before a horse race commenced on the race track at the fair grounds in Maricopa county, Ariz., the accused produced a device commonly called a "pari mutuel" machine. The accused furnished tickets to bettors who desired to lay bets on the proposed horse race about to start. The bettor, taking a ticket, named the horse selected by him to win the race, and delivered $2 to the accused at the time of receiving the ticket. The tickets furnished the bettor, by the accused, bore the name of the horse selected by the bettor to win the race. The accused caused such ticket, furnished by him, to be registered on the machine and closed the machine when the race started, and held all the money given to him in exchange for all the tickets until the result of the race was declared. The machine registering the tickets furnished the bettors recorded the total number of tickets furnished, and the number of tickets furnished naming each horse in the race to win. When the result of the race was known, the accused deducted 10 per cent. from the total sum of money, so in his hands, as his commission, and divided the balance of such sum among the holders of the tickets bearing the name of the horse declared the winner of the race. The accused "did not wager any money upon the result of the race and * * * the division of the money is not determined by the pari mutuel machines, or by the owners or operators thereof, but by the result of the horse race, but that the machine merely indicates the number of tickets sold upon the different horses in the race and the operators, and owners of the machine merely divide the money paid in for tickets less their commission."

The trial court held in effect that such facts constitute the carrying on of a banking or percentage game played with a device other than with cards or dice for money, checks, or other representatives of value, by the accused, and he was therefore guilty of a violation of section 321 of the Penal Code of Arizona of 1913, and adjudged that he be punished therefor, accordingly.

The question is whether the accused by the use made of the machine, as described in the statement of facts, violated the criminal law and thereby incurred the penalty prescribed by section 321 of the Penal Code. In other words, is the accused guilty of conducting a gambling game played with any device other than with cards or dice, by the operation of his pari mutuel machine, in registering tickets sold by him to the bettors on a horse race?

Certainly holding the stake is not playing a game. Dividing the stake and paying it out to the several winners is not playing a game. Holding a commission for the services rendered in the transaction is not playing a game. Neither can the furnishing of the tickets be considered as playing the game. Under the evidence the game played was the horse race. The bets were laid on the result of that contest. If a horse race may be considered a game and a gambling device, as some courts have affirmed and others denied, yet the accused is not charged with playing a game with horses running on a prepared track as gambling devices. The specific charge is that he conducted a gambling game by the use of a pari mutuel machine as a device. Clearly, then, the horse race, the tickets sold, the pooled funds in the accused's hands, his commissions, and the division of such funds and his paying them out to the persons entitled, are not involved in this charge, because he is not charged with conducting a horse race game in the first place; and, in the second place, those things which he did in the premises do not amount to conducting any game whatever.

If the charge has been maintained by the evidence, then, such evidence showing that the accused registered the tickets sold by him to the bettors, and kept a record of such tickets by means of the machine, is the only evidence supporting the charge that the accused conducted a gambling game by means of a device other than with cards or dice, to wit, a pari mutuel machine. To hold that such evidence is sufficient to support the charge of a public offense condemned by our statute would to my mind be wholly absurd. The accused is not charged with betting on the horse race. The record is clear that he wagered nothing upon the result of the race. Had he been charged with gambling on the horse race, the evidence clears him of that charge, unless he by his acts became an accessory. In which event we may have been called upon to determine whether the law condemns as a crime betting on horse races; but such question is not here presented, and until such question is properly before this court we may not declare an opinion thereon. I am of the opinion that the evidence fails to support the allegations of the information.

For these reasons I am of opinion that the judgment of conviction should be vacated, the cause remanded, with instructions to dismiss the cause and discharge the defendant.

ROSS, C. J. I concur in the disposition of this case as directed by Justice CUNNINGHAM, but feel that I should give my reasons therefor, inasmuch as I do not approve of all that is said by my learned Associate.

I do not think the count of the information upon which the appellant was convicted

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states a public offense, and, if that be true, our opinion should be limited to a decision of that question. The statute (section 321, Penal Code 1913) prohibits banking and percentage games of every kind played with cards or played with dice or played with any other device. The statute particularizes the instrumentalities, to wit, cards and dice, with which some of the games forbidden may be played. Experience teaches that those who have a penchant or passion for gambling are very ingenious in inventing new devices and contrivances with which to gratify their appetite for gambling, and at the same time evade the letter, if not the spirit, of the law, and the lawmakers, familiar with this well-known fact, after mentioning banking and percentage games played with cards and dice, anticipating, likewise prohibited banking and percentage games "played with * * * any other device." The games prohibited, then, are those played with named devices, to wit, cards and dice, and those played with unnamed devices.

The information names the game played by appellant as French pool or pari mutuel, and the device with which the game is said to be played is "a betting machine commonly known and called by the name of French pool or pari mutuel." Neither the game nor the instrumentalities with which it is played is further described in the information. Within and of itself, and the human factor which is always present in gambling, the game is alleged to be played. If a banking or percentage game can really be played with a pari mutuel machine, then the information is sufficient. 20 Cyc. 880 and 881, defines a "game" as follows:

"A 'game' has been defined as any sport or amusement, public or private. It includes physical contests, whether of man or beast, when practiced for the purpose of deciding wagers, or for the purpose of diversion, as well as games of hazard or skill by means of instruments or devices."

The game prohibited by the statute is not only a game, but it is a gambling game; it must "be played for money, checks, credits or other representative of value." "Gaming" or "gambling" is defined to be:

"The risking of money or other property between two or more persons on a contest of chance of any kind where one must be the loser and the other the gainer."

Where the game is played with cards, the cards themselves determine who is the winner and who the loser. This is likewise true with dice. An information charging that the gambling was with cards or dice or with any other well-known instrumentality, which in and of itself determines the contest, would doubtless state a public offense under the statute. As was said in the case of People v. Engeman, 129 App. Div. 462, 114 N. Y. Supp. 174; Id., 195 N. Y. 591, 89 N. E. 1107:

"'This is the test: Whether the implement or device is used in determining who shall win or lose; whether it is an integral part of the actual gambling. A 'gambling device' is defined (20 Cyc. 871) as an 'invention often used to determine the question as to who wins and who loses, that risk their money on a contest or chance of any kind; anything which is used as a means of playing for money or other thing of value, so that the result depends more largely on chance than skill.'"

If the pari mutuel machine, with which it is alleged the appellant played a gambling game, decides or determines who shall win or who shall lose, it is one of the "devices" prohibited by the statute.

"Paris mutuels" is defined by the Standard Dictionary as follows:

"A pool in betting, as in a horse race, in which each bettor lays a fixed sum on the contestant that he selects, and those who choose the winners divide the entire stake, less the percentage of the person who furnishes the pool tickets; literally, mutual bets."

This definition is descriptive of the game known as "pari mutuel," and not of the pari mutuel machine used by the bettors in registering their bets. The game as defined might well be played without any machine whatever. "The person who furnishes the pool ticket," as easily conceived, might do so without the aid of any automatic machine or apparatus whatever; he could use his hat or any other receptacle in which to deposit the bets and give a written receipt to each bettor for the amount of his bet and the horse of his backing. From his hat or a bucket or a basket the stake could be distributed among the winners, less a percentage. Neither the receptacle in which the bets are deposited nor the tickets issued to a bettor, nor both combined, would in the least determine who was the winner or who the loser; nor can it be said that the person who presides over the receptacle, and who issues the pool tickets or receipts, either bets or determines the bets that are made. The pari mutuel machine and the proprietor thereof and the functions that they each perform are stated in the stipulation of the parties as follows:

"Said pari mutuel machine is an indicator of the number of tickets sold on each horse in a horse race; not only an itemizer but a totalizer of said tickets. That the tickets are two dollars ($2.00) apiece. At the time of the purchase of a ticket, the man who sells it calls out the name of the horse the ticket was purchased on to the man who operates the indicator or machine; said man registering the ticket sold. That the pari mutuel machine registers like an automatic turnstile the number of tickets sold upon each horse, and also registers the total number of tickets sold upon the race. At the moment the race starts the machine is closed and no more tickets are sold upon the race. After the race is run and the result declared, all money taken in by the seller of tickets is evenly divided among those people who purchased tickets on the winning horse less ten per cent. (10%) which is deducted by the operators of the machine as their commission. That the owners and operators of the machine did not wager any money upon the result of the race and that the division of the money is not determined by the pari mutuel machine or by the owners or operators thereof, but by the result of the horse race and that the machine merely indicates the number of tickets sold upon the different horses in the race and the operators

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and owners of the machine merely divide the money paid in for tickets less their commission."

A pari mutuel machine, it would seem, differs from the crude and primeval method of registering bets instanced above principally, in this: It is automatic; it is quicker, and free from mistakes. Because of this facility in operation, it is doubtless more attractive and alluring to persons desiring to place bets on contests, such as horse racing and events of that kind. It has a tendency to emphasize, stabilize, and encourage the evil of gambling; its business is to invite, encourage, and facilitate wagering upon horse racing.

Notwithstanding all this, the proprietor and owner of the machine and the machine, while forming the nucleus of a betting crowd, do not play the game of horse racing; it is the crowd that plays the game; the proprietor and the machine hold the pool and distribute it after the race to the winners, retaining a percentage for their services. The machine, in and of itself, does not determine who wins or loses. It might be used in connection with any physical contest, whether of man or beast, as, for instance, in registering bets on foot races or boxing or jumping matches, on baseball contests, or on horse racing or trotting races. In all these cases, however, the winner is determined, not by the pari mutuel machine, but by the contestants—the men or horses. It will be seen therefore that the pari mutuel machine, while used in connection with gambling, is not a device which determines who shall win or lose and is not a device with which a game is played; it is an instrumentality employed by those gambling, but it is not a device mentioned in the statute with which a game is played.

The stipulation clearly shows that the game in this instance was a horse race, and the courts have disagreed as to whether horse racing is a game or not. We think those that hold that it is are not only in the majority, but are supported by the better reasoning. James v. State, 4 Okl. Cr. 587, 112 Pac. 944, 34 L. R. A. (N. S.) 515, 140 Am. St. Rep. 693; James v. State (Okl. Cr.) 113 Pac. 226, 33 L. R. A. (N. S.) 827. And taking that view of the case, we find that there were people gambling on horses and that the appellant was not one of them. He was merely registering the bets and acting as stakeholder for the bettors, using the machine to facilitate his labors. True, he kept a percentage of every bet made, and if the pari mutuel machine was the arbiter of the contest, or in and of itself determined who was the winner or loser, he would be within the statute, and the information would be sufficient.

A pari mutuel machine is as innocuous in and of itself as a faro table without cards, a roulette table without the ivory balls, a stein without beer, a goblet without wine. These are alike harmless without the complement of cars, balls, beer, and wine. So likewise is the pari mutuel machine without the horse race or other contest of chance.

It is plainly absurd to say a game of chance can be played with a pari mutuel machine in and of itself, and yet that is what the information charges. It is as reasonable to say faro may be played with a faro table alone; roulette, with a roulette table alone; beer drunk from an empty stein; or wine from an empty goblet.

There must be a contest of chance of some kind before the pari mutuel machine is usable, and it must be operated in connection with the contest of chance. The count of the information upon which appellant was convicted is silent as to any contest of chance.

The power to say what acts or omissions shall constitute a crime and be punished is entirely with the legislative department. It may limit or extend the law in that regard as it chooses. It is the only department of the state vested with the right and power to define crimes and fix punishments. It may make all gambling, of whatever kind or nature, a crime. In the exercise of the police power for the public morals, it is all powerful. It might have made it a crime to bet on horse racing or baseball contests or foot racing, but it has not seen fit to do so. It might have made it a crime to keep and operate a pari mutuel machine or any machine or apparatus used in connection with gambling, but it has not done so.

It is useless to say that courts cannot make laws or supply deficiencies or omissions in laws made by the Legislature. When their jurisdiction is invoked in a proper case, it is their duty to interpret and construe the law as they find it. The question for this court to decide in this case is whether the facts set forth in the count of the information upon which the appellant was convicted constitute a public offense. It is not whether what the appellant actually did constitutes a crime under the law or not, but whether the facts set forth in the information make out a crime. It is so clear to my mind that the facts charged do not constitute a public offense that I would have to do violence to my conscience in order to sustain the information.

An information or indictment must contain "a statement of the acts constituting the offense in ordinary and concise language. * * *" Section 934, Penal Code 1913. An inspection of the count of the information upon which appellant was convicted discloses that it does not set forth sufficient acts to constitute an offense. The acts alleged, in and of themselves, do not show that appellant was playing a game with a device that determined who was the loser or the winner.

FRANKLIN, J. (dissenting). I cannot agree with the court in the disposition made of this case. This proceeding is technically

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what is known as an "agreed case." While it is criminal in its form, it is brought for the purpose of obtaining the opinion of the court as to whether or not what is commonly known as race-track gambling is permissible through the operation of the pari mutuel system of betting. It is obvious from an examination of the record presented that the end sought is not an adjudication by the court of the guilt or innocence of the defendant, but a judicial expression which will determine whether resorts may be maintained in this state for public gambling at race tracks provided the plan adopted is a pooling scheme with a pari mutuel machine and operator, race track, horse races, and other paraphernalia as essentials of the project. In the brief of the Attorney General supplementing that of the defendant in favor of reversing the judgment of conviction, the matter is thus frankly stated:

"The cause is submitted to the court upon the briefs of appellant and respondent, for the purpose of having this court definitely pass upon the question, so that those interested in the pari mutuel machine, so far as they may be conducive to encouraging horse racing within the state of Arizona, may be advised of their rights to operate such machines with impunity."

An information in four counts was filed, a jury was waived, and the cause was submitted to the superior court on an agreed statement of the facts. The court found the defendant guilty and based the conviction on the first count of the information, which happens to be very awkwardly drawn and subject to exceptions according to the rules of pleading applicable to criminal informations.

A proceeding of this kind ought not to be encouraged by the courts. I know of no law which authorizes it. If such a practice is to be sanctioned, it needs no comment to emphasize the evils which may ensue from the practice in invoking the exercise of judicial power, not to decide an existing controversy, but to establish a rule for controlling future conduct. Parties who wish for advice in such matters should consult lawyers.

The function of courts upon elementary principles of sound public policy must be confined to the determination of a present actuality.

The notion is thus stated in California v. San Pablo & Tulare R. Co., 149 U. S. 308, 314, 13 Sup. Ct. 876, 878 (37 L. Ed. 747):

"The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard."

Even in a civil cause which, by virtue of a statute (paragraph 510, R. S. [Civ. Code] 1913), may be submitted under certain circumstances on an agreed statement of the facts, courts will not consider an agreed case which is not a real case but one simply intended to secure the opinion of the judges as a guide for future conduct. Such a remedy is not intended to enable parties to use the court as advisory in their business and pursuits, and any attempt to obtain the opinion of the court upon a question of law through the instrumentality of a supposititious case is regarded as reprehensible, and the party offending may be punished for contempt. See Submission of Controversy, 37 Cyc. 346.

If these "agreed cases" are to be tolerated, however, I think it behooves the court not to overemphasize on the technique of legal pleading, with no emphasis at all upon policies and principles. In these kinds of cases the pleadings are as the dead bark of the tree and the facts of the case as the roots and the living, growing inner core. The information, as I have said, is in four counts. Some of these counts in my opinion, under the liberal rules of pleading allowed by the Code, are good. The demurrer interposed was a general demurrer and apparently a formal one. If any of the counts are good, the demurrer was properly overruled. No argument is made in this court either orally or in the briefs against the sufficiency of the information. The office of an information is to apprise the defendant as to the offense with which he is charged. Here the defendant stipulated the facts of the case. An agreed case, where it is permitted, takes the place of pleading. As in this court, so in the lower court perhaps, no contention as to the pleading was urged or desired. If the lower court felt it to be a duty to entertain the proceeding at all, I think it was right in not looking narrowly at the information, but broadly at the facts to ascertain if those facts were criminal in their nature, and I think this is eminently a proper case for this court to heed the admonition of section 1170 of the Penal Code of 1913, as follows:

"After hearing the appeal, the court shall give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties, and no judgment in any criminal case shall be reversed for technical error in pleading or proceedings when upon the whole case it appears that substantial justice has been done."

In 1909 an act was passed "to prohibit gambling in the territory of Arizona." Chapter 92, Laws 1909. Its provisions have been translated into the Penal Code of 1913 as follows:

"319. Every person who shall deal, carry on, or open, or cause to be opened, or who shall conduct, either as owner, proprietor or employee, whether for hire or not, any game of faro, monte, roulette, lasquenet, rouge et noir, rondo, vingt-un or twenty-one, poker, stud poker, draw poker, bluff, fan tan, thaw, seven

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and one-half, chuck-a-luck, black jack, or any similar game whatsoever, played with cards, dice or any other device, and every slot machine or machine of like character whether the same be played for money, checks, credits or any other representative of value within the state of Arizona, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than three hundred dollars, or by imprisonment for not more than six months, or by both such fine and imprisonment.

"320. If any proprietor, owner or part owner, lessee, manager or any person having management, supervision or control, temporary or permanent of any gambling house or other resort, maintained for gambling or of any saloon or of any building in which a saloon may be situate shall permit any of the games mentioned in the preceding section to be played in such place, he shall be guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in the preceding section.

"321. Every person who shall deal, carry on, or open, or cause to be opened, or who shall conduct, either as owner, proprietor, or employee, whether for hire or not any banking or percentage game whatsoever played with cards, dice or any other device, whether the same be played for money, checks, credits, or any other representatives of value, within the state of Arizona, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars, nor more than three hundred dollars, or by imprisonment for not more than six months or by both such fine and imprisonment.

"322. If any proprietor, owner, or part owner, lessees, manager or any person having management, supervision, or control, temporary or permanent, of any gambling house or other resort maintained for gambling or of any saloon or of any building in which a saloon may be situate, shall permit any of the games mentioned in the preceding section to be played in such place, he shall be guilty of a misdemeanor."

The facts upon which the superior court based its judgment of conviction were stipulated to be as follows:

"It is hereby stipulated between the prosecution represented by C. M. Gandy, and the defendant represented by G. P. Bullard, that the following facts are true and may be considered in evidence in the above-entitled matter; both the prosecution and defense waiving the method of taking said testimony and stipulate that the following agreed facts should constitute the record evidence in the above-entitled proceeding, to wit:

"That at the state fair grounds in the county of Maricopa, state of Arizona, there was conducted, but not by this defendant, a horse race between two horses, viz., Antilla and H. B.; Antilla being owned by a man by the name of Stanley and H. B. by a man by the name of Schultz. That said horse race was held on said fair grounds on the mile track of said fair grounds on the said 9th day of November, 1915. That prior to said race and upon the same day at said fair grounds in said Maricopa county, the defendant conducted and operated a pari mutuel machine. That said pari mutuel machine is described as follows: Said pari mutuel machine is an indicator of the number of tickets sold on each horse in a horse race; not only an itemizer but a totalizer of said tickets. That the tickets are two dollars ($2.00) apiece. At the time of the purchase of a ticket, the man who sells it calls out the name of the horse the ticket was purchased on to the man who operates the indicator or machine; said man registering the ticket sold. That the pari mutuel machine registers like an automatic turnstile the number of tickets sold upon each horse, and also registers the total number of tickets sold upon the race. At the moment the race starts the machine is closed and no more tickets are sold upon the race. After the race is run and the result declared, all money taken in by the seller of tickets is evenly divided among those people who purchased tickets on the winning horse less ten per cent. (10%), which is deducted by the operators of the machine as their commission. That the owners and operators of the machine did not wager any money upon the result of the race, and that the division of the money is not determined by the pari mutuel machine or by the owners or operators thereof, but by the result of the horse race, and that the machine merely indicates the number of tickets sold upon the different horses in the race, and the operators and owners of the machine merely divide the money paid in for tickets less their commission.

"It is further stipulated between the prosecution and the defense that upon said 9th day of November, 1915, at said race track in Maricopa county, state of Arizona, the defendant operated a pari mutuel machine in the manner in this stipulation described, and did sell tickets upon said race in the manner in this stipulation described, and did subsequent to the race and after the result of the race had been declared divide money, among those persons holding tickets upon the winning horse, the total of all the money paid in for tickets on said race less the commission for the operation of the machine."

As in this case the view was urged in Schmidt v. Territory, 13 Ariz. 77, 108 Pac. 246, that:

The act "was more comprehensive in its restriction than was desired, in that it prohibited almost all kinds of games 'in nearly every place where such games are usually played,' and that taking into consideration the history of the times when the act was passed, and the evil sought to be remedied, the statute as a whole must be construed as directed solely against the carrying on of such games by professional gamblers; but," said the court, "the rules of construction invoked are only applicable where the statute itself is ambiguous, and we see no ambiguity in those provisions under consideration."

What is the scope and meaning of this act? Its title as originally enacted was "An act to prohibit gambling in the territory of Arizona."

The rule of the common law that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its object and to promote justice. Section 5, Penal Code.

Under this statute the courts of the state are required to construe the penal statutes of this state liberally according to the fair import of their terms, and when it can be reasonably done to give each statute such a construction as will enable it to reach and destroy the evil at which it is aimed.

To determine that a case is within the intention of a statute, its language must, of course, authorize us to say so; but "the courts follow the reason and spirit of such statutes till they overtake and destroy the mischief which the Legislature intended to suppress. In doing so they often go quite beyond the letter of the statute." Lewis' Sutherland, Statutory Construction (2d Ed.) vol. 2, p. 1077.

It will be observed that paragraph 319

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prohibits the carrying on, opening, or conducting certain enumerated games, "or any similar game whatsoever, played with cards, dice or any other device." Statutes of a like kind are found in most of the states. It is clear that the project of the defendant would not come within the inhibition of this statute, because the games specifically enumerated are those which have been repeatedly adjudged to be games which require some kind of an apparatus or contrivance upon the manipulation or operation of which alone the result of the game is determined. Under such a statute, the general character of such devices is fixed, and the words "or any other device" must be construed ejusdem generis with the particular devices that are described and in connection with the games enumerated in the preceding portion of the section.

This is the kind of a statute that was before the court of Oklahoma in James v. State, 113 Pac. 226, 33 L. R. A. (N. S.) 827, where the defendant was charged with conducting a turf exchange or pooling scheme for betting on horse races, and a conviction was affirmed; but subsequently the court receded from that ruling and reversed the conviction under that statute, applying the familiar rule of ejusdem generis, requiring that the device alleged in the information must be a device similar to those particularly described in the statute. See James v. State, 4 Okl. Cr. 587, 112 Pac. 944, 34 L. R. A. (N. S.) 515, 140 Am. St. Rep. 693. The opinion of Judge Furman in 113 Pac. 226, is exhaustive, and while I agree that the application of the statute before the court in that case was too broad, the reasoning, if applied to statutes like sections 321 and 322 of the Penal Code of Arizona of 1913, is an unanswerable piece of logic.

These statutes have a much broader and more comprehensive intention than is to be found in sections 319 and 320, because, if by interpretation the meaning is to be restricted to the kinds of games and devices of a similar character named in those statutes, the Penal Code has been uselessly incumbered with meaningless verbiage.

The language of the statute was skillfully framed in not denouncing as an offense the use of the pari mutuel machine by name, in not descending into too minute particulars, but leaving the language broad enough to comprehend the mischief sought to be destroyed. One of any considerable experience at all must know that rules of conduct to be effective must necessarily be expressed in general terms, and depend for their application upon circumstances; and circumstances vary. The comprehensive, absolute, and unqualified expressions used by the Legislature show that they regarded this species of gambling as a serious evil, and they desired to suppress it, and for reasons which they considered satisfactory they saw fit not to permit it under any circumstances. In the contest between the police and the betting confraternity, much ingenuity has been shown by the votaries of sport in devising means for evading the terms of such like enactments, and owing to the diversity in the statutes there is a consequent crop of legal decisions showing considerable divergence of judicial opinion.

This is largely due to the lawmaking power in attempting to regulate human conduct by particularizing too much and failing to generalize by expressing their meaning in terms so that the mischief sought to be avoided could receive the application of the statute as the varying circumstances of the particular case arise.

This seems to have been recognized in an early English statute against gambling, wherein the preamble to the act recited: "Divers and many subtle, inventive and crafty persons have found and daily find many and sundry games and plays."

If the Legislature sought to prohibit the conduct and operation of banking and percentage games by any device whatsoever, it is well that it used general terms; for, if it had attempted to do so by a particular name, the legislation would have lagged far behind the ingenuity of those who would see profit in devising new methods or schemes for its evasion.

It is not enough to say that there is no law against horse racing. That is a sport recognized and encouraged by the legislation of this state. This would be as idle as to say the law frowned upon the great American sport of baseball. But it is ridiculous to say that a horse race is permitted for the purpose of gambling upon the result of it, or that thereby it is the public policy of the state to encourage the citizen to stake his substance upon a wager that the mare "Antilla" could beat the horse "H. B." in a race of half a mile. It is not enough to say that there is no law against laying a wager on the result of a horse race, or that defendant did not do any betting. Those are not matters involved here at all. The question is: Did the defendant conduct or operate a banking or percentage game played with a device for money, checks, or credits, or any other representative of value? "Game," "gaming," and "gambling" are terms of allied meaning, as I speak of them. They are difficult exactly to define or adequately to distinguish, but are associated with the staking of money or money's worth on the result of a game.

The word "device" is not technically defined in the law, and must therefore be given its common acceptation. The Century Dictionary says:

"A scheme or plan; something devised or studied out for promoting an end; specifically something contrived for an evil or selfish purpose; a wrongful project, stratagem or trick." "*French Pool.* A contrivance used in betting, by which betting money or other thing is or may be won or lost; a contrivance used to make wagers on horse races." 20 Cyc. 849.

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The invention is known in France as the "Paris mutuels"; in Australia, as the "totalizator." This kind of a pooling scheme doubtless has different names as the exigencies of the situation may require.

Mr. Brown says (Common Words and Phrases, 324):

"This modern 'pool' differs from that of Siloam in two particulars; it is always 'disturbed,' and nobody who descends into it ever comes out cured."

To get an intelligent idea, we must not isolate the parts, and analyze the machine, the race track, horse races, betting, etc., separately. To do so would be a narrow and indefensible construction of the statute, whereas the Code requires a reasonable and forbids a strict construction of penal statutes. But we must look at the facts collectively as they appear in the stipulation, at the plan or scheme as a whole. Though it is proper to value small parts, as, "Sands make the mountain, moments make the year," yet we must contemplate collectively, to have a just estimation of the plan which defendant is charged with operating. As in filling a vessel drop by drop, though each may not be enough, there is at last a drop which makes its run over. Let us not divide the objects of our attention into minute parts, and think separately of each part. But let us contemplate the large mass of facts found in the stipulation, and in doing this I am persuaded they are criminal in their nature as tested by section 321 of the Penal Code, as well as of several other statutes which will hereafter be mentioned.

In this connection I quote with approval the language of Judge Furman as applicable to sections 321 and 322 of the Arizona Penal Code:

"We think that, by the use of the words 'or any device,' * * * the Legislature meant to include every scheme or plan or conception by which the person who opened or conducted a house, room, or place for betting, induced and enabled persons to bet or lay wagers upon any kind of game whatsoever; and that the charge contained in the information constituted a violation of this section of our law; and that the purpose of this statute was not aimed exclusively at any particular game or species of games, but was intended more effectually to suppress every kind of public gaming in the state of Oklahoma, not only those then in existence, but also those that might subsequently be devised and practiced. The great evil and vice aimed at was not the horse races, but the seductive allurements held out to the people, young and old, to frequent gaming tables and indulge in excessive gaming and thereby become the victims of the professional gambler." James v. State, 113 Pac. 226, 229, 33 L. R. A. (N. S.) 827.

I think that the Attorney General has easily been misled in taking the position that the operation of the pari mutuel system of betting in conjunction with horse races is not forbidden by the gaming statutes of this state. I am more persuaded of this because the case he cites as authority for the position (James v. State, 4 Okl. Cr. 587, 112 Pac. 944, 34 L. R. A. [N. S.] 515, 140 Am. St. Rep. 693) emphatically declared that the conduct of turf exchanges for betting upon horse races constituted common gambling houses and are nuisances per se. That "under section 5771 of Snyder's Comp. Laws Okl. 1909, their operation may be enjoined; they may be abated as provided in chapter 71 of said laws; and under section 2465 of said laws their operation constitutes a misdemeanor, and those who conduct them may be prosecuted criminally and have inflicted upon them the punishment prescribed by section 2032." See, also, State v. Lawrence, 9 Okl. Cr. 16, 130 Pac. 508. These Oklahoma cases are learned expositions of the law on the subject of gaming statutes and well worth perusing. The statutes cited from Oklahoma have found expressions in the laws of Arizona. See following sections of the Penal Code of Arizona 1913: Sections 322, 335, 317, 383, 385. And the case last cited from Oklahoma will show the relevancy of these Code citations from Arizona.

The attorneys for the defendant, however, have, in my opinion, a much clearer conception of the law pertaining to this matter. In the brief for the defendant, prepared by very able criminal lawyers, it is said:

"In Oklahoma and Illinois and other states it is settled that horse racing is gaming, and doubtless in those states where the statutes have by legislative enactment or by judicial construction been made to mean that horse racing is gaming, then the pari mutuel or any other kind of an arrangement for recording wagers on horse races would be construed as a gaming device, but by no possible stretch of judicial construction can it be said that section 321 of the Revised Statutes of Arizona [Pen. Code] were intended by the Legislature to apply to a race course or a grand stand or a place where horse races were conducted, but rather it is clear that the said section was intended to prevent gambling houses and such games as are usually conducted in gambling houses."

This puts the matter just as it must be put, and if horse racing when practiced or adopted for the purpose of deciding bets is gaming the matter is clear. It is obvious that no such exception as contended for by defendant is found in the law, and, of course, the courts must not ingraft upon the law an exception not contained in it. It must be apparent to any mind that there can possibly be no reason for the exception urged in favor of this kind of public gambling, because it is engaged in on a grand stand at the state fair grounds, or similar places. Acts of this character are just what the statute seeks to prohibit.

The operation of the pari mutuel system of public betting on horse races in such a multitude of people, and in the presence of and among the men and women, boys and girls there assembled, instead of lessening the evil of public gambling sought to be prohibited, would only aggravate it to an alarming extent. The contention involves an absurdity, and the argument, like Waller's Eagle, is pierced by a feather quivered from its own wing.

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This has been interestingly discussed in the case of State v. Lawrence, 9 Okl. Cr. 16, 130 Pac. 508.

That any kind of a contest when practiced or adopted for the purpose of deciding bets or wagers becomes gaming, and that a horse race under such circumstances is gaming, there can be no doubt. 12 R. C. L. § 17; 20 Cyc. pp. 880, 881, and the great number of authorities cited in the note 50 to subd. 5 at page 884. See, also, State v. Falk, 66 Conn. 250, 33 Atl. 913; Debardelaben v. State, 99 Tenn. 649, 42 S. W. 684; Watson v. State, 3 Ind. 123; Redman v. State, 33 Ala. 428; State v. Stripling, 113 Ala. 120, 21 South. 409, 36 L. R. A. 81; Cheesum v. State, 8 Blackf. (Ind.) 332. 44 Am. Dec. 771, and note; People v. Weithoff, 51 Mich. 203, 16 N. W. 442, 47 Am. Rep. 557; Shropshire v. Glascock, 4 Mo. 536, 31 Am. Dec. 189; St. Louis Fair Ass'n v. Carmody, 151 Mo. 566, 52 S. W. 365, 74 Am. St. Rep. 571; In re Opinion of the Justices, 73 N. H. 625, 63 Atl. 505, 6 Ann. Cas. 689.

"Horse racing was not the evil which the Legislature designed, by these enactments, to forbid. * * * But it was the mischievous practice of gambling upon horse races which the lawmaker here intended to reach." State v. Lovell, 39 N. J. Law, 463.

The injurious effects of the practice are in no way affected by the plan or project adopted. In this case it was held that a place for the sale of pools upon horse races is a disorderly house. To the same effect, see State v. Nease, 46 Or. 433, 80 Pac. 897.

That a horse race or a pari mutuel machine may be adopted as essentials of a gambling device I think, also, is beyond question.

I have not read the case of Tollett v. Thomas, L. R. 6 Q. B. 514, but I gather from the expression of learned judges that it was held in that case that the use of the machine called the "pari mutuel" is a mechanical contrivance, and as such is an instrument of gaming. While the Court of King's Bench did not decide that a horse race of itself was a game of chance, it did decide that the use of the machine changed it from a lawful to an unlawful game, and introduced an element of chance in it.

In Comm. v. Simonds, 79 Ky. 618, it was said:

"It is true, the operator or owner of the machine, by receiving 5 per cent. certain, without regard to the issue of the race, it not guilty of gaming or betting, in a technical sense, because he hazards nothing; but the ticket buyers are engaged in unlawful betting, whereby they either win the money of other ticket buyers or lose their own, and the machine is used by the ticket buyers in betting, and the operator or owner of the machine sets it up, exhibits, and uses it for the ticket buyers, and to aid them in unlawful betting, whereby they win money or lose money, and we are therefore of the opinion that the evidence shows in this case that the accused set up, exhibited, and used the machine known as 'French pool'; that it is a contrivance used in betting, by which beting money or other thing is or may be won or lost, and it is within the description of the statute."

It is said in the case of Miller v. United States, 6 App. D. C. 8, 13, holding that a horse race may be one of the essentials of a gambling device:

"The reason and policy of the law, as well as its comprehensive language, apply as well to all games and devices then existing, as to all that might be subsequently devised and practiced. That being the object to be accomplished, what could be more grossly obnoxious to the provisions of the statute, or more demoralizing to the community, than the existence of places for the making and selling of books and pools upon horse races, baseball games, foot races, dog fights, cock fights, and all other conceivable contests upon which money may be bet or wagered. The great evil and vice of the thing is not in the horse race, the foot race, or the baseball game, but in the seductive allurements held out to people, young and old, to frequent the gaming table, or the gambling device, and to indulge in excessive betting, and thereby become the victims of the wily and scheming professional gambler. Whether the game or contest upon which the wager is made be a horse race, foot race, baseball game, or what else, it is quite immaterial, if the thing or contest upon which the bet or wager is made be a game of chance. It has from an early time been held that a horse race is a game of chance, and so is a game of baseball, and so a foot race, where wagers have been made upon them. Goodburn v. Marley, Str. 1159; Blaxton v. Pye, 2 Wils. 309; Grace v. McElroy, 1 Allen (Mass.) 563; Lynall v. Longbottom, 2 Wils. 36; People v. Weithoff, 51 Mich. 203, 16 N. W. 442, 47 Am. Rep. 557. And a horse race being a game, within the meaning of the St. Anne, c. 14, against gaming, though not specially mentioned, but being embraced in the general words 'other game or games' (2 Wils. 309), there can be no reason for excluding horse races from the games contemplated or fairly embraced by the terms of the act of 1883."

Cooley, J., in the case of People v. Weithoff, 51 Mich. 203, 214, 16 N. W. 442, 447 (47 Am. Rep. 557), speaking for the court said:

"The word 'game' is very comprehensive, and embraces every contrivance or institution which has for its object to furnish sport, recreation, or amusement. Let a stake be laid upon the chances of the game, and we have gaming. Eminent judges have thought the pooling scheme was to be considered a game. Tollett v. Thomas, L. R. 6 Q. B. 514; Scollans v. Flynn, 120 Mass. 271, 273. And it was so decided in Edwards v. State, 8 Lea [Tenn.] 411. It does not furnish sport, recreation, or amusement except so far as the excitement of the choice of chances may furnish it; but this is true of many contrivances which are always called games and which the law aims to suppress. There is no good reason for a distinction between pooling and such games."

In construing the gaming statutes of Colorado the Supreme Court of that state said:

"He had a place, to wit, the space adjoining the grand stand, kept for gambling, and supplied with materials for that purpose; that is, the table, the blackboard, the slips, and the horse races then run, which latter he adopted and made a part of his establishment, project, or scheme. These constituted a gambling table, establishment, device, or apparatus. They were the essentials of the game as devised or projected as a means to a certain end. That plaintiff in error had nothing to do with the running of the races is of no consequence. The acts and instrumentalities of others in that respect he adopted, and thereby they became, in legal effect, his. It might well be said

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that his establishment, device, and apparatus—that is, his gaming table—included the race tracks and the horses thereon to the same extent and effect as though they were confined to the limits of the platform upon which he stood and operated. He brought them there by adoption and made them and their acts his for the purposes of his plan of operation. He and those participating in the pools were, in the understanding of all, 'playing the races.' As said in Joseph v. Miller, 1 N. M. 621, 626: 'We are unable to discover any distinction in general principle between the various methods that may be adopted for determining by chance who is the winner and who the loser of a bet—whether it be by throwing dice, flipping a copper, turning a card, or running a race. In either case it is gambling. This is the popular understanding of the term "gambling device," and does not exclude any scheme, plan, or contrivance for determining by chance which of the parties has won, and which has lost a valuable stake. That a horse race, when adopted for such purpose, is a "gambling device," there can be no doubt.' To the same effect and quoting the above language is James v. State, 4 Okl. Cr. 587, 112 Pac. 944, 34 L. R. A. (N. S.) 515, 140 Am. St. Rep. 693. A horse race is a game, and selling pools or making books upon the result of a horse race is gaming, because it is betting on a game, and is unlawful, though the game itself be not unlawful. Swigart v. People [154 Ill. 284, 40 N. E. 432], supra, affirming the same case in 50 Ill. App. 181; Edwards v. State, 8 Lea (Tenn.) 411; Thrower v. State [117 Ga. 753, 45 S. E. 126], supra; People v. Weithoff, supra; Miller v. U. S., 6 App. D. C. 6." Everhart v. People, 54 Colo. 281, 282, 130 Pac. 1080, 1081.

"At common law keeping a gaming house was an offense before any sort of game was prohibited, and was punished when gaming was not even against public policy, when the courts recognized such contracts, and by solemn judgment made the loser pay his bet. But to maintain a place for the purpose of inducing men to gather and game was a common nuisance, because of its tendency to corrupt morals and ruin fortunes. United States v. Dixon, 4 Cranch, C. C. 107, Fed. Cas. No. 14,970. The game might be harmless, or, if in private, only the immediate actors would be affected; but when the public were invited, when there were always present those ready and anxious to stake, when the gains of one incited others to participate, when the pride of public success stimulated the winner, and the loser attempted to hide the mortification of defeat by a bold front until the last coin was gone, the law was bound to interfere. The English rule and our own statute are both based on the recognition of the cumulative evil which may inhere in a multiplicity of acts not themselves criminal." Thrower v. State, 117 Ga. 753, 45 S. E. 126.

In State v. Mathis, 206 Mo. 604, 105 S. W. 604, 121 Am. St. Rep. 687, the defendant was convicted of keeping gambling devices, to wit, two poker tables and one crap table designed for playing games of chance for money and property. The court said:

"A further contention is that the game of poker cannot be played by means of a table alone, but that the thing that is adapted, devised, and designed for the purpose of playing such game is an ordinary deck of playing cards. The primary object of the statute was to prevent gambling, by prohibiting the setting up or keeping any kind of table or gambling device for the purpose of playing any game of chance for money or property, and, although cards or dice may be necessary to be used in conjunction with such table or device in order to play such game of chance, it is none the less a gambling table or device when used in conjunction with cards or dice for the purpose of playing a game of chance for money or property. State v. Rosenblatt, 185 Mo. 114, 83 S. W. 975; State v. Locket, 188 Mo. 415, 87 S. W. 470."

Additional authorities might be cited in numbers, but those used throw light upon every phase of the matter before us, and I shall stop.

The laws against gaming in this state are very broad and comprehensive. Most of the states in providing for the punishment of gaming commonly specify such games as would under accepted rules of construction restrict the criminal penalties to the specific games mentioned and to others which were similar. The statute of Arizona is not of this character, and, so far as I am aware, section 321 of the Penal Code has no counterpart in any other jurisdiction. If it be more comprehensive in its restriction than is desired, the policy of its repeal or amendment is a matter that must receive the attention of the lawmaking power. With the wisdom of its policy the courts have nothing to do. An act entitled "An act to create a state racing commission and to regulate and control horse race meetings, and authorize the use of the pari mutuel system where horse race meetings are conducted," was passed by the last Legislature. The Governor, however, disapproved the measure for reasons satisfactory to himself and it did not become a law. No doubt, those to whom the privilege might be given to operate this kind of a pooling scheme for public betting would derive a large revenue therefrom, just as a concession in any other form that would minister to the passion and weakness of men, or to their folly and gullibility, would bring big returns.

It is probably not contemplated that a fair association whose corporate life has been granted by the state, and which is under the control of public officers, should claim the right to authorize and rent a place for gambling at the fair grounds. In the absence of specific legislation this would be somewhat novel. But, nevertheless, those persons whose tastes and wishes can be gratified only by this species of public gambling at race tracks must find relief in legislative action, for no right-thinking person would like to see the odious spectacle of the courts of his state pioneering in the path of legislation that must be left open exclusively to another branch of the government. Such an undertaking will inflict a wound upon the law which nothing can heal, for one step in this respect opens the door for others which are sure to follow. The public policy of this state must be announced by the lawmaking power, not by the courts. The duty of the courts is jus dicere, not jus dare.

That the use of the pari mutuel machine requires the intervention of other agencies does not acquit the defendant. He adopted

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those agencies as a part of his plan or scheme in violation of the law, and he may not be relieved of the penalty by any such subterfuge as is shown in this case.

A judgment should be entered dismissing the appeal because the proceeding is sham. If the appeal is entertained, however, this court should cut at its root and substance, unfrock it of the mechanical parts, ignore the dead wood and the shadow of dry legal rules, and look broadly at the stipulated facts. Our vision of the forest must not be obscured by a tree.

As apropos of the gaming laws of Arizona, the remarks of Mr. Blackstone made on a résumé of the common-law and statutory provisions of England pertaining to gaming may be quoted with profit. Said the great commentator:

"Thus careful has the Legislature been to prevent the destructive vice: which may show that our laws against gaming are not so deficient as ourselves and our magistrates in putting those laws into execution." Cooley's Blackstone, vol. 2, p. 1344.

While I am convinced that a judge, when he wishes to air his individual opinions of the law, ordinarily should be willing to pay for the same at the current advertising rates, and not aid unduly to stuff these "fellows in buckram," nevertheless, in palliation of such prolixity, I can only say that my Brothers have grievously erred, and grievously have I gibbeted the error.

In this wise, and in the light of our statutes and the adjudicated cases, the judgment of conviction ought to stand.

I therefore dissent.

(98 Kan. 793)

STATE v. MIDLAND AERIE NO. 412, FRATERNAL ORDER OF EAGLES.

(No. 20669.)

(Supreme Court of Kansas. Oct. 7, 1916.)

(Syllabus by the Court.)

INTOXICATING LIQUORS ⟸261 — ABATEMENT OF NUISANCE—INJUNCTION.

Where a fraternal organization periodically permits intoxicating liquors to be brought upon its premises and permits its members to gather thereat for the purpose of drinking such liquors, its premises thereby become a nuisance which may be enjoined and abated; but where the officers and members of such organization are notified by the responsible public officers to quit such practices under threat of prosecution, and they do quit in apparent good faith and remove all liquor paraphernalia from their premises, the lodge and its property cannot be subjected to an injunction as an existing nuisance, in a suit commenced after the offensive practices have been definitely and permanently abandoned.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 400, 401; Dec. Dig. ⟸ 261.]

Appeal from District Court, Montgomery County.

Actions by the State against the Midland Aerie No. 412, Fraternal Order of Eagles, Caney Aerie No. 1000, Fraternal Order of Eagles, Independence Lodge, No. 780, B. P. O. E., and B. P. O. E., No. 1215, Caney, Kansas, and others. From judgments for defendants, plaintiff appeals. Affirmed.

S. M. Brewster, Atty. Gen., and Chas. D. Ise, of Coffeyville, for the State. Thos. E. Wagstaff, J. B. Tomlinson, and Charles D. Shukers, all of Independence, and Geo. H. Wark, of Caney, for appellees.

DAWSON, J. This is a consolidation of four appeals. The state, through its county attorney in Montgomery county, filed four suits, charging that the defendants, which are certain social fraternities in Caney and Independence, were keeping liquor nuisances on their respective premises at the time of the filing of the suits, and that such nuisances had been so kept and maintained for some time prior thereto. The state's evidence showed that periodically, usually once a week, once in two weeks, or once a month, the members of these lodges, or some of them, held so-called social sessions, at which intoxicating liquors were produced and drank and the participating members paid a small sum to meet the expenses. It was shown, however, by ample testimony that the lodge members and their officers had been warned to quit, and threatened with prosecutions unless they did quit, and that they had also such persuasive notice of the state's attention being directed toward their conduct as a deliberate and searching inquisition by the county attorney might be expected to give. This evidence was developed on the examination and cross-examination of the state's witnesses. It also was shown that these warnings were not without effect, and that from one to three weeks before the state's suits were filed, the defendant lodges and their officers and members determined to abandon these social or drinking sessions, and that they did abandon them, and cleaned out all their paraphernalia pertaining to these drinking sessions; and it was solemnly avowed that these reformations had been undertaken in good faith, as a permanent course of conduct, and with no intention to lapse into lawlessness hereafter. On this showing, a demurrer to the state's evidence was sustained, and the state appeals.

We need not discuss the technical question whether judgment was properly rendered on the demurrer. There is no doubt that where a lodge, society, or fraternity periodically or occasionally permits the drinking of beer or other intoxicants upon its premises it violates the law, and every officer or member responsible for this state of affairs is liable to criminal prosecution, and the premises are a nuisance which the state may have enjoined as a matter of its sovereign right. Indeed, the state may have a temporary injunction against such premises for the asking, and the details of evidence

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necessary to secure a permanent injunction may be gleaned by a county attorney's inquisition or otherwise after the suit for an injunction is filed. But where the public officers proceed as they did here, giving the defendants an opportunity to quit before filing suits for injunctions, and where the evidence shows that they did quit and cleaned up their premises, manifestly no nuisances in need of injunction or abatement existed when the state's cases were started; and so, for the time being, injunctions cannot issue. If the evidence touching the sincerity and permanency of the defendants' reformation is not true, it will be no trouble for the state to commence anew. Meantime the district court's judgment must be affirmed. All the Justices concurring.

(98 Kan. 747)

LENNEN v. OGDEN et al. (No. 20361.)*

(Supreme Court of Kansas. Oct. 7, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⟸502(1) — RECORD — SCOPE AND CONTENTS—RULING ON MOTION FOR NEW TRIAL.

Rule followed that assignments of error, presenting matters which are grounds for a new trial under section 305, Code Civ. Proc. (Gen. St. 1909, § 5899), will not be considered when the record merely shows that a motion for a new trial was made and overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2306; Dec. Dig. ⟸502(1).]

Appeal from District Court, Rice County.

Action by Eva Lennen against B. C. Ogden and another. From a judgment for plaintiff, defendants appeal. Affirmed.

C. M. Williams, of Hutchinson, for appellants. Sam Jones and Ben S. Jones, both of Lyons, for appellee.

BURCH, J. The action was one to recover a child's portion of real estate which would have descended to the plaintiff as an heir of Geraldine Ogden, desceased, had an agreement to adopt the plaintiff been performed. The plaintiff recovered and the defendants, claimants of the property as surviving husband and son of Geraldine Ogden, appeal.

The cause was tried before the court without a jury. The testimony of numerous witnesses was received, and a number of documents were introduced in evidence. The law of the state of Illinois, where the contract was made, was one of the facts concerning which evidence was introduced. The journal entry of judgment recites that a motion for a new trial was filed and overruled, but the motion is not preserved and the grounds of the motion are not stated. The defendants make the following assignment of error and no other:

"The court below erred in rendering judgment for appellee, when by the evidence of appellee and all of the evidence in the case judgment should have been rendered for appellants."

This assignment of error means that the decision is contrary to the evidence, one of the grounds for a new trial under Civil Code, § 305 (Gen. St. 1909, § 5899). The court cannot consider the error assigned. Ferguson v. Graves, 12 Kan. 39, syl. par. 4; Hover v. Cockins & McCarroll, 17 Kan. 518, syl. par. 1; Typer v. Sooy, 19 Kan. 593, syl. par. 1; Shadwell v. Hamilton, 24 Kan. 266, per curiam opinion; Ervin v. Morris, 26 Kan. 664, syl. par. 1; Morse v. Brunswick & Co., 34 Kan. 378, per curiam opinion, 8 Pac. 398; Illingsworth v. Stanley, 40 Kan. 61, syl. par. 1, 19 Pac. 352; White v. Douglas, 51 Kan. 402 (syl.), 32 Pac. 1092.

In the case last cited the syllabus reads:

"Where the only errors assigned are such as should be brought to the attention of the trial court by a motion for a new trial, and where the record merely shows that a motion for a new trial was made and overruled, but the motion is not preserved, nor the grounds therefor stated, no review can be had."

In the opinion it was said:

"It devolves upon a party who asserts that error is committed to affirmatively show it, and we cannot say that the district court erred in denying the motion for a new trial unless the grounds upon which it was based are shown; neither can we inquire into any error alleged to have been committed during the trial, either in the admission or exclusion of testimony, nor as to the sufficiency of the testimony to sustain the findings or the judgment." 51 Kan. 403, 32 Pac. 1092.

The decisions cited were rendered when one of the grounds for a new trial was that the decision was not sustained by sufficient evidence (Civ. Code 1868, § 306), but the two forms of expression mean substantially the same thing (Knote v. De Shirley, 84 Kan. 738, 115 Pac. 539).

It is said that the court should assume that the motion contained all the statutory grounds. Such an assumption would be contrary to the court's experience. Motions for new trials do not uniformly contain all the statutory grounds. In the case of Culp v. Steere, 47 Kan. 746, 28 Pac. 987, an application was made to amend the motion to include an omitted ground. In recent years attorneys have shown a disposition to omit from their motions all grounds which they do not intend to urge, and any ground for a new trial may be waived by not including it in the motion for a new trial. Besides this, the assumption would contravene the requirement that error must be made to appear affirmatively.

The case is an interesting one, and the court has looked into both the facts and the questions of law involved far enough to be satisfied that the decision of the district court would be sustainable if the merits were properly open to consideration. It was not essential that an agreement to adopt be established by direct evidence. Anderson v.

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*Rehearing denied December 13, 1916.

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Anderson, 75 Kan. 117, 127, 88 Pac. 743, 9 L. R. A. (N. S.) 229; Bichel v. Oliver, 77 Kan. 696, 95 Pac. 396; Scholz v. Hoth, 94 Kan. 205, 146 Pac. 339. The evidence of the plaintiff included facts and circumstances raising an implication that the Ogdens did agree to adopt the plaintiff, which was strongly reinforced by the conduct of the parties at the time and subsequently. Assuming that the agreement was not in writing, it was not an agreement to convey land or any interest in land, under the statute of frauds of the state of Illinois, as in the case of Pond v. Sheean et al., 132 Ill. 312, 23 N. E. 1018, 8 L. R. A. 414. It was an agreement to create a status, a domestic relation. In the case of Crumley v. Worden, 201 Ill. 105, 66 N. E. 318, cited by the defendants, the child was not taken under an agreement to adopt. The evidence was as follows:

"On the Sunday following the expiration of the two weeks the mother came and said to Mr. and Mrs. Worden, 'Don't you think you can take this child as your own?' that Mrs. Worden said: 'When she gets old enough to have company of her own she may make me trouble; we don't know what blood is in her veins, and I am in no hurry; we will wait; when she gets old enough to see if she cares and loves me properly we will adopt the child and she can have our property.'" 201 Ill. 111, 66 N. E. 321.

The ruling was that without adoption the child could not inherit as an heir, as this court holds. Malaney v. Cameron, 98 Kan. 620, 159 Pac. 19. The evidence was sufficient to show that the attitude of the foster parents toward the plaintiff had not changed when they removed to Kansas. The plaintiff was then only 7 years old, and if the agreement had been specifically to give property it was then governed by the lex loci solutionis rather than by the lex loci contractus. The plaintiff performed all the duties growing out of the relationship which the foster parents had created, rendering service, obedience, and companionship for about 28 years, and a court of equity would be lacking in efficiency if it were unable to protect the plaintiff from the consequences of the omission of duty in the matter of formal adoption.

The judgment of the district court is affirmed. All the Justices concurring.

(98 Kan. 796)

STATE v. TERRY. (No. 20694.)

(Supreme Court of Kansas. Oct. 7, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW ⇐680(2)—TRIAL—RECEPTION OF EVIDENCE—ORDER OF PROOF.

Ordinarily proof that a crime has been committed should precede evidence tending to implicate the defendant, but the order of proof is a matter largely within the discretion of the court and a departure from the usual order that does not operate prejudicially is no ground for a reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1610; Dec. Dig. ⇐680(2).]

2. WITNESSES ⇐380(5)—EXAMINATION—HOSTILE WITNESS.

Where witnesses called to testify in behalf of a party give testimony contradictory of former testimony and inconsistent with previous statements, the party calling them may be permitted to cross-examine them and call their attention to their former evidence and statements, and may also offer testimony which contradicts and impeaches their present testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1214, 1219; Dec. Dig. ⇐380(5).]

3. CRIMINAL LAW ⇐995(1) — JUDGMENT — REQUISITES.

An entry of judgment that "the defendant was duly arraigned for sentence in open court, all the officers of the said court being present in person, and the court, being fully advised in the premises, passed sentence upon the said William Terry," stating the sentence imposed, does not warrant the inference that the court in rendering judgment omitted the statutory requirement to inform the defendant of the verdict returned by the jury, and to ask him whether he has any legal cause to show why judgment should not be pronounced against him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2518, 2536, 2540; Dec. Dig. ⇐995(1).]

4. SUFFICIENCY OF EVIDENCE.

The evidence examined, and found to be sufficient to support the verdict.

Appeal from District Court, Sheridan County.

William Terry was convicted of rape, and appeals. Affirmed.

F. E. Lindquist, of Kansas City, Mo., and E. Anderson, of Council Grove, for appellant. S. M. Brewster, Atty. Gen., and John L. Hunt, of Topeka, for the State.

JOHNSTON, C. J. William Terry was charged with and convicted of committing a rape upon Pearl Terry, his 13 year old daughter. A motion for a new trial was overruled, and on the 14th day of October, 1914, the court sentenced the defendant to the penitentiary. Upon this appeal the defendant complains that the court erred in the admission of testimony, in the instructions given to the jury, and in holding that the verdict was supported by the evidence.

[1] It is first contended that there was error in receiving evidence of admissions made by the defendant before there was any testimony that an offense had been committed by any one. Ordinarily proof that a crime has been committed should precede evidence tending to implicate the defendant. It is a rule of convenience to aid in the search for truth, but is not an unbending one. The order of proof is a matter largely in the discretion of the court and a departure from the rule which does not operate to the prejudice of the defendant is not ground for a reversal.

[2] A complaint is made that the court permitted the prosecution to cross-examine and contradict witnesses called in behalf of the state. Pearl Terry, upon whom the offense was charged to have been committed, made

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the complaint which initiated the prosecution, and in the preliminary examination she testified that her father had had sexual intercourse with her a number of times. At the trial she was again called as a witness and stated that her father had not mistreated her. She did admit testifying previously to instances of criminal conduct, but stated that the evidence then given was not true. Having testified in support of the charge at the preliminary examination, the state naturally called her as a witness at the trial; and, her testimony being directly contrary to that previously given, it was not improper to permit the state to call her attention to her former testimony and to induce her, if she would, to correct her present testimony. Under such circumstances it was competent for the state, not only to cross-examine her as to the inconsistencies in her statements, but also to show by other witnesses that the facts were in accordance with her previous testimony, although it might incidentally discredit her present testimony. Johnson v. Leggett, 28 Kan. 590; State v. Sorter, 52 Kan. 531, 34 Pac. 1036; State v. Moon, 71 Kan. 349, 80 Pac. 597; State v. Hamilton, 74 Kan. 461, 87 Pac. 363; Nuzum v. Springer, 97 Kan. 744, 156 Pac. 704. During her examination, and when the inconsistencies in her testimony became apparent and she had stated that she had affirmed rather than testified under oath, the court admonished her that she was under the same obligation to tell the truth as she would have been had an oath been administered to her, and if she had testified falsely, she was liable for perjury just the same as though testifying under oath. Complaint is made of this admonition. Under the circumstances it cannot be regarded as error.

It is next charged that the court erred in permitting the county attorney to cross-examine Mrs. Terry, the wife of the defendant, who was called as a witness for the state. She, too, proved to be an adverse witness, and it was claimed that her testimony conflicted with former statements made by her to a number of people. A part of the inquiry took on the character of a cross-examination, but most of the questions were asked and answered without objection. One of them to which an objection was made was answered, but the answer was without materiality or prejudice.

Evidence which tended to impeach that given by Mrs. Terry and her daughter was received. As we have seen, they were hostile witnesses as much so as if they had been called by the defendant, and the state was justified in offering testimony which tended to contradict and impeach them. Much of the testimony of which complaint is made was received without objection, and error cannot be predicated on its admission. Some evidence was received which was in the nature of hearsay, and if an objection had been made to it upon that ground, it should have been excluded, but such objections were not made except in a few instances, and then only immaterial answers were given.

Error is assigned on the refusal of the court to give a number of instructions that were requested; but the defendant does not undertake to support them in argument, and the instructions given appear to fully cover the subjects of those which were requested, and those given fairly state the law applicable to the case.

[4] Some contention is made that the evidence does not sustain the conviction, the principal contention being that proof of penetration is wanting. Some proof was offered as to this element of the offense and sufficient we think to warrant the finding of the jury that the offense had been committed.

[5] The final complaint is that judgment was not legally pronounced against the defendant, in that he was not informed by the court of the verdict that had been returned against him, and had not been asked whether he had legal cause to show why judgment should not be pronounced against him. His motions for a new trial and in arrest of judgment indicate that he had learned of the verdict and had attempted to show cause why he should not be adjudged guilty. The statute provides for the statement and inquiry so that the defendant may, at the last moment, state or show any cause he may have why judgment should not go against him. Gen. Stat. 1909, §§ 6826, 6827, Code Cr. Proc. §§ 248, 249. The record does not show the omission of any of the steps essential to the rendition of a valid judgment, and we cannot assume from the mere silence of the record that the court acted erroneously in this respect. In the entry of judgment it is recited that "the defendant was duly arraigned for sentence in open court, all the officers of the said court being present in person, and the court being fully advised in the premises passed sentence upon the said William Terry," stating the sentence imposed. In the ordinary legal sense arraignment precedes a trial, and is the calling of the defendant to the bar of the court to answer to the charge made against him. While the term is rarely used in speaking of the bringing of the defendant to the bar for judgment, it would appear, when so used, to imply that he was called before the court to answer what reasons he had why judgment should not be entered upon the verdict returned by the jury.

The judgment is affirmed. All the Justices concurring.

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(99 Kan. 412)

MAUGHLELLE v. J. H. PRICE & SONS et al. (No. 20951.)*

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. MASTER AND SERVANT ⟸5—EXISTENCE OF RELATION—INDEPENDENT CONTRACTORS.
A contract, in form a lease of a certain coal mine and its equipment, examined, and found to leave the lessees in the attitude of independent contractors respecting the operation of the mine.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 5; Dec. Dig. ⟸5.]

2. MASTER AND SERVANT ⟸367—WORKMEN'S COMPENSATION ACT—PERSONS LIABLE.
The record failing to show the work in which the plaintiff was engaged to have been under the direction, execution, or control of the lessor company, the judgment against it must, under section 4 of the Workmen's Compensation Act (chapter 218 of the Laws of 1911), be held erroneous.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⟸367.]

Appeal from District Court, Crawford County.

Action by Toni Maughlelle against J. H. Price & Sons and another. From a judgment for plaintiff, defendant J. R. Burnett Coal & Mining Company appeals. Reversed.

Skidmore & Walker, of Columbus, and John P. Curran, of Pittsburg, for appellant. F. B. Wheeler, of Pittsburg, for appellee.

WEST, J. The plaintiff sued J. H. Price & Sons and J. R. Burnett under the Workmen's Compensation Act by reason of an accident in a coal mine where the plaintiff was working. Afterwards the J. R. Burnett Coal & Mining Company was substituted for J. R. Burnett, defendant, and from a judgment in favor of the plaintiff against both defendants, the Burnett Company appeals.

The plaintiff alleged, among other things, that on or about the 31st day of January, 1912, the J. R. Burnett Coal & Mining Company, as lessor and principal, entered into a contract with the James H. Price & Sons Company, as lessee and contractor, whereby the Prices were to mine certain coal pursuant to an agreement set out as an exhibit, and that in pursuance of this contract and under the terms thereof the Prices began operating a shaft; that a part of the business of the Burnett Company was to contract for the removal of coal and to buy the outfit of strip pits and other shafts, and buy and sell coal on the market; that by the terms of the contract the Burnett Company was liable.

[1, 2] The plaintiff insists that the decision in Pottorff v. Mining Co., 86 Kan. 774, 122 Pac. 120, controls. The coal company contends that under the Workmen's Compensation Act the principal and subcontractor cannot be sued jointly, that the Pottorff decision does not apply, that the coal company was served with no notice of injury or claim for compensation, and no waiver was shown, and that this defendant is not liable on any theory. The claims of counsel as to what the evidence was are so diverse that the transcript itself has been carefully examined, with the result that, aside from the contract, the only evidence found touching the relation of the two companies is that the Prices operated the mine under the contract, the coal company exercising no control thereover whatever, and that the miners were paid by Price & Sons.

The contract is in form a lease covering the mine and its entire equipment, the work of mining to be prosecuted continuously and industriously from the 1st day of February, 1912, until all the workable or minable coal should be taken out. Lessees were to furnish all posts, ties, caps, and mine timbers and all other necessary materials to carry on a successful mine operation, to pay all costs, charges, and wages in whatsoever nature involved in the operation of the mining, to work the mine in compliance with the mining laws of the state, to permit the lessor or its agents to inspect and examine the equipment and mine at any and all times, the development of the mine and ground, the work to progress on lines established by the mining engineer of the lessor, the mine to be surveyed twice a year and blueprints thereof furnished, the lessee to permit an examination of its books and papers pertaining to weights and the daily bulletin from which miners' wages were paid, for the purpose of ascertaining the total output. The mine was to be turned back to the lessor in good condition, ordinary wear and tear of equipment excepted, the lessee to maintain the same at its own cost, replace parts broken, and not to suffer any removal thereof, except for repairs, and to employ only competent men to handle the machinery. The lessees were to purchase six mules from the lessor, and to accept and pay for all feed, props, and mine timber on hand February 1, 1912, at actual cost to lessor, the mules to be paid for in monthly installments on a basis of 10 per cent. of the net earnings of the lessee. All coal taken out or removed was to be loaded in railroad cars on tracks at the mine on orders of the lessor and subject only to its disposition, "one of the principal objects of this agreement on the part of the lessor company being to secure the entire output from this mine, it being expressly understood that the lessees are not to dispose of or sell any coal in wagon load lots mined from said land, except to employés as per contract with the U. M. W. of A., and said lessees shall pay the difference between the U. M. W. of A. contract price per ton and the price per ton paid to lessees by lessor under this agreement." The lessee was to furnish clean marketable coal at $1.25 a ton, payment to be made on or before the 20th of

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied January 27, 1917.

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each month for all coal furnished to lessor the preceding calendar month. "Cash shall be advanced to enable the lessee to meet pay rolls as per contract with U. M. W. of A., but no money will be advanced in excess of the value of the coal mined on the date such advance is made." The lessee was to have equal running time with other mines mentioned or that might be operated with the lessor during the life of the contract, but unless the lessee should furnish clean marketable coal the running time should be reduced according to complaints. No assignment was to be made, or any one permitted to come in under the lease, except upon the written consent of the lessor. The tenth paragraph was to the effect that the lessee should be responsible for all damages of every nature whatsoever done to persons or property during the performance of the work, or arising from any negligence of the lessee, or any trespass by it or its employés or agents, the lessor in no wise to be responsible for any claim, expense, and costs in connection with such damages or injuries. In case the wage contract of district No. 14 should be altered, and the cost of mining should thereby be changed, the price for coal under this agreement was to be adjusted so as to conform to such change. Any refusal of the lessee to comply with any provision of the agreement for five days after the lessor's attention should be called thereto in writing was to authorize a termination by the latter of all rights of the lessee upon ten days' written notice. "But such termination shall not relieve the lessee from any obligation hereby imposed upon it except that of further prosecuting the mining, and nothing in this paragraph shall modify the provisions of paragraph 'tenth.'" It was further agreed, among other things, that James H. Price should give his personal supervision to the mine and the operation thereof during the term of the agreement. Mention was made of a former lease of a part of the mine called the Curran-Patmor part, which lease was to be respected by the parties to this contract. Finally it was stipulated that all the property placed on the premises by the lessees should be security to the lessor for any loss suffered on account of any violation of the terms of the contract by the lessee, and a lien thereon was expressly granted as if the mortgage extended thereover.

The trial court treated the contract in question as evidence of a partnership, and instructed the jury that, if they should find that the firm of Price & Sons was operating the mine under and by virtue of the contract, "then and under such circumstances, if they exist, the defendant the J. R. Burnett Coal & Mining Company will be deemed to have reserved some control over the work and workmen in said mine, and therefore would likewise be subject to the provisions of the Workmen's Compensation Law along with its codefendants, said partners." In another instruction they were told that under such circumstances the Burnett Company would be jointly liable along with the defendant firm of J. H. Price & Sons Coal Company for such injury. It is claimed that Price & Sons were independent operators or contractors, and according to all the authorities whether they were or not depends upon who had the right of control over the work. This was made plain in Pottorff v. Mining Co., 86 Kan. 774, 781, 122 Pac. 120, 122, approving the definition of the term "independent contractor" as "one who, exercising independent employment, contracts to do" and does all "work according to his own methods and without being subject to control of his employer, except as to result of his work;" and it was said that "an independent contractor represents the will of his employer only in the result of his work, and not as to the means by which it is to be accomplished," and "the proprietor may make himself liable by obtaining the right to direct and control the time and manner of executing the work." In a footnote to State v. District Court of St. Louis County, 7 N. C. C. A. 1076, citing numerous authorities, several of them involving cases somewhat similar to the one now under consideration, it is said that "the principal element which controls in determining the relationship is, apparently, the extent to which the one undertaking the work is subject to or free from the control of the person for whom the work is done," and it was pointed out the right, and not the fact, of control is the determining feature, and that the test is the same in compensation as in other cases.

The company had a right to lease the mine and its equipment, and provide that the coal should be taken in a proper manner and delivered to the lessor or its order, developing the underground work in directions desirable to the owner, as indicated by its engineer. It had a like right to provide that a breach of contract should work a termination of the rights of the other party and to require such party to respond for all damages incurred in the work. We find nothing in the contract which authorizes the lessor to say aught as to who shall be employed in the mine, what hours shall be observed, or what wages paid, or dictates in any manner, save to require compliance with the plain terms of the agreement by virtue of which the lessee is to mine and deliver the coal to the lessor or its order. In the Pottorff Case the law stated in Railway Co. v. Loosley, 76 Kan. 103, 90 Pac. 990, was quoted to the effect that the fact that the one who engages a contractor to produce a given result "possesses a limited or partial control will not entail such a liability, if the contractor is still left free to exercise his own will generally respecting the methods and means of accomplishing the result."

The contract contains nothing to indicate

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a partnership to share mutually in the profit or loss of an enterprise. It is either what it purports to be, or else it is the creation of the relation of employer and employé, in which case the lessee was to act for, represent, and be responsible to the lessor in the mining operations. But there is nothing in the instrument tending to show any thought or desire to form such a relationship. Several features relied on in the Pottorff Case are wanting here, and there is not present here, as there, a manifest purpose to cloud with words a meaning to be extracted by the searching eye of the law in spite of such purpose. It was there pointed out that the agreement could be annulled at the pleasure of the company, with or without default of the other party; that the owner might work the mines to their capacity, restrict production, or stop the work altogether; that the company owned a store, and the employés were to purchase all their merchandise supplies and powder thereat. These features are not found in the present contract. Much stress was laid, also, on the provision in that case that the lessee must quit, should the work of the mines not be "agreeable" to the company, and that the company might operate the mines at full capacity, or shut down entirely, according to its own requirements and demands—features that are not in the contract before us. From the contract itself, and from the meager portion of evidence abstracted, and from the entire transcript nothing can be deduced to indicate that any miner employed by Price & Sons had any reason to believe, or even suspect, that he was working for the Burnett Coal & Mining Company, and we are unable to find anything to justify the conclusion that the company had any authority over or responsibility for such employés.

"It is not essential that one who engages a contractor to produce a given result should reserve, or should interfere and take, complete or exclusive control over all features of the work, to render him liable as a master of the contractor's servants; but the fact that he possesses some control will not necessarily entail such liability. No matter if the control go to the extent of conditioning the work in many aspects, still, if the contractor is left free to exercise his own will generally respecting methods and means, he is independent, and the employer is not the master of his own servants." Railway Co. v. Lossley, 76 Kan. 103, 121, 90 Pac. 990, 997.

In a note to Messmer v. Bell, etc., Co., 19 Ann. Cas. at pages 12 and 14, it is stated that:

"Where the employé represents the will of the employer as to the result of the work, but not as to the means or manner of accomplishment, he is an independent contractor." Page 12. "The mere fact that the employer reserves a right to supervise or inspect the work during its performance does not make the employé a servant, where the mode and means of performance are within the control of the employé." Page 14.

In Laffery v. Gypsum Co., 83 Kan. 349, 111 Pac. 498, 45 L. R. A. (N. S.) 930, Ann. Cas. 1912A, 590, the exception to the rule holding an owner liable when the work is intrinsically or inherently dangerous, discussed and applied in Railroad Co. v. Madden, 77 Kan. 80, 93 Pac. 586, 17 L. R. A. (N. S.) 788, was again considered at length, and numerous authorities cited. It was said, however (83 Kan. 362, 111 Pac. 498, 45 L. R. A. [N. S.] 930, Ann. Cas. 1912A, 590), that in the absence of legislation upon the subject the courts had not hitherto held as a matter of law that mining is so inherently dangerous as to make the owner liable for the negligence of an independent contractor, where it is not shown that the mine was unsafe when the contract was made or that the owner reserved some control of its operation. From this two members of the court dissented, on the ground that mining is intrinsically dangerous. A similar holding, and an expression by special concurrence in line with the dissent referred to, may be found in Nelson v. Cement Co., 84 Kan. 797, 115 Pac. 578. These decisions were rendered in 1910 and 1911, respectively. In 1913 the Legislature by section 2 of chapter 216 of the Laws of that year, amending the original Compensation Act, referred, among other things, to a mine and all employments wherein a process requiring the use of any dangerous explosive or inflammable materials is carried on, "each of which employments is hereby determined to be especially dangerous, in which from the nature, conditions or means of prosecution of the work therein, extraordinary risk to the life and limb of the workman engaged therein are inherent, necessary, or substantially unavoidable. * * *"

The views of counsel as to the effect of this declaration have, since the submission of the case, been requested, received, and considered, also their further views as to the matter of claim for compensation, and the effect of section 4 of the original Compensation Act (chapter 218, Laws of 1911), invoked by the plaintiff. Whether or not the exception would apply, and the lessor as well as the lessee be liable, were this an action for damages on account of negligence, need not be considered. This is an action for compensation, the question of negligence not arising. The amended petition alleged that J. H. Price, in looking after the plaintiff and attempting to settle with him, was acting for the Burnett Company. After a demurrer had been overruled, an answer was filed, consisting of a general denial, duly verified, thus placing on the plaintiff the burden of showing the alleged agency of J. H. Price, of which there was no proof, except the contract itself, the effect of which has already been determined. Otherwise there was no allegation or proof of any claim for compensation made to the Burnett Company. The failure to plead want thereof might well be held not to amount to a waiver of such claim, as contended by the plaintiff, but a decision on this point is rendered un-

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necessary by the statutory provision relied on—section 4 of chapter 218 of the Laws of 1911. This provides that when any person therein referred to as principal undertakes to execute any work which is a part of his trade or business, or which he has contracted to perform, and contracts with any other person, referred to as the contractor, for the execution of the whole or any part of such work, the principal shall be liable to pay to any workman employed in execution of the work any compensation under the act which he should have been liable to pay if that workman had been immediately employed by him; that when compensation is claimed, or proceedings are taken against the principal, then in the application of the act "references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed." Other provisions as to liability over and questions of pleading are made, and subdivision "d" is as follows:

"This section shall not apply to any case where the accident occurred elsewhere than on, or in, or about the premises on which the principal has undertaken to execute work or which are otherwise under his control or management, or on, in, or about the execution of such work under his control or management."

Whatever may be the basis of the liability of the owner in certain cases involving employment inherently dangerous, whether imputed agency, public necessity, or other ground, real or fictitious, this statute attaches no liability for compensation to one who is not in the execution, control, or management of the work wherein the injury occurs.

Finding nothing in the record showing such execution, management, or control by the Burnett Company, the judgment against this defendant must be reversed. All the Justices concurring.

(49 Utah, 137)

JOHNSON et al. v. GEDDES et al. (No. 2927.)

(Supreme Court of Utah. Nov. 24, 1916. Rehearing Denied Dec. 28, 1916.)

1. MINES AND MINERALS ⟸34—SALE—CONSTRUCTION OF CONTRACT—PAYMENT.

Plaintiff, in 1901, entered into a contract with defendants to sell certain unpatented mining claims and the improvements thereon for $21,000, payable $1,000 on the day of the contract, $1,000 on or before September 2, 1901, $6,000 on or before October 20, 1901, $4,000 on or before July 2, 1902, and the remaining $9,000 payable "only in the manner following and not otherwise," that is, by the payment of a net one-half of the proceeds of all ores mined from the property after deducting the expenses of mining, etc., and providing that the managing and developing of the property should be left solely to the sound and reasonable discretion of the defendants; that plaintiff, when the property was being worked, might have employment under defendant at the usual miner's wages; that on payment of the $12,000 plaintiffs would deliver a warranty deed of title in fee clear of incumbrances, whereupon defendants would deliver an agreement to pay the balance, and that on payment of the first $1,000 the plaintiffs would put the deeds in escrow. Defendants made the first four payments amounting to $12,000, and did not thereafter operate the mine or obtain any proceeds from ore up to September, 1909, when action for the balance of $9,000 was brought. *Held*, that plaintiff could not recover, since nothing in the contract obligated the defendants to develop the claims within what any one might consider as reasonable time, and since, there being no proceeds from ore, the balance was not due.[1]

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 81–86; Dec. Dig. ⟸ 34.]

2. CONTRACTS ⟸152—CONSTRUCTION—NECESSITY.

Unless it is shown that a contract was obtained by fraud, oppression, or duress, or that it is against law or public policy, or is unconscionable, it is the duty of the court to enforce it according to its terms, and it may not by forced construction modify or disregard it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 732, 733, 738; Dec. Dig. ⟸ 152.]

3. EVIDENCE ⟸400(2)—CONTRACTS—CONTEMPORANEOUS STATEMENTS.

Statements of the parties contemporaneous with the making of their contract for the sale of mining claims could not be given the effect of enlarging liability under the contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1779, 1781–1783; Dec. Dig. ⟸ 400(2).]

4. EVIDENCE ⟸400(2) — PAROL EVIDENCE — CONTRADICTING TERMS OF CONTRACT.

Contemporaneous statements of the parties to a contract for the sale of mining claims, directly contradictory of the terms of their contract, would be given no force where it was neither claimed nor found that they were intended for or constituted a modification of the contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1779, 1781–1783; Dec. Dig. ⟸ 400(2).]

5. CONTRACTS ⟸169—CONSTRUCTION—INTENTION OF PARTIES.

Where the terms of a contract are uncertain or obscure, the court not only may, but should, avail itself of all the legitimate legal evidence appearing upon the intention of the parties and the rights created on the one side and the obligations assumed on the other.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 752; Dec. Dig. ⟸ 169.]

6. CONTRACTS ⟸152 — MODIFICATION — GROUNDS.

Courts of equity, under the guise of construction, may not so change or modify contracts as to impose conditions or obligations not express or clearly implied, though such conditions may make the terms of the contract more equitable and in accord with the court's sense of justice; nor can they give relief merely because parties to a long-time contract did not provide for all possible emergencies.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 732, 733, 738; Dec. Dig. ⟸ 152.]

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[1] Charter Oak, etc., v. Gisborne, 5 Utah, 319, 15 Pac. 253; McIntyre v. Ajax M. Co., 20 Utah, 323, 60 Pac. 552; Id., 28 Utah, 162, 77 Pac. 613; Haslam v. Haslam, 19 Utah, 1, 56 Pac. 243; Schenck v. Wicks, 23 Utah, 576, 65 Pac. 732.

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7. MINES AND MINERALS ⊂=54(3) — SALE — TERMS OF PAYMENT — SUFFICIENCY OF EVIDENCE.

In an action to recover the balance due upon the purchase price of certain mining claims, evidence *held* not to sustain a finding that defendants could have realized net proceeds in any amount between July, 1901, and September, 1909, out of which to pay the balance according to the contract.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 151; Dec. Dig. ⊂=54(3).]

Straup, C. J., dissenting.

Appeal from District Court, Salt Lake County; Geo. G. Armstrong, Judge.

Action by Silas F. Johnson and another against Theron Geddes and others. Judgment for plaintiffs, and defendants appeal. Reversed, and cause remanded, with direction to enter judgment dismissing the complaint.

Howat, Macmillan & Nebeker, of Salt Lake City, for appellants. Wm. H. King and Samuel Russell, both of Salt Lake City, for respondents.

FRICK, J. On September 23, 1909, the plaintiffs commenced this action in equity to recover the sum of $9,000 from the defendants as an alleged balance due upon the purchase price of certain mining claims, and to have said sum declared a lien upon said mining claims, and for an order of sale thereof to pay said $9,000, etc. The defendants denied the maturity of the alleged indebtedness, and, as a further defense to the action, set up the contract entered into between the parties concerning the purchase of the mining claims in question, the terms of which, so far as material to this controversy, we shall refer to hereafter. It is not necessary to set forth the pleadings. Such parts as may be deemed material, however, will be referred to in the course of the opinion.

The conceded facts, briefly stated, are, that on the 2d day of July, 1901, the plaintiffs entered into what may be termed a dual option agreement with the defendants whereby the plaintiffs sold to the defendants seven mining claims, of which six were unpatented, together with the improvements thereon. By the terms of said agreement the defendants were given the choice to pay the sum of $16,000 in full for said mining claims or to pay the sum of $21,000, $9,000 of which to be paid as hereinafter stated. If the defendants elected to pay the sum of $16,000 for the full purchase price of said claims, they were required to pay the same as follows: $1,000 on the date of the contract July 2, 1901; $1,000 on or before September 2, 1901; $6,000 on or before October 20, 1901; and the remaining $8,000 on or before July 2, 1902. Upon the other hand, if the defendants elected to pay the $21,000 for said mining claims the payments were to be made at the dates and upon the conditions following: $1,000 on the date of the contract; $1,000 on or before September 2, 1901; $6,000 on or before October 20, 1901; $4,000 on or before July 2, 1902; and the remaining $9,000, in the language of the contract were made payable in the manner and upon the conditions following:

"5. The balance of the above-named purchase price, being the sum of nine thousand dollars ($9,000.00), shall be paid only in the manner following and not otherwise—that is to say, on and after the 2d day of July, 1902, the said second parties, or their assigns, shall pay over to said first parties, or their assigns, a net one-half (½) of said second parties' proceeds from said mine, meaning thereby a net one-half (½) of the proceeds of all ores mined from said property after the said second parties have deducted all moneys paid out by them or expenses incurred in mining, milling, sampling, handling, transporting, smelting and marketing said ores."

The contract also contained the following conditions:

"E. The extent and manner of managing and developing said property shall be left solely to the sound and reasonable discretion of said parties of the second part.

"F. It is also understood and provided that the parties of the first part may have, if they so desire, when the property is being worked, employment thereon under the orders and direction of said second party, or his assigns, so long as said first parties are competent and faithful and said work continues, at usual miners' wages.

"G. * * * And the parties of the first part agree, upon the payment of the twelve thousand dollars ($12,000.00) as above specified, to deliver to the parties of the second part, or their assigns, a warranty deed containing the usual covenants conveying title in fee to their full undivided interests in the above-described premises free and clear of all incumbrances, and subject only to the paramount title of the United States in the unpatented claims. Upon delivery of said deed the second parties hereto shall make and deliver to the parties of the first part hereto their certain contract agreement to pay the balance of the purchase price named herein of nine thousand dollars ($9,000.00) in the manner and only in the manner provided by paragraph 5. And the said parties of the first part further agree that upon the payment of the one thousand dollars ($1,000.00) required, and to-day made, under paragraph No. 1, said deed shall be placed in escrow in Salt Lake City, Utah, to be delivered to the said second parties, or their assigns, upon the payment of the said twelve thousand dollars ($12,000.00)."

The defendants elected to purchase the mining claims for the sum of $21,000, to be paid, however, in the manner stated in the part of the contract we have set forth above. The defendants made the first four payments amounting to the sum of $12,000, and obtained the deed mentioned in the contract. Upon the delivery of the deed the parties entered into the contract provided for in the original agreement, the material parts of which are:

"In consideration of the conveyance by the second parties to the first parties of the Atlas, Atlas No. 1, Atlas No. 2, Atlas No. 3, Atlas No. 4, Atlas No. 5, and Atlas No. 6, lode mining claims, in Star Mining District, Beaver county, Utah, the first parties hereby promise and agree,

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for themselves and their assigns, that they will pay to the second parties or their assigns, one-half of the net proceeds of all ores mined by the first parties, or their assigns, from said property, until the second parties shall have received the sum total of $9,000.00 out of such net proceeds. The words 'net proceeds' as hereinabove used shall be construed as the proceeds of the sales of ores taken from said property remaining after the first parties shall have deducted all moneys paid out by them or their assigns for expenses incurred in mining, milling, sampling, handling, transportation, smelting and marketing said ores. This contract shall be deemed and construed as a covenant running with the title to said land and shall bind the grantees, heirs and assigns of the first parties. It is distinctly understood and agreed that the first parties shall not be liable hereunder to pay to the second parties any sum whatever unless such net proceeds are realized by them out of said property, and then only to the extent of one-half of such net proceeds until the full sum of $9,000.00 shall be paid to the second parties."

The plaintiffs, in their complaint, pleaded only the legal effect of the contract, and, among other things, also alleged:

"That said defendants, with full knowledge of the rights of the plaintiffs in the premises, and of their obligation to pay the said $9,000 remaining due upon the purchase price of said property, have willfully failed, neglected and refused to pay said sum, or any part thereof, out of the proceeds of said mining property, or otherwise, and said defendants with full knowledge as aforesaid of the rights of the plaintiffs and of their duty in the premises, have willfully failed, neglected and refused to work, develop or operate said mine, or extract ores therefrom, all for the express purpose of delaying the payment of said $9,000, and of defeating, if possible, the rights of the plaintiffs in the premises. That said defendants have had a reasonable time to pay said $9,000 from the proceeds of said mining property, and have likewise had a reasonable time to develop said property, and to sell and dispose of the same; but to do either of said things said defendants have neglected and refused and still neglect and refuse."

In support of the foregoing allegations the plaintiffs, over defendants' objections, were permitted to propound the following question and to receive the answer thereto as stated below:

"Mr. Johnson, from your knowledge of the ground and your experience as a mining man, what do you say as to whether or not with but comparatively slight expenditure ore could have been mined and shipped at a profit sufficient to have paid your $9,000 from the claims which were sold to the defendants by you and Lockwood? A. Why, I think with an expenditure of $5,000 sinking this vertical shaft, that the mine could have been paying right along."

Appellants, as appears from the evidence, did not work the mining claims after the payment of the $12,000, did not receive any net proceeds therefrom whatever, and did not pay plaintiffs any more money.

The court made findings of fact and conclusions of law in favor of the plaintiffs. The principal part of the findings merely relate to the contracts entered into by the parties. It, however, made some additional findings as follows:

"That said defendants, Geddes, Snyder and Beckett, at the time of the execution of said option agreement on the 2d day of July, 1901, and said agreement of October 4, 1901, represented and stated they would immediately work and develop said mining claims; that they had sufficient means with which to work said property; that the examination made and caused to be made by them of said property showed that said mining claims contained large deposits of ore from which, at an expense not to exceed five thousand ($5,000.00) dollars, they could have mined and shipped lead, silver and other ores, at a profit, and discharged said indebtedness of $9,000.

"The court further finds that said mining property is valuable for mining purposes, and is of a valuation of at least $50,000; that it contains valuable deposits of ore which can be mined and shipped at a profit, and that if defendants had worked said property and mined the ore therein they could, within a short time after entering into said contract, have paid said $9,000 out of one-half of the net proceeds of the ores mined from said property, and by such proceeds (the court means, proceeds of the sales of ores taken from said property), remaining after the defendants deducted the moneys paid by them, or expenses incurred in mining, milling, sampling, handling, transporting, smelting or marketing such ores.

"The court further finds that the said defendants, after obtaining said option and entering into said agreements on October 4, 1901, refused to work said mining claims, or to extract and remove ore therefrom; that plaintiffs, upon a number of occasions between said dates and the commencement of this action, requested the defendants to work, operate and develop said property and to ship ores therefrom and to pay said $9,000, but the said defendants refused upon each occasion, and continued to refuse to work said property or to mine the ores thereon or to pay said $9,000, or any part thereof. That from the year 1901, when the defendants obtained a deed to said premises, until the time of the trial, the said defendants have not worked said property or expended any sum of money thereon or attempted to develop said property or to ship ore therefrom, but during all of said period refused, and still refuses, to work, develop or operate said property, or to pay said $9,000; and the said defendants give out and declare that they are under no obligation whatever to either work said property or to ship ore therefrom, and further give out and declare that they never will be required to pay the said $9,000, or any part thereof, until they shall work said property, and from one-half of the net proceeds thereof derive a sufficient sum to pay and discharge said $9,000."

[1, 2] Upon the findings and conclusions of law the court entered a judgment or decree in favor of plaintiffs for the sum of $9,000, with 8 per cent. interest from September 1, 1909, amounting to $5,100, declared said principal and interest to be a lien upon the mining claims and ordered them sold to pay the amount found due as aforesaid. The defendants appeal to this court and here assail the findings of fact, conclusions of law, and judgment.

The findings, and especially those we have hereinbefore set forth, are assailed both upon the alleged ground that they are not sustained by the evidence, and that they are immaterial under the issues.

The district court seems to have proceeded upon the theory outlined by plaintiffs' counsel, the substance of which may be stated thus: That inasmuch as the $9,000 were mentioned in the contracts as being a part of the

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$21,000 purchase price for the mining claims, and although defendants agreed to pay that sum out of the net proceeds which they should obtain from the mining claims, yet that sum was payable at all events within a reasonable time after the deed was executed and delivered; that notwithstanding the defendants have had a reasonable time within which to develop said mining claims and obtain therefrom sufficient net proceeds to pay said sum of money, they, nevertheless, have failed and neglected to do so and for that reason said sum of $9,000 became due when such a reasonable time had elapsed, which was on the 1st day of September, 1909, or 23 days before this action was commenced. Plaintiffs' counsel, in this court, defend the judgment of the court upon the theory just outlined. In support of their contention counsel refer to the following Utah cases, namely, Charter Oak, etc., Co. v. Gisborne, 5 Utah, 319, 15 Pac. 253, McIntyre v. Ajax M. Co., 20 Utah, 323, 60 Pac. 552, and 28 Utah, 162, 77 Pac. 613, Haslam v. Haslam, 19 Utah, 1, 56 Pac. 243, and Schenck v. Wicks, 23 Utah, 576, 65 Pac. 732. Cases are also cited from other jurisdictions. Inasmuch as we are firmly convinced that both the plaintiffs and the defendant must stand or fall by the terms of their contract we do not deem it necessary to specially point out why the foregoing cases are not controlling, much less do we deem it necessary to review any of them. In this connection we also desire to state that while plaintiff's counsel have filed an elaborate brief and argument, yet we shall not attempt to follow and answer their arguments except as that is done in the statements made in the course of this opinion.

At the threshold of this controversy we are again reminded that courts are created to enforce and not to make contracts. In other words, unless it is shown that the contract in question was obtained by fraud, oppression, or duress, or that it is against law or public policy, or is unconscionable, it is the duty of the courts to enforce it according to its terms and not by forced construction to modify or disregard it. The terms of the contract in question here, as we view them, are so explicit, so plain, and are expressed in such apt and clear language that there really is nothing for a court to construe. It is true that the district court made certain findings, among others, that when the option agreement was entered into in 1901 some of the defendants made certain statements to the effect that they would "immediately work and develop said mining claims," etc. That finding is assailed. It must not be overlooked that the finding relates to the time when the original option agreement was entered into, namely, in 1901. Now, by reference to that agreement it will be seen that the finding is in the very teeth of its terms. In that agreement it is provided:

"The extent and manner of managing and developing said property shall be left solely to the sound and reasonable discretion of said parties of the second part [defendants]."

[3, 4] Further it was provided that "when the property is being worked" the plaintiffs shall be given employment, etc. Plaintiffs' counsel, however (and it seems the district court took their view), insist that notwithstanding the fact that plaintiffs then agreed that the working and development of the mining claims, as well as "the extent and manner" thereof, should be left to the judgment or discretion of the defendants, yet such should be the case only if the work and development should comport with the wishes or judgment of the plaintiffs, or the judgment of some court to which the matter might be submitted. True, the court finds that certain statements were made, but such statements, if made at all, were also found to have been contemporaneous with the making of the contract, and, under elementary rules of evidence, can, therefore, not be given the effect of enlarging the liability under the contract. But the statements can be given no force or effect for the simple reason that they are directly contrary to and hence contradictory of the terms of the contract, and for the further reason that it is neither claimed nor found that they were intended for or constituted a modification of the contract. Neither can the other findings of the court, except those relating to the contract, be given any effect for the obvious reason that the rights of the parties must be determined from the terms of the contract alone. It is quite true that where the terms of a contract are uncertain or obscure the court not only may, but it ought to, avail itself of all legitimate legal evidence which will shed light upon the intention of the parties and upon the rights granted upon the one side and the obligations assumed upon the other. A court may, however, not receive evidence for the sole purpose of enlarging the rights upon the one side and increasing the obligations upon the other. Nor may a court do that simply because the provisions of the contract in its judgment should have been made more equitable.

[5, 6] Let us pause for a moment to see what the contract says concerning the rights of the plaintiffs and the duties or obligations assumed by the defendants. In the first option agreement it is made as plain as the English language can make it that the $9,000 "shall be paid only" out of the "net one-half of the proceeds of all ores mined from said property." Then follows the provision that the defendants shall determine the "extent and manner" of the development work. In another part of the option agreement it was again provided that the $9,000 shall be paid "in the manner, and only in the manner, provided for by paragraph 5," which paragraph we have quoted in full. Then again in the final contract, which was

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made and delivered pursuant to the option contract and after or contemporaneous with the deed to the mining claims, after again providing that the $9,000 shall be payable only out of one-half of the net proceeds, it is said:

"It is distinctly understood and agreed that the first parties [the defendants] shall not be liable hereunder to pay to the second parties any sum whatever unless said net proceeds are realized by them out of said property, and then only to the extent of one-half of such net proceeds until the full sum of $9,000 shall be paid to the second parties [the plaintiffs]."

In order to secure the $9,000, regardless of the time when the ore shall be mined and the net proceeds, if any, obtained, the parties in that contract also provided:

"This contract shall be deemed and construed as a covenant running with the title to said land and shall bind the grantors, heirs and assigns of the first parties."

Considering, therefore, all of the provisions of the contract together it is quite clear that it was assumed by all the parties that it might not only be a long time before one-half of the net proceeds would be obtained in sufficient quantities to pay the $9,000, but that it was possible that one-half of the proceeds might not reach that sum at any time. This is made clearer still when reference is had to the purchase price that was fixed in the two options. In one the defendants could obtain the mining claims by paying $16,000 in full therefor. They declined to pay that amount, but elected to purchase under the other option by the terms of which they were required to pay only $12,000 of their own money, but were required to pay an additional $9,000 (which was $5,000 more than the first option), but they were required and agreed to pay said $9,000 only out of one-half of the net proceeds to be derived from the mining claims. Notwithstanding the fact, however, that the plaintiffs were willing to sell the mining claims for $16,000 in full, one of the plaintiffs testified that the claims were worth $50,000 at the time they were sold, and were worth that at the time of the trial. Plaintiffs, however, gave the defendants the option to purchase the mining claims for $12,000 in money regardless of whether that amount, or any amount, was realized out of the property, and for an additional $9,000 making the purchase price $21,000, but agreed that the $9,000 should be paid only out of one-half of the net proceeds, if any, obtained from the mining claims. The defendants agreed to the latter proposition, paid the plaintiffs $12,000 as agreed, but paid no more and have never worked nor developed the mining claims nor have realized any net proceeds therefrom. The defendants did not, certainly not in express terms, agree to work and develop the mining claims. No doubt it was their intention to do that, and no doubt it was assumed by the plaintiffs that they would do so. There is, however, nothing in the contract, that obligates the defendants to do so at any time nor within what any one else might consider to be a reasonable time. If the plaintiffs had desired such a contract they should have demanded it when the option was given to the defendants, and the latter could then either have accepted or declined the proposed conditions. It is too late to impose conditions after a new contract has been entered into which supersedes the old one.

But there is still another reason why the district court's construction of the contract in question cannot prevail. Under the contract no payments were due nor could become due until the defendants had obtained at least some net proceeds. If they had worked the mining claims during all of the years from 1901 to the present time, and had obtained no net proceeds, nothing would be due under the terms of the contract, and if, during that time, they had obtained net proceeds in any amount less than $18,000, the plaintiffs would have been entitled to only one-half of the amount realized, whether that amount was $1,000 or $10,000, or any other sum less than $18,000. If, therefore, the defendants had obtained net proceeds from the mining claims and had failed or neglected or refused to pay plaintiffs one-half thereof, the plaintiffs could have sued for and recovered said one-half and no more, and the burden of proof in such an action would have been upon them to establish that the defendants had realized net proceeds, and the amount thereof. The district court, however, held that in view that the plaintiffs did not, within a reasonable time, work and develop the mining claims, and therefore did not to an absolute certainty demonstrate the fact that they could not obtain net proceeds from the claims, for that reason they should be required to pay the whole $9,000 with legal interest from September 1, 1901, the date when, according to the judgment of the district court, a reasonable time had elapsed. This is not a case where one party to a contract may sue and recover before his claim has matured under the terms of the contract upon the ground that the other party to the contract has, by his own act, deprived himself of the ability to perform according to the terms of the contract when it has matured. Here the parties made ample provision in the contract that such a condition could not arise. The defendants can never prevent the plaintiffs from having recourse to the mining claims in case there are net proceeds derived therefrom. Neither can they, under the terms of the contract, have recourse against the defendants personally, nor against the mining claims, unless and until either the defendants, or some one who claims under them, obtain some net proceeds from the mining claims. This is their contract, and they must abide by it.

It is, however, suggested that if this conclusion is sound, then the defendants may

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never pay the $9,000, and can never be compelled to do so, although they hold and enjoy the mining claims. There are several answers to that contention. The first one is that under the terms of the agreement the defendants did not obligate themselves to pay unless and until they realized net proceeds from the mining claims. Secondly, that they did not agree to pay the $9,000 out of the net proceeds within a reasonable time, or at any time, unless they should first realize the net proceeds. Nor did they obligate themselves to work the mining claims within a reasonable time, nor within a specified time, or at all. That was a matter taken for granted by the plaintiffs, but not agreed to by the defendants, and hence is not a part of the obligations assumed by them. The third answer is, that if the defendants have in any way breached the terms or conditions of their contract the plaintiffs may sue and recover such damages as they may have sustained thereby, precisely the same as they would have to do in case of a breach of any other contract. Courts of law are always open for such actions, and courts of equity may act only when the remedy at law is inadequate. Again, courts of equity may not, under the guise of construction, so change or modify contracts as to impose conditions or obligations not expressed or clearly implied, although such conditions or modifications, in the judgment of the court, may make the terms and conditions of the contract more equitable and more in accord with the court's sense of justice. Where the terms and conditions of a contract are not unconscionable, and no fraud, duress, or misrepresentation is claimed, the courts must enforce all contracts as the parties have made them and not as the court thinks they should have been made. Neither can a court of equity give relief merely because under a long-time contract the parties did not foresee and provide for all possible emergencies that might arise. Under the contract in question the defendants no doubt paid the $12,000 for the mining claims in the hope and expectation that they could make a profit out of them, and the plaintiffs were willing to sell the claims for $16,000 in money in full payment or for $12,000 in money with the promise that they should receive $9,000 additional out of one-half of the net proceeds that should be obtained from the claims. The defendants were not willing to risk $16,000 but were willing to take the chance of getting back their $12,000, while the plaintiffs were willing to take the $12,000, and also take the risk of getting $9,000 in addition out of the net proceeds that should be derived from the mining claims in case any net proceeds should be obtained therefrom. The plaintiffs took it for granted, however, that the necessary net proceeds would be realized. We can see nothing unfair nor unjust in such a contract, although it afterwards develops that for eight years or more the defendants made no effort to work or develop the property for which they had paid $12,000 in cash.

[7] But even though it were conceded that the district court's theory were correct, yet the fact that the defendants could have realized net proceeds in any amount between July, 1901, and September, 1909, in our judgment, is not established. When one of the plaintiffs was testifying he was questioned with regard to whether, in his judgment, the mining claims could have been worked so that they would have yielded "profits sufficient to have paid your $9,000." He answered thus:

"Why, I think with an expenditure of $5,000 sinking this vertical shaft that the mine could have been paying right along."

While, according to the view we have taken, that evidence is wholly beside the question which controls here, yet where is there anything on or between the lines of the contract sued on which required the defendants to expend $5,000, or any other sum, to sink a shaft? That matter was expressly left to their own judgment. Moreover, as already pointed out, a complete answer to the contention that the $9,000 are due and payable is the condition of the contract that if the defendants had worked the mining claims for any number of years and up to the present time, or would continue to work them for any length of time in the future, and they had obtained no net proceeds, or should obtain none, plaintiffs would have no right of action; and in case they had obtained net proceeds in the past, or should obtain some in the future, plaintiffs' right of recovery would be limited to one-half thereof until they had obtained $9,000. Now, plaintiffs concede that no net proceeds have been obtained, and further testify that in order to make the mine pay, that is, to obtain any net proceeds therefrom defendants would have to expend an additional $5,000, and in the very teeth of those facts contend, and the court found, that the $9,000 were due with $5,100 accrued interest. We confess our entire inability to see how this can be due under the contract without disregarding its terms upon the one hand and without imposing duties upon the defendants not assumed by them upon the other. Much evidence was admitted and considered by the court regarding the condition of the mining claims and, their probable value. In our judgment that evidence is without any force whatever. The parties have expressly agreed upon the price to be paid which, for the purposes of this case, must be assumed was deemed the reasonable value. Moreover, the parties have fixed the time and manner of paying the purchase price, and we cannot understand how the condition of the mining claims or their speculative value can be given any effect in construing the language employed in the contract sued on. We have

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thus refrained from referring to the evidence just mentioned.

The real question in this case may thus be viewed from any angle, and still we arrive at the same conclusion, namely, that under the contract the defendants did not obligate themselves to do the things the district court has required of them, and hence the judgment of that court cannot be sustained.

In conclusion we desire to add that counsel for the defendants have referred to the case of Consolidated Arizona Smelting Co. v. Hinchman, 212 Fed. 813, 129 C. C. A. 267. A perusal of that case has convinced us that it is very much in point in favor of the contentions of the defendants, and is in harmony with the conclusions that we have reached. It is not necessary, however, to do more than refer to the case.

The judgment, for the reasons stated, is reversed and the cause is remanded to the district court of Salt Lake county, with directions to set aside its findings of fact and conclusions of law in so far as they are in conflict with this opinion, and to substitute others which are in accordance with the views herein expressed, and to enter judgment dismissing the complaint. Appellant to recover costs.

McCARTY, J. I concur. It is a recognized rule of law that where a contract is susceptible of two constructions, each of which is probable, or its meaning otherwise rendered doubtful, the court, in order to construe the contract so as to give it the meaning and effect the parties who made it intended that it should have, will place itself, as nearly as can be done, in the position of the parties "by admitting evidence of the surrounding facts and circumstances, the nature of the subject-matter, the relation of the parties to the contract, and the objects sought to be accomplished by the contract." 2 Page on Contracts, § 1123. It is also a well-recognized rule of construction that a contract should be considered and construed as an entirety and should be interpreted so as to give effect, if possible, to each provision therein contained. By following and applying these familiar rules of construction in construing the contract under consideration, the uncertainty, if any, of its provisions is more apparent than real, and its meaning—the intention of the parties making it—is reasonably plain and free from doubt.

The record shows that some time about the first of the year 1900, the exact date is not given nor is it material, plaintiffs entered into a contract with one W. R. Sloan whereby they were given an option for two years to purchase a portion of the mining claims involved in this litigation. The group then consisted of one patented and two unpatented claims. The court found, and the evidence shows, that Sloan "agreed to sell and convey said claims to plaintiffs for the sum of $5,000, and plaintiffs thereon paid the sum of $500 to him, and the said Sloan placed a deed in escrow with the Wells-Fargo Company, Bankers, Salt Lake City, Utah, to be delivered to the plaintiffs upon payment by them of the further sum of $4,500.

Plaintiffs, immediately after the execution of their contract with Sloan, took possession of the property, commenced, and, continuously for 15 months thereafter, prosecuted development work thereon. It is admitted, and the record shows, that prior to the time plaintiffs took possession of the property a large amount of work had been done thereon. Respondents (plaintiffs below) in their printed brief say:

"These claims had been worked prior to 1901 for many years, and more than $30,000 worth of work had been done on the same."

There was an incline 800, and one 300, feet in depth and several perpendicular shafts ranging in depth from 50 to 200 feet, besides numerous drifts and tunnels on the property. Plaintiffs, immediately after taking possession, located four claims contiguous to the property. A United States patent was later on procured for the six unpatented claims by and at the defendants' expense. During the 15 months plaintiffs were at work on the property they expended, in addition to their time and labor, $3,500 in cash in their efforts to make the enterprise a going and paying concern.

Silas F. Johnson, one of the plaintiffs, who is a practical mining man of long experience, testified in part as follows:

"Lockwood and I put in about 15 months' work; we had some hired men; we spent about $3,500 there besides our own time. That was cash. * * * We didn't spend much on the four claims we located. As a matter of fact, the four claims didn't cost us anything except the expense of making the locations. * * * Mr. Lockwood and I worked there for 15 months practically every day. * * * We didn't keep on because it was impossible to get the ore out of this long incline. We spent at least six months trying to straighten it up and clean the waste out of it in order to get the ore, and we couldn't make a success of it after we did it. * * * I gave an option on the property for $16,000 for the simple reason I hadn't the money to develop it."

The only conclusion deducible from these facts, as I read the record, is that this group of mining claims could not, without the expenditure of a large sum of money, be placed on a paying basis; and even with an outlay of large sums of money there was nothing in the then condition and appearance of the property to justify more than a vague hope or belief on the part of the plaintiffs that merchantable ore would be found in sufficient quantities to more than pay the running expenses of working the mine. That such was the opinion of the plaintiff Johnson, who testified as a witness in the case, I think, is too plain to admit of serious argument. His

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testimony, considered in connection with the somewhat unusual favorable terms in the contract providing how the final payment of $9,000 may be made, I think, shows this.

Reference is made to a copy of a written report introduced in evidence by plaintiffs that was made by a civil engineer and mining expert of the result of an examination he made of the property and samples of ore taken therefrom and assayed, just prior to or about the time the contract in question was executed. The report, among other somewhat extravagant, and, in view of the evidence of Silas F. Johnson, one of the plaintiffs, who was familiar with every incline, shaft, drift, and tunnel in the mine, and the amount and character of the ore exposed, I might add, reckless and misleading statements therein set forth contains the following respecting the tonnage and value of "high-grade" ores exposed in the mine, namely:

"In the two inclines mentioned, limiting the measurement severely on an estimate, the tonnage practically in sight can safely be considered as 300 tons of an average value of $30 per ton. In extracting this it will be necessary to take out an equal amount of waste. The expense of mining this in a small way will be high, about $2 per ton:

Mining	$ 2.00
Hauling to Milford	1.25
Freight	3.50
Sampling and smelting	6.00
	$12.75

—leaving a net profit of $17.25 per ton, or $8,625. There is every probability that when this ore is extracted an equal tonnage will be exposed, and that this will continue indefinitely. * * *

"The showing at the bottom of the 800-foot incline shaft is extremely favorable for a very large tonnage. The recent development does not show the width of the ore body except to the extent that it is greater than 20 feet. The surface of the vein matter directly above this point is 100 feet or more across, and a comparatively small amount of work below would probably open tonnage to furnish a 200-ton mill indefinitely. The profit that could be realized on the operation of the 200-ton concentrator on ore of the grade now exposed would be: * * * Net profit per month, $28,320.00."

This report, in so far as it deals with the amount and value of the ores exposed in the mine, is manifestly unreliable and misleading. It is a matter of common knowledge to all parties, and their numbers are legion, who have had experience in and are familiar in a general way with the mining industry in this and adjoining states, that a mine containing the amount and character of ore described in the report as being exposed and partially blocked out could readily have been sold for many times the price named in the contract. While the defendants may have been, and probably were, misled by the report respecting the amount and the character of the ore exposed and the value of the mine, it is manifest that plaintiffs were not, in any respect, misled by it. Their willingness to dispose of the property for $16,000, payable in installments, at intervals covering a period of one year, as provided in a contract executed by the parties contemporaneously with the contract under consideration, or for $21,000 as provided in the contract here involved, namely, $12,000 in cash and $9,000 payable from the "net proceeds" of ores mined and "not otherwise," is very persuasive, if it does not conclusively show that in their opinion values placed on the mine in excess of $16,000 were largely, if not entirely, speculative and conjectural. Moreover, it is inconceivable that Sloan would have parted with mining property containing the extensive bodies of commercial ore mentioned in the report and there described as being exposed and partially blocked out for $5,000, giving the parties purchasing it 2 years in which to pay $4,500 of the purchase price and that plaintiffs would have expended thereon $3,500, besides 15 months of their time and labor, without being able to take out sufficient of this high-grade shipping ore to pay the running expenses of operating the mine. As considerable importance seems to be attached to the report and as it is practically the only matter in the record that in any sense tends to support the finding of the trial court, that the property "contains valuable deposits of ore which can be mined and shipped at a profit, and that if defendants had worked said property and mined the ore therein they could, within a short time after entering into said contract, have paid said $9,000 out of one-half of the net proceeds of the ores mined from said property," I shall, for the purpose of further showing the unreliable and misleading character of the instrument, refer, in a general way, to the evidence of the witness Johnson, one of the plaintiffs, wherein he described in detail the condition of the mine and the amount of development work done thereon since the execution of the contract. He stated that three different parties were given options by defendants to purchase the property, each of whom operated—worked on—the property for a few months and then abandoned it; that the development work done on the property since the execution of the contract aggregated from $6,000 to $7,000, and that but little, if any, ore had been mined and shipped therefrom. He also testified that in his opinion it would require a further expenditure of $5,000 in development work to put the mine on a paying basis. Therefore the finding of fact referred to, made by the court, is not only unsupported by but is contrary to the overwhelming weight of the evidence.

Furthermore, the report was the rankest kind of hearsay evidence, and if proper and timely objections had been made when it was offered in evidence the trial court would undoubtedly have excluded it. While the admission of it in evidence without objection

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entitles plaintiffs to have it considered by this court, its unreliable character as hearsay may, nevertheless, be considered in determining the weight that should be given it. The evidence of the witness Johnson as to the condition of the mine respecting the amount and character of the ore therein exposed, the amount of development work done and expenditures made by plaintiffs and their inability to mine sufficient ore to pay the running expenses, the $6,000 or $7,000 worth of development work done since the contract was executed, and the limited amount of ore, if any, the parties doing the work were able to mine, considered in connection with his evidence wherein he says that in his opinion it will require an expenditure of $5,000 to put the property in a condition so that "ore can be mined and shipped at a profit," completely destroys, as I view the record, the value of the report as evidence.

I here remark, parenthetically, it is safe to predict that if the numerous—countless—undeveloped mining claims in this and the adjoining states that have heretofore been examined, and reports, both verbal and written, made thereon, by mining experts and men claiming to be such, had, in the majority of cases, possessed the merit claimed for them in the reports, including the property in question, and the properties had been continuously worked to their full capacity, the output of silver bullion would be equal to if not greater than that of copper, and the output of gold so great as to demonetize it and to make the metal a drug on the market.

The plaintiffs, as stated, were given an option for 2 years by Sloan in which to purchase the property. They paid $500 on the purchase price and expended $3,500 in cash, besides 15 months of their time and labor, in trying to make the mine a dividend paying concern. In other words, plaintiffs, at the time the contract was executed, had invested $4,000 in cash and 15 months of their time and labor, making a total investment by them of about $7,000. This, they realized, would be irretrievably lost to them unless they could induce men with means to take the property off their hands before their option, which had about 6 months to run expired. They were given an opportunity by defendants, which they took advantage of, to dispose of the property on terms that would return to them the $4,000 cash they had put into the enterprise, pay Sloan the balance owing him on the purchase price ($4,500), give them $3,500 for the 15 months' labor that each of them put in the mine, which would be equal to $116.66 per month for each of them over and above their expenses, besides guaranteeing to them one-half of the net proceeds of all ores thereafter mined and shipped until they shall have received $9,000 out of such net proceeds. It was under these circumstances, as shown by the record, that the contract under consideration was made and executed.

The defendants paid $12,000 of the purchase price as provided in the contract. The provision of the contract providing how and under what circumstances the balance ($9,000) may be paid is as follows:

"The balance of the above-named purchase price ($21,000) being the sum of $9,000, shall be paid only in the manner following and not otherwise, that is to say, on and after the 2d day of July, 1902, the said second parties or their assigns shall pay over to said first parties or their assigns a net one-half of said second parties' net proceeds from said mine, meaning thereby a net one-half of the proceeds of all ores mined from said property after the said second parties have deducted all moneys paid by them or expense incurred," etc.

The contract further provides that:

"The *extent and manner* of managing and developing said property *shall be left solely* to the sound and reasonable discretion of said second parties." (Italics mine.)

These provisions, whether read by themselves or in connection with the other provisions of the contract, are plain and free from ambiguity. They provide, first, that the $9,000 shall be paid from the *net proceeds* of the mine "*and not otherwise*," and, second, that the *extent and manner* of managing and developing the mine shall be left solely to the sound and reasonable discretion of the defendants.

That the parties anticipated at the time the contract was executed, and at the time the deed conveying the title of the property to defendants was delivered, that the plaintiffs might have to wait indefinitely for the payment of the $9,000, or any portion thereof, and that defendants would not be called on to pay any part of the amount until there are "net proceeds" from ores mined with which to make payment, I think, is further evidenced by certain provisions of a contract, herein referred to, executed by the parties contemporaneously with the delivery of the deed. That contract or agreement is incorporated in the opinion written by Mr. Justice FRICK. It provides that the defendants will pay to plaintiffs one-half of the "net proceeds of all ores mined * * * from said property" until plaintiffs shall have received "the sum total of $9,000 out of such proceeds." It is also provided that the "contract shall be deemed and construed as a covenant running with the title to said land and shall bind the grantees, and heirs and assigns," etc. It also contains the following provision:

"It is distinctly understood and agreed that the first parties shall not be liable hereunder to pay to the second parties any sum whatever unless such net proceeds are realized by them out of said property, and then only to the extent of one-half of such net proceeds until the full sum of $9,000 shall be paid to the second parties."

No claim is made by plaintiffs that any net proceeds of ores taken from the mine have been received. In fact the record shows

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that at no time since plaintiffs first became interested in the property have the proceeds of the ore been sufficient to pay the running expenses of the mine, or any considerable portion thereof. The provisions of the contract herein set forth, considered in connection with the circumstances and conditions with which plaintiffs were confronted in a financial way, their knowledge of the mine and of the extent and value of the ore exposed therein at the time the contract was executed, I think clearly show that the parties, especially the plaintiffs, were doubtful as to whether the mine ever would or could be worked at a profit, and that it was uncertain as to whether there ever would be any net proceeds from ore mined, and that they executed the contract with that uncertainty in view and with the understanding that the payment of the $9,000 would be made from the "net proceeds of ores mined and not otherwise." In other words, I think it is plain that the payment of the $9,000 was contingent upon the mine being operated and worked at a profit.

In order to uphold the judgment of the trial court it seems to me that this court must refuse to give effect to the provisions of the contract herein referred to, namely, the provision providing that the $9,000 shall be paid out of the net proceeds of ores mined *and not otherwise*, the provision providing that "the *extent* and manner of developing the property shall be left *solely*" with the defendants, and that defendants "shall not be liable to pay (plaintiffs) any sum whatever unless such net proceeds are realized by them out of said property." This, I submit, a court has no right to do.

Furthermore, it is almost unbelievable that defendants would have bound themselves to pay $9,000 in addition to the $12,000 received by plaintiffs on the purchase price, regardless of whether the mine should be operated at a profit or loss, when they had an option to take over the property for $16,000, payable in installments covering a period of one year. We therefore must, in order to affirm the judgment, not only refuse, as stated, to give effect to the provisions in the contract to which I have just referred, but we must in effect hold that the defendants, whom we have a right to believe from the record were men of average intelligence, possessing ordinary business acumen and shrewdness, were willing to and did bind themselves to pay $21,000 for property on which they had an option to purchase for $16,000.

Counsel for plaintiffs, in their printed brief, say that the contract "clearly contemplates that defendants should work and develop the property" and devote considerable space in discussing the alleged dereliction of defendants in that regard.

The action is not brought to recover damages for an alleged breach of the contract by defendants in failing to work the property. The action is to enforce an alleged vendor's lien and to subject the property to the payment of the lien. If the plaintiffs are entitled to have the $9,000 declared a lien on the property and the lien foreclosed and the property sold and the amount of the lien paid out of the proceeds of the sale, then I submit that the right would have existed even though the parties who have been in possession of the property since the execution of the contract had expended $7,000, or, for that matter, $70,000, each year on the property without realizing any profit or "net proceeds." If the $9,000 mentioned in the contract is a lien on the property, as declared by the trial court, the continuity with which work may have been prosecuted and the amount of money expended in carrying on the work without paying the expenses of operating the mine could not in any sense affect the plaintiffs' right to foreclose the lien and subject the property to the payment of the obligation. In other words, if defendants, at great expense, had kept a large force of men continuously at work, since the contract was executed, and had been unable to extract and market sufficient ore to pay expenses, they would be in no better position to resist the foreclosure of the lien than they are under the existing state of the record.

STRAUP, C. J. I dissent. True, the court cannot make a new contract for parties. It, however, is required to construe and give effect to those made by them. The intention of the parties as expressed in language employed by them of course must govern. The several contracts being parts of one transaction should be read together and construed with reference to each other and to the subject to which they relate and with which they deal.

The defendants purchased from the plaintiffs seven mining claims lying in the vicinity of other claims from which pay ore was being shipped, some of great value. When purchased, the claims were not wholly undeveloped. About 3,000 feet of work, running tunnels and inclines and sinking shafts, had been done upon them, and pay ore taken out of them. Testimony was given on behalf of plaintiffs to show the character and extent of the workings and the grade and quantity of ore exposed. One of the plaintiffs, after testifying concerning such subjects, testified that the mining properties were of the value of $50,000. And, as shown by the report of a mining engineer, who at the request of the defendants experted the properties and submitted his report to them before they purchased, there were, among other workings, an incline shaft of 800 feet following down shipping ore in a secondary vein and at the bottom, about 208 feet below the surface, "passed close to and probably partially entered

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the large primary vein." At the bottom of another incline shaft down 300 feet and running on a secondary vein the ore pitched toward the main vein "and no doubt leads into it." He described other workings showing ore, and about a half dozen shafts about 50 feet deep showing streaks of high grade ore assaying from samples taken therefrom values, in lead, silver, copper, and gold, a number of them, from $26 to $65, one as high as $258, and a number from $8 to $18. He reported that at two inclines mentioned and described in his report 300 tons of ore were exposed at an average value of $30 a ton which could be extracted, hauled, sampled, and smelted at a net profit of $8.625, and that the showing at the bottom of the 800-foot incline shaft "is extremely valuable for a very large tonnage," and that "a comparatively small amount of work below would probably open tonnage to furnish a 200-ton mill indefinitely," and that "the profit that could be realized by the operation of a 200-ton concentrator on ore of the grade now exposed would be * * * a net profit per month of $28,320."

His "résumé" is:

"Although this property has not had the advantage of any intelligent development and the workings in many cases resemble gopher holes, there is, nevertheless, sufficient evidence to convince me that there is here an exceptional opportunity for developing a mine of great value."

Against this the defendants gave no testimony and adduced nothing to show that the mine did not contain pay ore, or that it could not have been worked profitably, or that any effort was made by them to work the property, or to extract ore therefrom. The findings of the court that the properties are valuable for mining purposes, and that they "contain valuable deposits of ore which can be mined and shipped at a profit, and that if defendants had worked said property and mined the ore therein they could, within a short time after entering into said contract, have paid said $9,000 out of one-half of the net proceeds of the ores mined from said property," but had willfully and without cause refused to work it and meet such payment, are not only well, but substantially without conflict, supported by the evidence.

In July, 1901, the defendants unconditionally purchased the claims from the plaintiffs, but with the option to pay $16,000 in cash, payable in installments, or $21,000, $12,000 of which in cash, payable in installments, and $9,000 out of net proceeds of ore mined by the defendants, or their assigns, from the properties. The defendants chose the latter. There thus was an absolute sale and an unconditional promise to pay the sum of $21,000, $12,000 of which to be paid in cash in installments, and $9,000 out of net proceeds of ore mined by them from the properties. By their contract of July, 1901, it was provided that "the balance of the above-named purchase price [$21,000] being the sum of $9,000, shall be paid" in manner that "on and after the 2d day of July, 1902 (when the last installment of the $12,000 was due), said second parties (defendants), or their assigns, shall pay over to the said first parties, or their assigns, the net one-half of said second parties' proceeds from said mine, meaning thereby a net one-half of the proceeds of all ores mined from said property after the said second parties have deducted all moneys paid out by them for expenses incurred in mining, milling, sampling, handling, transporting, smelting, and marketing said ores." In October, 1901, the defendants paid the full amount of the $12,000 at which time plaintiffs made their deed conveying unqualified title to the properties to the defendants. Contemporaneous therewith, and in consideration thereof, by further agreement, and in accordance with the prior or main agreement, it was provided:

"That the first parties [defendants] hereby promise and agree for themselves, and their assigns, that they will pay to the second parties, or their assigns, one-half of the net proceeds of all ores mined by the first parties, or their assigns, from said property until the second parties shall have received the sum total of $9,000 out of said net proceeds."

The defendants thus just as unconditionally agreed to pay $9,000 out of net proceeds of ore mined by them from the properties as to pay the $12,000 in cash. The language of their contract admits of no other interpretation. But the defendants say that they had not agreed to work the properties or to mine or take out any ore. But they in no uncertain terms agreed to pay $9,000 out of proceeds of ore mined by them from the properties. They, of course, could not comply with such stipulation unless the properties were mined by them and ore extracted therefrom, for ore does not thrust itself out of the ground, nor without human agency reduce itself to a marketable product. As well say that a vendee, who, as part of the purchase price of a farm, had agreed to pay a sum definite out of net proceeds of crops raised by him on the farm, was not required to farm it or to raise any crops, for it was not nominated in the bond that he was to till, sow, or reap. To say one had agreed to pay $9,000 out of proceeds of ore mined by him from the property, and then say he was at no time required to work or mine it or do anything to obtain ore, seems to me but contradictory propositions. I thus think the defendants had a duty to perform and were required to make reasonable efforts to meet the payment out of net proceeds of ore, and that they were entitled to a reasonable time to do that.

The period of eight years they had to do so certainly was more than reasonable time. The stipulations in the first or main contract that "the extent or manner of managing and developing said property shall be left solely to the sound and reasonable discretion of said parties of the second part," and that the

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plaintiffs should be given employment under orders and directions of the defendants "when the property is being worked," do not imply that the defendants, in compliance with their contract to pay $9,000 out of net proceeds of ore mined by them, were not required to work the property, but rather imply an intention that the property was to be worked, but under the exclusive management and control of the defendants. Notwithstanding the conveyance to them of an unqualified title, their exclusive possession of the properties, and, as found by the court and shown by the evidence, of valuable deposits of ore which could have been profitably extracted, and out of one-half of the net proceeds thereof the obligation of $9,000, shortly after entering into the contracts and the conveyance, could have been discharged, the defendants, nevertheless, for a period of about eight years, did nothing, made no effort, and willfully refused to do anything, and when, on numerous demands that they proceed and work the property they but replied that they were not required to work it, that they were interested in other properties and would work those purchased from plaintiffs when they got ready, and that it was none of their business whether they worked them or not. And thus, for eight years before this action was commenced, and for seven more before judgment was rendered in the court below, have the plaintiffs been deprived of the unpaid purchase price of their claims conveyed to and exclusively possessed by the defendants.

Contracts, with such stipulations respecting payment as here, are and should be liberally construed in favor of the payee. Smithers v. Junker (C. C.) 41 Fed. 101, 7 L. R. A. 264. So construing those in hand I think it clear that the defendants had a duty to perform respecting the discharge of their obligation as to payment of the unpaid $9,000 purchase price. I do not think it was contemplated by the parties that the $9,000 could become due only at the pleasure or will of the defendants regardless of lapse of time or the rights of the plaintiffs. To uphold the defendants in their contention but means that they have the sole right to say when such unpaid balance shall be paid, or that it shall never be paid. Surely that was not contemplated by the parties. I think the provision in the contract to pay the unpaid balance of the purchase price out of proceeds of ore mined by the defendants from the property constitutes but the means and not the end. And though the means had been inadequate to accomplish the end they, nevertheless, are not to control the end, but must yield to it. 2 Story, Eq. Jur. (11th Ed.) § 1064A; Sears v. Wright, 24 Me. 278. For much stronger reasons must this be true when the means are adequate and when the defendants willfully refuse to resort to or to avail themselves of them. The plaintiffs conveyed and warranted an unqualified title to the defendants, not only in consideration of the payment of the $12,000, but also in consideration that the defendants, out of net proceeds of ore mined by them, pay the further sum of $9,000. Though the parties thought, as no doubt they did, that such net proceeds would, in a reasonable time, discharge the debt, yet, if such proceeds fail to accomplish the object of the conveyance and to discharge the debt, the provision that the $9,000 was to be paid out of net proceeds, does not prevent the application of the property itself thereto. Gisborn v. Charter Oak Ins. Co., 142 U. S. 326, 12 Sup. Ct. 277, 35 L. Ed. 1029. Again, for stronger reasons, must that be true if the proceeds fail through the fault and refusal of the defendants to resort to the stipulated and available means to obtain them.

I do not see wherein the case of Consolidated Arizona Smelting Company v. Hinchman, 212 Fed. 813, 129 C. C. A. 237, cited and relied on by the defendants, supports them in their contention. The only thing there decided was that the provision of the contract there considered respecting payments of net proceeds from the operation of mining properties was not a part of the purchase price and not a covenant running with the land, but was merely personal, and did not create an equitable charge on the land. That is apparent from the syllabi, and is expressly so stated by the court in its opinion. Here the $9,000 to be paid out of the net proceeds admittedly is a part of the purchase price. The contracts in unmistakable terms so recite; in the one "the balance of the abovenamed purchase price [$21,000] being the sum of $9,000 shall be paid" out of net proceeds; in the other, "in consideration of the conveyance by" the plaintiffs of the claims, the defendants "promise and agree for themselves and their assigns that they will pay" the plaintiff net proceeds until the sum of $9,000 is paid; and by express provisions of the contract confessedly are covenants running with the land charging it with the unpaid purchase price of $9,000 in accordance with the terms of the contract.

Thus, from these considerations, do I think the judgment right declaring the unpaid purchase price of $9,000 due and unpaid, adjudging it a lien on the property and ordering it sold in satisfaction thereof. Something is said concerning interest. The court allowed no interest for the period of about eight years before the action was commenced and which time the defendants had to comply with their contract. It allowed interest only from the filing of the complaint to judgment, a period of a little more than seven years. If the plaintiffs were entitled to interest, as I think they were, they certainly were entitled to it for the period allowed.

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(49 Utah, 43)

HOLLAND-COOK MFG. CO. v. CONSOLIDATED WAGON & MACHINE CO.

(No. 2921.)

(Supreme Court of Utah. Dec. 5, 1916.)

1. APPEAL AND ERROR ⟸1011(1)—REVIEW—FINDINGS.

Findings of fact in a law case based upon conflicting evidence are conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⟸1011(1).]

2. SALES ⟸1(4) — VALIDITY OF CONTRACT — CERTAINTY.

A memorandum of agreement to purchase "3 carloads Crown silos, sizes to be specified within two weeks," was not too uncertain to support action for damages for breach, for the reason that the sizes were left undetermined, but was an agreement for the delivery of a definite amount, imposing a duty upon the buyer to specify the sizes it might desire.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 5; Dec. Dig. ⟸1(4).]

3. SALES ⟸384(6)—ACTION FOR BREACH BY BUYER—MEASURE OF DAMAGES.

Where defendant refused to perform his contract for the purchase of three carloads of silo material which had not been manufactured at the time of the breach, as the plaintiff was not bound to manufacture the material and tender it to defendant, the measure of damages was the difference between the cost of manufacturing the silo material and the price agreed to be paid by the defendant therefor, less the freight which the plaintiff had agreed to deduct from the price, being equal to the profits the plaintiff would have derived from the contract if the defendant had performed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1106; Dec. Dig. ⟸384(6).]

4. SALES ⟸384(1) — ACTION FOR BREACH — MEASURE OF DAMAGES.

Where finished silo material purchased by the defendant was to be prepared so that it could be assembled into any size of silo that defendant might desire, as the plaintiff's profits would have been the same regardless of the size of the silo constructed, it was immaterial, in determining the damages for breach of the contract, that the court adopted the standard size silo.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098, 1102–1104; Dec. Dig. ⟸384(1).]

5. EVIDENCE ⟸471(1)—OPINION EVIDENCE—CONCLUSION.

In an action for breach of a contract, the court did not err in striking an answer which consisted of a mere conclusion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149, 2160, 2163; Dec. Dig. ⟸471(1).]

6. APPEAL AND ERROR ⟸221—PRESENTATION IN LOWER COURT OF GROUNDS FOR REVIEW.

In an action for breach of contract, where counsel duly assigned the court's ruling on measure of damages as error and argued the assignment in the printed brief, and orally, the question was properly before the appellate court, though not argued in the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1353–1356, 1359, 1361–1363, 1365–1367; Dec. Dig. ⟸221.]

7. SALES ⟸384(4) — ACTION FOR BREACH — MEASURE OF DAMAGES.

Where the price to be paid for finished silo material was 20 per cent. from the list price, less the freight, in determining the damages for breach of the contract by the buyer the freight should be deducted from the agreed price, and not from the list price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1101; Dec. Dig. ⟸384(4).]

Appeal from District Court, Salt Lake County; F. C. Loofbourow, Judge.

Action by the Holland-Cook Manufacturing Company against the Consolidated Wagon & Machine Company. Judgment for plaintiff, and defendant appeals. Modified, and as modified affirmed.

Stewart, Bowman, Morris & Callister, of Salt Lake City, for appellant. Booth, Lee, Badger & Rich, of Salt Lake City, for respondent.

FRICK, J. The plaintiff, a corporation, sued the defendant, also a corporation, to recover damages for breach of contract. It is, among other things, alleged in the complaint that the defendant had refused to receive three carloads of silos which it had ordered or purchased from the plaintiff. The defendant denied the contract of purchase, and, as an affirmative defense, averred that if a contract was entered into it was oral and void under the statute of frauds. A trial to the court, without a jury, resulted in findings and judgment in favor of the plaintiff, and the defendant appeals.

The place of business of the plaintiff corporation is in Tacoma, Wash., where it is engaged in the manufacture of the material for wooden silos, and the principal place of business of the defendant corporation is at Salt Lake City, Utah, where it is engaged in the business of selling and distributing all kinds of farm machinery and other implements. During the early part of the year 1914, the defendant, through its so-called sales manager, B. P. Critchlow, entered into correspondence with the plaintiff for the purpose of ascertaining prices and terms on the silos manufactured by it. All of said correspondence was produced in evidence at the trial and is set out in the bill of exceptions. Pursuant to the letters written by the sales manager as aforesaid, the president of the plaintiff, in April, 1914, came to Salt Lake City and conferred with the defendant respecting the purchase of silos by it. The evidence shows that at that time Mr. Holland met and conferred with the sales manager and the assistant general manager of the defendant. The three discussed the question about purchasing silos manufactured by the plaintiff. The evidence shows without dispute that from lumber and other material the plaintiff manufactured the different parts of which the silos were made; that it did not keep in stock the manufactured articles, but prepared them upon order; and that it generally sold the manufactured or prepared material to dealers throughout the western country in carload lots. The purchasers of

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the material for silos would assemble or put together the material manufactured or prepared by the plaintiff, and would thus build up or construct the silos at such places and in such sizes as was desired. The material for the silos was prepared in such fashion that out of the same material any particular size that might be desired by the purchaser could be constructed. After a full discussion between the defendant's sales manager and its assistant general manager and Mr. Holland of all the matters pertaining to the silos manufactured by the plaintiff, the defendant's sales manager entered into a memorandum of agreement with Mr. Holland for the purchase of three carloads of silos. The agreement was entered into in defendant's place of business, and, in view that there were no order blanks on hand, Mr. Holland used an acceptance blank in preparing the memorandum of agreement. The memorandum aforesaid reads as follows:

"An acknowledgment of your order as we understand it. If correct, advise us immediately. All orders subject to strikes or accidents beyond our control.

"Your order No. ——. Date Apr. 11, 1914.

"Ship to Consolidated Wagon & Machine Co.,

"Address Salt Lake, Utah.

"Ship when ——.

"Via ——.

"Our order No. 7716. Date Apr. 11, 1914.

"Invoice to Consolidated Wagon & Machine Co.

"Address Salt Lake, Utah.

"Freight allowed, 40c per 100 lbs.

"Terms 2% 10 days—60 days net.

"3 carloads Crown silos. Sizes to be specified within two weeks. *20% from our list.*

"I suggest that in making these specifications that large sizes 16x32 or larger in spliced staves be ordered; then smaller sizes can also be made from same stock. T. S. Holland.

"For Idaho Falls, Twin Falls and Salt Lake Territory, O. K. B. P. Critchlow, Sales Mgr. 4–11–14." (Italics ours.)

[1] It is contended that the memorandum is insufficient to meet the requirements of the statute of frauds. That conclusion is based upon the contention insisted on by the defendant that the words in italics, namely, "20% from our list," were not in the memorandum when it was signed by the sales manager of the defendant. It is insisted by defendant's counsel that with the four italicized words omitted from the memorandum it is insufficient to meet the requirements of our statute of frauds for the reason that the price or consideration for which the property in question was sold is an essential element of the memorandum. Mr. Holland, who was a witness for the plaintiff, disputes the defendant's contention. He testified that the words were in his own handwriting, that he wrote the words in the typewritten memorandum, and that he wrote them in before the sales manager placed his o. k. and signature thereto. The sales manager, however, testified that the italicized words were not in the memorandum when he signed it. The court, upon that conflict of evidence, found the fact against the defendant, and, as this is a law case, we are bound by the finding of the court, inasmuch as it is based upon conflicting evidence. In view that the assumed omission of the four italicized words is the only reason defendant's counsel urge why the memorandum is insufficient, and in view that the court found that those words were written in the memorandum and were a part thereof when it was signed by the sales manager, counsel's contention cannot prevail.

[2] It is next urged that the memorandum or contract is too uncertain to be enforced for the reason that the sizes of the silos were not agreed upon by the parties and that that matter was left undetermined by reason of the following clause in the memorandum, namely, "Sizes to be specified within two weeks." It is contended that, inasmuch as the sizes of the silos that the defendant might desire were to be specified or designated after the memorandum was signed, the agreement was left incomplete in a material matter; that is, that the minds of the parties had not met upon the particular sizes of silos that the defendant might desire, and hence it had not purchased any silos. Is that contention sound?

What is it that the defendant purchased? By referring to the memorandum it will be seen that it purchased "3 carloads Crown silos." Defendant was given two weeks' time, however, in which to determine the sizes of silos it desired. The evidence is without dispute that from the material contained in the three carloads purchased by the defendant all sizes of silos manufactured could be constructed. If that be so, we cannot see how the sizes of the silos were material. For the purposes of this decision we shall, however, treat the sizes of the silos as being material. In doing that, however, we do not concede counsel's contention that the memorandum was left incomplete and so uncertain as to be unenforceable. In giving defendant two weeks in which to designate the sizes of silos that it might desire, the memorandum was left neither uncertain nor incomplete. The defendant had, in explicit terms, purchased three carloads of silos. It also agreed to designate or specify the sizes it might desire within two weeks; that is, within two weeks from the date of the memorandum. To designate the sizes of silos, if it desired particular sizes, was a duty or obligation imposed on and assumed by the defendant, and it was required to comply with that stipulation precisely the same as with any other material one mentioned in the memorandum. It was not necessary that the parties should have agreed upon the particular sizes at the time the memorandum was entered into if they provided a method by which that matter could be definitely determined at any time before the contract was to be executed by the plaintiff. They did that, and that was sufficient. The defendant had purchased three carloads of silos with

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the privilege of specifying particular sizes, and it was bound just as much to designate the sizes as it was to pay for the three carloads of silos purchased by it. To that effect are the authorities. The following cases will be found precisely in point. George Delker Co. v. Hess Spring & Axle Co., 138 Fed. 647, 71 C. C. A. 97; Gardner v. Deeds & Hirsig, 116 Tenn. 128, 92 S. W. 518, 4 L. R. A. (N. S.) 740, 7 Ann. Cas. 1172; Hinckley v. Pittsburgh, etc., Co., 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967; Kirwan & Riggs v. Roberts, 99 Md. 341, 58 Atl. 32; Jacobson v. Sullivan, 152 Mass. 480, 25 N. E. 973, 9 L. R. A. 508. In the first case cited, counsel contended that the contract was too indefinite and uncertain to be enforced because the purchaser had agreed to designate within a specified time the various sizes and varieties of springs and axles that should be manufactured and delivered under the contract. It was there contended, as here, that inasmuch as the selection was to be made after the contract was entered into therefore nothing had been selected. The court, in discussing the question, said:

"These contracts are definite as to the quantity of springs and axles, and as to the price and time of delivery, and nothing remained but the specification by the defendant of the sizes and varieties. A failure on the part of the defendant to keep its agreement to make these specifications as provided is the only way in which the contracts could be rendered uncertain; and it would be illogical to hold that by a breach of that part of the contracts the defendant could relieve itself of all the obligations it had assumed, and take the springs and axles only so long as the price of steel advanced, and, by failing to specify when the market declined, throw the loss upon the plaintiff. These were not options given to the defendant, but definite agreements by it for the purchase of the property mentioned, and the provisions for the specifications to be furnished did not make them so uncertain that an action did not lie for their breach. Hinckley v. Pittsburgh Steel Co., 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967; Kimball Bros. v. Deere, Wells & Co., 108 Iowa, 676, 77 N. W. 1041; Ault v. Dustin, 100 Tenn. 366, 45 S. W. 981; Minn. Lumber Co. v. Coal Co., 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529. The defendant cites many cases which are claimed to sustain its view, but they lack the agreement to take a quantity of goods, which is made certain by the contract itself, or could be made certain by evidence; thereby differing from the contracts here, where a definite quantity is fixed, and only its apportionment is to be made by the defendant."

In the case of Hinckley v. Pittsburgh, etc., Co., supra, the decision is correctly reflected in the headnote, which reads:

"The defendant agreed, in writing, to purchase from the plaintiff rails to be rolled by the latter, 'and to be drilled as may be directed,' and to pay for them $58 per ton. He refused to give directions for drilling, and, at his request, the plaintiff delayed rolling any of the rails until after the time prescribed for their delivery, and then the defendant advised the plaintiff that he should decline to take any rails under the contract. *Held:* (1) The defendant was liable in damages for the breach of the contract. (2) The plaintiff was not bound to roll the rails and tender them to the defendant. (3) The proper rule of damages was the difference between the cost per ton of making and delivering the rails and the $58."

We shall not quote, neither is it necessary to do so, from any of the other cases.

[3] It is, however, further contended that the court erred in applying the measure of damages. The court found that the defendant had breached the contract, in that it had renounced the same after the plaintiff had purchased at least a large portion of the lumber which was to be used in the silos purchased by the defendant and before the lumber had actually been prepared or manufactured into finished silo material. The court allowed plaintiff as damages the difference between the cost of manufacturing the three carloads of silo material and the price agreed to be paid by the defendant therefor, less the freight which plaintiff had agreed to deduct from the price. In other words, the court allowed the plaintiff the profits it would have received from the three carloads of silo material if the defendant had in all respects complied with the terms of the written memorandum. Defendant's counsel contend that the correct measure of damages in such case is the difference between the market value of the articles sold and the price agreed to be paid therefor. While the authorities are not entirely in harmony, yet the great weight of authority sustains the ruling of the district court. Where, as here, the article contracted for is not in esse, but is to be manufactured, and the purchaser refuses to comply with his contract, the seller is not bound to manufacture the article and tender it to the purchaser, but he may sue the purchaser for damages for breach of contract, and the measure of damages and of his recovery is the difference, if any, between the cost of manufacturing the article or property purchased and the price agreed to be paid therefor by the purchaser. In other words, the profits that the seller would have derived from the contract in case the purchaser had fully performed the same is the measure of damages. The cases hereinbefore cited clearly lay down and support the rule just stated. In addition to the cases already cited, see, also, Kingman & Co. v. Western Mfg. Co., 92 Fed. 486, 34 C. C. A. 489, and Kimball Bros. v. Deere Wells & Co., 108 Iowa, 676, 77 N. W. 1041, where the rule just stated is discussed and approved. The cases cited by counsel for the defendant upon this proposition can hardly be said to decide the real question involved here, and, for that reason, are not controlling.

[4] In this connection, it is also contended that the court erred in determining the damages by allowing the profits that the plaintiff would have derived from what the court found to be the standard size silo. There is no merit to that contention, for the reason that the court determined what profit

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the plaintiff would have made if the defendant had actually received and paid for the three carloads of silo material. The evidence is clear that the profits would have been precisely the same to the plaintiff, regardless of the size of the silos that might have been selected or designated by the defendant. As before stated, the three carloads of material purchased by the defendant was to be prepared so that it could have been assembled into any size of silos that the defendant might desire. If large size silos had been constructed, there would have been fewer of them, and, if small sized ones had been desired, there would have been more of them in the three carloads; but the profits to the plaintiff on the three carloads would have been precisely the same whether larger or smaller sizes, or some of both kinds, had been constructed out of the three carloads of material which the defendant purchased from the plaintiff. All that the court said, therefore, concerning a standard size silo, has, and can have, no real influence upon the result, or the correctness thereof.

[5] It is also insisted that the court erred in striking a certain answer of Mr. Critchlow the sales manager, who was a witness for the defendant. The answer was a mere conclusion of the witness, and the court did not err in striking it. But even though it were conceded that the court should not have stricken the answer, yet striking it in no way prejudiced the defendant.

Counsel also urge that the sales manager had no authority to enter into the agreement to purchase the three carloads of silos. Without setting forth the evidence upon that question, it must suffice to say that if the court, under the evidence in this record, should hold that the sales manager and the assistant general manager acted without authority, and that therefore the defendant was not bound by their acts, the transaction of business with corporate officers or agents would become hazardous indeed, and such a holding would prove very mischievous in the long run. We unhesitatingly state that the record leaves no doubt respecting the authority of the sales manager and the assistant general manager.

[6] Defendant further insists that the court erred in determining the amount of damages by deducting the amount allowed the defendant for freight from the list price, instead of deducting the same from the price agreed to be paid for the silos after the 20 per cent. from the list price was deducted. Plaintiff's counsel suggest that this question is not properly before us because it was not argued in the court below. The mere fact that defendant's counsel did not present or argue a question of this character in the court below, in view that they otherwise properly raised it, does not prevent them from presenting it to this court. Counsel have duly assigned the court's ruling in this regard as error, and they argue the assignment in their printed brief, and orally as well. The question therefore is: Did the court err in deducting the amount allowed for freight from plaintiff's price list, instead of deducting the same from the amount the defendant agreed to pay for the three carloads of silos?

[7] So far as the defendant was concerned, the list price was material only for the purpose of determining the price it agreed to pay, and the plaintiff agreed to accept, for the silos. A fair construction of the agreement in which the plaintiff agreed to make an allowance for freight, we think, requires that the deduction for freight shall be made from the price actually agreed upon and not from the list price, which was 20 per cent. higher and would thus, to some extent at least, increase the amount the defendant would be required to pay for the silos. We think the court should have deducted the allowance for freight from 80 per cent. of the list price, which was what the defendant agreed to pay, and not, as was done, from the full list price, which was 20 per cent. more than the agreed price for the silos. The difference between what the court should have allowed and did actually allow as damages to the plaintiff is, however, a mere matter of computation and amounts to just $144. While plaintiff's counsel did not concede that the court had erred in the particular just stated, they, however, in advance, consented that we might correct the error, if we found it to be such, by deducting the amount before stated from the amount of the judgment.

There are a number of other assignments, but none of them is of sufficient importance to require further discussion. The record discloses that the case was ably tried and as ably defended, and the trial court fully and fairly considered all the questions that were raised by counsel.

It is not necessary to reverse the judgment, nor to enter a conditional order granting a new trial, for the reason that plaintiff's counsel have agreed that the difference is $144. In view of counsel's consent, it is ordered that the plaintiff remit from the judgment, as of the date it was entered in the district court, the sum of $144, and the judgment, as thus modified, will be affirmed.

For the reasons stated, therefore, the judgment appealed from is modified by deducting from the amount thereof the sum of $144 as of the date the judgment was entered in the court below, which reduces the amount of the judgment to the sum of $1,604.34, and to that extent and for that amount it is affirmed. Neither party to recover costs in this court.

STRAUP, C. J., and McCARTY, J., concurs.

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(49 Utah, 197)

SALT LAKE CITY v. LEE. (No. 2865.)

(Supreme Court of Utah. Nov. 22, 1916. Rehearing Denied Dec. 30, 1916.)

CRIMINAL LAW ⊂⊃1022—VIOLATION OF ORDINANCE—JUDGMENTS APPEALABLE — "CRIMINAL PROSECUTION"—"AMOUNT INVOLVED."

Under Laws 1909, c. 87, providing for appeals from the city court to the district court, but that the judgment of the district court shall be final unless the amount involved exceeds $100 or a constitutional question is involved, one convicted in city court of violating an ordinance, and again convicted in the district court, has no appeal, the prosecution being criminal, and, though the penalty may be a fine, it is not an "amount involved."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2581, 2582; Dec. Dig. ⊂⊃ 1022.

For other definitions, see Words and Phrases, First and Second Series, Amount Involved; Criminal Prosecution.]

Appeal from District Court, Salt Lake County; M. L. Ritchie, Judge.

Henry Lee, convicted in the city court of violating an ordinance, on appeal to the district court and trial de novo therein was again convicted, and he appeals. Appeal dismissed.

S. P. Armstrong, of Salt Lake City, for appellant. H. J. Dininny, Aaron Myers, and W. H. Folland, all of Salt Lake City, for respondent.

STRAUP, C. J. The defendant, in the city court, was convicted of selling adulterated milk in violation of an ordinance. He appealed to the district court. There, on a trial de novo, he again was found guilty and adjudged to pay a fine of $50. From that judgment he has appealed to this court.

A motion is made to dismiss the appeal on the ground that the judgment is nonappealable. The statute (Laws Utah 1909, c. 87), bearing on the question, reads:

"From all final judgments of a city court a motion for a new trial may be made, and an appeal may be taken by either party in a civil case, or by the defendant in a criminal case, to the district court of the county, in the manner and with like effect as is now or may be provided by law for appeals from justices' courts in similar cases, and from all final judgments in the district courts, rendered upon such appeals, an appeal may be taken to the Supreme Court in like manner as if said actions were originally commenced in the district court; provided, however, when the amount in controversy does not exceed one hundred dollars, exclusive of costs, that the same shall be final, and no appeal shall lie therefrom; and, provided further, that in all cases involving the validity or constitutionality of a statute or ordinance there shall be a right of appeal to the Supreme Court. * * *"

While somewhat ambiguously expressed, yet we think the statute fairly means that in all cases, both criminal and civil, an appeal lies from the city court to the district court; and from all final judgments in the district court rendered upon such appeals an appeal lies to the Supreme Court, provided, however, the amount in controversy exceeds $100 or the case involves the validity or constitutionality of a statute or an ordinance. The proviso that when the amount in controversy does not exceed $100 the judgment shall be final and nonappealable is a restriction and a limitation upon the language preceding it, and imposes a condition precedent to the right of an appeal to the Supreme Court. That is, the judgment rendered in the district court is final and nonappealable unless the amount in controversy exceeds $100 or the case involves the validity or constitutionality of a statute or an ordinance. It is hard to make anything else out of it. The words "amount in controversy," as used in the statute, can apply only to civil actions and not to criminal. A prosecution for a violation of an ordinance is criminal. We have uniformly held that. The penalty, whether by fine or imprisonment, or both, which may be imposed can in no sense be regarded as the amount in controversy, for in a criminal prosecution the matter in dispute or in controversy is the guilt or innocence of the accused, and not the penalty which may be imposed upon a conviction. Thus does it follow that a judgment in a criminal case rendered in the district court upon appeal from the city court is final and nonappealable unless the validity or constitutionality of a statute or an ordinance is involved; and, as no such question is presented, let the appeal be dismissed. Though the case is criminal, yet in view of the prior holdings of this court (Salt Lake City v. Robinson, 39 Utah, 274, 116 Pac. 442, 35 L. R. A. [N. S.] 610, Ann. Cas. 1913E, 61, Salt Lake City v. Robinson, 40 Utah, 448, 125 Pac. 657, and Salt Lake City v. Doran, 42 Utah, 401, 131 Pac. 636), let the respondent's costs on the appeal be taxed against the appellant, and it be given judgment therefor. Such is the order.

McCARTY, J., concurs.

FRICK, J. (concurring). I think a fair and reasonable construction of the statute is that in civil actions the right to an appeal is given in all cases where the amount in controversy exceeds $100. If the amount is less, however, then no appeal is permitted unless the validity of the statute or ordinance upon which the action is based is assailed. Further, that in criminal actions the amount in controversy has no application. Therefore, an appeal is permitted only in those cases where the validity of the statute or ordinance upon which the transaction is based is assailed.

In this case, as pointed out by the CHIEF JUSTICE, no such a question is presented, and therefore this court is without jurisdiction to hear the appeal.

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(49 Utah, 53)

SALT LAKE ENGINEERING WORKS v. UTAH CONCRETE PIPE CO.

(No. 2900.)

(Supreme Court of Utah. Dec. 5, 1916.)

1. APPEAL AND ERROR ⟸927(2) — SCOPE — PRESUMPTIONS.

On appeal from a judgment of nonsuit, the record must be considered most favorably to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 3748; Dec. Dig. ⟸ 927(2).]

2. ACCOUNT STATED ⟸20(1) — EVIDENCE — QUESTION FOR JURY.

Evidence *held* not to warrant nonsuit in action on account stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 9, 98; Dec. Dig. ⟸ 20(1).]

3. ACCOUNT STATED ⟸5—AGREEMENT.

Though one or more items in an account are disputed, yet that does not prevent the account from becoming stated as to all other items admitted or agreed upon to be correct.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 16–29; Dec. Dig. ⟸5.]

Appeal from District Court, Salt Lake County; Geo. G. Armstrong, Judge.

Action by the Salt Lake Engineering Works against the Utah Concrete Pipe Company. Judgment of nonsuit, and plaintiff appeals. Reversed and remanded for new trial.

Van Cott & Moreton, of Salt Lake City, for appellant. Bagley & Ashton, of Salt Lake City, for respondent.

STRAUP, C. J. This is an action on an account stated. It is alleged that on a day certain "an account was stated between plaintiff and defendant, and that upon such statement a balance of $2,459.79 was found due and owing from the defendant to the plaintiff, which account the defendant promised and agreed to pay the plaintiff"; that thereafter the defendant paid the sum of $1,639.75, leaving a balance due and unpaid of $820.04, for which amount, together with interest, judgment was demanded. The case, at the close of plaintiff's evidence, went off on a nonsuit, based on the defendant's motion of insufficiency of evidence to show that the alleged account was agreed to or acquiesced in, or that the defendant's president and secretary, with whom it was claimed the account was agreed to and acquiesced in, had authority to so bind the defendant. The plaintiff appeals.

The defendant claims nothing for the latter, and only relies on the former, part of the motion, want of evidence to show that the account was agreed to or acquiesced in. The defendant bought goods and material from the plaintiff, and had a running account with it. The plaintiff's bookkeeper testified that on the 19th day of November, 1914, there was a balance due the plaintiff from the defendant of $2,459.79, on which, on the 7th day of January, 1915, there was paid $1,639.75, leaving a balance due and unpaid of $820.04. He further testified that he—

"had charge of sending out the statements of accounts each month, and made out statements of this account regularly every month, which statements were mailed to the defendant and inclosed in an envelope, postpaid, and deposited by me in the United States mail box. On a number of occasions the statements were sent by me to the defendant for the sum of $2,459.79. The account was stated to them. No objection or complaint was ever received by us to these statements. Invoices were also sent of each order as they were delivered to the defendant company, and these invoices also stated the amount in each case. At the end of the month a statement for the entire month, together with the balance carried forward, was sent."

The plaintiff's superintendent testified that between March and August, or September, 1914, he, on several occasions, demanded payment of the account from defendant's president, who promised from time to time to pay it. One of plaintiff's attorneys testified that he, on ten or more occasions, had a conversation with the defendant's president, or secretary, respecting the account, and as many times demanded payment, and that as many times the president promised to pay it, and that the account at no time was disputed, except on one occasion when the secretary claimed that the account was $29 too large. At the secretary's request an itemized statement was procured from the plaintiff, which then was by the attorney and the defendant's president and secretary checked with the defendant's books, with the result that the claimed $29 was found to be a mere error in addition and computation on the defendant's books. Then, on the 19th of November, 1914, the defendant, through its secretary, wrote the plaintiff:

"In checking our books we find that our books agree with your statement of October 31st, showing a balance due you of $2,266.92. Invoice Nov. 1st $80.62; Invoice Nov. 1st $112.25. Balance, $2,459.79."

But in this connection the secretary further stated:

"$346.00 of the foregoing account is the Atlas Concrete Pipe Manufacturing Company."

The Atlas Concrete Pipe Manufacturing Company was a corporation which had its office with the defendant corporation and was managed and controlled by the same officers. Of course, the $346 item was not chargeable to the defendant. Because of that it is contended that the minds of the parties had not met as to the balance due, and hence had not met as to an account stated. That is, it is claimed that the plaintiff stated an account due it from the defendant of $2,459.79, but that such account included an item of $346 which the defendant disputed. But the plaintiff's bookkeeper testified that:

"There is nothing in this account of the Utah Concrete Pipe Company [the defendant] that has ever been charged to any other company, and the sum of $2,459.79 does not contain any

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items or charges made against the Atlas Concrete Pipe Manufacturing Company. I have no such balance here against the defendant company on October 1, 1914, of $2,213.90. On September 1, 1914, the books show the balance due from the defendant company at that date to be $963.57. Charges made subsequent to that date up to November 2, 1914, amount to $2,459.79. Charges made between September 1st and November 1st were $1,496.22. The charge of $346 made against the Atlas Concrete Pipe Company is not included in any of those items constituting that account. I sent that statement out, and that is my pencil memorandum on it in my handwriting, 'Atlas Concrete Pipe Mfg. Company, $346.00.' That was a separate account in my hands, and I understood that it was to be kept separate from the Utah Concrete Pipe Company, but that it belonged to them. It was my opinion that it belonged to them. The charges which we have made, aggregating $2,459.79, do not include that charge. In addition to the charge of $2,459.79 there is $346 additional due from the Atlas Concrete Pipe Mfg. Co. That charge appears on our books under 'Atlas Concrete Pipe Mfg. Company.'"

It is further shown that when the accounts from time to time were sent to the defendant, showing a balance due from it to the plaintiff of $2,459.79, the defendant at no time objected thereto, nor claimed that such statements included a charge against the Atlas Concrete Pipe Manufacturing Company. When the defendant paid $1,639.75 on the account the plaintiff wrote it, acknowledging receipt thereof, and stated that it had received—

"the sum of $1,639.75 to apply upon your account of $2,459.79. You will observe that there is, therefore, a balance due of $820.04, payment of which sum Mr. Wall insists upon at an early date."

[1] To this the defendant made no objection, and made no claim that the balance due, after giving credit for the payment, was not correctly stated. We, in considering this matter, of course, have pointed to evidence most favorable to the plaintiff. But so must the record be considered on the defendant's motion for a nonsuit.

[2, 3] Let it, however, be assumed that there is some evidence tending to show that the $346 item due the plaintiff from the Atlas Concrete Pipe Manufacturing Company was included in some of the statements furnished the defendant by the plaintiff. But the most that can be said of it is that the evidence as to that is in conflict, which could not be weighed, reconciled, or determined on a motion for a nonsuit. There certainly was some evidence to support plaintiff's theory that the account, as stated and rendered the defendant, showing a balance due of $2,459.79, was not objected to; that the defendant from time to time promised to pay it, and that in checking it over with plaintiff's attorney the defendant's president and secretary agreed with him that the account was correct and promised to pay it, and that when the defendant made the partial payment of $1,639.75 on the account, it did not then dispute that $820.04 was still due and owing.

But further as to this. Though it may be conceded that the minds of the parties had not met as to a balance due of $2,459.79, still there is good evidence to show that their minds met as to a balance due and unpaid of $2,113.79, the difference between $2,459.79 and $346. When the defendant paid the plaintiff $1,639.75 on the account, there still admittedly was due the plaintiff from the defendant the sum of $474.04. Thus, on that theory, was the nonsuit improperly granted. It, however, is urged that there cannot be an account stated as to certain items if others are questioned and disputed and left open for further adjustment, and that to constitute an account stated all the items thereof must be conceded to be true and agreed upon. There are authorities which lend support to such a proposition. But we believe the weight of authority to be that, though one or more items in an account are disputed, yet that does not prevent the account from becoming stated as to all other items admitted or agreed upon to be correct. 1 R. C. L. p. 210; 1 C. J. 690; 1 Cyc. 373; Ingle v. Angell, 111 Minn. 63, 126 N. W. 400, 137 Am. St. Rep. 533, 20 Ann. Cas. 625; Tuggle v. Minor, 76 Cal. 96, 18 Pac. 131; Mulford v. Caesar, 53 Mo. App. 263; Burns v. Campbell, 71 Ala. 271. Of course, where the parties attempted to come to an agreement as to an account stated, but because of disagreements or disputes as to certain items no agreement is reached, there can be no account stated as to any of the items. But that is not this case, viewed most favorably to the plaintiff. So we think there is evidence to show that the minds of the parties, either expressly or by implication, met, if not as to a balance due of $2,459.79 of a stated account, certainly as to a balance due of $2,113.79 of which, later, only $1,639.75 admittedly was paid. We thus are of the opinion that the nonsuit was improperly granted, and that the judgment should be reversed and the case remanded for a new trial. Such is the order, with costs.

FRICK and McCARTY, JJ., concur.

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(40 Nev. 284)

FIRST NAT. BANK OF ELY v. MEYERS et al. (No. 2166.)

(Supreme Court of Nevada. Dec. 30, 1916.)

1. HOMESTEAD ⊂=42—ESTABLISHMENT—NOTICE TO THIRD PARTIES.
Occupancy by the family is prima facie evidence to third parties of the homestead nature of the premises.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 60; Dec. Dig. ⊂=42.]

2. HOMESTEAD ⊂=42—INTEREST OF WIFE—PROTECTION—"TO BE SELECTED."
Const. art. 4, § 30, declares that a homestead as provided by law shall be exempt from forced sale, and shall not be alienated without the joint consent of the husband and wife, and that laws shall be enacted providing for the recording of such homestead. St. 1864–65, c. 72, provides that a selected homestead shall be exempt from forced sale, and that the selection shall be made by recording intention in writing. Amendatory Act St. 1897, c. 20, provides that no deed or mortgage of a homestead, whether a declaration has been filed or not, shall be valid, unless both the husband and wife executed and acknowledged the same. *Held*, that although a homestead was not registered as required by law the husband's sole conveyance or incumbrance of it did not affect the wife's right in the homestead which could not be alienated unless the instrument was executed and given by both.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 60; Dec. Dig. ⊂=42.]

Appeal from District Court, White Pine County; Ben W. Coleman, Judge.

On rehearing. Former opinion, reversing and remanding, affirmed.

For former opinion, see 39 Nev. 235, 150 Pac. 308.

Anthony Jurich and Walker & Haight, all of Ely, for appellants. Chandler & Quayle, of Ely, for respondent.

McCARRAN, J. A rehearing was granted in this case on petition of respondent, in order that a full and complete argument might be presented to the court and in order that the members of the bar of this state, amici curiæ, might, in view of the importance of the question to be determined, make such contribution as they saw fit by way of oral argument or brief to assist the court in arriving at a final determination.

In our former consideration of the case (First National Bank of Ely v. Meyers, 39 Nev. 235, 150 Pac. 308) we dwelt at some length on the constitutional and statutory provisions which seemed to us applicable to the matter at bar. Hence it will be unnecessary for us to go extensively into the question here on rehearing.

Our Constitution (section 30 of article 4) provides:

"A homestead, as provided by law, shall be exempt from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife when that relation exists."

If the constitutional provision terminated at this point, we apprehend there would be no serious question to consider in the matter at bar. But it is the latter part of the section upon which this controversy in the main rests:

"And laws shall be enacted providing for the recording of such homestead within the county in which the same shall be situated."

It will be noted that this section of the Constitution makes no attempt at describing, limiting, or qualifying either the character, class, or quantity of the property that shall constitute a homestead. Such is entirely left to future legislation.

So one thing is apparent without proceeding further, namely, that when this homestead contemplated by the provision of the statute is designated, limited, and fixed as to the character, class, and quantity of the property to be exempted, such homestead so designated, so described, and so limited "shall not be alienated without the joint consent of husband and wife when that relation exists."

Pursuant to the direction of this section of the Constitution, the Legislature in 1865 passed an act which, as we take it, described, limited, and fixed the homestead contemplated by section 30 of article 4 of the Constitution. It declared as to the property out of which the homestead might be created. It limited the amount of property in value that might be covered by the homestead, and thereby made exempt from forced sale, and in this respect specifically provided:

"The homestead, consisting of a quantity of land, together with the dwelling house thereon, and its appurtenances, not exceeding in value the sum of five thousand dollars, to be selected by the husband and wife, or either of them, or other head of the family, shall not be subject to forced sale on execution. * * * Said selection shall be made by either the husband or wife, or both of them, or other head of a family, declaring their intention, in writing, to claim the same as a homestead." Stat. 1864–65, p. 225.

The statute proceeds to prescribe what declaration shall be made where the party selecting is a married person and where the party selecting is an unmarried person; that the declaration should be signed, "acknowledged and recorded as conveyances affecting real estate are required to be acknowledged and recorded."

The statute continues by declaring how the husband and wife shall hold after the declaration of homestead. If the property selected be the separate property of either spouse, both must join in the execution and acknowledgment of the declaration. The statute then makes provision as to how the property shall be disposed of in the event of the death of one or the other of the spouses. The section of the statute makes provision for tenants in common making declaration of homestead rights upon their respective estates in land and the improvement thereon.

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But a singular feature with reference to this statute enacted under the specific mandate of the Constitution is that while it defines the homestead, fixes its value, prescribes the property, separate or community, from which the homestead may be selected, provides for the recording of the same, specifies that from and after the filing for record of said declaration the husband and wife shall be deemed to hold said homestead as joint tenants, etc., it nowhere by any word or expression limits or prescribes or designates the rights of the respective parties to alienate or effect the disposal or incumbrance of the homestead so created. That the homestead "shall not be subject to forced sale on execution or any final process from any court" is all that is provided in the way of exemption.

In the case at bar it must be recalled that we are not dealing with the question of forced sale of a homestead under execution or by final process from a court for any debt or obligation. We are dealing exclusively with the right of one spouse to alienate a homestead without the joint consent of the other. We are dealing here solely with the question of the validity of an instrument made by the husband without the knowledge, consent, or acquiescence of the wife, by which instrument the former alienated, at least to the extent of a mortgage, the home which had been at all times and was then openly and notoriously occupied by and was the only place of abode for himself, his wife, and his family. The statute enacted by our Legislature in 1865 with a view to carrying out the specific requisites of section 30 of article 4, for some reason best known to itself, studiously avoided mention or provision as to the rights of the respective parties to the homestead as regards alienation of the same.

Respondent contends that the homestead "as provided by law" mentioned in the Constitution means the homestead as recorded, and that no homestead can become effective for any purpose unless the parties claiming the same shall have first recorded their declaration.

What is the object and purpose of selecting a homestead or recording a homestead declaration? It is fundamental that the aim of the law in this respect is to give notice to those who would extend credit or who by any process would become creditors, that the property described in the notice should not be looked to as security for the declarant's future indebtedness.

It has repeatedly been held by the courts in cases involving the matter of forced sale under execution that the words in a constitutional provision, such as found in ours "to be selected," have no significance where there is actual occupancy, and the property in question does not exceed in value or quantity that prescribed as a maximum by the statute or Constitution. Stephen-Putney Shoe Co. v. White et al., 172 Ala. 89, 55 South. 503, Ann. Cas. 1913C, 1278; Pollak v. McNeil, 100 Ala. 203, 13 South. 937; Green v. Farrar, 53 Iowa, 426, 5 N. W. 557; Riggs v. Sterling, 60 Mich. 643, 27 N. W. 705, 1 Am. St. Rep. 554; Barton v. Drake, 21 Minn. 299; Rogers v. Marsh, 73 Mo. 64; Peake v. Cameron, 102 Mo. 568, 15 S. W. 70; Hobson v. Huxtable, 79 Neb. 334, 112 N. W. 658; Kimball v. Salisbury, 17 Utah, 381, 53 Pac. 1037; Id., 19 Utah, 161, 56 Pac. 973; Atherton v. Hughes, 249 Ill. 317, 94 N. E. 546; Thompson on Homesteads, § 230.

In the case of Beecher v. Baldy, 7 Mich. 488, the Supreme Court of Michigan, in dealing with a constitutional provision (Const. 1850, art. 16), wherein it was expressed that:

"Every homestead of not exceeding forty acres of land, and the dwelling house thereon, and the appurtenances to be selected by the owner thereof, * * * not exceeding in value fifteen hundred dollars, shall be exempt from forced sale on execution, or any other final process from a court, for any debt contracted after the adoption of this Constitution"

—went at length into the subject; and this decision has been quoted from extensively and cited approvingly by nearly every other court that has had to do with the subject. Among the expressions put forth in the opinion we quote the following:

"Having already shown what description of homestead is exempt by the Constitution, we proceed to, second, the question of its selection. In what cases is any actual selection necessary, except that which is evidenced by ownership and occupancy as a homestead, in order to bring it within the constitutional exemption? To answer this we must first settle the meaning of the phrase 'to be selected,' as used in the Constitution. Now, whether we look to its derivation or its universal use, the term, 'to select,' signifies to choose, to take some particular part or number from a greater; to take by preference from among others; to pick out; to cull. The term 'selection' has never, we think, been used to express merely an election or option, whether to take anything or nothing; to insist upon, or to waive a right. The purpose for which a selection of a homestead is required is exactly in accordance with this universal signification of the term. The obvious purpose for which the selection is required is only to identify and define the property to which the exemption applies, so as to distinguish that which is exempt from that which may be sold at the instance of creditors. The selection in question, therefore, necessarily implies a larger tract or a greater amount of real estate from which the selection is to be made, and it is only for such cases that the statute of 1848 has provided a mode of selection. Both that and the Constitution are silent as to the election to claim a homestead at all, or to waive it altogether."

In the case of Stephen-Putney Shoe Co. v. White, supra, the Supreme Court of Alabama was confronted with a constitutional provision which, among other things, provided:

"Every homestead, not exceeding eighty acres," of land "and the dwelling and appurtenances thereon, to be selected by the owner thereof, * * * shall be exempt from sale on execution or any other" form of "process." Const. Ala. 1901, § 205.

Under this constitutional provision a statute had been enacted which among other things provided that:

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"The homestead of every resident of this state, not exceeding one hundred sixty acres of land, and not exceeding two thousand dollars in value, * * * to be selected by the owner, * * * shall be exempted from levy and sale under execution or other process for [the collection of] debts contracted after April 23, 1873." (Acts 1876-77, p. 32, § 2).

The term "to be selected," as used in the Constitution of Alabama and in the statutory provision, was dwelt upon at length by the Supreme Court, and many of the decisions of other states, dealing with similar questions, were reviewed. Among other things, the court quoted approvingly from Thompson on Homesteads and Exemptions, § 652, to the effect that:

"It is a familiar maxim that the law does not require a person to do an impossible thing, or a vain thing. A necessary application of this maxim is that, where all the land which a debtor has embraces his family homestead, and is within the statutory area and value, he is not required, in order to save his right of homestead, to exercise an act of selection. * * * The exercise of such an act, under such circumstances, would not only be useless, but impossible."

We refer to the principle thus enunciated by these several authorities, not as decisive of the matter at bar, but rather as illustrative of a sound reason which we deem equally applicable to the question of selection and declaration as affecting right of husband and wife in the homestead premises.

We have already drawn attention to the fact that the statute of 1865, which defines the homestead and provides for the recordation of the same, makes no provision or intimation that selection or recordation are in any wise necessary to prevent alienation by one spouse without the joint consent of the other. When we stop to consider, it is not surprising that the Legislature in its wisdom saw the uselessness of such a provision. One need but revert to the fact that recordation is for the purpose of giving notice to the world of the exemption of certain specific property from becoming security for obligations. But why should recorded notice be necessary as between husband and wife, who, occupying the premises, living together, perhaps beneath the very roof, perchance rearing a family therein, are fully aware of the nature and character of the premises? As between husband and wife occupying a given premises as a homestead, does any good reason occur why selection and recordation of the same should be necessary? As between these persons, would not such selection and recording be the "vain thing," unnecessary? The statutory provision of 1865 made no mention of alienation of the homestead premises being affected by the act of selection or declaration. The amendatory act of 1897, having to do with the rights of husband and wife, declared no more, indicated to no greater extent, and effected no greater limitation on the powers of the husband to alienate a homestead than did section 30 of article 4 of the Constitution itself. This section of the Constitution declared that:

"The homestead, as provided by law, should not be alienated without the joint consent of husband and wife."

But the homestead which was by law thereafter provided was "to be selected," not with a view to affecting the powers of alienation—because that specific matter is not mentioned in the statute—but rather to exempt the homestead so selected from forced sale under execution or any final process from any court for any debt or liability contracted. The homestead defined by the law of 1865—a quantity of land, together with the dwelling house thereon and its appurtenances, not exceeding in value $5,000—was required to be selected and hence recorded in order to accomplish the only purpose mentioned by the statute of 1865, exemption from forced sale under execution. Where in the constitutional provision or in any of our statutory provisions on the subject is there to be found an expression indicating that the homestead provided by law must be declared and recorded in order that it "shall not be alienated without the joint consent of the husband and wife?"

[1] Is it the recorded declaration of homestead that makes the premises exempt from alienation? The statute fails to answer. Is alienation prohibited only where the declaration of homestead has been recorded? If so, why was it not so provided in section 1 of the act of 1865 entitled "An act to exempt the homestead and other property from forced sale in certain cases?" What is there in section 1 of this act? What word or phrase or sentence is there in the section that implies, much less expressly declares, that it shall be effective to any extent as prohibiting alienation of the homestead by the husband, whether recorded or unrecorded? What is there about the statute from which we can draw even an inference that it was intended to affect the rights of husband and wife, and in the alienation of an occupied homestead who else can be affected, in view of the fact that the occupancy by the family is prima facie evidence to third parties of the homestead nature of the premises? Cook v. McChristian, 4 Cal. 23; Lubbock v. McMann, 82 Cal. 226, 22 Pac. 1145, 16 Am. St. Rep. 108; Larson v. Butts, 22 Neb. 370, 35 N. W. 190; Brichacek v. Brichacek, 75 Neb. 417, 106 N. W. 473; Hobson v. Huxtable, supra.

Respondent argues with great earnestness that the decision of this court in the case of Child v. Singleton, 15 Nev. 461, is decisive of the question at bar. But we are constrained to believe from the language of that decision that had the learned and eminent jurist who drafted the opinion been confronted with a statute such as that found in the amendatory act of 1897, a different conclusion would have been arrived at.

The amendatory act of 1897 provides:

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"* * * No deed of conveyance, or mortgage, of a homestead as now defined by law regardless of whether a declaration thereof has been filed or not, shall be valid for any purpose whatever unless both the husband and wife execute and acknowledge the same as now provided by law for the conveyance of real estate." Stat. 1897, p. 24.

This is in no wise repugnant to the statute of 1865, which was enacted to accomplish a different purpose, as its title indicates. The amendatory act of 1897 was a limitation to the dominance of the husband over the community property. It sought to accomplish a humane purpose, and in this it sought to do no more than was made manifest as being the spirit and intention of the framers of the organic law.

We are asked:

"If the recording is not an essential element of the homestead, what did the constitutional convention mean by saying that the Legislature shall enact laws providing for the recording of the homestead, and why did the Legislature so enact?"

We reply that the Legislature did not, by any word or sentence, expression or inference, declare that the homestead should be recorded in order that alienation by one spouse without the consent of the other could not be effected. The statute says:

"The homestead * * * to be selected by the husband or wife, or either of them * * * shall not be subject to forced sale."

"To be selected," in order to be exempt from forced sale, is the statutory direction. Nowhere does the statute in this respect say or infer that the term "to be selected" means to make unalienable by one spouse without the consent of the other. Selection, as we have already emphasized, is for the purpose of giving notice. What an idle thing it would be to say that the wife shall give notice to the husband by selecting, and hence recording, a declaration under oath, etc., that she claimed the roof over her head, acquired though it was by her efforts in conjunction with his, as a homestead. This they contend she must do in order to bring to his attention that the community property, "consisting of a quantity of land, together with the dwelling house thereon and its appurtenances," could not be alienated by him. In other words, if we hearken to the contention supporting respondent, we shall say the wife must bring this selection to the attention of her husband by public recordation in order that he may be bound by the specific declaration found in section 30, article 4, of the organic law, which says, in no uncertain terms:

"The homestead as provided by law shall not be alienated without the joint consent of the husband and wife."

The law does not deal in absurdities.

Nor does the Constitution require recording of the homestead as affecting the rights of husband and wife to alienate. The Constitution says:

"Laws shall be enacted providing for the recording of such homestead." What homestead? The homestead "as provided by law."

The homestead contemplated was instituted by the law of 1865, and the homestead "provided by [that] law" was a homestead "consisting of a quantity of land, together with the dwelling house thereon," and was required to be selected to effect one expressed purpose only—to be exempt from forced sale. If we say that the expression in the Constitution, "provided by law," means a selected and recorded homestead, then the expression has no bearing on the right of alienation, because the homestead that was required "to be selected" and recorded only affects the exemption from forced sale under execution.

Under fundamental rules of construction we are bound to give effect to every statutory provision not repugnant to the organic law. No one will attempt to contend that under section 31, article 4, of our Constitution, the Legislature could not enact a law such as the amendatory act of 1897. This act was clearly within the mandate of the Constitution providing that "laws shall be passed more clearly defining the rights of the wife," etc. If we say that the amendatory statute of 1897 is unconstitutional, then we must say that no law can be passed protecting the wife from the act of alienation of the homestead by the husband, unless she does the vain, idle, absurd thing—select and record, and thereby serve notice on her spouse.

In the case of Ham v. Santa Rosa Bank, 62 Cal. 134, 45 Am. Rep. 654, the court, dwelling on a peculiar statute of California, emphasized the words "the record of the declaration operates as a notice of selection to all the world." This is but a reannunciation of an old principle. It does not apply to our peculiar statute, because our statute says nothing as to selection or recordation as affecting the rights of the wife as against those of the husband. Recordation may be, and in fact is, necessary to give notice to all the world of the selection of the homestead to exempt it from forced sale under execution. But to exempt it from alienation by one spouse without the consent of the other, in the absence of specific constitutional or statutory provision, why should such be necessary? Neither the constitutional provision nor the statute law of California is the same as that in this jurisdiction on the subject of homestead rights or the rights of husband and wife in respect thereto. Hence the California decisions afford no assistance in the final question here.

[2] The provision of the statute of 1865, "the homestead * * * shall not be subject to forced sale * * * except * * * for the payment of any mortgage thereon executed and given by both husband and wife," emphasizes, if anything, the very conclusion we draw here. It revives the spirit and intent of the framers of the law, as well as the writers of our Constitution, that the wife's right in the homestead could not be alienated

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unless the instrument of alienation was "executed and given by both."

The occupancy of the premises by the Meyers family, consisting of the maker of the mortgage in question here, his wife and children, was at all times known to the respondent. Its character as a homestead in fact was a matter of common knowledge. The act of Meyers in making the mortgage of these premises without the co-operation of his wife was one prohibited by the spirit and letter of the Constitution, as well as by the specific language of the statute of 1897. His act in mortgaging the premises was void.

Our opinion here, and the observations herein made, are to be understood as in connection with and in furtherance of our views as expressed in our former opinion (First National Bank of Ely v. Meyers, 39 Nev. 235, 150 Pac. 308).

The judgment is reversed. The case is remanded. It is so ordered.

NORCROSS, C. J. I concur in the judgment and order, and adhere to the views expressed in the former opinion of this court.

COLEMAN, J. As I presided at the trial of this case in the district court, I declined to participate in its consideration when it first demanded the attention of this court. I would be reluctant to file an opinion in the case, in any event; but in view of the importance of the question involved, may elect to do so at a later date.

(40 Nev. 299)

PORCH v. PATTERSON et al. (No. 2161.)
(Supreme Court of Nevada. Dec. 30, 1916.)

Appeal from District Court, Elko County; E. J. L. Taber, Judge.

On rehearing. Former opinion affirmed. For former opinion, see 156 Pac. 439.

E. A. Klein, of San Francisco, Cal., for appellant. B. F. Curler and F. S. Gedney, both of Elko, for respondent.

McCARRAN, J. As was said in our former opinion in this case (Porch v. Patterson, 156 Pac. 439) the precise question involved in this case is also involved in the case of First National Bank v. Meyers, 150 Pac. 308. Having granted a rehearing in the last-named case, in view of the importance of the question presented, rehearing was also granted in this case.

Upon rehearing in the case of First National Bank v. Meyers, we affirmed our position taken on the occasion of its first consideration, reversing the judgment and remanding the case.

Upon the authority of that case, the judgment in this case will be affirmed. It is so ordered.

NORCROSS, C. J., concurs.

COLEMAN, J. As the order in this case follows that of First National Bank of Ely v. Meyers, 39 Nev. 235, 150 Pac. 308, I may elect to file an opinion herein, as in the Meyers Case, 161 Pac. 929, at a later date.

(40 Nev. 317)

VERDI LUMBER CO. v. BARTLETT et ux. (No. 2224.)

(Supreme Court of Nevada. Dec. 30, 1916.)

1. MECHANICS' LIENS ⇐78—NOTICE REPUDIATING LIABILITY—STATUTES.

Rev. Laws, § 2213, provides for a lien, whether work is done or material furnished at the instance of the owner or his agent, and that every contractor, subcontractor, architect, builder, etc., in control, shall be held to be the owner's agent. Section 2221 provides that every building or other improvement constructed with the knowledge of the owner shall be held to have been constructed at his instance, and his interest shall be subject to lien, unless within three days after he shall have obtained knowledge of the construction he shall give notice that he will not be responsible, by posting notice in writing on the land or building. Alterations were made on a building, and the contractors for the work with the owner ordered lumber. After the work had been commenced, the owners posted a notice of nonliability. *Held*, that such notice could not affect the lien under section 2213, since section 2221 merely imposes an active duty upon the owner to repudiate liability for improvements made or materials furnished without his consent, and not to the case where the order is given by his agent.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 111; Dec. Dig. ⇐78.]

2. STATUTES ⇐206—CONSTRUCTION—HARMONIZING PARTS OF ACT.

Instead of construing one section of an act as repealing another section in part, courts rather seek to harmonize the different parts of the act, or different acts in pari materia, so as to enable them all to stand.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 283; Dec. Dig. ⇐206.]

Appeal from District Court, Nye County; Mark R. Averill, Judge.

Action by the Verdi Lumber Company, a corporation, against M. B. Bartlett and wife. From a judgment for plaintiff, defendants appeal. Judgment affirmed.

P. M. Bowler, of Tonopah, George A. Bartlett, of Reno, and George B. Thatcher, of Carson City, for appellants. H. R. Cooke, of Tonopah, for respondent.

COLEMAN, J. This is an appeal from a judgment and decree of foreclosure of a mechanic's lien, entered in the district court in and for Nye county. Appellants, who were the owners of a certain lot, and a building situated thereon, in the town of Tonopah, entered into a contract with Kelleher & Kuhlman, on or about September 1, 1913, for the making of certain alterations and additions to the said building. Pursuant to the contract, the contractors were to furnish all materials necessary in the making of the alterations and additions. The respondent, the Verdi

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Lumber Company, furnished and delivered to the contractors, upon their request, at the property mentioned, certain lumber and other building material, which were used by the contractors in making the alterations and additions contemplated by the contract. The contractors having failed to pay for the lumber and material so purchased, the company filed its lien statement, and in due time brought this action to foreclose the same.

Section 1 of an act entitled, "An act to secure liens to mechanics and others, and to repeal all other acts in relation thereto," approved March 2, 1875 (St. 1875, c. 64) being section 2213 of the Revised Laws of 1912, reads:

"Every person performing labor upon, or furnishing material of the value of five (5) dollars or more, to be used in the construction, alteration or repair of any building or other * * * structure, has a lien upon the same for the work or labor done or material furnished by each, respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent; * * * and every contractor, subcontractor, architect, builder, or other persons, having charge or control of any * * * or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner, for the purposes of this chapter."

Section 9 of the same act reads as follows:

"Every building or other improvement mentioned in section 1 of this act, constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration, or repair, or the intended construction, alteration or repair, give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place upon said land, or upon the building or other improvement situate thereon."

Several days after work had been commenced upon the property pursuant to the contract, a notice of nonliability, such as contemplated by said section 9, was posted upon the property by appellants.

Several reasons are urged why the judgment should be reversed; but, in the view which we take of the case, we deem it necessary to consider only one question, and that is, conceding that the notice of nonliability was posted in apt time, and in a conspicuous place, did it accomplish the purpose intended by it?

While appellants contend that they never became liable to respondent, because of the posting of the notice, respondent asserts that it was not the intention of the Legislature that section 2221 should apply to a situation such as is here presented, upon the theory that under section 2213, Kelleher & Kuhlman were the agents of appellants, and that the appellants were bound by the acts of their agents just as much as they would have been had they ordered the lumber and other supplies themselves, and that if appellants had themselves ordered the materials, they could not have relieved the property from the liability by posting a notice of nonliability.

A clause similar to the last one in section 2213, supra, making "the contractor, subcontractor, architect, builder, or other person having charge of the work," the agent of the owner, is embodied in the mechanic's lien statutes of many of the states; and, so far as we have been able to find, the courts have uniformly given such language its plain and ordinary meaning, and have held that supplies and other materials ordered by persons in any of the named classes were proper to be secured by a lien, with the same force and effect as if ordered by the owner himself. In fact, the intention of the Legislature in using the language making the contractor, etc., the owner's agent is so clear that the courts have not found it necessary to construe it very often.

[1] If the language of section 2213, supra, is given its plain meaning, and if the principal is as much bound by the acts of his agent as if he had acted for himself, how can the mere posting of a notice, such as contemplated in section 2221, supra, by the owner of the property, relieve him of liability under circumstances such as are presented in the case at bar? To sustain appellants' contention, we must hold that in so far as the circumstances of this case are concerned, so much of section 2213, supra, as provides that the contractor, etc., is the agent of the owner is repealed by section 2221, supra. Courts do not favor any such consequence when it can be avoided, but rather seek to so harmonize the different parts of acts, and different acts which are in pari materia, as to enable them all to stand. We are convinced that the Legislature never intended by section 2221 to convey any such idea as contended for by appellants, for if it did, we would have the absurd situation of an owner of property being able to order supplies, directly or through a duly authorized agent, procure their delivery, and then, pursuant to the preconceived plan, post a nonliability notice and escape liability therefor. It ought to require no argument to refute such a preposterous contention.

But, fortunately, it has not been left for us to become pioneers in interpreting this statute, for similar questions have received the consideration of other courts. The most recent case in point is that of Oregon Lumber & Fuel Co. v. Nolan, 75 Or. 69, 143 Pac. 935, 146 Pac. 474. That was a case in which Nolan, the owner of a certain lot, gave a lease upon condition that the lessee should erect thereon a building, by the terms of which lease it was agreed that the lessee should not suffer any lien to be filed against the property. The lessee entered into a contract

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with a builder for the erection of a building upon the lot. During the erection of the building the contractor failed, and liens were filed. On the day following the commencement of the work of digging the foundation for the building, Nolan posted a nonliability notice. In the foreclosure suit he took substantially the same position as has been taken by appellants in this case. In passing upon Nolan's contention, the court said:

"The terms of the contract between himself [Nolan] and Blanchard [the lessee] required the latter, without any choice on his part, to construct a building. Although this stipulation was coupled with a lease and an option to purchase the premises, yet its legal effect is to make Blanchard a contractor for the erection of a building which, by the terms of the contract, was eventually to become the property of Nolan and to increase the value of his holdings. These conditions made Blanchard the statutory agent of Nolan within the scope of section 7416, L. O. L., so that one furnishing material or labor at the instance of such an agent for the erection of a building would be entitled to a lien on the realty on which it was situated if Nolan owned the fee. Under such circumstances the law imposed upon Nolan's property certain obligations to those who should furnish materials for the erection of the house at the instance of his statutory agent. Laborers and materialmen, covenanting with Blanchard either directly or through subcontractors, have rights in the premises arising by operation of law which Nolan and Blanchard cannot destroy by contract between themselves. Although each for himself could properly stipulate to waive the provisions of the statute in his own favor, yet without the consent of materialmen who are strangers to that contract, they cannot waive nor impair the rights which the law confers upon such claimants. Hume v. Seattle Dock Co. [68 Or. 477] 137 Pac. 752, 50 L. R. A. [N. S.] 153. If Blanchard had been only a tenant of the premises, without any obligation on his part to erect a building, and under such circumstances had contracted for the erection of the structure, only his leasehold estate would have been primarily liable, under section 7417, L. O. L., for the materials and labor furnished. Yet even then the fee owned by Nolan also would have been liable under section 7419, if he knew of the work, unless he had given the notice mentioned therein, and this because there would then have been no contract to which Nolan was a party contemplating the compulsory erection of the building. This is in accordance with the principal, so often announced by this court, that to support a lien there must be some contractual relation, either directly or indirectly between the lien claimants and the holder of the realty interest sought to be charged. Here, however, Nolan himself has in unmistakable terms directly made an agreement with his contractor, Blanchard, to build the house. He holds out Blanchard to the world as the person having charge of the construction of a building on Nolan's land. He cannot repudiate any of the terms or conditions which the law itself visits upon such a convention for the benefit of persons named in the statute. The distinction between cases where improvements are at the option of a tenant or mere acquiescence of the landlord, entailing no right to a lien when proper notices are given, and the other class of cases where the improvement is compulsory on the part of the tenant, making him a contractor with the landlord, with the consequence that liens may be claimed against the fee for materials or labor furnished, is clearly pointed out by Mr. Justice Dunbar in Stetson-Post Mill Co. v. Brown, 21 Wash. 619, 59 Pac. 507, 75 Am. St. Rep. 862. See, also, Hall v. Parker, 94 Pa. 109; Boyer v. Keller, 258 Ill. 106, 101 N. E. 237, Ann. Cas. 1916B, 628; Curtin-Clark Hdw. Co. v. Churchill, 126 Mo. App. 462, 104 S. W. 476; Western Lumber & Mill Co. v. Merchants' Amusement Co., 13 Cal. App. 4, 108 Pac. 891; Arctic Lbr. Co. v. Borden, 211 Fed. 50, 127 C. C. A. 486."

See, also, Warde v. Nolde, 259 Mo. 285, 168 S. W. 596; Western L. & M. Co. v. Merchants' Amusement Co., 13 Cal. App. 4, 108 Pac. 892.

[2] We have quoted at some length from the case mentioned because it fully and clearly presents the views of the courts which have been called to pass upon the question involved, as well as our interpretation of the statute. We are clearly of the opinion that by section 2221, supra, it was not the intention of the Legislature that an owner might exempt his property from a lien for materials furnished for improvements, alterations, or additions upon his property, no matter whether the materials were ordered by himself or by his legally constituted agent, but that it was the intention of the Legislature that the owner might be enabled to exempt his property from a lien in cases where improvements were made by one who occupied a relationship to the owner pursuant to which the owner was not charged with knowledge that improvements were to be made at the time the relationship was created, but became aware of the making of improvements thereafter. Any other construction of the section in question would necessitate our holding that section 2221 substantially repeals section 2213, so far as they are in conflict.

Section 2221 was not, in our opinion, intended to narrow the scope and effect of section 2213, but rather to give a lien in cases not covered by the latter section. In other words, section 2213 expressly provides that liens might be acquired where materials were furnished at the request of the owner or his legally constituted agent, while by section 2221 an active duty is imposed upon the owner to repudiate liability for improvements made or materials furnished without his consent, within three days after acquiring knowledge thereof, and by his failure to do so he is, in effect, estopped from denying the authority of his tenant, or other person authorizing the improvements, because of which the property must be held subject to a lien. No other construction can be given to section 2221 which will harmonize the two sections.

For the reasons given, it is ordered that the judgment appealed from be affirmed.

McCARRAN, J., concurs. NORCROSS, C. J., not participating.

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(98 Kan. 636)

FROST v. CITY OF TOPEKA. (No. 20307.)

(Supreme Court of Kansas. July 8, 1916.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS ⇐734 — TORTS — PERSONAL INJURIES.

Dynamite caps were used in blasting preparatory to installing water and sewer systems in the city's detention hospital while it was under construction. Employés of the city negligently failed to remove an unused sack of caps from the grounds on completion of the hospital. The plaintiff, a child of nine years, was taken to the hospital with his parents, who were afflicted with smallpox, and was allowed to play about the grounds. He found the caps and exploded one of them and was injured. The hospital was established, owned, and maintained by the city for the sole purpose of detaining and treating persons afflicted with smallpox. *Held*, the city is not liable in damages for the plaintiff's injury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1550; Dec. Dig. ⇐734.]

Appeal from District Court, Shawnee County.

Action by James Frost, a minor, etc., against the City of Topeka. From a judgment for defendant, plaintiff appeals. Affirmed.

J. J. Schenck and Jamison & Jamison, all of Topeka, for appellant. George P. Hayden, of Topeka, for appellee.

BURCH, J. The action was one for damages for personal injuries sustained through the negligence of the city. A demurrer to the answer was overruled, and the plaintiff appeals.

The petition disclosed that the plaintiff's parents became afflicted with smallpox and were confined in the detention hospital of the city. The plaintiff, a child of nine years, was taken to the hospital with his parents and was allowed to play about the hospital grounds. He found a sack of dynamite caps which employés of the city had taken to the hospital grounds and had neglected to remove or render inaccessible. The plaintiff carried the caps into the hospital, accidentally exploded one of them, and injured his hand so that some of his fingers had to be amputated. The answer was that the city established, owned, and maintained the hospital for the sole purpose of detaining and treating persons afflicted with the contagious disease of smallpox. Proper sanitation required that the building be equipped with water and sewer systems, and these were installed entirely on the hospital grounds in connection with the construction and completion of the building. While excavating for the water and sewer systems rock was encountered which it was necessary to remove by blasting, and the dynamite caps belonged to one of several lots which were taken to the premises for use in the conduct of that work. The demurrer to the answer raised the question whether or not the negligence of the city's employés in leaving the dynamite caps where they might be picked up and exploded by the plaintiff was exhibited in connection with the performance by the city of proprietary or of governmental functions. If the latter, the city is not liable.

While the hospital, with its equipment and grounds, was property of the city, it was property held and maintained in a public and governmental capacity, and not in a private proprietary capacity. The sole object in establishing and maintaining the hospital was to conserve the public health, a purely governmental function exercised under the police power of the state. The enterprise was public and governmental from its inception, and in doing the work of constructing the building and installing the water and sewer systems the city acted as a mere agency of the state in promoting the general welfare. While the dynamite caps were property of the city, they were mere contributions to the enterprise, the same as building material, water pipe, sewer pipe, and other articles necessary to secure the ultimate end in view. If in performing the work of constructing and equipping the hospital and putting the grounds in condition for occupancy, materials of any kind were used or disposed of in a negligent or unsafe way, the capacity in which the city acted shielded it from pecuniary liability. When construction was completed and maintenance of the institution as a detention hospital was begun, the relation of the city to the project remained the same, and if for any reason the premises were not safe for occupancy by persons detained in the hospital, the same exemption from liability existed. The decision in the case of Butler v. Kansas City, 97 Kan. 239, 155 Pac. 12, which was a detention hospital case, is conclusive. In that case an inmate of the hospital, detained there because afflicted with smallpox, was injured by a splinter in the floor which it was alleged was maintained in a defective and dangerous condition. The district court overruled a demurrer to the petition. On appeal this court reversed the judgment and directed that the demurrer be sustained. The opinion cites numerous authorities. The syllabus reads as follows:

"Where a municipal corporation maintains a pesthouse for the treatment and isolation of persons who have been exposed to or affected with smallpox, it performs a governmental duty.

"The rule that the governmental agencies of the state are not liable in an action of tort for either misfeasance or nonfeasance is applied to an action against a city to recover damages for personal injuries resulting from the defective condition of the floor of a pesthouse where plaintiff, who was afflicted with smallpox, was confined by the city authorities." Butler v. Kansas City, syl. pars. 1, 2.

It makes no difference in principle whether the building or the grounds appurtenant to the building be defective, and it makes no difference whether the dangerous agency act by penetration or by concussion. The em-

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ployés of the city who caused the hospital grounds to be unsafe by negligently failing to remove the portion of the supply of dynamite caps not consumed in blasting may be personally responsible for the consequences of their conduct, but the city is not.

The plaintiff cites the case of Cherryvale v. Studyvin, 76 Kan. 285, 91 Pac. 60, 11 L. R. A. (N. S.) 385. The case is stated in the opinion as follows:

"Studyvin sued the city for damages alleged to have been caused to his building by the negligence of the city in blasting a ditch for a sewer in an alley at the side of the building. He recovered judgment for $554, and the city claims that he was entitled to recover only the value of two panes of glass broken by a rock thrown while blasting. Whether the city was negligent in doing the blasting is practically the only issue under the pleadings." 76 Kan. 286, 91 Pac. 60, 11 L. R. A. (N. S.) 385.

The principles invoked by the city in the present controversy were not discussed. None of the numerous previous decisions of this court illustrating those principles was cited. State v. Hunter, 38 Kan. 578, 17 Pac. 177; Peters v. City of Lindsborg, 40 Kan. 654, 20 Pac. 490; La Clef v. City of Concordia, 41 Kan. 323, 21 Pac. 272, 13 Am. St. Rep. 285; City of Caldwell v. Prunelle, 57 Kan. 511, 46 Pac. 949; State v. Water Co., 61 Kan. 547, 60 Pac. 337; Freeman v. Chanute, 63 Kan. 573, 66 Pac. 647; Water Co. v. Cherryvale, 65 Kan. 219, 69 Pac. 176; Asher v. Water Co., 66 Kan. 496, 71 Pac. 813, 61 L. R. A. 52.

The city of Cherryvale conceded liability for a part of the injury done. The concession was made because of the declarations of this court in cases like that of Freeman v. Chanute, 63 Kan. 573, 66 Pac. 647, in which the distinction between proprietary and governmental action was drawn with clearness and accuracy:

"There are two kinds of duties which are imposed on a municipal corporation—one arising from the grant of a special power, in the exercise of which the municipality is a legal individual; the other arising from the use of political rights under the general law, in the exercise of which it is a sovereign. The former power is quasi private, and is used for private purposes; the latter is public and used for public purposes. * * * In the exercise of its quasi private or corporate power a municipality is like a private corporation, and is liable for a failure to use its power well or for an injury caused by using it negligently. In building its waterworks, gas, electric light plants, sewers, and other internal improvements which are for the exclusive benefit of the corporation, it is in the exercise of its quasi private power, and is liable to the same extent as are private corporations. * * * But in the exercise of the political or public power conferred on it as an arm of the state for the benefit of all the people, its officers, although appointed or elected by the city, paid and subject to be discharged by it, are not the agents of the municipality, but of the state, and the corporation is not liable either for their misfeasance or nonfeasance." 63 Kan. 577, 66 Pac. 648.

The power and the duty to conserve the public health are not matters of private and local interest to the city alone, but are public and general in their nature and belong to the same class as the power and duty to conserve the public peace.

The plaintiff cites the case of Bowden v. Kansas City, 69 Kan. 587, 77 Pac. 573, 66 L. R. A. 181, 105 Am. St. Rep. 187, 1 Ann. Cas. 955. The syllabus reads as follows:

"A municipal corporation is performing a ministerial public duty in maintaining a fire station, and is liable in damages to an employé for personal injuries resulting from the neglect of the corporation to furnish him a reasonably safe place in which to work."

It will be observed that the word "ministerial" was used, and not the word "governmental," in describing the nature of the city's duty. The gist of the decision was that, whether the maintenance of a fire station be referred to public or to private corporate power, a special, private, corporate duty exists to maintain and manage corporate property so that city employés shall have safe places in which to work. Edson v. Olathe, 81 Kan. 328, 334, 105 Pac. 521, 36 L. R. A. (N. S.) 861.

The plaintiff cites authorities in which it is said that, after legislative judgment and discretion have been exercised and nothing remains but ministerial execution of work which has been laid out, a city may be liable for negligence in the conduct of such work. The statement is unobjectionable as a statement of principle if confined in its application to its proper sphere. If the work be undertaken in the exercise of purely governmental power, performance of the work will also involve the exercise of governmental power. In a certain sense maintenance of a park, or a jail, or a detention hospital may involve the discharge of ministerial duties, but such duties are none the less governmental in character.

"The executive function partakes in any case of the same quality as the legislative function. If an ordinance be ministerial in character, the city will be liable for the failure of its officers to execute the ordinance the same as a private individual would be. If, however, the ordinance be one enacted pursuant to the city's governmental power, the city is not liable in damages for the nonfeasance or for the misfeasance of its officers in executing it." Everly v. Adams, 95 Kan. 305, 306, 147 Pac. 1134, 1135 (L. R. A. 1915E, 448).

The answer stated a complete defense to the action, and the judgment of the district court overruling the demurrer to the answer is affirmed. All the Justices concurring.

(99 Kan. 188)

KAW VALLEY DRAINAGE DIST. OF WYANDOTTE COUNTY v. MISSOURI PAC. RY. CO. et al. (No. 19115.)

(Supreme Court of Kansas. Dec. 9, 1916.)

(Syllabus by the Court.)

1. NAVIGABLE WATERS ⟸1(6) — KANSAS RIVER.

The Kansas river is and always has been a navigable stream in contemplation of federal law.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 10; Dec. Dig. ⟸1(6).]

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2. NAVIGABLE WATERS ⟸1(6) — KANSAS RIVER.

Prior to the enactment of chapter 97 of the Laws of 1864, the Kansas river was a navigable stream in contemplation of Kansas law (Wood v. Fowler, 26 Kan. 682, 688, 40 Am. Rep. 330), and the repeal of the act of 1864, by chapter 259 of the Laws of 1913, restored its legal status as to navigability, subject to all rights which have arisen under valid acts or grants by this state or by the federal government prior to the enactment of chapter 259 of the Laws of 1913.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 10; Dec. Dig. ⟸1(6).]

3. STATUTES ⟸107(1)—CONSTITUTIONALITY—SUBJECTS OF ACT.

The act of 1864 (chapter 97) is not void under the constitutional inhibition that no law shall contain more than one subject (State Const. art. 2, § 16). The provision of the act declaring the Kansas river's nonnavigability is correlated and germane to the chief purpose of the act, which was a grant of power to railroads to bridge the principal streams of the state.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 121; Dec. Dig. ⟸107(1).]

4. RAILROADS ⟸108 — POWER TO BRIDGE RIVERS—OBSTRUCTION OF STREAMS.

Except as governed by chapter 215 of the Laws of 1905 and supplemental legislation, a grant of power to a corporation to construct and operate a railroad in Kansas carries with it the right to bridge all rivers along its right of way; but, whether such rivers are navigable or nonnavigable, they must be bridged so as not unduly to interfere with the flow of the stream, nor to create or aggravate the danger of floods and peril to life and property through the obstruction of bridge piers and embankments in the channel.

[Ed. Note.—For other cases, see Railroads, Century Dig. §§ 333–336; Decennial Dig. ⟸108.]

5. DRAINS ⟸18—DRAINAGE DISTRICTS—JURISDICTION—REVIEW.

The exclusive jurisdiction over the Kansas river in and near Kansas City, vested in the Kaw Valley drainage district by chapter 215 of the Laws of 1905, is not to be construed as an unconstitutional binding of administrative and judicial powers in one tribunal. All the reasonable orders of the drainage district board designed to aid in protecting the city and district will be enforced by judicial aid, but the reasonableness of the orders of the board is a proper question for judicial review.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 11, 13; Dec. Dig. ⟸18.]

6. STATES ⟸45—ADMINISTRATIVE POWERS—EXERCISE BY AGENTS.

When the state creates an agency to serve its public needs and confers administrative powers upon it, a just and reasonable exercise of such powers is intended, and the power to make unreasonable, arbitrary, and confiscatory orders is not intended. Bill of Rights, Kansas Const.; Amendment 14, U. S. Const.

[Ed. Note.—For other cases, see States, Cent. Dig. § 50; Dec. Dig. ⟸45.]

7. DRAINS ⟸18 — DRAINAGE DISTRICTS — POWERS—MANDAMUS.

The state may create an agency to protect a city or district against floods which jeopardize life and property; it may clothe such agency with power to maintain actions to enforce all its rules, regulations, and orders reasonably designed to accomplish the purposes of its creation; and the Kaw Valley drainage district thus created may maintain mandamus proceedings to enforce its reasonable orders to secure its territory against floods.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 11, 13; Dec. Dig. ⟸18.]

8. COMMERCE ⟸8 — INTERSTATE COMMERCE — POLICE POWER OF STATE.

The security of the lives and homes of the people is more important than interstate commerce, and the latter must yield to the former under the reserved police power of the state.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. ⟸8.]

9. COMMERCE ⟸58 — INTERSTATE RAILROAD BRIDGE—REMOVAL.

A bridge which is an integral part of an interstate railroad highway may be demolished and removed from a stream if it constitutes such an obstruction as to cause the river to overflow and imperil the lives and inundate the homes of the people residing near by.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 77–86, 100; Dec. Dig. ⟸58.]

10. COMMERCE ⟸8—BRIDGES OVER NAVIGABLE STREAMS—CONCURRENT AUTHORITY.

The general and exclusive control of interstate commerce vested in Congress is specifically modified by Congress itself (Act of March 3, 1899, c. 425, §§ 9 and 10, 30 Stat. 1151), in the matter of bridges over navigable streams located in a single state, and concurrent power over such bridges is vested in the state.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. ⟸8.]

11. NAVIGABLE WATERS ⟸1(6) — KANSAS RIVER.

All the navigable portions of the Kansas river are located exclusively in Kansas.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 10; Dec. Dig ⟸1(6).]

12. ABATEMENT AND REVIVAL ⟸12—COURTS ⟸493(3)—FEDERAL AND STATE COURTS — JURISDICTION OF STATE COURT.

When a proceeding in mandamus is pending in a state court to compel the removal of a railroad bridge which tends to obstruct the flow of a river, and to flood the neighborhood and imperil the lives and homes of the people, a later proceeding in a federal court to foreclose a mortgage on the railroad property does not operate to abate the action in the state court nor to oust the jurisdiction of the latter.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 87–91, 94, 95, 98; Dec. Dig. ⟸12; Courts, Cent. Dig. §§ 1349–1352; Dec. Dig. ⟸493(3).]

13. ABATEMENT AND REVIVAL ⟸12—STATE AND FEDERAL COURTS — APPOINTMENT OF RECEIVER—JURISDICTION OF STATE COURT.

The appointment of a receiver to manage and operate a railroad as an instrumentality of interstate commerce does not operate to abate a prior pending action in a state court to require the removal of a bridge which is an integral part of such railroad, where it is alleged that the bridge is a public nuisance which imperils the lives and homes of the people residing near it.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 87–91, 94, 95, 98; Dec. Dig. ⟸12.]

14. RECEIVERS ⟸179 — ACTION AGAINST — PARTY DEFENDANT.

Such receiver may be made a party defendant, and subject to the provisions of the federal Judicial Code, § 66 (Act March 3, 1911, c. 231, 36 Stat. 1104 [U. S. Comp. St. 1913, § 1048]), he is bound by the judgment which may be rendered in the state court.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 352–357; Dec. Dig. ⟸179.]

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15. DRAINS ⟸55—AUTHORITY OF ADMINISTRATIVE BOARD—PREJUDICE OF MEMBERS.

An order of an administrative board requiring the destruction of a bridge as a continuing menace to life and property through its tendency to obstruct the flow of a river and to cause it to overflow—the bridge having five piers in the channel—is not necessarily void because the members of the board, in their campaign for the suffrages of the people affected by the bridge's capacity for mischief, committed themselves to the proposition that, if elected, they would not tolerate any bridge having more than two piers.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 61; Dec. Dig. ⟸55.]

16. DRAINS ⟸18 — DRAINAGE DISTRICTS — HEARINGS—SUFFICIENCY.

A hearing precedent to official action by an administrative board is not governed by the rules of procedure followed in courts of law. Informal hearings, consultations, and conferences may fill the requisite requirements, and the true test of its sufficiency is the reasonableness of the official action which is taken pursuant to such hearing.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 11, 13; Dec. Dig. ⟸18.]

17. COMMERCE ⟸58—CONCURRENT JURISDICTION—BRIDGE OVER NAVIGABLE STREAM.

Where the federal government and the state have concurrent jurisdiction of the bridging of a stream as in cases where the navigable portions of it are located exclusively within one state, a bridge erected without the sanction of the War Department and without regard to public and private rights under state law is a public nuisance, and, although the bridge is an integral part of an interstate railroad highway, it may be abated and removed if the welfare of the public cannot otherwise be safeguarded.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 77–86, 100; Dec. Dig. ⟸58.]

18. APPEAL AND ERROR ⟸1116—REVIEW—DECISION.

Controverted questions of law and fact determined. The evidence summarized, and *held* sufficient to show that defendant's bridge as now maintained is a continuing menace to life and property and a public nuisance. Question of the necessity for the total destruction of the bridge undecided, to await conference of the parties; and jurisdiction of the cause retained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4411, 4412; Dec. Dig. ⟸1116.]

Application by the Kaw Valley Drainage District of Wyandotte County, Kan., for a writ of mandamus against the Missouri Pacific Railway Company and others. Questions of fact and law determined, and final judgment withheld pending conference between the litigants.

T. A. Pollock, R. J. Higgins, and Henry E. Dean, all of Kansas City, Kan., for appellant. B. P. Waggener and W. P. Waggener, both of Atchison, Frank Hagerman, of Kansas City, Mo., and A. L. Berger, of Kansas City, Kan., for appellees.

DAWSON, J. This is an application for a writ of mandamus to compel obedience to an order of the Kaw Valley drainage district requiring the Missouri Pacific Railway Company to remove one of its bridges across the Kansas river because its low elevation, many piers, its southern abutment, riprap, and filling obstruct the channel and free flow of flood waters to such an extent as to menace the lives and property of the people residing or doing business in the bottoms of Kansas City, Kan.

Before going into the details of this controversy, a general statement of the situation which gives rise to this lawsuit seems pertinent.

In the early summer of 1903, a great flood devastated the entire valley of the Kansas river from the interior of the state down to its confluence with the Missouri near the eastern state line. Many lives were lost, and 20,000 people in and near Kansas City, Kan., were rendered homeless. Many millions of dollars worth of public and private property was destroyed, including some 17 railroad and public bridges in Kansas City. Destructive floods in the Kaw Valley have not been uncommon, although those carrying such enormous volumes of water as that of 1903 have only occurred previously within recorded annals in 1785 and 1844, at which times the only sufferers were the primitive Indians and the missionaries residing among them. Kansas Historical Collections, 1903–04. In 1826, 1845, 1851, 1881, 1886, 1904, 1908, and 1915, the Kaw Valley has been flooded, usually by the "June rise"; and as settlement has developed and property and business have become more congested the recurring frequency of these floods has become a matter of increasing and imperative concern to the commonwealth. With the usual negligence which is characteristic of free governments, the channel of the Kansas river had been permitted to be encroached upon by enterprising riparian owners, railroads, and business men, until the stream bed had become far too narrow to furnish a waterway for floods of much less volume than that of 1903. On these encroachments in the natural channel, properties of great value had been erected, and, while it is technically true that doctrines of prescription and statutes of limitations do not run against the state (nullum tempus occurrit reipublicæ), yet it has only been after much litigation and expense that the state has recovered and brought under its practical control this important waterway. To bring that about, and to create a responsible public agency charged with the duty to clear the channel of the Kaw, and to maintain a clear channel therein, and to construct and maintain dikes as a protection against floods, the Legislature of 1905 (chapter 215) created the Kaw Valley drainage district, vesting it with all necessary powers for the effective exercise of its arduous and important responsibilities.

Prompted by similar motives, the federal government has lent its aid. Army engineers detailed for that purpose made elaborate reports showing careful study of the local con-

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ditions, the extent of the encroachments made by riparian owners, the obstructions to the flow of the river by the wilderness of bridge piers which had studded its channel, the débris of wrecked bridges which incumbered it, and suggested that the channel be cleared and widened to a minimum of 734 feet for the first 17,000 feet above the mouth of the river. The War Department established harbor lines accordingly, and the Kaw Valley drainage district adopted the recommendations of the federal engineers and the harbor lines of the War Department as the basis of its program for flood protection. The cost of clearing and widening the channel sufficiently to carry the waters of such a flood as that of 1903 would be altogether prohibitive, unless, indeed, the enormously valuable properties erected in the natural channel should be treated altogether as illegal encroachments and condemned and confiscated as such. It was determined, however, as necessary to protect the people and their property in the lower levels of the city from damage by even the ordinary floods which so frequently afflict that locality, that the extreme minimum channel width should be 734 feet and that the river should be diked on that basis. To give the state's agent, the Kaw Valley drainage district, full dominion and free access to the river to construct these dikes and to pursue this work of flood protection and river improvement, the Governor, pursuant to legislative authority (Laws 1911, c. 168), and after provision for reimbursement of all concerned was made, appropriated a strip of land 40 feet wide parallel and adjacent to the harbor lines. With funds raised by taxation dikes were erected on both sides of the river to a height of 30 feet above low-water mark, and most of this work has been completed from the river mouth to a point some miles west of the city. The river channel has been cleared, the bridges and remains of bridges destroyed by the flood of 1903 have been removed, encroachments within the dikes and harbor lines have mostly been abated, and the work has been so far successful that the flood of 1915 was controlled within the dikes and rendered comparatively harmless.

To accomplish all this has not only taken much labor and expense, but litigation as well. The government engineers had advised that bridges having more than two piers in the river would increase the flood hazard and unduly obstruct the adopted minimum width of the channel. As practically all the bridges about Kansas City had been destroyed by the great flood of 1903, it was possible and practical to prescribe that no new bridges having more than two piers in the channel should be erected and that the elevation and clearance should harmonize with the height of the drainage district's embankments. The one lone railroad bridge which survived the flood of 1903 was an exceptionally durable and expensive one built by the Missouri Pacific Railway shortly prior thereto. Immediately after the flood, another and similar bridge was speedily erected by the Union Pacific Railway close to the Missouri Pacific bridge. Both of these have three piers in the river, but the harbor lines and dikes were there widened to 742 feet to make allowance for the extra piers. These bridges were constructed without authority from the War Department and before the state's plans for the protection of the city from floods had been perfected. The federal department of justice filed suits in the federal court against these railroads on the ground that they were built without the sanction of the War Department; but, probably because of the great cost of these structures and the hardship which it would impose on the railroads to remove them and because the channel and harbor lines had been specially widened thereat to make allowance for the extra piers, the federal court, with the consent of the War Department, entered a decree ordering these bridges raised and otherwise reconstructed, but permitting their three pier supports to remain in the channel. All the other new public and railroad bridges, except the one which is the subject of this lawsuit, have been erected with only two piers and elevation conforming to the regulations of the Kaw Valley drainage district. One of the railroads, the Kansas City Southern, was at first disposed to resist the orders of the drainage district in this respect, and it was directed by this court to reconstruct its bridge to conform to the suggestions of the drainage board. Drainage District v. Railway Co., 87 Kan. 272, 123 Pac. 991. The railway company appealed to the Supreme Court of the United States, where the judgment of this court was reversed, the court of last resort declaring that the destruction of a bridge on an interstate railroad could not be ordered merely to "help the drainage of a district." Kansas Southern Ry. v. Kaw Valley Dist., 233 U. S. 75, 34 Sup. Ct. 564, 58 L. Ed. 857. So obvious was it, however, that the public's interest in the matter had not been sufficiently presented to the Supreme Court and that the court had been led to believe that the controversy was a mere balancing of rights and conveniences between improving "the drainage of a district" and the destruction of an interstate railroad bridge, that, generously waiving its judicial victory, the Kansas City Southern acquiesced in the plans of the drainage district and is at this time reconstructing its bridge in full conformity to the drainage district's general program for the protection of the city and district against floods.

The resolution and order of the Kaw Valley drainage district to compel obedience to which the original jurisdiction of this court is invoked recites in part:

"The bridge of the Missouri Pacific Railway Company, across the Kansas river, it being the

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first bridge above the mouth of said river, in the city of Kansas City, Kan., in the Kaw Valley drainage district of Wyandotte county, Kan., generally known as the 'Chicago, Great Western Railway Bridge,' sometimes called the Kansas City, Northwestern Railroad Bridge, is now and hereby found and declared to be constructed and maintained within the harbor lines and channel of said river, so as to cause and contribute to cause the overflow of said river. Said bridge is found and declared to be constructed in an unsafe, dangerous, and improper manner in the following respects, and by reason thereof to contribute directly to cause the overflow of the Kansas river at all times of floods and high water therein.

"Said bridge is composed of three main spans of the aggregate length of 610 feet, and has a through girder span at each end 80 feet in length. The main spans are supported by four concrete piers. The landward ends of the girders rest upon tubular iron piers, the east one 115 feet distance from and within the east harbor line (measured parallel with bridge). The main spans of said bridge should be 734 feet between faces of abutments, measured at right angles to the harbor lines. There should be no girder spans, and the ends of the bridge should rest upon abutments constructed adjoining and outside of the harbor lines. The pier at the west end of the bridge is 78.7 feet from the west harbor line. The pier at the east end of the bridge is 239 feet from the east harbor line. Said bridge should have but two piers inside the harbor lines. It now has nve wholly within the harbor lines. The piers of said bridge should be constructed with the longest dimension thereof parallel to the current. The present piers are constructed at an angle of 30 degrees and 18 minutes to the current [37 degrees]. The four concrete piers of said bridge as constructed and maintained in effect reduce the lineal width of the river at said bridge 112 feet. The lineal width of the river at said place should not be reduced by piers more than 20 feet.

"The superstructure of said bridge is 337.73 feet elevation St. Louis Directrix. The lowest point of the superstructure should not be at an elevation of less than 339.42 feet St. Louis Directrix. The superstructure of said bridge is now 1.69 feet below the height and established elevation of the levees at said bridge.

"All the piers of said bridge within the harbor lines should go to bedrock. The present piers should be removed to a depth of 15 feet below low water, to elevation 294.42 feet. The piers of said bridge should be approximately 217 feet from the abutments, and the center span 300 feet in length, all measured at right angles to the harbor lines. The piers should go to bedrock, or at least 25 feet below low water.

"Said bridge by reason of its length, the number, location, manner of construction and maintenance of its piers, and the elevation of its superstructure, is now and hereby found and declared to unnecessarily, materially, and wrongfully obstruct the flow of the water in the Kansas river during high water and floods in said river.

"It is further found and declared that said bridge as constructed and maintained, by reason of the matters aforesaid, does and will in the future materially and proximately contribute to cause and cause overflows of the Kansas river throughout the Kaw Valley drainage district, and that said bridge as now constructed and maintained is a dangerous and wrongful obstruction and nuisance in said water course.

"It is now and hereby found and declared necessary to the protection of the public health, life, and property from the overflows of the Kansas river, that the said bridge, the superstructure, abutments, and piers thereof, the piling and riprap supporting and about the piers of said bridge and its abutments (to a depth of 15 feet below low-water elevation to 294.42 feet) be removed from within the harbor lines and the channel of the Kansas river, and said bridge and all its said parts and each of them are now and hereby and for the reasons aforesaid condemned and ordered removed therefrom."

The answer of the principal defendant, the Missouri Pacific Railway Company, in part, alleges:

"That said bridge was constructed many years ago, if not with the actual approval of the Secretary of War, under authority of the laws of the state of Kansas under which said Kansas City Northwestern Railroad Company and its predecessor were incorporated, and without objection of the Secretary of War, or the authorities of the government of the United States, has been maintained and operated in its present condition; that during all said years said Secretary of War and the United States government have acquiesced therein, and taken no steps, directly or indirectly, to require this defendant to remove the same. * * *

"Seventh. This defendant further says that there is no necessity for said action on the part of said plaintiff, and the compliance with the commands of said alternative writ would be productive of no good or benefit to the public, or any person or persons or corporations under the jurisdiction or control of said plaintiff herein; that said proceeding to require the removal of said bridge is wholly arbitrary, unnecessary, and without reason, and, if the commands of said alternative writ are complied with, it will interfere with and destroy the facilities operated and used by this defendant in the discharge of its duty to the public and in the transportation of United States mails and interstate commerce. * * *

"Ninth. This defendant further says that the order made by said plaintiff, in its corporate capacity as the Kaw Valley drainage district, was made without any authority of law, and was an ex parte order, and this defendant, under the law creating the said Kaw Valley drainage district, was [not] entitled to and had no notice that said order was about to be made, and had no hearing relative to the reasonableness of the same, but it was made arbitrarily and without notice, and deprived this defendant of the equal protection of the law; that the enforcement of the said order would cause this answering defendant great and irreparable damage, without due process of law."

The answer recites the history of the federal government's suits against the Missouri Pacific Railway Company and the Union Pacific Railroad Company in 1905 concerning their main line bridges located about a mile upstream, and narrates the disposition, by consent, of certain litigation then pending between the defendant and other railroads and the Kaw Valley drainage district, and continues:

"Twelfth. This answering defendant further says: That the said the Missouri Pacific Railway Company and the Union Pacific Railroad Company were granted permission by said plaintiff herein, to each, to construct a bridge across said Kansas river at a point located approximately one mile upstream from the bridge involved in this controversy, and that said bridges so authorized by said Kaw Valley drainage district to be constructed were built at right angles to the harbor lines so established by the United States government and the Kaw Valley drainage district, and, as constructed under said authority, were capable of passing a certain quantity of water under the same. That this answering defendant's bridge, as now constructed

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across said Kansas river, is at an angle of approximately 36 to 37 degrees with the axis of the channel, but the superstructure of said bridge is one and seven-tenths (1.7) feet below the top of the dike as constructed on the right bank of said river. And this answering defendant further says: That it has at all times been ready and willing and is now ready and willing to reconstruct said bridge, which is sought to be removed by the alternative writ of mandamus herein, in accordance with plans submitted to the plaintiff herein on or about the 29th day of September, 1913, and that, if said bridge is reconstructed as proposed by said plans, a copy of which is hereto attached and made a part hereof, greater quantities of water than can possibly flow through the Union Pacific Bridge, which consists of three piers, the Missouri Pacific Bridge, which consists of three piers (both of which bridges are located approximately one mile above said bridge in controversy), the James Street Bridge, and the Intercity Viaduct (both of which bridges consist of two piers each and located 1,000 to 1,500 feet upstream from the present bridge), will readily pass under said answering defendant's bridge as proposed to be reconstructed. That in the reconstruction of said bridge, this answering defendant is now, and has at all times been, ready and willing to reconstruct the same in accordance with the plans hereto attached and made a part of this amended and substituted answer. On said plans hereto attached is shown in green the portion of the present bridge that it is proposed be permitted to remain, in red the portion of the present bridge it is proposed to remove, and in yellow the new portions to be constructed to provide enlarged waterway; the razing and reconstruction to consist of the following:

"(1) The entire bridge to be raised 1.7 feet to make the lowest point of the steel work as high as the top of levee and the approaches to be raised to meet the new elevation of the bridge.

"(2) That portion of the present east approach between the east concrete pier and the east harbor line on the right bank of the Kaw river, consisting of a through girder span, cylinder piers, trestle approach, and some riprap surrounding east concrete pier, to be removed and the footing of the pier to be protected if necessary by steel sheeting, and all the piers of the bridge to be thereafter kept in such condition that it will not be necessary to deposit any riprap around them.

"(3) New concrete abutment to be constructed at the east end of the approach landward of the right harbor line of the Kansas river.

"(4) New steel span approximately 250 feet in length to be constructed as a clear span from the east concrete pier to the new abutment that will be constructed on the right bank of the river landward of the harbor line.

"Answering defendant further says that the board of directors of the said plaintiff herein arbitrarily and unreasonably and unnecessarily refuses to permit this defendant to proceed with the reconstruction of said bridge on such plans and specifications, but insist in lieu thereof that the said bridge as now existing shall be removed, and that a bridge be constructed in its place having but two piers, all of which is unreasonable and unnecessary and will compel this defendant to pay out a large and unreasonable sum of money, when the construction of a two pier bridge will not be of any benefit whatever to the people of said Kaw Valley drainage district."

This action was commenced on May 3, 1913, and the taking of evidence and the collection of evidentiary documents, charts, and more or less pertinent data, began some time afterwards. The record is interminably long and embraces many matters of minor significance. There is an unusual amount of conflict in the testimony, especially as to the relative volume of water which can pass under this bridge compared with the Missouri Pacific and Union Pacific main line bridges and other bridges upstream. Many formulas using hypothetical coefficients to estimate the roughness of the river bed, and to approximate the probable scouring of the channel by flood waters, etc., were mathematically worked out by civil engineers and submitted.

So voluminous is the record, and so many and varied are the matters of fact and of law which are urged upon our attention, that, with due regard to the compass of our opinion and the limits of time to prepare it, we will be compelled, on many phases of the controversy, to simply state our conclusions.

After much of this exhaustive and expensive evidence had been gathered, on August 19, 1915, some two years and three months after this action was commenced, the Missouri Pacific Railway was subjected to a foreclosure proceeding in the federal court in Missouri, and a receiver was appointed for all of the properties of the defendant in Missouri, Kansas, Nebraska, and elsewhere, including, of course, the bridge involved in this case. On application of the plaintiff, the receiver was made a party to this action; his plea in abatement was overruled; and, saving his exception, he answered setting up the foreclosure proceedings in the federal court and his appointment thereunder, his possession and administration of the defendant's property under the orders of the federal court, and alleging that the bridge was an integral part of the property and devoted to interstate commerce and valued at $300,000, and:

"That said federal court so appointing Benjamin F. Bush receiver as aforesaid has and had full and complete jurisdiction, not only of the parties to such action in which said receiver was appointed, but of the subject-matter of the same, * * * and this court has no power, jurisdiction, or authority, by mandamus or otherwise, to require said receiver, so acting under the direction and orders of said federal court, and as an officer of said court, to remove said bridge, or any part thereof. * * *

"This answering defendant, Benjamin F. Bush, receiver, here adopts the averments and allegations of the amended and substituted answer of the Missouri Pacific Railway Company to the alternative writ of mandamus issued against it, which amended and substituted answer is on file as a part of the record in this case, and here refers to the same, and the same is made a part hereof, as fully as if incorporated herein."

The order of the federal court appointing the receiver contains the following:

"(2) That said receiver be and is hereby authorized and directed immediately to take possession of all and singular said railroads * * * wherever situated or found, * * * and to run, manage, maintain, and operate said railroads and property, * * * and to use, manage, and conduct the business of the defendant railway company in such manner as in his judgment will produce the best results, and to this end to exercise the authority and franchises of the defendant railway company, and to dis-

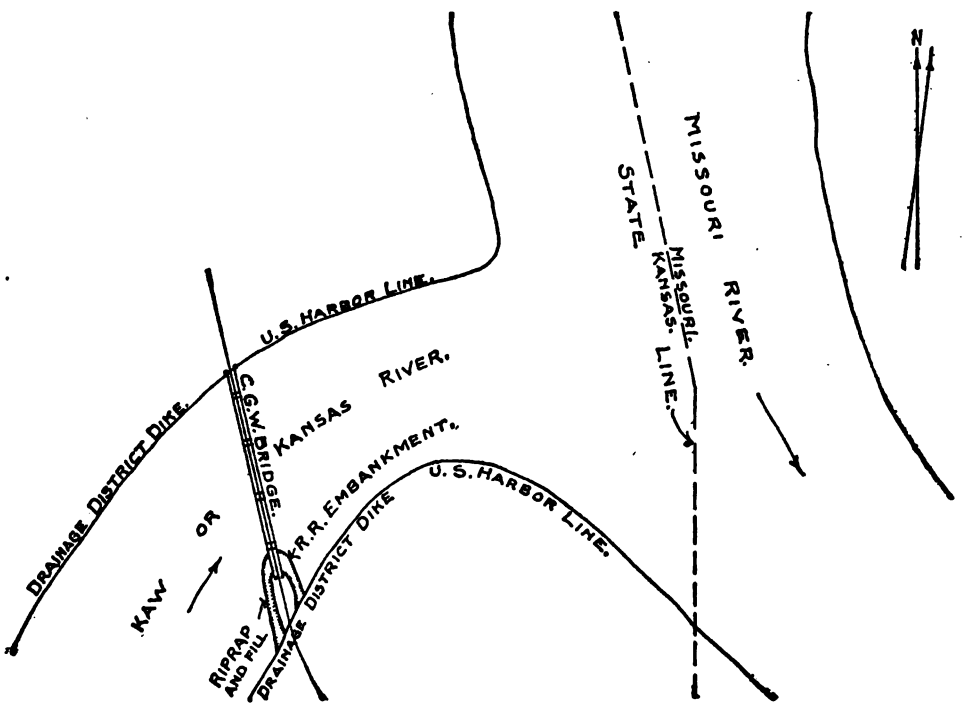
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charge all public duties obligatory upon it and to preserve said railroads and property in proper condition and repair, and to manage and operate said railroads and property according to the requirements of the valid laws of the various states in which the same are situated, and in the same manner that the defendant railway company would be bound to do if in possession thereof. * * *

"(3) That said receiver be and hereby is authorized and empowered to institute and prosecute within this state or elsewhere, and in his own name as receiver or in the name of the defendant railway company as he may be advised by counsel, all such suits as in his judgment may be necessary for the recovery or proper protection of said property or any part thereof, and the discharge of his trust, and likewise to defend, compromise, or settle any and all actions which may be instituted against him as receiver, and to appear in and conduct the prosecution or defense of or compromise or settle any actions, proceedings, or suits now pending or which may hereafter be brought in any court or before any officer, department, commission, or tribunal in which the defendant railway company is or shall be a party, which, in the judgment of said receiver, affect or may affect the property of which he is hereby appointed receiver; but except upon further order or direction of this court no payment shall be made by said receiver in respect of any such suits, actions, or proceedings; and no action taken by the receiver in the defense or settlement of any such actions or suits against the defendant railway company shall have the effect of establishing any claim upon or right in the property or funds in the possession of the receiver so as to alter or change any existing equities or legal rights of the parties."

The bridge whose destruction is demanded by the plaintiff is located near the confluence of the Kansas and Missouri rivers. It is indifferently known in this record as the Kansas City Northwestern and as the Chicago Great Western Bridge. It spans the river diagonally to the current, stretching nearly north and south. It has four concrete piers in the channel, and at each end of the main bridge structure are tubular iron and cement piers, one of the latter standing at the northerly end of the bridge so close to the harbor line and dike embankment that it is of little or no consequence as an obstruction.

The other tubular pier stands about 115 feet inside the harbor line and supports a steel truss connecting the main bridge structure with an embankment which projects into the stream from the southern or southeastern shore. In this embankment, also, is some piling designed to strengthen the grade where the bridge and embankment meet. The four main piers of the bridge do not stand parallel with the current, but about 37 degrees athwart it and at right angles to the direction of the bridge. The superstructure is 1.67 feet below the top of the grade established by the drainage district. From the scores of photographs, diagrams, and blueprints submitted, a simple composite diagram of the location and situation of this bridge may assist us in this discussion:



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[1] This bridge, like the Union Pacific Bridge some distance up the stream, was erected shortly after the flood of 1903 to replace one destroyed thereby. This was before the organization of the Kaw Valley drainage district and before the state began to concern itself methodically with the regulation of bridges which should be permitted to span the river at Kansas City. The bridge was built by a local company for the use of the Kansas City Northwestern Railway, and later the Missouri Pacific Railway became the owner of it. The only interest of the Chicago Great Western Railway in this lawsuit is that of a tenant of the Missouri Pacific and it uses the bridge under its lease. Both the defendant owner and its tenant are interstate carriers, and both use the bridge in the discharge of their corporate duties as such. The Kansas river spanned by this bridge is a navigable stream in contemplation of federal law. 2 Stat. L. p. 666, § 12; 2 Stat. L. 747, § 15. Its status under state law needs some special discussion which will follow.

The bridge was constructed without the formal sanction and approval of the War Department. The plans for its construction were submitted for approval, but the War Department officials declined to act, apparently on the ground that the federal government was not then actively exercising control over the Kansas river as a navigable stream; and the applicants for approval of the bridge plans were told, in effect, to go ahead and build their bridge so far as the federal government was concerned, but formal approval and sanction of the bridge was withheld.

[2] Under Kansas law and Kansas history the status of the Kaw as a navigable stream may be briefly stated. In territorial days, before the Civil War and the coming of railroads, the river was navigable and navigated. Wood v. Fowler, 26 Kan. 682, 688, 40 Am. Rep. 330. A considerable commerce was developed extending from its mouth as far west as Ft. Riley and Junction City, and occasionally further west. Kansas Historical Collections, vol. 9 (1905–06), 317. During the Civil War this commerce greatly declined, and for many years it continued to be inconsequential, although more recently it has somewhat increased. By 1864, it was seen that an era of railroad transportation was at hand. To foster it, the Legislature (Laws 1864, c. 97) enacted:

"Section 1. That the Kansas, Republican, Smoky Hill, Solomon and Big Blue rivers, within the limits of the state of Kansas, are hereby declared not navigable streams or rivers.

"Sec. 2. Any railroad or bridge company, having a charter under any general or special law of the state of Kansas, shall have the same right to bridge or dam said rivers as they would have had if they never had been declared navigable streams."

This act was repealed by chapter 259 of the Laws of 1913, which, however, provided:

"Section 6. For the purposes of this act the bed and channel of any river in this state or bordering on this state to the middle of the main channel thereof and all islands and sand bars lying therein shall be considered to be the property of the state of Kansas unless this state or the United States has granted or conveyed an adverse legal or equitable interest therein since January 29, 1861, A. D., or unless there still exists a legal adverse interest therein founded upon a valid grant prior thereto; provided, that nothing in this act shall affect or impair the rights of any riparian landowner or lawful settler upon any island which is state school land."

[3, 4] The plaintiff contends that the act of 1864 was unconstitutional on the ground that it contained two distinct and separate subjects. We think not. These subjects, a declaration of nonnavigability and a grant of power to bridge the rivers, were correlated; the former serving chiefly as a "whereas" or "preamble" to explain the purpose of the latter and to pave the way for it. Furthermore, this act stood during all the 49 years of its existence as valid legislation, rights were acquired and frequently adjudicated under its terms, and it would never do at this late date to throw a doubt around its validity. Moreover, the act of 1913, which repealed it, virtually ratified all rights acquired under the act of 1864. Aside from this act, we have much general legislation which has authorized and encouraged the construction of railroads. To the right of eminent domain expressly conferred by statute, a grant of corporate power to build a railroad carries with it the power to do all that may be necessary and proper to build it, to level the hills, to grade the valleys, and to bridge the streams along its proposed right of way. Gen. Stat. 1868, c. 23, § 47; Gen. Stat. 1909, § 1763. All this must be done, of course, with due regard to public and private interests; and streams, whether navigable or nonnavigable must be bridged so as to permit free egress for all flood waters which may reasonably be anticipated. Bearing in mind that such was the Kansas law when this bridge was erected, and that the state's special agent to regulate the bridging of the Kaw at Kansas City and thereabout, the Kaw Valley drainage district, had not then been created, it cannot be said that the bridge in controversy was without legal sanction by this state, unless indeed it was constructed without due regard to public rights and was and is inherently a serious obstruction to the flow of the river and tending materially to increase the flood hazard in Kansas City. Of that we will speak later.

But the plaintiff says that this bridge is illegal because it was unauthorized by the federal government, under the federal statute (Act of March 3, 1899, c. 425, 30 U. S. Stat. at Large, 1151), which in effect provides that the consent of both the state and national governments is required to bridge a navigable stream located in one state. Granted. But, unless the bridge as it stands offends against state law, the fact that it was built without federal sanction need not concern the plaintiff. Under our dual sys-

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tem of government, the state and national governments frequently do and probably always should co-operate for the more efficient exercise of their respective functions; but each government has its own machinery for the enforcement of its own laws, and it is not the duty and probably not within the powers of either one to enforce the laws of the other unless at the special invocation of the executive.

The mere matter of the navigability of the Kansas river is no concern of the plaintiff, whose duties only relate to such supervision and control of it as is necessary to secure adequate protection against floods; but, if the navigable capacity of the river had always been properly preserved, the flood hazard would be materially less than it is. To that extent the matters of preserving the navigability of the river and its preservation from obstructions which increase the peril of floods coincide harmoniously.

[5, 6] It is also contended by the plaintiff that the statute (Laws 1905, c. 215) which clothes the Kaw Valley drainage district with complete and exclusive jurisdiction over the river at Kansas City makes its findings as to the necessity for the demolition of this bridge conclusive and forecloses judicial investigation into the reasonableness of its orders. That goes too far. The plaintiff board is an administrative agency. Within its powers it is supreme. But its orders must be reasonable, and it cannot be the final judge of the reasonableness of its own orders. That would be tying administrative and judicial powers in one hand, and this our own Constitution will not allow. That was the constitutional rock which wrecked the Court of Visitation Act nearly 20 years ago. State v. Johnson, 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662. Other public boards with duties almost as onerous as those of this plaintiff, like the Public Utilities Commission, for example, exercise their powers in harmony with this principle. So do the city governments.

Concerning the powers of the Utilities Commission, it has been said:

"It will be seen from the foregoing statutes that the Legislature has promulgated a comprehensive program for the regulation and control of public service corporations. The Public Utilities Commission * * * has power to supervise the conduct of public service corporations in this commonwealth. It may order improvements in the public service where conditions so demand. State v. Railway Co., 76 Kan. 467, 92 Pac. 606, affirmed in Mo. Pac. Ry. Co. v. Kansas, 216 U. S. 262 [30 Sup. Ct. 330, 54 L. Ed. 472]; State v. Railway Co., 81 Kan. 430, 105 Pac. 704 [28 L. R. A. (N. S.) 1082]; Railway Co. v. Railway Commissioners, 85 Kan. 229, 116 Pac. 896; State ex rel. v. Railroad Co., 85 Kan. 649, 118 Pac. 872. Likewise an unreasonable order, such as one requiring the erection and maintenance of a railway station where there was no need for a station, will be corrected on judicial review. Railroad Commissioners v. Railway Co., 71 Kan. 193, 80 Pac. 53." State ex rel. v. Postal-Telegraph Co., 96 Kan. 298, 303, 304, 150 Pac. 544.

Touching the powers of city governments, the same general doctrine is recognized:

"Reasonable changes and improvements in the affairs of public utilities may be ordered at the expense of the public utility company. Thus, as a municipality increases its population and business becomes congested, telephone wires may be ordered removed and located elsewhere, railroads may be required to establish new and expensive crossings, larger terminals, additional connections, etc. State ex rel. v. Railroad Co., 85 Kan. 649, 118 Pac. 872; City of Emporia v. Railway Co., 88 Kan. 611, 129 Pac. 161. Of course, the exercise of such powers must be reasonable; otherwise the courts will withhold or enjoin their enforcement. Paola v. Wentz, 79 Kan. 148, 98 Pac. 775 [131 Am. St. Rep. 290]; City of Emporia v. Railway Co., 94 Kan. 718, 147 Pac. 1095; Emporia Telephone Co. v. Utilities Commission, 97 Kan. 136, 154 Pac. 262." Wichita Water Co. v. City of Wichita, 98 Kan. 256, 259, 158 Pac. 49.

It may therefore be said generally that, when the state creates an agency to serve its public needs and confers administrative powers upon it, whatever be the language of the statutes conferring such powers, a just and reasonable exercise of such powers is intended, and the power to make or exercise unreasonable, arbitrary, and confiscatory orders is not intended. Such is the spirit of our own Bill of Rights and of the Fourteenth Amendment which have been expounded times without number by this court and by the federal Supreme Court.

Before examining the reasonableness of the drainage district's order, we will turn to some of the defendant's principal contentions and endeavor to dispose of them.

[7] It is contended that the plaintiff is not the real party in interest and has no right to maintain this action. We hold otherwise. Whatever the state may lawfully do it may provide a public agency to do for it, and this plaintiff has been granted power to make all necessary and reasonable provision for the protection of the people against destruction of life and property by floods in the Kaw Valley in and about Kansas City. Laws 1905, c. 215, § 7. It is authorized to engage in litigation and to maintain and defend actions pertaining thereto.

It is contended by defendant that the decision of the United States Supreme Court in Kansas Southern Ry. v. Kaw Valley Drainage Dist., 233 U. S. 75, 34 Sup. Ct. 564, 58 L. Ed. 857, settles this controversy. If we could be persuaded that that contention is correct, with what relief and alacrity would we lay aside this enormous record, with its endless depositions, its 2,000 pages of abstract, its plethora of charts, diagrams, and exhibits, its hypothetical coefficients and stupendous show of mathematical calculations touching the volume of water which can pass through the bridge; not to mention the more familiar, if not less ponderous, field covered by the learned briefs of counsel arrayed in this case. But did the Supreme Court's decision in the Kansas City Southern Case settle this controversy? We do not

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think so. One paragraph of the syllabus tends strongly to show that that case was presented to the Supreme Court on the theory that the destruction of the Kansas City Southern Railway Bridge, which was an essential part of an interstate railway, was sought to be justified because it would "help the drainage of a district." Significant of this is one paragraph of the syllabus, which reads:

"A direct interference by the state with interstate commerce cannot be justified by the police power; and so held that the destruction of a bridge across which an interstate railroad line necessarily passes cannot be justified by the fact that it helps the drainage of a district." Kansas Southern Ry. v. Kaw Valley Dist., 233 U. S. 75, 34 Sup. Ct. 564, 58 L. Ed. 857. (Syl. par. 5.)

To the same significant effect is part of the opinion, thus:

"Furthermore, in the present case it is not pretended that local welfare needs the removal of the defendants' bridges at the expense of the dominant requirements of commerce with other states, but merely that it would be helped by raising them." 233 U. S. 79, 34 Sup. Ct. 565, 58 L. Ed. 857.

[8-10] We can understand a doctrine which holds that as between the respective importance of "helping the drainage of a district" and the maintenance of a bridge which is essential to a highway of interstate commerce the latter must prevail; but here we have to consider, both in substance and in law, the relative importance of a bridge which is an integral part of an interstate highway and the ever impending menace of that bridge to the lives and property of 20,000 people in the bottoms of Kansas City, Kan. Can there be any doubt about the relative importance of these propositions? Nothing in the Kansas City Southern Case—nothing ever said by the Supreme Court—warrants the assumption that an interference with interstate commerce could not be tolerated even to avert destruction of human life and the destruction of the homes and business institutions of the people adjacent to an avenue of such commerce. Interstate commerce was made for man, and not man for interstate commerce. The lives and homes of men are of infinitely greater concern than their rights of traffic, state or interstate. Moreover, while Congress has jurisdiction over interstate commerce, and, with certain familiar exceptions, its control of such commerce is exclusive, yet Congress has expressly extended to the state a part of its regulatory power over bridges like the one in controversy. The federal statute in part reads:

"Sec. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War. Provided, that such structures may be built under authority of the Legislature of a state across rivers and other waterways the navigable portions of which lie wholly within the limits of a single state, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced. And provided further, that when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

"Sec. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War, etc." Act of March 3, 1899, 30 U. S. Stat. L., 1151, c. 425, §§ 9 and 10; 6 Fed. Stat. Ann. 805–813.

This statute is a specific recognition by Congress itself that, notwithstanding its paramount jurisdiction of the means and instrumentalities of interstate commerce, the bridging of navigable waters is likewise one of vital interest to the states, and that they also have a governmental concern as to proper bridging of such waterways. In Austin v. Tennessee, 179 U. S. 343, 349, 21 Sup. Ct. 132, 134 (45 L. Ed. 224) before the enactment of the statute quoted above, it was declared:

"We have had repeated occasion to hold, where state legislation has been attacked as violative either of the power of Congress over interstate commerce, or of the Fourteenth Amendment to the Constitution, that, if the action of the state Legislature were a bona fide exercise of its police power, and dictated by a genuine regard for the preservation of the public health or safety, such legislation would be respected, though it might interfere indirectly with interstate commerce. While, as was said in Holden v. Hardy, 169 U. S. 366, 392, 18 Sup. Ct. 383, 42 L. Ed. 780, 791, 'The police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances, and a large discretion is necessarily vested in the Legislature to determine, not only what the interests of the public require, but what means are necessary for the protection of such interests.' Thus, while in Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527, it was held that a statute of Missouri, prohibiting the driving or bringing of any Texas, Mexican, or Indian cattle into the state, was in conflict with the interstate commerce clause of the Constitution, it was subsequently held that the introduction of diseased cattle might be prohibited altogether, or subjected to such regulations as the Legislature chose to impose. Missouri, K. & T. R. Co. v. Haber, 18 Sup. Ct. Rep. 488, 169 U. S. 613, 42 L. Ed. 878."

[11] The Kansas-Missouri state line comes up from the south a short distance east of the bridge to a point in the middle of the Missouri river opposite the mouth of the

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Kaw, and thence runs northerly and northwesterly up the main channel of the Missouri, in the median line of the main current thereof, to the intersection of the Kansas-Nebraska state line. Missouri v. Kansas, 213 U. S. 78, 29 Sup. Ct. 417, 53 L. Ed. 706. The mouth of the Kaw and all the navigable portions of it lie west of that boundary line and exclusively in Kansas.

[12, 13] Does the foreclosure suit and the appointment of a receiver by the federal court necessitate an abatement of this action? We think not. This court had jurisdiction of the parties and of the subject-matter, and the litigants had incurred great expense both in the prosecution and defense of this action, long before the foreclosure suit was instituted. While the action takes the nature of mandamus, yet, by the approved procedure and practice of this state, the scope of mandamus has been broadened far beyond the limits of the old common-law writ of that name. It has been invoked approvingly in an action to require the building of bridges and restoration of highways which had been obstructed by the ditches of an irrigation company. State v. Irrigation Co., 63 Kan. 394, 398, 65 Pac. 681. And this notwithstanding an entire want of statutory imposition of such duties. In mandamus, in this state, also, the rights of private citizens to funds paid under protest to a public officer have been adjudicated. State ex rel. v. Akers, 92 Kan. 169, 140 Pac. 637, Ann. Cas. 1916B, 543. It extends to cases and persons as to whom no duty is required or sought, but who may be affected by the judgment. State v. Dolley, 82 Kan. 533, 108 Pac. 846. In short, the judicial policy of this state has been to conform mandamus to the mandate of the Code, which provides:

"The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished, and in their place there shall be hereafter but one form of action, which shall be called a civil action." Civ. Code, § 10 (Gen. St. 1909, § 5603).

While the inherent differences of actions, suits, and special proceedings remain, yet practically all the ancient artificialities between actions in personam or in rem are abolished, and our proceedings in mandamus may and frequently do partake of the nature of both. Civ. Code, § 580 (Gen. St. 1909, § 6175).

The institution of the federal foreclosure suit did not oust the jurisdiction of this court over the defendant corporation, nor does that suit necessitate an abatement of this action. Union Trust Co. v. Cuppy, 26 Kan. 754, syl. par. 6; Kansas City, M. & O. Ry. Co. of Texas v. State (Tex. Civ. App.) 155 S. W. 561; High on Receivers, § 318; Thompson on Corporations, §§ 6894–6896. It is not intimated that the federal receivership is intended to wind up and conclude the corporate existence of the Missouri Pacific Railway Company. Indeed, the order of the federal court plainly shows that it is intended that the corporation shall continue to discharge its functions just as if the president and board of directors were still in charge. The federal receiver for the time being represents the corporation. Even if this action had not been already pending at the time of the receiver's appointment, he might be subjected as a defendant to this action. U. S. Jud. Code, § 66 (Act March 3, 1911, c. 231, 36 Stat. 1104 [U. S. Comp. St. 1913, § 1048]); Erb v. Popritz, 59 Kan. 264, 52 Pac. 871, 68 Am. St. Rep. 362; Railroad Commission of Alabama v. Ala. Great Sou. R. R. Co. et al., 185 Ala. 354, 64 South. 13, L. R. A. 1915D, 98; Grant v. Buckner, 172 U. S. 232, 238, 19 Sup. Ct. 163, 43 L. Ed. 430; Nashville Ry. & Light Co. v. Bunn, 168 Fed. 862, 94 C. C. A. 274.

[14] It is proper and good practice to bring him in as a defendant in a case already pending against the corporation before his appointment. Black v. Power Co., 158 N. C. 468, 74 S. E. 468. The order of the federal court appointing him commands him to obey all valid state laws, and the lawful orders of the plaintiff board have the potency of law. U. S. Jud. Code, § 65 (U. S. Comp. St. 1913, § 1047); Reinhart v. Sutton, 58 Kan. 726, 51 Pac. 221; Black v. Power Co., supra.

In Erb v. Morasch, 177 U. S. 584, 20 Sup. Ct. 819, 44 L. Ed. 897, it was said in the syllabus:

"It is the duty of a receiver, appointed by a federal court to take charge of a railroad, to operate it according to the laws of the state in which it is situated, and he is liable to suit in a court other than that by which he was appointed, even in a state court, for a disregard of official duty which causes injury to the party suing." Gableman v. Peoria, etc., Ry. Co., 179 U. S. 335, 21 Sup. Ct. 171, 45 L. Ed. 220.

See, also, a note on this point in 37 Ann. Cas. 1915C, 1248.

[15, 16] Another contention of defendant is that it did not receive due consideration from the plaintiff's board before the order for the removal of the bridge was issued, and that the members of the board made the order pursuant to pre-election promises that they would not tolerate any bridge across the river having more than two piers. The circumstances were unusual. The people had suffered terribly by floods. The likelihood of their recurrence was obvious. Doubtless the public was wrought up about the matter, and the public knew that the army engineers had recommended the adoption of a two-pier plan for all bridges at Kansas City. But the members of the board testified that if they had been convinced that a bridge of more than two piers would not have increased the flood hazard they would have voted to sanction it, although they did not deny the pre-election agitation and their sympathy with it. In any matter of such general interest as flood protection in Kansas City, it

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would be asking entirely too much of mere laymen to keep their minds open and uncommitted on such matters likely to come before them later for official consideration. Lawyers and judges trained in the art of jurisprudence which requires a suspension of the judgment until all sides of a controversy have been fully considered can do this; but, if such high standards of mental neutrality are absolutely essential to qualify for membership in administrative boards, the whole system of administering governmental functions by boards and commissions of laymen will fail. The remedy for such pre-judgments is not wanting, however. The redress of such grievances is usually taken care of when the courts are called on to test the reasonableness of the official orders of these boards. The defendant by its counsel, officers, and engineers was given several hearings before the plaintiff board. We cannot say that the defendant had no hearing before the order of removal was made. There were discussions, conferences, and negotiations for compromise and settlement. This was sufficient. In Meffert v. Medical Board, 66 Kan. 710, 715, 72 Pac. 247, 249, 1 L. R. A. (N. S.) 811, affirmed in 195 U. S. 625, 25 Sup. Ct. 790, 49 L. Ed. 350, it was said:

"It is contended that the procedure before the board in the admission and rejection of evidence was violative of the rights of Meffert, in that the evidence received and acted upon was made up largely of unsupported accusations, hearsay, and street rumor, and was not sufficient to sustain the findings. The provisions of the act creating the board plainly indicate that such investigation was not intended to be carried on in observance of the technical rules adopted by courts of law. The act provides that the board shall be composed of seven physicians. These men are not learned in the science of law, and to require of a board thus composed that its investigations be conducted in conformity to the technical rules of a common-law court would at once disqualify it from making any investigation."

[17] Coming now to the paramount question, it will be noted that the bridge is illegal so far as Congress itself can denounce it. It was built without official approval of the War Department, and thus in violation of federal law. The power to construct a bridge of some character has been granted by the state, but no authority has been granted to build it in such manner as to obstruct unduly the flow of the river or to increase the flood hazard and to imperil the lives and property of thousands of people. By necessary implication every grant of power to build a bridge across a Kansas stream, navigable or nonnavigable, carries with it the mandate to build it with due regard to public rights and with the inhibition to build it in any improper manner. Union Trust Co. v. Cuppy, 26 Kan. 754, syl. par. 3. A grant of power by the public is never to be interpreted as a privilege to injure the public. Kansas Bill of Rights, § 2.

[18] Does this so-called Chicago Great Western bridge as it now exists do this? Neither in the answer to the writ nor in the evidence is there any serious attempt to deny it. A flood like that of 1903 would make short work of this bridge. To such a flood it would be of trifling consequence. How it outlived the floods of 1904 and 1908 does not appear. But for the interposition of this court, that additional riprapping might be used temporarily to protect the southeastern embankment, and to preserve the existing status of the bridge while the litigation was pending, and, over the plaintiff's insistent and weighty objections, the flood of last year, 1915, would have undermined and destroyed it. Driftwood, ice floes, and débris do lodge against its piers, and in the future this is likely to increase, since the other bridges up the river have been reconstructed with a view to give all such flotage free passage downstream.

The chief defense, aside from many interesting questions of law most exhaustively presented, is that the order requiring the entire demolition of the bridge is unreasonable; that it would entail needless expense; that the sort of bridge which the plaintiff would approve would pass no more flood waters than the present bridge if the defendant were permitted to raise the superstructure, to remove the south tubular pier, to remove the south embankment and riprap inside the harbor and dike lines, and to build a new span on the southerly end of the main structure reaching to the main shore, all of which defendant avows that it is ready and at all times has been ready to do. Both plaintiff and defendant placed on the witness stand a number of the leading civil engineers of North America, also army engineers distinguished in talents and achievements, to enlighten the court concerning the flood-carrying capacity of this bridge, and of its relative capacity to that of the Missouri Pacific and Union Pacific bridges some distance up the stream. This evidence is highly technical and amazingly voluminous, and it is only because of unavoidable responsibility that we dare to weigh and decide the facts so dogmatically affirmed and so positively denied by these eminent experts. However, by invoking our own general notions of things we incline to hold with plaintiff's expert witnesses that a pier set at an angle of 37 degrees to the current of a stream is a much greater obstruction than one set with its narrowest end facing and its longest side parallel to it, and that in just so much as the pier set angularly exceeds the area of the end of a parallel pier the obstruction is so much the greater. We are inclined to hold that, since this bridge sits diagonally across the stream and a cross-section of flood waters would strike but one of the piers at the same time, the obstructive force of this bridge's four concrete piers cannot be reckoned by computing four times the obstructive force of one pier. But we would hesitate to adopt the theory that it is

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like the obstructive force of four bridges of only one pier each. The four piers do not fall directly below each other in the current, but more in stepladder fashion, each being a material obstruction and deterrent to the stream's general course. The evidence touching the hydraulic head developed by the bridge piers and the hypothetical estimates touching the scour line, besides being too conflicting for the court's enlightenment, is too subtle, we think, for the adjudication of practical rights in a controversy of this sort; although it can be readily understood that every pier does develop some hydraulic head, and that floods do tend to deepen the scour line to some extent. We do hold, upon all the evidence, that the bridge as maintained tends seriously to create and increase the flood hazard at Kansas City, and that it is a constant menace to life and property thereabout whenever the Kansas river begins to approach flood stage, and critically so when the river mouth is blocked by a concurrent flood in the neighboring Missouri river. We also hold that the bridge was constructed without regard to these consequences, and in these respects it was built and has been maintained without lawful sanction by this state, and, since we have seen that it never did have federal sanction of any sort, it is unlawful and a public nuisance.

We must now consider what ought to be done in view of this conclusion. This bridge ought not to be demolished if such a drastic remedy can be avoided. It is an integral part of an interstate highway, and its destruction would interfere with and hinder interstate commerce, although there are other but more circuitous routes in Kansas City by which the defendants' traffic could move across the river. The bridge cost $172,765, and since it has only been constructed a few years it has deteriorated but little. The price of bridge materials has greatly increased, and the expense of a new structure built according to the plaintiff's and the War Department's new regulations for bridging the river at Kansas City would be much greater than the cost of this bridge. Defendant's engineer estimates the cost of reproduction at $242,700. It was erected, like the Missouri Pacific and Union Pacific main line bridges, before the Kaw Valley drainage district was created and its rules for bridges promulgated. A modification of the drainage board's bridge regulations was allowed on the Missouri Pacific and Union Pacific main line bridges partly on that account. If possible to do so without increasing the flood hazard, similar consideration should be given in the case of this bridge. The defendant has avowed its willingness to improve the flood-carrying capacity of the bridge at an estimated outlay of $80,000. We cannot determine from the record whether this will be sufficient to answer the purpose or not, because both parties have been so positive in their contentions and so diverse in their views that the probability of such a solution has not received the attention it deserves. It seems therefore that no final judgment should yet be entered. We believe we have disposed of those phases of this controversy most seriously in dispute; and, as has been shown, we cannot altogether adopt the views of either party. Those features of the controversy which we have undertaken to settle should now be laid aside, and the litigants should confer together with the aid of their expert engineering advisers and should consider the feasibility of improving and reconstructing the bridge without destroying it, to the end that its capacity for mischief in times of flood shall no longer threaten the public welfare. One feature of the case which is also worthy of further consideration by the plaintiff board is the defendant's contention that a slight and inexpensive increase in the height of the dike in the vicinity of the bridge would counteract the hydraulic head developed by the bridge piers. We believe that, if these problems are now approached in good faith by both parties, a solution will be discovered.

To await that and to make any further needful interlocutory order or final judgment, jurisdiction of the cause is retained. All the Justices concurring.

(53 Mont. 109)

STATE ex rel. FURNISH et al., County Com'rs, v. MULLENDORE et al.

(No. 3823.)

(Supreme Court of Montana. Dec. 19, 1916.)

1. CERTIORARI ⇐28(1)—GROUNDS.

Under Rev. Codes, § 7203, providing for a writ of review where the inferior tribunal has exceeded its jurisdiction, and there is no appeal nor any other plain, speedy, and adequate remedy to authorize such writ, the lower tribunal must have exceeded its jurisdiction.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 41; Dec. Dig. ⇐28(1).]

2. CERTIORARI ⇐28(3)—EXCEEDING JURISDICTION—PUBLIC BOARDS.

Under 1911 Laws, c. 112, as amended by 1913 Laws, c. 133, authorizing commissioners to apportion an existing debt between old and new counties, the commissioners did not exceed their jurisdiction, so as to be subject to review by certiorari, because they erroneously assumed that certain property was owned by the county.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 33, 41; Dec. Dig. ⇐28(3).]

3. CERTIORARI ⇐29—NATURE OF RELIEF.

Under Rev. Codes, § 7210, providing that the office of certiorari is to annul, modify, or affirm the action of an inferior tribunal, it cannot supply defects or restrain excesses therein.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 42; Dec. Dig. ⇐29.]

4. CERTIORARI ⇐69—ADEQUACY OF REMEDY—ADJOURNMENT OF PUBLIC BOARD.

A trial court should not enter a judgment upon certiorari proceedings outlining what an inferior tribunal should find, after such tribu-

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nal's adjournment, since the judgment is ineffective.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 185–194; Dec. Dig. ⟸69.]

5. BRIDGES ⟸7—OWNERSHIP—COUNTY OR PUBLIC.

Highway bridges belong to the public and not to the county, irrespective of the source from which the funds therefor were derived.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 9–13, 15, 16; Dec. Dig. ⟸7.]

6. MANDAMUS ⟸73(4)—PUBLIC BOARDS—APPORTIONMENT OF INDEBTEDNESS BETWEEN COUNTIES.

Mandamus is the proper remedy to compel commissioners to reassemble and correctly apportion an indebtedness between an old and a new county.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 135; Dec. Dig. ⟸73(4).]

7. COUNTIES ⟸218—ACTIONS—CAPACITY TO SUE.

Under Rev. Codes, § 2872, providing that the county must be known by its corporate name in all actions touching its corporate rights, mandamus proceedings to compel commissioners to correctly reapportion an indebtedness between an old and new county should be brought in the county's name, and not by the board of county commissioners.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 347–351; Dec. Dig. ⟸218.]

Appeal from District Court, Custer County; Daniel L. O'Hern, Judge.

Certiorari proceedings by the State of Montana, on the relation of R. T. Furnish, Robert Yokley, and Charles Daly, as Commissioners of the County of Custer, Mont., against Henry Mullendore, John Oliver, and Thos. Wear, Commissioners, T. S. Garlow, Secretary, and F. C. Bunn, Clerk and Recorder for Fallon County, Montana. Judgment for relators and defendants appeal. Reversed with directions to quash the writ and dismiss the proceedings.

Booth & Dousman, of Baker, for appellants. Frank Hunter and George W. Farr, both of Miles City, for respondents.

BRANTLY, C. J. During the year 1913, under the provisions of chapter 112 of the Laws of 1911 as amended by chapter 133 of the Laws of 1913 (Laws 1911, p. 205; Laws 1913, p. 484), providing for the formation of new counties, Fallon county was created out of territory theretofore included in Custer county. The organization of the board of commissioners of the new county was perfected on December 8, 1913. The board at once gave to the Governor the notice required by section 6 of the act. As therein provided, the Governor appointed three commissioners to ascertain and declare the proportion of the indebtedness of Custer county outstanding at the date of the organization of Fallon county, which should be paid by the latter, as provided in section 7 of the same act. The three commissioners so appointed were John Oliver, residing at Ekalaka, Fallon county; Thomas Wear, residing at Miles City, Custer county; and Henry Mullendore, residing at Glendive, Dawson county. On January 2, 1914, the commissioners convened at Ekalaka, then the county seat of Fallon county, and, having effected an organization by choosing Mullendore for their chairman and T. S. Garlow for their secretary, proceeded to perform the duty enjoined upon them. On February 2d Mullendore and Oliver, a majority of the commissioners, certified the result of the proceedings in a report in duplicate to the respective boards of commissioners of Custer and Fallon counties. They found Fallon county indebted to Custer county in the sum of $44,486.20. This result was reached by the majority by pursuing the method of adjustment pointed out by section 7 of the act. In ascertaining the value of the property to be included in the adjustment, with the county courthouse, the county poor farm, moneys in the treasury, etc., they took into account and treated as property belonging to Custer county several steel bridges recently constructed or then substantially completed, whereas, if these bridges had been disregarded and omitted from the adjustment, Fallon county would have been found to be indebted to Custer county in a much larger sum. In a minority report made by Commissioner Wear, who thought that all bridges should be excluded, the amount due from Fallon county was found to be $113,919.96. Thereupon the commissioners of Custer county, deeming themselves beneficially interested, applied to the district court of that county for a writ of certiorari to have the adjustment, as certified by Mullendore and Oliver, reviewed and modified in so far as bridges had been considered county property and included in it. Upon service of the writ the defendants appeared and moved for an order quashing it, and dismissing the proceeding on the ground that the court was without jurisdiction to issue and determine it. The motion having been denied, the court heard the controversy upon a return of the record of the proceedings of the commissioners, aided by explanatory statements under oath by Mullendore and Oliver. It held that bridges are not county property within the meaning of the statute, and modified the result reached by the majority report, by excluding all bridges. It also modified the report in other minor particulars, and adjudged the amount due from Fallon county to be $105,190.15. The cause is before this court on appeal from this judgment.

[1] The first contention made by defendants is that, however erroneous may have been the result reached by the majority of the commissioners, the error cannot be corrected by certiorari. "A writ of review may be granted by the Supreme Court (and in proceedings for contempt, in the district court, by any justice of the Supreme Court), or by the district court or any judge thereof,

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when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal nor, in the judgment of the court any plain, speedy and adequate remedy." Rev. Codes, § 7203. That the writ may be successfully invoked under this provision it is indispensable that it appear (1) that the inferior court, tribunal, board, or officer the validity of whose action is questioned has exceeded its or his jurisdiction; (2) that there is no appeal; and (3) that there is no plain, speedy, or adequate remedy other than certiorari. State ex rel. Whiteside v. District Court, 24 Mont. 553, 63 Pac. 395. It may be conceded at the outset that the power vested in such commissioners under their appointment is judicial in its nature, and that their action would, in a proper case, be subject to review by certiorari, just as may be the action of a board of county commissioners in a like case. State ex rel. Jacobson v. Board of County Com'rs, 47 Mont. 531, 134 Pac. 291. It may be conceded, also, that no appeal lay from the final action of the commissioners because the statute does not provide for one. Did the commissioners exceed their jurisdiction?

[2] By referring to the statute defining the functions of the commissioners (section 7), we do not find any statement as to what shall be considered property of a county, nor any enumeration classifying the items to be considered by them. True, the phrase "property belonging to the old county," and similar expressions employed therein, would seem to refer only to property owned by a county in its proprietary capacity, as distinguished from that in which it has only a qualified interest as trustee for the general public, such as public highways and the like. Elliott on Roads and Streets (3d Ed.) § 52. It is also true that this court has held that, in view of the express provision of the statute upon the subject (Laws 1913, § 3, c. 1, p. 139), a bridge is a part and parcel of the highway upon which it is built (State ex rel. Foster v. Ritch, 49 Mont. 157, 140 Pac. 731; State ex rel. Donlan v. Board of Com'rs, 49 Mont. 517, 143 Pac. 984); nevertheless we do not think that in including the bridges the commissioners exceeded their jurisdiction in the sense meant by the statute. They were empowered to make the adjustment. To accomplish this they were vested with the power to determine what was the indebtedness of Custer county, what property belonged to it, what part of this, if any, was within the boundaries of Fallon county, what was the value of all of it and, after making the proper charges to Custer county and deducting these from the gross sum of the indebtedness, to declare the balance due from Fallon county. This necessarily involved a determination of questions of law and fact, because otherwise no final result was possible. As is the case with all such bodies, they might err in their judgment, but it was within their power to decide the questions presented during the course of their deliberations. This implied the power to decide wrong as well as right with reference to any particular matter, and though their decision might be manifestly erroneous, they did not, to this extent, lose jurisdiction of the subject-matter which they had under consideration. The error was error within jurisdiction. Otherwise, as was suggested in State ex rel. Whiteside v. District Court, supra, the decision must have been right in any event, or there was excess of jurisdiction. The case is not made different by the fact that the Legislature has not provided for an appeal or some other method of review. The defendants are right in their contention, and it must be sustained.

[3, 4] It should be sustained for another reason. When the commissioners had filed their report in duplicate with the boards of commissioners of Custer and Fallon counties, their power, so far as they could voluntarily act, ceased to exist. It could not thereafter be put in motion except by judicial process appropriate to compel the commissioners to reassemble and proceed in conformity with the law. The office of the writ of certiorari is to annul, modify, or affirm the action of the inferior tribunal, board, or officer to whom it is directed. Rev. Codes, § 7210. It cannot supply defects or restrain excess. Recognizing the true scope of the writ, the court in this case did not go further than modify the result as reached by the commissioners; in other words, it merely declared the law which should have controlled the commissioners, by ascertaining what it found to be the correct balance. The result is that its judgment was for all practical purposes upon a moot question, and was not effective for any purpose. In pronouncing the decision, the presiding judge expressed the opinion that some other appropriate proceeding must still be resorted to in order to compel the board to reassemble and proceed in conformity with his view. In this he was correct, but should have declined to direct a judgment which could not have any effective operation.

The foregoing remarks dispose of this case. It is not out of place, however, to notice briefly some of the other questions submitted for our consideration.

[5] Counsel for the defendants contend that the decisions in State ex rel. Foster v. Ritch and State ex rel. Donlan v. Board of Commissioners, supra, are not conclusive of the ownership of the bridges in question, because they had been or were being constructed by the use of funds derived from the sale of bonds for this special purpose. We do not think there is any merit in this contention. In such cases, funds are designated as "special" because they have been provided by the sale of bonds by the board of county commissioners for the particular purpose of constructing

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bridges, after securing the consent of the electors. These funds may not be expended for any purpose other than that for which they have been provided. Const. art. 13, § 5. But the method by which they have been provided does not, in the least, affect the relation of the county to the public property acquired by means of them. If such funds have been provided for county purposes, such as the erection of a county courthouse, title to the property for which they are expended vests in the county in its proprietary capacity. If, however, they have been provided for the construction, repair, or improvement of public roads, bridges, etc., the expenditure of them inures to the public benefit, just as does the expenditure the commissioners may make at any time for the same purposes out of the general funds of the county. If the highways belong to the public, it must follow that anything permanently affixed to them, either in the way of repairs or in the form of completed structures, such as bridges and the like, become a part of them, and as much of public right as the highways themselves. It is undoubtedly true that materials purchased by a county for the construction of a bridge, for instance, belong to the county until they are affixed to the highway. After this has been done, however, especially after the structure is substantially completed, the right of the public is complete, because in legal theory the structure has become permanently affixed to the public property. A different situation might call for a different conclusion, such as when the structure has not been so far completed that it is of any practical use. In such a case it might well be said that the public right has not attached.

After this controversy arose, the Legislature amended section 7 of the act supra, by providing that steel bridges in use for a shorter period than ten years shall be considered county property. Chapter 139, Laws 1915, p. 301. The question presented here will therefore probably not arise again.

[6] Counsel for plaintiff submit the question whether, if certiorari is not the proper remedy, mandamus may be successfully invoked. That the latter is the proper remedy we think is clear. "It may be issued * * * to any inferior tribunal, corporation, board or person, to compel the performance of an act, which the law specially enjoins as a duty resulting from an office, trust or station." Rev. Codes, § 7210. Under the decisions in State ex rel. Foster v. Ritch and State ex rel. Donlan v. Board of Commissioners, supra, it was the manifest duty of the commissioners to include in the adjustment only property belonging to Custer county, and exclude all other. This latter they failed to do, thus being guilty of a delinquency affecting substantially the rights of Custer county. They then adjourned. In order to perform their duty correctly, they must reassemble and formulate another report, excluding the property improperly included. Mandamus, it seems, is the only remedy adequate to compel this result.

It is not to the point to say that the commissioners have adjourned and cannot now act. Their office cannot be considered ended until they have performed their duty properly. Until they have done this, they are not beyond appropriate legal process to correct their dereliction. Nor is it to the point to say that the writ will control their discretion or compel them to render any particular decision. They have no discretion in the matter. The writ should go whenever there is no speedy or adequate remedy in the ordinary course of law and the person seeking it is entitled to have the defendant perform a clear legal duty. Raleigh v. District Court, 24 Mont. 306, 61 Pac. 991, 81 Am. St. Rep. 431; State ex rel. Bean v. Lyons, 37 Mont. 354, 96 Pac. 922; State ex rel. Stuewe v. Hindson, 44 Mont. 429, 120 Pac. 485. The decision in State ex rel. Mountrail County v. Amundson, 23 N. D. 238, 135 N. W. 1117, cited by counsel for relators, exemplifies the use of mandamus in a case similar in its facts to the one in hand, and besides contains an instructive discussion of the ownership of bridges on the public highways, and the rights and duties of county commissioners in relation to them. It is entirely in accord with our own views, both as to rights involved and the remedy awarded.

[7] All the parties have assumed throughout that this proceeding was properly instituted by the relators in their official capacity as commissioners of Custer county. Assuming that a taxpayer might have prosecuted it on behalf of the county, the county commissioners, as such, could not do so. The county is the real party in interest. It is a body corporate (Rev. Codes, § 2870). Its powers are exercised by the commissioners, it is true (Rev. Codes, § 2871), but they are not therefore authorized to bring actions in their official capacity on behalf of the county. There is no provision of law authorizing them to do so. In the absence of such provision, the county by its corporate name is the proper party to bring "all actions and proceedings touching its corporate rights, property and duties." Rev. Codes, § 2872. Therefore the proceeding should have been brought in the name of the county.

The judgment is reversed, with directions to the district court to quash the writ and dismiss the proceeding.

Reversed.

SANNER and HOLLOWAY, JJ., concur.

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(53 Mont. 104)

STATE v. POSTAL TELEGRAPH CABLE CO. (No. 3907.)

(Supreme Court of Montana. Dec. 18, 1916.)

1. CRIMINAL LAW ⟸552(1)—CIRCUMSTANTIAL EVIDENCE.
Circumstantial evidence is legal evidence, and if of such quantity and quality as to establish a defendant's guilt beyond a reasonable doubt, it will sustain a conviction.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1259; Dec. Dig. ⟸552(1).]

2. CRIMINAL LAW ⟸552(3)—CIRCUMSTANTIAL EVIDENCE.
When a conviction is sought upon circumstantial evidence alone, the circumstances proved must be consistent with each other, and inconsistent with any rational hypothesis other than defendant's guilt.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1257, 1260; Dec. Dig. ⟸552(3).]

3. CRIMINAL LAW ⟸1159(2)—TRANSMISSION OF INFORMATION FOR BETTING—EVIDENCE.
A conviction of a telegraph company for transmitting information for betting, contrary to provisions of Laws 1915, c. 55, cannot be sustained, where the record is barren of any evidence that the message was transmitted by defendant.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3075; Dec. Dig. ⟸1159(2).]

4. CRIMINAL LAW ⟸561(2)—EVIDENCE—REASONABLE DOUBT.
Under Rev. Codes, § 8028, declaring that in criminal cases guilt must be established beyond reasonable doubt, a conviction of defendant telegraph company for transmitting information for betting cannot be sustained, where the evidence as a whole does not do more than furnish an uncertain basis for a vague suspicion that possibly defendant may be guilty.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. ⟸561(2).]

5. GAMING ⟸97(1)—TRANSMISSION OF INFORMATION FOR BETTING—EVIDENCE.
In a prosecution of a telegraph company for transmitting information for betting, contrary to Laws 1915, c. 55, it was competent for the state to show that race track gambling was being conducted and the methods and paraphernalia used.
[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 286; Dec. Dig. ⟸97(1).]

6. CRIMINAL LAW ⟸338(3)—EVIDENCE DEPENDENT ON PRELIMINARY PROOF.
In a prosecution of a telegraph company for transmitting information for betting, contrary to Laws 1915, c. 55, evidence that race track gambling was being conducted and of the means and paraphernalia used became immaterial, unless the prosecution followed it up by proof that defendant aided and abetted such unlawful acts.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 752; Dec. Dig. ⟸338(3).]

7. CRIMINAL LAW ⟸697—TRIAL—EXCEPTIONS.
In view of Rev. Codes, § 6375, making an exception to an adverse ruling by a court a matter of right, and, when taken, the duty of the stenographer to enter it, the taking of such exception is not a matter of grace or discretion of the court.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1645–1650; Dec. Dig. ⟸697.]

8. GAMING ⟸102—TRANSMISSION OF INFORMATION FOR BETTING—INSTRUCTIONS.
Since Laws 1915, c. 55, does not make it an offense to transmit information concerning horse racing, unless for the purpose of having bets or wagers made, reported, recorded, or registered, in a prosecution of a telegraph company for transmission of information for betting, it was error for the court not to so instruct the jury.
[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 301; Dec. Dig. ⟸102.]

9. CRIMINAL LAW ⟸809—TRIAL—ERRONEOUS REQUESTS FOR INSTRUCTIONS.
Where defendant offered instructions, which as they stood were erroneous, and might have misled the jury, the court was not in error in refusing them.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1961–1967; Dec. Dig. ⟸809.]

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

The Postal Telegraph Cable Company was convicted of communicating and transferring information for the purpose of having a bet or wager made upon a horse race, its motion for new trial was overruled, and it appeals. Reversed and remanded.

William Meyer, of Butte, for appellant. J. B. Poindexter, Atty. Gen., and C. S. Wagner, Asst. Atty. Gen., for the State.

HOLLOWAY, J. The Postal Telegraph Cable Company was convicted of communicating and transferring information for the purpose of having a bet or wager made upon a horse race, and appealed from the judgment and from an order denying its motion for a new trial.

The evidence discloses: That about January 18, 1916, two saloon keepers in Butte were making and registering bets upon horse races presumably being run at Juarez, Mexico, and New Orleans, La. That the necessary information concerning the races was furnished to the bookmakers by one Harris. That Harris employed a stenographer to make copies of the race sheets which disclosed the character of the races, the names and numbers of the entries, the names of the riders, the betting odds, etc., which sheets were thereafter delivered to the bookmakers. That the stenographer had an office or workroom in the Pennsylvania Block, in Butte. That messenger boys from the defendant company's office were seen frequently going from the telegraph office to the Pennsylvania Block. That on January 15, 1916, Walter Reed delivered to a messenger from defendant's office a message for transmission to Kansas City. That a reply was received, but not over the defendant's line. That on one occasion, when the report of the races was delayed, one of the bookmakers went from his place of business to the defendant's office, and upon his return reported that "there was wire trouble; the results would be coming in very shortly." That on another occasion the other bookmaker visited the defendant's office. That on January 17, 1916, C. C. Slavens sent a code message by the Western Union Telegraph Company to the Thiel Detective Agency in Kansas City.

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That on January 18th the clerk of the Butte Hotel delivered to Slavens a paper in the form of message blanks used by the defendant, upon which was printed and written the following:

"Bo Kansas City Mo Jany 18–16.
"C. C. Slavens, Butte Hotel, Butte, Mont.
"Bet on Quiz fifth race to-day at Juarez straight, place and show. Henderson."

That the Western Union, the Continental, and the Postal Telegraph Companies were engaged in business in Butte. That in addition there were three or more private wires into Butte, and telephone and letter communications reaching Butte. There was evidence tending to show that the Slavens message was not transmitted by either the Western Union or Continental.

The foregoing fairly epitomizes the material evidence in the case, and much of this was purely hearsay, introduced over the objections of the defendant.

[1, 2] It will be observed that there is not a scintilla of direct evidence connecting the defendant with the violation of chapter 55, Laws 1915, the statute under which this prosecution was sought to be maintained. This fact alone is not significant, for circumstantial evidence is legal evidence, and if it is of such quantity and quality as to establish a defendant's guilt beyond a reasonable doubt, it will sustain a conviction. It is the rule in this state, however, that where a conviction is sought upon circumstantial evidence alone, the circumstances proved must not only be consistent with each other and with the hypothesis of defendant's guilt, but inconsistent with any rational hypothesis other than his guilt. State v. Chevigny, 48 Mont. 382, 138 Pac. 257; State v. Suitor, 43 Mont. 31, 114 Pac. 112, Ann. Cas. 1912C, 230; State v. Allen, 34 Mont. 403, 87 Pac. 177.

[3, 4] The statute in question declares it to be a misdemeanor for any one to make, report, record, or register a bet upon the result of a contest of speed of an animal, and likewise makes every one a principal offender who aids or abets such unlawful acts by transmitting, communicating, or transferring information for the purpose of having such a bet made, reported, recorded, or registered. There is not any evidence indicating the source from which or through which Harris received the information which he furnished to the bookmakers. The Reed telegram does not fall under the ban of this statute, and the answer to it was not transmitted by the appellant. Assuming, for the purpose of this appeal only, that the Slavens message contains information the transmission of which would constitute a crime, the record is barren of any evidence that it was communicated by the defendant. The clerk of the Butte Hotel was not called as a witness. From whom, if from any one, he received the message; whether such a message was ever delivered to the defendant at Kansas City for transmission, or was ever transmitted by defendant; whether the message was a bona fide one or one prepared in Butte—are all questions left without any evidence whatever to suggest their solution. Indeed, the evidence as a whole does not do more than furnish an uncertain basis for a vague suspicion that possibly defendant may be guilty, but in this state the rule is declared by statute "that in criminal cases guilt must be established beyond reasonable doubt." Rev. Codes, § 8028. A conviction cannot be founded upon conjecture, however shrewd, nor upon probabilities, however strong. State v. McCarthy, 36 Mont. 226, 92 Pac. 521; State v. Taylor, 51 Mont. 387, 153 Pac. 275.

[5, 6] In the first instance, it was competent for the state to show that race track gambling was being conducted in Butte, the methods by which bets were made and recorded, and the paraphernalia used. This evidence became immaterial, however, unless the prosecution followed it up by proof that the defendant aided or abetted such unlawful acts. So much of the evidence introduced upon the trial of this case was hearsay, and consisted of declarations of third parties not made in the presence of the defendant or any of its agents, that to review every error predicated upon the rulings admitting it would extend this opinion to an unreasonable length. It is altogether improbable that such errors can occur upon a second trial.

[7] During the course of the trial, counsel for defendant sought to have an exception entered, but the court remarked: "Your exception is denied." It certainly never could have occurred to any one before that an exception to an adverse ruling by a court is a matter of grace or discretion upon the part of the court. An exception is a matter of right, and, when taken, the duty of the court stenographer to enter it is imposed by Law (Rev. Codes, § 6375), any opinion of the trial court to the contrary notwithstanding.

[8] Under the statute in question it is not an offense to transmit information concerning a horse race unless done "for the purpose of having bets or wagers made or reported or recorded or registered." An instruction upon this subject should have been given, to the end that the jurors might receive a correct impression of the purpose of the statute.

[9] With the exception of the last sentence, defendant's offered instruction 10A correctly states the law, but with that sentence added it might have misled the jury, and for this reason we think the court was not in error in refusing it.

The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., and SANNER, J., concur.

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(82 Or. 468)

BOTT v. CAMPBELL et al.

(Supreme Court of Oregon. Jan. 9, 1917.)

1. REFORMATION OF INSTRUMENTS ⟸45(9)—EVIDENCE—SUFFICIENCY—MISTAKE.

In a suit to reform a five-year lease of wheat land, one half of which the lessee was to put in crop each year and the other half he was to fallow, evidence *held* to show that it was agreed by the parties that the lessee should receive a reasonable compensation for fallowing during the last summer of the term that portion of the land which he was not to crop that year, and that the provision was omitted from the lease as written by the scrivener, though the terms of the agreement had been stated to him.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 170; Dec. Dig. ⟸45(9).]

2. REFORMATION OF INSTRUMENTS ⟸45(9)—EVIDENCE — SUFFICIENCY — MEETING OF MINDS.

In a suit to reform a lease for mistake, evidence *held* to show that statements by the parties were not mere negotiations leading up to the making of the agreement, but constituted an agreement on which the minds of the parties met, and which by mistake of the scrivener was not set forth in the written lease, so that such statements were admissible under L. O. L. § 713, excluding parol evidence varying a written instrument, except where a mistake or imperfection of the writing is put in issue by the pleadings.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 170; Dec. Dig. ⟸45(9).]

3. REFORMATION OF INSTRUMENTS ⟸45(2) — MISTAKE—DEGREE OF PROOF.

Where one of the parties to a written contract is dead, evidence of a mistake in the contract must be carefully scrutinized, and found to be convincing and to show clearly the contract and the existence of a mutual mistake.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 158, 184–188, 190; Dec. Dig. ⟸45(2).]

4. LANDLORD AND TENANT ⟸322 — CONSTRUCTION OF LEASE—FURNISHING SEED.

In a written lease of wheat land for five years which provided that one half thereof should be put in crop each year, and the other half left fallow, a provision that the lessee should cultivate and summer fallow the lands each year, and would summer fallow it for the last year, the work to be done in a husbandlike manner, and would furnish all seed necessary to sow the same, will not be construed to require the lessee to furnish the seed necessary to sow the part left fallow during the last year, from the crop on which he would get no benefit, but only that he would furnish the seed for the crop raised during the five years, of which he was to receive two-thirds and the lessor one-third.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1353, 1354, 1357; Dec. Dig. ⟸322.]

In Banc. Appeal from Circuit Court, Umatilla County; G. W. Phelps, Judge.

Suit by N. K. Bott against Harriet Campbell and others, for the reformation of a lease. Decree for plaintiff and defendants appeal. Affirmed.

The plaintiff in this suit seeks to reform a written contract. From a decree in his favor defendants appeal.

On September 19, 1911, Charles H. Campbell was the owner of 1,120 acres of wheat land in Umatilla county, about 1,000 of which were in cultivation, approximately 500 then in summer fallow, and about 500 in stubble, from which a crop had been taken in 1911. Plaintiff, N. K. Bott, a young man, purchased of Mr. Campbell the farming outfit, consisting of horses and mules, machinery and implements, paid him $5 an acre for the work done in summer fallowing the 500 acres during the season of 1911, aggregating about $8,600, and on the date first mentioned leased the land for a term of five years and until September 19, 1916. In order to pay for the outfit and summer fallow plaintiff obtained a loan from his father, J. K. Bott. After there had been some negotiations between plaintiff and Mr. Campbell, and a few days before the transactions were completed, Mr. J. K. Bott, in the interest of his son, went with him to the premises of Mr. Campbell. They were accompanied by Mr. A. L. Grover, a neighbor for whom plaintiff had been working for a few years. Charles A. Campbell, a son of the lessor, was about the place at the time, and his mother was in the house. Mr. J. K. Bott secured some reduction in the price of the personal property, and, as he and Grover state, the terms of the lease were talked over in their presence. Plaintiff asserts that the conditions of the lease as agreed upon were to the effect that plaintiff should cultivate, furnish seed, plant, and raise crops on one half of the wheat land and summer fallow and cultivate the other half each year, alternating the same, and pay as rental one-third of each crop delivered in the sack at the warehouse, and that during the last season, that of 1916, plaintiff should plow or summer fallow and cultivate the one-half of the land not then in crop for which Charles H. Campbell agreed to pay him the customary or going price. Plaintiff further states that on the day the lease was executed, Charles H. Campbell, then a resident of Walla Walla, Wash., and Mr. N. K. Bott, of Helix, Or., met in Pendleton; that they went to the office of Mr. Leffingwell, a real estate and insurance man, for the purpose of having the lease drawn, and informed him of the agreement, and particularly that at the expiration of the lease, if the place was left in summer fallow, Bott was to be paid the customary price of the country for such work; that nothing was said about seed for the crop to be sown in the fall of 1916. The lease, which is in evidence, was written in duplicate by Mr. Leffingwell, read to the parties, and signed by them. Plaintiff deposited his copy in the First National Bank across the street, and Mr. Campbell took his copy with him. Upon being informed that the lease was executed Mr. J. K. Bott gave Mr. Campbell a check for his son in payment of the personal prop-

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erty and the summer fallow then on the land. No other memorandum of the farming outfit or payment for the summer fallow appears to have been made, these matters not being mentioned in the lease. The evidence shows that plaintiff took possession of the personal property and farmed the land as agreed until about the first of the year, 1916, when a dispute arose in regard to the summer fallowing of the land during the season of 1916 and the furnishing of seed for a crop to be harvested in 1917 without pay therefor. Plaintiff then examined his lease for the first time since it had been read to him. Charles H. Campbell died in December, 1911. Mr. Leffingwell is now deceased.

In his complaint plaintiff sets forth the agreement as he claims it was made. He further alleges that the scrivener who drew the lease, a copy of which is attached to the complaint, "was told of all of the provisions of said agreement by both parties thereto, but" failed and neglected to correctly specify the full terms thereof, in this, that he failed to insert in the body of the instrument that the plaintiff should receive the reasonable market price for the work performed by him in summer fallowing the half of the tillable lands during the year 1916, and did inadvertently and erroneously provide in the lease that the plaintiff was to furnish all necessary seed to sow the summer fallow; that it was thoroughly and mutually agreed between the parties to the lease that plaintiff was to receive such pay for such work, and that he was not to furnish the seed to sow the summer fallow during the fall of 1916; that the lease was hurriedly read by the scrivener, and neither plaintiff nor Charles H. Campbell noticed or understood that the written lease contained any provisions to the contrary, "but both believed and understood said written lease contained the provisions so agreed upon." Plaintiff alleges that whatever provisions contained therein are contrary to the understanding and agreement so had between him and Charles H. Campbell were inserted therein erroneously, inadvertently, without the knowledge, and contrary to the understanding, of both parties, and contrary to the real agreement of lease and rental made and entered into between them "and without fault or negligence on the part of either"; that the defendants are contending for a performance according to a literal construction of the exact language used by the scrivener in the lease. Defendants, who are the heirs of Charles H. Campbell, deceased, deny the allegations of the complaint as to any mistake in writing the agreement.

Alger Fee and Jas. A. Fee, both of Pendleton, for appellants. Will M. Peterson and J. Roy Raley, both of Pendleton (Raley & Raley, of Pendleton, on the brief), for respondent.

BEAN, J. (after stating the facts as above). [1] From a careful reading of the evidence we find, as did the learned trial judge, that the agreement was made between plaintiff and Charles H. Campbell as alleged in plaintiff's complaint; that it was mutually agreed between the parties to the lease that plaintiff should receive a reasonable compensation for the work to be done by him in summer fallowing that portion of the land which was not in crop during the season of 1916, and that it was not agreed nor understood that he should furnish seed to sow the summer fallow during the fall of 1916 for the 1917 crop; that by mistake of the scrivener the writing failed to express the contract as made. The terms of the lease were stated to the plaintiff by Mr. Charles H. Campbell when the former was first at his place for the purpose of renting the land and purchasing the personal property. Defendant Charles A. Campbell testified to the effect that he was present during the preliminary negotiations on the front porch and also at the time of the second conversation, when Mr. J. K. Bott and Mr. Grover were there. As to what was said at the second meeting about the lease, he stated:

"The lease was to be made for five years and they were to give one-third of the crop in the warehouse; they agreed to the whole substance of it."

To the question: "Was there anything said at that time about the terms of it that you recall?" he answered, "No, sir." He further stated the substance of the conversation about the equipment, and that that was the extent of the conversation there that day; that he was present all the time when Bott was there with his faher. On cross-examination he testified in part that a few days before the lease was drawn this conversation was held—

"around the place, part of it in the house and part of it around the machine shed and barn; they walked around. Q. Was there anything said about the general terms of the lease of the farming lands? A. No, sir. Q. Where was that discussed about the farming lands? A. About the terms of the lease, it was discussed a few days before that when Mr. N. K. Bott came down to see about renting the place. Q. But on that date what was discussed, or was anything said about the lease that day? A. There was nothing said about the lease at all that day. Q. Was anything said at all about the farming lands that day when Mr. Grover was there? A. No, sir; it was all about the outfit that was talked about that day."

The witness stated that if the summer fallow was mentioned it was somewhere else; that about a week before this time, when N. K. Bott was first there, the conditions of the lease (as above stated) were mentioned, and "there was nothing said about the summer fallow; he bought the summer fallow at $5 an acre and that is all there was about it;" that the summer fallow was on a list with the outfit, 500 acres at $5 an acre. He continued:

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"My father said to him he should leave the ground plowed the last year; that is all there was said. * * * Q. Was there anything said about whether he was to get any pay for it or not? A. No, sir; there was nothing said either way. * * * He (plaintiff) said he would plow the land the last year of the lease, the last year he was there. Q. Did that mean all the land, he was to plow all the land the last year, or did he say what he meant? A. It was not said but it was taken for granted that he would plow the part which was in stubble. * * * Q. Wasn't it also taken for granted, if there was any summer fallow left there, a reasonable price was to be paid for it? (Objection by counsel and ruling by the court.) Q. Do you know whether that was taken for granted or not from the course of the conversation you heard there? A. I thought it was."

Mrs. Harriet Campbell, widow of the lessor, testified to the conversation on the front porch the first time that plaintiff came there to rent the place, and stated: "They didn't come to any definite conclusion the first time about all of the details, but it was afterwards," that she did not hear all the conversation between the parties at the second meeting, but that a definite bargain was made the second time the parties were there. The only effect of the evidence of Mrs. Campbell and Charles A. Campbell is that they did not hear the agreement as to the extra work. Mr. C. A. Campbell thinks he was present all the time during the two conversations. N. K. Bott is corroborated by the positive testimony of J. K. Bott, his father, and of A. L. Grover, a disinterested witness, to the effect that Mr. Charles H. Campbell stated that when he came back he wanted the summer fallow left on the place, and that he would pay the customary price for such work. The whole proposition appears to have been accepted by plaintiff with that understanding. No one heard anything said about Bott furnishing seed for seeding the land after the lease expired. The lease was drawn by a layman who apparently was unaccustomed to such work and unfamiliar with the usual manner of raising wheat in that locality. The instrument is a novelty in that according to its stipulations:

The lessee "agrees that he will cultivate and summer fallow the said lands each year during the life of this contract, and will summer fallow the land during the last year of said contract; the work to be done in a good and husbandlike manner, and will furnish all seed necessary to sow the same, and that prior to sowing said lands he will keep the same free and clear from weeds. Said second party agrees to cut, thrash and take care of said crop so grown on said lands, in proper season, and that he will deliver to the said first party, one-third of the grain so grown at the warehouse designated by the said first party, free of all expense to the said first party, as soon as the grain is thrashed, said second party to furnish all new sacks for all the grain so grown. * * *"

It was well known that no crops could be raised during the time the land was in summer fallow; therefore the parties proceeded with that understanding. Plaintiff cultivated and raised crops upon about one half of the land, and plowed and summer fallowed the other half each year for four years, and paid defendants their portion of the crop, which was accepted without question. Except for the last year of the term when only one-half of the land would ordinarily be in crop, the language of this part of the writing is immaterial. The evidence plainly shows that one half of the land was agreed to be summer fallowed and one half sowed to a crop each year, and that as the lease would practically expire as to that part of the land which was in crop in 1915, during that fall or one year before plaintiff's interest in the other half would cease, Mr. Campbell promised to pay a reasonable price for summer fallowing that portion during the season of 1916.

[2] It is contended on behalf of defendants that the testimony of J. K. Bott and A. L. Grover as to the conditions of the lease stated by Mr. Campbell is incompetent to prove the actual contract; that such statements were mere negotiations leading up to the making of the agreement, which was effected when the lease was signed. However, the testimony leads us to believe that the contract was perfected at the time the parties met on the premises when J. K. Bott and A. L. Grover were there, and they talked over and agreed upon all the details. The only thing remaining was to reduce the agreement to writing. There was a meeting of the minds of the contracting parties. The error in reducing the agreement to writing occurred in the ordinary way, and without the particular fault or negligence of either party. Both appeared to understand that the written memorandum expressed the stipulations made between them.

[3] Where one of the contracting parties is deceased, in order to reform a written memorandum of the stipulations executed by them, the evidence should be carefully scrutinized, and found to be convincing and to clearly show the contract as actually made by the parties, and that a mutual mistake has been made in reducing the agreement to writing, and that the instrument does not express the contract as intended. Lehigh Coal, etc., Co. v. Central R. Co. of N. J., 41 N. J. Eq. 167, 3 Atl. 134, 137; Hawkins v. Doe, 60 Or. 437, 445, 119 Pac. 754, Ann. Cas. 1914A, 765. The testimony in the present case complies with this rule in a full measure. All agree that the writing in question is erroneous in respects other than as to the portion about which there is a controversy. It was read over to the parties, and no one suspects that it was not correctly read; therefore no negligence can be predicated upon the fact that the plaintiff did not read it himself until about four years afterwards.

The language of the instrument is so general that it is not at all strange that it was not understood by the parties. It shows that there was a special agreement in regard to the summer fallowing to be done during the season of 1916. This was quite a large

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amount of work, a season's plowing of 500 acres, and the writing, in any event, should have specified at whose expense it was to be done, instead of being left out. As we understand the document, instead of the oral evidence contradicting its terms, it merely supplies a portion of the agreement which was not reduced to writing. The imperfection of the instrument, a part of which is admitted, lessens its evidentiary force and value. The writing is not the contract. It is merely evidence thereof.

It is inconceivable that N. K. Bott, a young man just starting on a business venture of five years' duration, should assent to doing extra plowing and cultivating to the amount of about $2,500 when he was to get no part of the crop prepared for, without talking the matter over with his prospective landlord. It was perfectly in keeping with the usual business methods that the matter should be discussed, just as Mr. J. K. Bott and A. L. Grover testify was done. They were both familiar with such farming arrangements, and Mr. Bott, was, no doubt, interested for his son; in fact acted in his behalf in making a part of the deal. The integrity of neither of these two men is questioned. We have no doubt that the contract was made in regard to the compensation for the summer fallow in 1916, as asserted by plaintiff and these two witnesses, when the evidence is considered in the light of all the attending circumstances, and that by mistake of the scrivener the written lease failed to record the agreement as made, or as the parties thereto intended. In 2 Pom. Equi. Juris. § 859, the general rule is announced as follows:

"It is therefore settled that in the suits, whenever permitted, to reform a written instrument on the ground of a mutual mistake, parol evidence is always admissible to establish the fact of the mistake, and in what it consisted, and to show how the writing should be corrected in order to conform to the agreement which the parties actually made. * * * The court may grant relief upon the strength of the verbal evidence alone. * * * The authorities all require that the parol evidence of the mistake and of the alleged modification must be most clear and convincing, in the language of some judges, 'the strongest possible,' or else the mistake must be admitted by the opposite party; the resulting proof must be established beyond a reasonable doubt. Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of evidence, but only upon a certainty of the error."

In Smith v. Interior Warehouse Co., 51 Or. 578, at page 581 of the opinion (94 Pac. 508, 509, 95 Pac. 499), it is stated:

"There can be no dispute as to the law that equity will entertain jurisdiction to reform a contract on the ground of mistake; but, to entitle plaintiff to such relief, the mistake must be shown by satisfactory proof, and that it was mutual. Stein v. Phillips, 47 Or. 545 [84 Pac. 793]."

When a mistake or imperfection of a written instrument is put in issue by the pleadings, oral evidence of the agreement as actually made is permissible under section 713, L. O. L., as between the parties or their representatives or successors in interest.

Let us contrast the clause in regard to the work during the last year with the following specifications found in the latter part of the lease:

"The party of the first part agrees to furnish at the town of Helix all posts and wire necessary to keep the fences on the premises in a good state of repair; it being understood that the party of the second part is to furnish the labor without expense to the party of the first part."

It is easy to conjecture the reason for such an exact stipulation in relation to an outlay of a very few dollars and a little labor in repairing the fences each year when a matter of plowing and cultivation at an expense of some $2,500 for a crop to be raised after the lease would expire is couched in a dozen words. The clause in regard to fencing is very common, and it was handy for an amateur to obtain a form for the same, while it was necessary to write the agreement in regard to the work of summer fallowing as an original, without the assistance of a form.

[4] While there is a chance for controversy as to the seed for sowing the land during the fall of 1916, from an examination of the agreement, the substance of which, in so far as it relates to that matter, is set out above, we very much doubt if the stipulation should be so construed as to require the lessee to furnish seed after the expiration of the lease. Taking the document by its four corners, it is clear that Bott was to have possession of the land for five years and raise five crops thereon, furnishing seed to sow the same. Looking at the second paragraph quoted above, we find that he agrees to care for and harvest the grain so grown and deliver to the lessor one-third thereof. There is just as much room for contention that Bott should have a portion of the crop sown in 1916, and that the lessor should have only one-third thereof, as that the lessee should be required to furnish grain to seed the land after his term had expired, for a crop to be raised in 1917 in which he was not to share. It seems to us, rather, that the lease terminates on September 19, 1916, and that the clause, "will furnish all seed necessary to sow the same," means that the lessee should furnish necessary seed for sowing the lands each year during the five years. The evidence clearly shows that such was the agreement. The finding of the trial court amounts to the same thing as the construction we have given the written memorial.

It follows that the decree of the lower court should be affirmed; and it is so ordered.

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(82 Or. 428)

STATE ex rel. COFFEY, County Clerk, v. MULTNOMAH COUNTY et al.

(Supreme Court of Oregon. Jan. 2, 1917.)

1. COUNTIES ⊜146—LIABILITY—ACTS OF OFFICERS.
In the absence of statute, a county is ordinarily not liable for defaults of its officers.
[Ed. Note.—For other cases, see Counties, Cent. Dig. § 212; Dec. Dig. ⊜146.]

2. COUNTIES ⊜146—STATUTE IMPOSING LIABILITIES.
Laws 1915, c. 62, making a county liable for money lost by a former county clerk by failure of a bank in which he deposited a litigant's funds, should be strictly construed.
[Ed. Note.—For other cases, see Counties, Cent. Dig. § 212; Dec. Dig. ⊜146.]

3. COUNTIES ⊜89—OFFICERS—LIABILITIES—CLERK.
A county clerk is not liable for money which never came into his possession.
[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 118, 135, 136; Dec. Dig. ⊜89.]

4. MANDAMUS ⊜121—OFFICERS—DUTIES AND LIABILITIES—CLERK.
Under Laws 1915, c. 62, directing that a county clerk be given credit for certain funds lost by his predecessor, and directing the clerk to return such funds to the parties entitled thereto, the clerk cannot comply with the latter requirement, without rendering himself liable, until the money collected is delivered to him, and, no express provision having been made therefor by said act, mandamus will not lie to compel the county commissioners to deliver the funds raised by taxation to the county clerk.
[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 255; Dec. Dig. ⊜121.]

5. MANDAMUS ⊜10—GROUNDS—FREEDOM OF QUESTION FROM DOUBT.
Mandamus will not lie unless the ministerial duty imposed by law is free from doubt.
[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 133; Dec. Dig. ⊜10.]

Department 2. Original mandamus proceedings by the State, on the relation of John B. Coffey, County Clerk, against Multnomah County and Rufus C. Holman, W. L. Lightner, and Philo Holbrook, County Commissioners of Multnomah County. Demurrer to the application for an alternative writ sustained.

This is a special proceeding to compel the performance of an act which it is alleged the law enjoins as a duty resulting from an office. An alternative writ of mandamus, issued from this court, substantially states that the relator, John B. Coffey, is the county clerk of Multnomah county, Or.; that his predecessor in office, F. S. Fields, pursuant to the provisions of a statute applicable to that county, collected in advance from parties litigant certain sums of money on account of fees, which when earned were paid over to the county treasurer, and the remainder was held in trust for the depositor, to be returned when his cause was finally determined, if the prescribed fees earned for the services performed did not exhaust the payment exacted (L. O. L. § 1114); that Fields deposited the money so received, and not earned by the county as fees, with the American Bank & Trust Company, which failed, and by reason thereof he was unable, when his term of office expired, to deliver to Coffey $15,522.43 which had been so left with the bank; that in order to meet the payment of such loss a tax was duly levied for that purpose by the county court of Multnomah county, pursuant to the provisions of an enactment filed in the office of the secretary of state February 10, 1915 (Gen. Laws Or. 1915, c. 62), and the sum of money stated has been collected and is now in the county treasury; that on November —, 1916, the relator demanded in writing of the defendants Rufus C. Holman, W. L. Lightner, and Philo Holbrook, as members of and constituting the board of county commissioners of that county, that an order be passed directing the issuance of a warrant on the general fund of that county payable to the relator as county clerk in the sum of $15,522.43, to make good such deficiency, and to transmit the command to the county auditor for final account, but the defendants then and now refuse to comply therewith, on the ground that no efficient means has been provided by law whereby such credit could be allowed. The defendants were required forthwith to assemble as the board of county commissioners and make the order so requested, or in default thereof to show, at a day and hour specified, why they had not done so, and then and there to return the mandate. A demurrer to the writ challenges its sufficiency on the ground that it does not state facts sufficient to authorize the relief demanded.

Martin L. Pipes, of Portland (John B. Cleland, of Portland, on the brief), for plaintiff. Walter H. Evans, Dist. Atty., and Arthur A. Murphy, Deputy Dist. Atty., both of Portland, for defendants.

MOORE, C. J. (after stating the facts as above). The question to be considered is whether the statute referred to prescribes the means of disbursing to the persons entitled thereto the moneys so collected by taxation. Section 1 of the enactment substantially directs the county court of Multnomah county, Or., to make good the loss of $15,522.43 "by giving the present county clerk, John B. Coffey, credit in his fee account to the amount of said deficiency." Gen. Laws Or. 1915, c. 62. The other parts of the statute, so far as material herein, read:

"That the said John B. Coffey shall pay to litigants having funds as shown by the records of the said county clerk's office due them on account of said litigants' deposit fund, the full amount thereof as the same shall become due to them under the existing laws of the state, and shall also permit papers to be filed and charged against said several funds to the same extent as though he had received said money in full from the said F. S. Fields." Section 2.

"The auditor and treasurer of Multnomah county, Oregon, shall give the said John B. Cof-

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fey credit for the full amount of said deficiency, and shall charge against said amount the fees earned by said county clerk and charged against the credits on the records of his office which stood to the credit of said litigants at the time the said F. S. Fields retired from office. As soon as said several items of litigation have been concluded and all of the litigants have been paid the balance due them under the laws of the state, the county clerk shall pay over to the county treasurer the balance of the fund received by him from the said F. S. Fields." Section 3.

[1] The rule is quite general that, in the absence of a statute imposing upon a county liability for the default of any of its officers in the performance of a duty enjoined by law, a private party who suffers injury by reason of a breach of such duty cannot maintain an action against the quasi corporation to recover the damages sustained. 11 Cyc. 498. Thus in Vigo Tp. v. Knox County, 111 Ind. 170, 12 N. E. 305, it was ruled that a county treasurer was not such an agent of the county as to render it liable for his misappropriation of public funds, in the absence of a statute creating the responsibility. To the same effect, see, also, Cedar Rapids, I. F. & N. W. Ry. Co. v. Cowan, 77 Iowa, 535, 42 N. W. 436; State ex rel. v. Spinney, 166 Ind. 282, 76 N. E. 971.

[2] In the case at bar the statute by express terms makes Multnomah county, Or., which is a party hereto, liable for the money lost by F. S. Fields, its former county clerk, in consequence of the failure of the bank in which he deposited the litigants' funds. In referring to such enactments a text writer observes:

"As counties are not suable except by statute, the mode pointed out by the statute must be strictly pursued." 7 R. C. L. 966.

The enactment relied upon herein is therefore to be strictly construed.

[3] It will be remembered that section 1 of the statute under consideration commands the county court of Multnomah county, Or., to give the relator credit in his fee account for an amount of money equal to the deficiency mentioned. No part of that sum ever came into his possession, and for that reason he is not legally chargeable therewith or required to account therefor. Haradon v. Coffey, 66 Or. 80, 133 Pac. 815. To the same effect see Cedar Rapids, I. F. & N. W. Ry. Co. v. Cowan, supra, where, in discussing a right of action against a public officer, it is said:

"It is insisted, on behalf of appellants, that plaintiff's only remedy is by mandamus against the treasurer of Hardin county. But he never received any of the money in controversy, and is not liable for it"—citing in support of the language quoted the case of Minneapolis & St. L. Railway Co. v. Becket, 75 Iowa, 183, 39 N. W. 260.

The relator herein never having been charged with any of the money so lost it is difficult to understand why he should be given credit therefor. It was evidently the practice of his predecessor in office to deposit in a bank the litigants' fund when received and to issue checks to the proper officer for sums of money as they were earned by the county as fees for services performed by the county clerk, and also to issue checks to parties for any remainder in his possession due them when their causes were finally determined. A party to a suit or action who had advanced sums of money on account of fees was not obliged, every time it became necessary to file a paper, to pay the prescribed fee, since it was charged to his account as the service was performed, and he was not permitted wholly to exhaust the money required to be paid beforehand until his cause was ultimately adjudicated. L. O. L. § 1114. By keeping the money thus collected in a bank subject to check the county clerk had constant control of the litigants' fund and could disburse it as the law required. If the act of February 10, 1915, had directed the county court of Multnomah county to cause the issuance of a warrant in favor of the relator for $15,522.43, or to deposit that amount in some reputable bank in Portland, Or., for his account, subject to check, he could have been legally charged with the money, and might then have disbursed it as provided by statute, receiving proper credit therefor on or before the 4th day of each month upon a report thereof. L. O. L. § 3056.

[4] The demurrer confesses that the deficiency in the litigants' fund has been made good by the county court as an available asset by levying and collecting a tax for that purpose, and, this being so, no mandatory writ is necessary to compel a performance of that duty, which has already been discharged. Jacksonville School Dist. v. Crowell, 33 Or. 11, 52 Pac. 693.

[5] It will be remembered that section 2 of the act in question required John B. Coffey, as county clerk, to pay litigants having funds as shown by the records of his office the full amount thereof as the same shall become due, and also to permit papers to be filed and charged against the several funds to the same extent as though he had received the money in full from the former county clerk. The relator cannot comply with this requirement without rendering himself and his bondsmen liable, until the sum of money so collected has been placed at his disposal. No express provision therefor has been made by the enactment. Mandamus will not lie unless the ministerial duty enjoined by law is free from doubt. Habersham v. Sears, 11 Or. 431, 5 Pac. 208, 50 Am. Rep. 481; Mackin v. Portland Gas Co., 38 Or. 120, 61 Pac. 134, 62 Pac. 20, 49 L. R. A. 596; State ex rel. v. Malheur County Court, 46 Or. 519, 81 Pac. 368.

The demurrer should be sustained; and it is so ordered.

BEAN, HARRIS, and BENSON, JJ., concur.

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(82 Or. 434)

OUTCAULT ADVERTISING CO. v. BROOKS et al.

(Supreme Court of Oregon. Jan. 2, 1917.)

BAILMENT ⊂=5—CONTRACT—EXECUTED CONTRACT—DAMAGES FOR BREACH.

Where defendant ordered advertising matter from plaintiff, which was to be used for one year and then held subject to plaintiff's orders, the contract became executed when the goods were delivered to a carrier consigned to defendant, the same as in the case of a sale, and defendant's refusal thereafter to accept the goods did not render the contract executory so as to prevent plaintiff from recovering the entire contract price and to limit his recovery to damages merely.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 23, 24; Dec. Dig. ⊂=5.]

In Banc. Appeal from Circuit Court, Marion County; Percy R. Kelly, Judge.

On rehearing. Former opinion adhered to.

For former opinion, see 158 Pac. 517.

Roy F. Shields and T. A. Rinehart, both of Salem (McNary, Smith & Shields, of Salem, on the brief), for appellant. C. E. Ross, of Silverton, for respondents.

BURNETT, J. This is the second hearing of this case. In an opinion written by Mr. Chief Justice Moore and reported in 158 Pac. 517, the court reversed a nonsuit, entered on motion of the defendants, and directed a judgment to be rendered by the circuit court in favor of the plaintiff. By their petition for rehearing the defendants urged upon us that the findings of fact showed the contract involved to have been yet executory when the defendants canceled the order, with the consequence that the plaintiff had no cause of action for the stipulated price, but was restricted to an action for damages for the breach of the covenant by the defendants. It will be remembered that the latter signed and delivered to the plaintiff through its agent the following writing:

"To Outcault Advertising Co., 508 S. Dearborn St., Chicago, Ill. Order No. ——. Date Oct. 13, 1913. Ship us at our expense as per samples shown your Drug Store Boy 'Ad' Service, to cover a period of one year, beginning Jan. 1st, 1914. This service to consist of 52 Drug Store Boy Cuts, 1 font type. Brooks & Steelhammer. We (or I) agree to pay you net cash monthly, at the rate of 2.10 per week, for one year, we (or I) to have exclusive right to use the above Drug Store Boy 'Ad' service in our city only, and to hold type and cuts subject to your order when this contract expires. Failure to pay any installment when due renders full amount of this contract due. This contract cannot be canceled. Ship all at one time if possible. Brooks & Steelhammer."

—that the plaintiff accepted this order October 17, 1913, and on the 24th of that month delivered the goods to a common carrier selected by the plaintiff, consigned to the defendants at their place of business at Silverton, Or., but that before the goods arrived, they notified plaintiff that they would not receive them, and that they had canceled and countermanded the order. It is agreed that upon the arrival of the chattels at Silverton the defendants refused to pay the freight or have anything to do with them.

As contended by the defendants one of the things contemplated by the contract was a bailment of the plaintiff's property by which the defendants were to use it for a period and then hold it subject to the plaintiff's order. This, however, does not change the analogous principle governing a contract for the outright sale of the goods to the effect that the agreement becomes executed as to the seller when he has fulfilled all its conditions incumbent upon him. In the present juncture the proposition was to vest in the defendants a qualified property in the chattels mentioned. The contract was complete when the order of the defendants to that effect was accepted by the plaintiff. It was binding at that time on both parties. As shown in the former opinion, it became an executed agreement on the part of the plaintiff when it delivered the goods to a common carrier consigned to the defendants. Nothing more remained for the plaintiff to do. It had complied with every feature of its contract. It is not apropos to say that because the defendants refused to receive the goods no bailment was created, and hence the contract was yet executory, with the result that the defendants had a right to rescind the same subject to an amercement in damages at the suit of the plaintiff. By the same token the defendants could say that the contract was yet executory at any time when they refused to pay a prescribed installment of the price, although they may have used the type and cuts. The agreement having been fully executed by the plaintiff, it remained for the defendants to carry out their part, and they cannot say that their default in performance, including the acceptance of the goods, made the contract still executory as to the plaintiff, with the attendant right of the defendants to rescind, subject to damages. It is true no bailment ensued, but the plaintiff did everything it could to bring about that result, and so put the contract past the executory stage. A case very much like the one in hand is Ware Bros. Co. v. Cortland Cart & Carriage Co., 192 N. Y. 439, 85 N. E. 666, 22 L. R. A. (N. S.) 272, 127 Am. St. Rep. 914, which decides that:

"The damages for revocation of a contract to permit an advertisement to run in a periodical for a year is prima facie the contract price for the service."

In short, the defendants directed the plaintiff to ship the goods, and promised to pay. The plaintiff did ship the goods. The conclusion is that the defendants must pay as they stipulated. We adhere to the former opinion.

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(82 Or. 414)

SKINNER v. FURNAS et al.

(Supreme Court of Oregon. Dec. 27, 1916.)

1. SPECIFIC PERFORMANCE ⇐⇒46, 47 — ORAL CONTRACT—POSSESSION.

It is possession of real property, and, when any relation of affinity or consanguinity exists between parties, also the improvements made upon the land by the purchaser pursuant to the vendor's oral agreement to sell and convey, that takes the case out of the statute of frauds and authorizes a court of equity to decree a specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 128, 132; Dec. Dig. ⇐⇒ 46, 47.]

2. SPECIFIC PERFORMANCE ⇐⇒114(2) — COMPLAINT—POSSESSION AND IMPROVEMENTS.

Since an oral agreement and its part performance are the essentials to be established by evidence at the trial of a suit for specific performance, it is necessary that the complaint therein set forth the oral agreement and allege that possession was taken by the purchaser pursuant thereto, and that, if the parties are related, the latter has made improvements on the land.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 357–361; Dec. Dig. ⇐⇒ 114(2).]

3. PLEADING ⇐⇒402—INSUFFICIENCY OF COMPLAINT—CURE BY REPLY.

Where the complaint, in a suit for the specific performance of an oral agreement to sell and convey land, did not allege that plaintiff took possession pursuant to any oral contract or otherwise, but the answer averred the entry and possession by complainant's husband without any contract and without the knowledge and consent of defendant mortgagors, and where the demurrer to the complaint was overruled, plaintiff, under a reply traversing the averments of new matter in the answer, might offer evidence to substantiate the issue as to the making of the oral contract for the purchase of the land and possession and improvements pursuant thereto.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1343; Dec. Dig. ⇐⇒402.]

4. SPECIFIC PERFORMANCE ⇐⇒121(3) — PURCHASE BY WIFE—SUFFICIENCY OF EVIDENCE.

In a suit by a married woman for specific performance of an oral contract to sell and convey land, evidence *held* to establish the allegation of the complaint that she was the purchaser under the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 390; Dec. Dig. ⇐⇒ 121(3).]

5. VENDOR AND PURCHASER ⇐⇒22 — POSSESSION—SELECTION.

Where a purchaser takes possession of land by an indicated boundary, his right to the premises vests upon the selection.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 27; Dec. Dig. ⇐⇒22.]

6. SPECIFIC PERFORMANCE ⇐⇒32(3) — ORAL AGREEMENT—MUTUALITY.

Mutuality must exist when the aid of the court is invoked to enforce the rights of the parties to an oral contract for the sale of land, and where a recovery of the consideration and the execution of a deed could have been granted to either party when suit was begun, the oral contract was not wanting for mutuality.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 92–98; Dec. Dig. ⇐⇒ 32(3).]

7. SPECIFIC PERFORMANCE ⇐⇒12 — ORAL AGREEMENT—ESTOPPEL.

A married woman should not be denied specific performance of an oral contract to sell land because she permitted her husband to hold the legal title in trust for her, where defendants did not rely upon the husband's apparent legal title.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 26–28, 37; Dec. Dig. ⇐⇒12.]

8. DOWER ⇐⇒46(2) — MORTGAGE — EFFECT — STATUTE.

Under L. O. L. § 7289, relating to dower in land mortgaged for purchase money, the fact that a married woman made no contract, barring her inchoate right of dower, when plaintiff took possession and made improvements under an oral contract with her husband, was of no consequence, where she afterwards joined her husband in executing to defendants a purchase-money mortgage, as the foreclosure of that lien and a sale of the premises under the decree concluded all the estate she had in the realty.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 147, 148; Dec. Dig. ⇐⇒46(2).]

9. MORTGAGES ⇐⇒535(3)—FORECLOSURE—PURCHASE BY MORTGAGEE—TITLE.

A mortgagee, purchasing at a sheriff's sale with knowledge of plaintiff's prior equity in land as purchaser in possession under an oral agreement with the mortgagor, acquired no greater estate than the mortgagor held.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1556; Dec. Dig. ⇐⇒535(3).]

In Banc. Appeal from Circuit Court, Umatilla County; Gilbert W. Phelps, Judge.

Suit in the nature of a cross-bill in equity by Mrs. Georgia A. Skinner against Leroy W. Furnas and wife and others, defended only by the named defendants. Decree for plaintiff, and the named defendants appeal. Decree affirmed.

This is a suit by Mrs. Georgia A. Skinner against Leroy Furnas and Grace M., his wife, J. H. Reid and Genevieve, his wife, and the Umatilla Project Orchard Lands Company, a corporation, to enforce the specific performance of an oral agreement to convey real property. Mr. Furnas, being the owner in fee of the southwest quarter of the northwest quarter of section 11, in township 4 north, range 28 east of the Willamette meridian, near Hermiston, Or., on October 1, 1910, with his wife conveyed such tract of land and other real property, containing in all 320 acres, to Mr. Reid, who was to discharge a mortgage of $2,500 on the premises. The latter paid a substantial part of the consideration, and evidenced the remainder by three promissory notes of $10,000 each, respectively maturing on the 1st day of October each year thereafter, with interest at 7 per cent. from date, and to secure the payment thereof he and his wife at the same time executed to Mr. and Mrs. Furnas a mortgage of the entire property. About November 1, 1910, at the solicitation of W. H. Skinner, the plaintiff's husband, Reid, in consideration of $450, to be paid when a deed was executed, agreed to sell and convey a strip of land out of the southeast corner of the 40-acre tract,

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particularly described, possession of which small piece was taken, a house built thereon, and other improvements were made thereto, costing about $4,500. Reid and his wife thereafter executed to the Umatilla Project Orchard Lands Company, a corporation, a quitclaim deed of all their interest in and to the northwest quarter of section 11, in the township and range mentioned. Default was made in the payment of the promissory notes, whereupon the mortgage securing them was foreclosed, in which suit, with others, Mr. Skinner, but not his wife, was made a party defendant. At a sale under the decree Furnas and his wife, on February 14, 1914, became the purchasers for the amount of the debt, costs, etc. They, on March 27, 1915, commenced an action against Mr. Skinner alone, to recover the possession of the small tract on which the house was built. He filed an answer in that action, denying the averments of the complaint, and for a separate defense alleging that he was not then, nor had he ever been, in possession of the demanded premises, nor did he claim any title or interest therein or right thereto. The reply put in issue the allegations of new matter in the answer, and the cause, being tried, resulted in a verdict and judgment in favor of Mr. Skinner, which determination has become final. Thereafter Furnas and his wife commenced against Skinner another action, in which his wife was joined, to recover possession of the small tract. An answer having been filed in that action, Mrs. Skinner, as plaintiff, commenced this suit in the nature of a cross-bill in equity, setting forth the facts hereinbefore stated, and averring that about November 1, 1910, she "purchased from said J. H. Reid" a tract of land, beginning at a point where the north line of Ridgeway street in the town of Hermiston intersects the east boundary of the southwest quarter of the northwest quarter of section 11, township 4 north, range 28 east, and running thence north 200 feet, thence west 180 feet, thence south 200 feet, to the north line of Ridgeway street, and thence east 180 feet to the place of beginning. "That thereupon the plaintiff entered into the immediate possession of the said piece or parcel of land, and has ever since remained in the quiet, peaceable and undisturbed possession thereof." The complaint details the improvements so made upon the premises, and avers:

"That thereafter plaintiff learned defendant Reid could not make plaintiff a good and sufficient deed of conveyance, and this plaintiff caused the said Grace M. Furnas and the said Leroy W. Furnas to be notified of the purchase of the said tract of land from the said J. H. Reid, and that the purchase price had not been paid."

That the Umatilla Project Orchard Lands Company secured its deed with knowledge of the plaintiff's possession of a small part of its land and of her rights thereto, and that Furnas and wife, upon the sale of the entire lands under the decree of foreclosure, took the naked legal title of the disputed tract with knowledge that the plaintiff was in the possession thereof and had placed valuable and permanent improvements thereon. With the filing of the complaint herein the plaintiff deposited with the clerk of the trial court $450 and interest at 7 per cent. per annum from November 1, 1910, amounting to $615, for the benefit of the persons who might be entitled thereto.

The defendants Reid and his wife and the Umatilla Project Orchard Lands Company, having been duly served with process in this suit, each failed to appear or answer. The defendants Furnas and his wife demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of suit. The demurrer was overruled, whereupon they, alone answering, denied the material averments of the complaint, and for a further defense alleged that about January 1, 1911, Mr. Skinner sought to enter into an agreement with Mr. Reid to purchase a small tract of land; that they could not concur in the boundaries nor as to the purchase price, and thereupon Skinner began the erection of the dwelling and the making of the improvements—

"without any contract or agreement with the said J. H. Reid * * * and without the knowledge or consent of these defendants or either of them. * * * That the said plaintiff never at any time had the sole possession or sole occupancy of the said premises, or any part thereof, and never expended any moneys or placed any improvements upon said tract of land, nor performed anything with respect thereto, except to reside in said house as the wife of the said W. H. Skinner."

The reply put in issue the averments of new matter in the answer, and further alleged that Furnas and his wife ought to be estopped to aver or prove that Mr. Skinner claimed to be the owner of the demanded premises, for that the judgment rendered in his favor in the first ejectment action had conclusively determined the matter to the contrary. The cause was thereupon tried, resulting in a decree as prayed for in the complaint, awarding the money so deposited to Furnas and his wife, and requiring them, within 30 days, to execute to Mrs. Skinner a good and sufficient deed of the premises, and that in default thereof the decree stand as and for a conveyance of the tract of land in dispute. From this decree Mr. and Mrs. Furnas appeal.

J. H. Raley, of Pendleton (Raley & Raley, of Pendleton, on the brief), for appellants. Jas. A. Fee and Alger Fee, both of Pendleton, for respondent.

MOORE, C. J. (after stating the facts as above). Invoking the doctrine announced in Barrett v. Schleich, 37 Or. 613, 617, 62 Pac. 792, where it is said:

"The parol agreement to convey real property is the foundation, and the part performance thereof by the purchaser is the superstructure, which, considered as a unity, authorizes a court of equity specifically to enforce the contract"

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—it is maintained by appellants' counsel that, the complaint having failed to aver that a parol agreement to purchase the tract of land was ever consummated, or that pursuant to the terms of any contract possession of the premises was taken and improvements were made, the initiatory pleading does not state facts sufficient to constitute a cause of suit, and, this being so, an error was committed in overruling the demurrer interposed on that ground, which mistake was not cured by answering over. It is argued by plaintiff's counsel that the use of the word "purchase" in the primary pleading implies the consummation of an agreement by the vendor to sell, and the purchaser to buy, property, and that having alleged a purchase of the land, and "that thereupon the plaintiff entered into the immediate possession" thereof, reasonably shows that possession was taken pursuant to the terms of the contract, and, such being the case, the complaint is sufficient in these particulars. In support of the legal principle thus asserted reliance is placed upon the case of Cantwell v. Barker, 62 Or. 12, 124 Pac. 264, where in a statement of the facts involved it is said:

"On July 14, 1911, plaintiff commenced this suit against Barker and wife to compel specific performance of a contract of sale of certain town lots, alleging that in October, 1907, defendants, by a verbal contract, sold to plaintiff lots 5 and 6, in block 30, of Condon and Cornish's addition to Condon, Or., for the agreed price of $800; that, immediately upon the purchase, plaintiff entered into possession of the lots and expended $230 in erecting an additional building thereon; and that he has remained in exclusive possession as owner thereof," etc.

An examination of the printed abstract in that case shows that paragraph 2 of the complaint reads:

"That on or about the month of October, 1907, the defendants W. L. Barker and Annie L. Barker, by a verbal contract of the last-named date, sold and delivered possession of the above-described premises (referring to the preceding paragraph of the complaint) to the plaintiff herein, under said contract, and he, the plaintiff, has continued in possession of said premises from that time until the present, and has made valuable improvements thereon, and has ever since held possession as the exclusive owner of said property." 277 Or. Briefs, 118.

It will thus be seen the complaint in the cause mentioned substantially alleges that possession of the lots was delivered by the defendants to the plaintiff pursuant to the terms of the oral agreement. An examination of the statement of facts in the case relied upon will show that the excerpt hereinbefore set forth is not indicated in that opinion by quotation marks.

[1] It is possession of real property, and, when any relation of affinity or consanguinity exists between the parties, also the improvements made upon the land by the purchaser, pursuant to the terms of an oral agreement with the vendor to sell and convey the premises, that takes the case out of the statute of frauds and authorizes a court of equity, in a suit instituted for that purpose, to decree a specific performance of the contract.

[2] Since the agreement and its part performance are the essential prerequisites to be established by evidence at the trial, it is necessary to the maintenance of a suit of this kind that the complaint should set forth the oral contract, and also allege that pursuant to its terms possession of the premises was taken by the purchaser, and, if the parties are related, that the latter has made improvements upon the land. Barrett v. Schleich, 37 Or. 613, 62 Pac. 792; Zeuske v. Zeuske, 62 Or. 46, 124 Pac. 203; Thayer v. Thayer, 69 Or. 138, 138 Pac. 478. A tenant in possession of real property under a written lease, which grants him a privilege to purchase the premises, may, when the option is accepted within the time and upon the terms specified, maintain a suit for specific performance of the contract without change of possession. House v. Jackson, 24 Or. 89, 32 Pac. 1027; Merrill v. Hexter, 52 Or. 138, 94 Pac. 972, 96 Pac. 865. In these instances it was the writing that took the cases out of the statute of frauds.

In Aitkin's Heirs v. Young, 12 Pa. 15, 24, in speaking of the acts of part performance which will take an oral agreement relating to land out of the statute of frauds, Mr. Justice Rogers remarks:

"That in order to constitute a good title by parol the possession must be contemporaneous with, or immediately consequent on, the contract, and in pursuance of it, and that these facts must be established by clear, precise, and satisfactory evidence."

The importance of taking possession of real property, pursuant to the terms of an oral agreement to sell and convey land, is illustrated by the decision in Roberts v. Templeton, 48 Or. 65, 80 Pac. 481. See, also, the very extended notes to this case in 3 L. R. A. (N. S.) 790.

[3] In the case at bar the complaint does not allege that the plaintiff took possession of the demanded premises pursuant to the terms of any agreement oral or otherwise.

It will be kept in mind, however, that the answer substantially avers the entry upon and possession of the land by W. H. Skinner were taken and held without any contract or agreement with Mr. Reid or any one for the purchase of the land, and without the knowledge or consent of either Mr. or Mrs. Furnas, which allegation was controverted by the reply. After the demurrer was overruled, the allegations of the answer hereinbefore quoted gave the plaintiff by her reply the opportunity to offer evidence to substantiate the issue as to the making of the oral contract with Reid for the purchase of the tract of land, and that pursuant to the terms of that agreement possession of the premises was taken and improvements thereon were made. If the controversy raised by the reply had been stated as new matter in that pleading and not as a denial of the averments of the answer, there would have been

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no departure, but a mere enlargement of the averments of the complaint. Mayes v. Stephens, 38 Or. 512, 63 Pac. 760, 64 Pac. 319; Crown Cycle Co. v. Brown, 39 Or. 285, 64 Pac. 451; Kiernan v. Kratz, 42 Or. 474, 69 Pac. 1027, 70 Pac. 506; Zorn v. Livesley, 44 Or. 501, 75 Pac. 1057; Pioneer Hardware Co. v. Farrin, 55 Or. 590, 107 Pac. 456. If, therefore, the averments of the complaint are insufficient in the respects mentioned, the new matter in the answer waived the defects in these particulars.

[4] It is maintained that the testimony received was insufficient to establish the allegations of the complaint that Mrs. Skinner was the purchaser of the tract of land under the oral contract to convey, and, this being so, an error was committed in decreeing her the relief sought. Evidence of many circumstances was given by defendants' counsel tending to prove that Mr. Skinner was named as the grantee in several conveyances of real property as to which deeds his wife testified he held the legal title in trust for her, which sworn declarations are corroborated by the testimony of her husband. Thus it appears he owned in his own right an undivided one-fourth of a part of the town site of Hermiston, Or., and also held the legal title to an equal interest in the same real property in trust for his wife. It also appears that at a school meeting, held in that town, at which assembly there was quite a rivalry between different sections of the district respecting local matters, Mrs. Skinner's right to vote was challenged on the ground that she was not a qualified elector, but upon Mr. Skinner's declaration that she was the equitable owner of an interest in the town site she was allowed to vote. Mr. Skinner was also named as the grantee in a conveyance of land which was exchanged for lumber that was used in building the house on the disputed premises, but he testified that as to such premises he held the legal title in trust for his wife. One circumstance seems to discredit his testimony, and that is the new house was insured in his name. In explaining this matter, however, he states upon oath that the policy was thus issued by mistake of the agent.

The testimony shows that Mrs. Skinner owned a desert land claim near Hermiston, which right she sold, expecting to use the money as it matured under the terms of the agreement in completing the new house and improving the tract of land she had agreed to purchase. She was disappointed in the collection of the money thus due her and was obliged to resort to expedients in order to meet the payment of her obligations. She with her husband borrowed from the Hermiston Bank & Trust Company $2,750 and $1,455, respectively, pursuant to an agreement that, if demanded, she would give as security a mortgage of her desert land claim.

J. H. Reid, having testified that $450 was agreed upon as the consideration to be paid for the tract of land desired, and that prior to concluding the bargain therefor he walked over the premises with the plaintiff's husband, was asked:

"Didn't Mr. Skinner state to you at the time of that purchase, Mr. Reid, that the land was being purchased as a home for Mrs. Skinner, and the lots must be satisfactory to her, or words to that effect?"

The witness answered: "Yes, sir." Notwithstanding the circumstances adverted to, it is believed Mr. Skinner was acting as the agent of his wife, and not on his own account, when he negotiated with Mr. Reid, the then owner of the entire lands, for the purchase of the small tract; that she then had reason to believe, and did believe, that from the proceeds of the sale of her desert claim she would receive a sufficient sum of money with which to pay for the land in question and to put up the buildings and make improvements thereon.

[5] It is insisted that no agreement was reached respecting the boundaries of the land Reid was to sell and convey, and hence an error was committed in granting the relief decreed. The testimony shows that prior to concluding the oral agreement Mr. Reid went to the southeast corner of the small tract desired, and pointed out the particular land involved, one boundary of which might possibly be shortened to coincide with the line of an alley when the larger premises were surveyed and platted into lots and blocks, which has never been done. It also appears that with his knowledge and consent Mrs. Skinner took possession of the parcel of land so indicated, and improved it to the extent of the boundaries thus designated. When, under such circumstances, the purchaser takes possession of land by an indicated boundary, his right to the premises vests upon the selection. 1 Dembitz, Land Titles, 36; Richards v. Snider, 11 Or. 197, 3 Pac. 177; Guillaume v. K. S. D. Land Co., 48 Or. 400, 86 Pac. 883, 88 Pac. 586; Purinton v. Northern Ill. R. Co., 46 Ill. 297. No error was committed in this respect.

[6] It is maintained that the alleged oral agreement was not mutual, and for that reason an error was committed in decreeing specific performance. In Brown v. Munger, 42 Minn. 482, 44 N. W. 519, a headnote on this subject reads:

"In order that specific performance of an agreement for the sale, exchange, or conveyance of land be decreed, it is not absolutely essential that there be mutuality of remedy ab initio. But the mutual enforcement of the contract should be practicable when specific performance is adjudged. The court should then be able to enforce by its decree all of the terms, in praesenti; should have the power to supervise the performance of the contract by each of the parties, and in all of its parts."

Another part of a headnote to that case is as follows:

"The legal principle that contracts must be mutual does not mean that each party must be

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entitled to the same remedy for a breach by the other. There must be mutuality of obligation, but not necessarily mutuality of remedy."

See, also, House v. Jackson, 24 Or. 89, 32 Pac. 1027; Cooper v. Thomason, 30 Or. 161, 45 Pac. 296; West v. Washington Ry. Co., 49 Or. 436, 90 Pac. 666. Mutuality must exist when the aid of a court is invoked to protect and enforce the rights of the parties by its decree; and, as a recovery of the consideration and the execution of a deed could have been granted to either party when this suit was instituted, the oral contract was sufficient in this particular.

[7] Neither Mr. nor Mrs. Furnas, relying upon Mr. Skinner's apparent legal title in or to the real property which he asserts he held in trust for his wife, permitted him to become a debtor upon faith in such credit, and, this being so, Mrs. Skinner should not be denied an exercise of her legal right to specific performance of the oral contract to convey the land, because she had such confidence in her husband as to allow him to hold in trust for her the legal title to her property.

[8] No contract appears to have been made with Mrs. Reid, whereby her inchoate right of dower to the land involved in this suit was barred when Mrs. Skinner took possession of the premises and made such valuable and permanent improvements thereon. Any failure in this respect, however, is now of no consequence, for, Mrs. Reid having joined her husband in executing to Mr. and Mrs. Furnas a purchase-money mortgage, the foreclosure of that lien and the sale of the premises under the decree effectually concluded all possible estate Mrs. Reid had in the real property. L. O. L. § 7289; 14 Cyc. 952; Mansfield v. Hodgdon, 147 Mass. 304, 17 N. E. 544.

[9] Mr. and Mrs. Furnas, the purchasers at the sheriff's sale, though they may have been restored to their original estates as to all the land, except the small tract, took, as to the latter strip, only the naked legal title. May v. Emerson, 52 Or. 262, 96 Pac. 454, 16 Ann. Cas. 1129; Cantwell v. Barker, 62 Or. 12, 124 Pac. 264. They took with knowledge of the plaintiff's equity, and hence acquired no greater estate than Reid held. Dimmick v. Rosenfeld, 34 Or. 101, 55 Pac. 100; Jennings v. Lentz, 50 Or. 483, 93 Pac. 327, 29 L. R. A. (N. S.) 584; Smith v. Farmers' & Merchants' Nat. Bank, 57 Or. 82, 110 Pac. 410.

The lien created by the mortgage of the entire 320 acres, executed by Mr. and Mrs. Furnas to secure the payment of $2,500, for water rights appurtenant to the premises, was not disturbed by the decree rendered herein, nor could it have been, for that mortgagee was not made a party to this suit. If, however, Mrs. Skinner is compelled to pay any part of that sum, she can be subrogated and enforce the lien against the remainder of the land, after a merger as to her separate tract.

A careful examination of the testimony leads to the conclusion that the decree should be affirmed; and it is so ordered.

(82 Or. 490)

FIRST NAT. BANK OF PORTLAND v. COURTRIGHT et al.

(Supreme Court of Oregon. Dec. 27, 1916.)

1. FRAUDULENT CONVEYANCES ⟸277(2)—BURDEN OF PROOF.

Where a debtor conveys substantially all his estate to a near relative, ostensibly to satisfy his debt to the latter, in a suit by creditors to set aside a deed for fraud, the grantee must establish clearly that there was a valuable consideration therefor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 813; Dec. Dig. ⟸277(2).]

2. INTEREST ⟸59(1)—COMPUTATION—PARTIAL PAYMENTS.

The rule for casting interest, where partial payments have been made, is to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on a balance of principal remaining due. If the payment be less than the interest, the surplus of the interest must not be taken to augment the principal; but interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied towards discharging the principal, and interest is to be computed on the balance as aforesaid.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 132; Dec. Dig. ⟸59(1).]

3. MORTGAGES ⟸7—TRUST DEED.

Where land is transferred to a trustee to secure a loan from a bank, it is to be treated as a mortgage, and foreclosed only in the statutory manner.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 6; Dec. Dig. ⟸7.]

4. MORTGAGES ⟸209—DUTY OF TRUSTEE UNDER TRUST DEED—FORECLOSURE.

The cestui may call upon the trustee to foreclose such mortgage by appropriate legal proceedings, and apply the proceeds to the debt, or the judgment in which the debt has been merged.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 466–468; Dec. Dig. ⟸209.]

5. MORTGAGES ⟸209—FORM OF DECREE.

In a creditors' suit, in which plaintiff was the cestui of a deed securing its loan, and the trustee of such trust and the debtor and others were defendants, the complaint asking for decree requiring the trustee to "sell and dispose" of the property held by him as trustee, a decree would be entered merely directing the trustee to foreclose the mortgage by appropriate proceedings, although the plaintiff conceded that it did not seek to obtain strict or ordinary foreclosure of the conveyance, since, in any event, a decree directing the trustee to sell and dispose of the land would not empower a sale without suit to foreclose the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 466–468; Dec. Dig. ⟸209.]

In Banc. Appeal from Circuit Court, Multnomah County; Geo. N. Davis, Judge.

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On rehearing. Former opinion modified and affirmed.

For former opinion, see 158 Pac. 277.

Joseph Simon, of Portland (Dolph, Mallory, Simon & Gearin, of Portland, on the brief), for appellant. Albert B. Ridgway, of Portland (Ridgway & Johnson, of Portland, and Morris L. Courtright, of Bay City, Mich., on the brief), for respondents.

HARRIS, J. [1] On account of the importance of this suit and because of the large amount of money involved in the controversy, a rehearing was granted in order to afford an opportunity to correct any error that we may have committed in the original opinion reported in First National Bank v. Courtright, 158 Pac. 277; and, after again hearing the arguments of counsel, we have for the second time scrutinized each of the numerous business transactions, covering a period of about six years, between Morris L. Courtright and his son, Harry M. Courtright. Every one of the many letters, checks, drafts, and papers which were received in evidence has been examined with care, and the testimony of all the witnesses has received our closest attention, in order that we might, if possible, discover the truth. We have been mindful of the fact that the Courtrights are father and son, and therefore throughout the entire examination of the record we have applied the rule announced in Marks v. Crow, 14 Or. 383, 13 Pac. 55, and again stated in Wright v. Craig, 40 Or. 191, 195, 66 Pac. 807, 809:

"Where one who is in debt at the time conveys substantially the whole of his estate to" a near relative, "ostensibly in satisfaction of his debt to the latter, in a suit by creditors to set aside a deed for fraud, it is incumbent upon the grantee to establish by satisfactory proof that there was a valuable and adequate consideration for the deed; and, unless he can give a clear and precise account of the items constituting the alleged debt, a fraudulent intent will be inferred."

Because of the fact that nearly all of the property of the debtor has been transferred to a near relative, and practically no assets have been reserved to pay another creditor, and on account of the harsh consequences worked by that transfer, we have thrown the searchlight of suspicion upon each letter, check, paper, writing, and transaction in order to detect any possible fraud.

To recite the evidence upon which our conclusions are based would be to perform a lengthy, but useless and fruitless, task; and it is therefore sufficient to say that the evidence, when considered in its entirety, and after being subjected to the severe test imposed by the rule defined in Marks v. Crow, supra, satisfies us that Morris L. Courtright was in truth a genuine creditor of Harry M. Courtright, and that they agreed that the son was to pay 7 per cent. on all loans by Morris L. Courtright. The father procured most of the money by borrowing from banks, and is entitled to credit for all sums borrowed from the banks, as well as all amounts which he was able to supply without borrowing. Morris L. Courtright has satisfactorily shown that on October 7, 1908, he assigned to his son four delinquency certificates, aggregating $432.27; and by means of checks, drafts, deposit slips, and the records kept by banks it is established beyond a reasonable doubt, even, that Harry M. Courtright received from his father, between October 7, 1908, and July 6, 1914, 71 different cash items, ranging in amounts from $10 to $10,000, and aggregating $82,430.02. The son received from the father the total sum of $82,862.29 in cash and delinquency certificates; and this entire sum, less $100, which according to his own testimony Morris L. Courtright "gave" to the son on October 7, 1908, is to be treated as money loaned.

Between January 2, 1912, and August 22, 1914, Harry M. Courtright made 46 cash payments to his father, ranging in amounts from $30 to $12,000, and aggregating $42,367.86. The assignment of the Cherryman mortgage and the conveyances made on April 7, 1914, and July 1, 1914, may be treated as payments to the amount of $6,634; and in addition to this amount Morris L. Courtright must be charged with $15,000 on account of delinquency certificates which he had received from his son prior to August 22, 1914, and then assigned to banks in Bay City, where the certificates were still held, as security for money borrowed from those banks. Harry M. Courtright borrowed the total sum of $82,762.29, and repaid $64,001.86, during the period ending August 22, 1914. Before striking a balance on that date, however, it is necessary to ascertain the interest earned by the loans made by Morris L. Courtright.

The borrower and lender agreed that the moneys loaned should bear interest at 7 per cent., but the litigants disagree as to the amount of interest earned at that rate. This difference results from the variant methods of computation employed, since one party has used the method known as the "mercantile rule," while the other party has followed what is commonly known as the "United States rule." Under the mercantile rule the account is stated calculating interest on each item of the debt and allowing interest on each payment; but this method has received the approval of only a few courts. 22 Cyc. 1566. More than a century ago, in Connecticut v. Jackson, 1 Johns. Ch. (N. Y.) 13, 7 Am. Dec. 471, Chancellor Kent announced a rule for computing interest where partial payments are made, and this method has been adopted by most of the courts in this country. 22 Cyc. 1564. This rule has been heretofore employed by us whenever it was necessary to compute interest where partial payments were made, and we have therefore calculated the interest due from Harry M. Courtright according to the United States

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rule. The formula prescribed by Chancellor Kent reads thus:

[2] "The rule for casting interest, where partial payments have been made, is to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due. If the payment be less than the interest, the surplus of the interest must not be taken to augment the principal; but interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied towards discharging the principal, and interest is to be computed on the balance as aforesaid."

Calculating the interest according to the rule adopted here, the loans made by Morris L. Courtright had earned $12,729.65 during the period ending August 22, 1914. In addition to the $15,000 in delinquency tax certificates previously mentioned, in July or August, 1914, Harry M. Courtright assigned to his father certificates amounting to $20,073.80; and hence, if a balance is struck for the day ending August 22, 1914, it will be seen that Morris L. Courtright is to be credited with a total sum of $95,491.94 and charged with $84,075.66, leaving a balance of $11,416.28 due from Harry M. Courtright.

The plaintiff contends, and we shall assume, without deciding, that Morris L. Courtright has admitted in his answer that the land conveyed to him on November 6, 1914, was taken at a price of $10,000, although the evidence shows that the net value of the realty does not exceed one-fourth of that sum. Even though the land is estimated at $10,000, and though no interest is calculated for the period commencing August 22, 1914, there is nevertheless a balance of $1,416.28 due on November 6, 1914, from Harry M. Courtright after the land, figured at $10,000, is applied on the balance of $11,416.28 carried forward from August 22, 1914. The plaintiff argues that Morris L. Courtright should be charged with certificates amounting to $44,831.28, instead of $35,073.80. Morris L. Courtright resided in Bay City, Mich., while Harry M. Courtright lived in Portland, Or., and the latter assigned certificates to the former, who in turn assigned them to banks in Bay City to secure money borrowed. Whenever a certificate was redeemed, the son wrote to the father to return the certificate, and when the instrument was returned the son would receive the redemption money for it. The contention made by the plaintiff takes no account of the certificates returned by Morris L. Courtright, and for which the son, and not the father, received the redemption money. As we read the record, Morris L. Courtright did in fact receive certificates amounting to $44,831.28, together with some additional certificates not charged against him by the bank; but after tracing the course followed by each certificate, as shown by letters, assignments, and other documents, we have ascertained that Morris L. Courtright should only be debited with certificates valued at $35,073.80 because all in excess of that amount were returned to Harry M. Courtright, who received and then used the redemption money, or sent it to his father as partial cash payment.

After a critical examination of all the testimony and exhibits received in evidence, we can reach no other conclusion than that the moneys received by Harry M. Courtright were loans, and that there was a genuine relationship of creditor and debtor; that the cash, land, and certificates which were paid, assigned, or transferred to Morris L. Courtright were received and applied by him on a real and not a fictitious debt, without any intention to defraud another creditor; and that, while the debtor preferred one creditor to another, the transaction did not result in the debtor preferring himself, for the reason that it did not involve a reservation of any interest for the debtor.

[3-5] The plaintiff urges that in any event it is entitled to "a decree requiring the Security Savings & Trust Company to sell and dispose of the real property" which was conveyed to the company by Harry M. Courtright, although the bank concedes that it "does not by its complaint seek to obtain a strict or ordinary foreclosure of the conveyance made to the Security Savings & Trust Company." We have found that the plaintiff is not entitled to any relief against Morris L. Courtright, and hence the only question remaining is whether the bank is entitled to a decree directing the Security Savings & Trust Company to "sell and dispose of" certain land. On November 4, 1914, Harry M. Courtright gave his note to the bank in the sum of $43,500, and then, according to a specific allegation in the complaint, he conveyed his lands in Skamania county, Wash., and Clackamas county, Or., to the Security Saving & Trust Company as security for the note. The bank reduced the note to a judgment before the commencement of this suit; no part of the land is in Multnomah county, where this suit was commenced and tried; this is a creditors' bill, and not a proceeding to foreclose a mortgage; and the main purpose for which the suit was commenced fails of accomplishment, for the reason that the bank is not entitled to any relief against Morris L. Courtright. The conveyance is not like the one spoken of in Ladd v. Johnson, 32 Or. 195, 49 Pac. 756; but the transfer was made to secure a debt, and therefore the instrument must be treated as a mortgage, and should be foreclosed in the manner prescribed by the statute, and not otherwise. Thompson v. Marshall, 21 Or. 171, 27 Pac. 957; Marquam v. Ross, 47 Or. 374, 407, 78 Pac. 698, 83 Pac. 852, 86 Pac. 1; Starr v. Kaiser, 41 Or. 170, 175, 68 Pac. 521. The bank, of course, has a right to call upon the Security Savings & Trust Company to foreclose the mortgage by appropriate legal pro-

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ceedings, and have the proceeds of a sale on foreclosure applied on the judgment in which the note has been merged; but a decree directing the company to sell and dispose of the land would not empower a sale without a suit to foreclose the mortgage, and with this explanation a decree will be entered directing the Security Savings & Trust Company to foreclose the mortgage by appropriate proceedings.

Even though the plaintiff is not entitled to an annulment of any transfers made to Morris L. Courtright, yet under all the circumstances we think it fair that the decree be without costs to any party in either court; and with these modifications we adhere to our original opinion, and affirm the findings made by the circuit court.

(84 Or. 224)

WHITE v. EAST SIDE MILL & LUMBER CO.

(Supreme Court of Oregon. Jan. 9, 1917.)

1. APPEAL AND ERROR ⟸624—RECORD—FAILURE TO FILE TRANSCRIPT—MOTION TO DISMISS—AFFIDAVITS.

The recitals of a nunc pro tunc order as to an oral order previously made extending the time for filing transcript on appeal imports absolute verity, and cannot be contradicted, on motion to dismiss the appeal for failure to file transcript, by affidavits of counsel as to what actually occurred at the time of the previous order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2737-2742; Dec. Dig. ⟸624.]

2. APPEAL AND ERROR ⟸624—TRANSCRIPT—TIME FOR FILING—EXTENSION.

Under Act Feb. 28, 1913 (Laws 1913, p. 619), providing that the trial court or Supreme Court may enlarge the time for filing the transcript, but that such order shall be made within the time allowed to file the transcript, an order extending the time for filing the transcript may be entered before appeal has been perfected.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2737-2742; Dec. Dig. ⟸624.]

3. APPEAL AND ERROR ⟸624—ORDER EXTENDING TIME TO FILE TRANSCRIPT—"FROM DAY TO DAY."

An order extending time for filing transcript "from day to day" is self-executing to extend the time from one day to another until the next term of the appellate court, and gives the court making it jurisdiction to make further order limiting the time for such filing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2737-2742; Dec. Dig. ⟸624.

For other definitions, see Words and Phrases, Second Series, From Day to Day.]

4. COURTS ⟸114—RECORD—"JOURNAL ENTRY."

A "journal entry" is the prescribed memorial of what the court actually did, and must speak the real truth; so that, if the court did not in fact make an order on a certain date, one cannot be supplied by any subsequent journal entry.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 368; Dec. Dig. ⟸114.]

5. MOTIONS ⟸58—NUNC PRO TUNC ORDER.

The authority to make an order nunc pro tunc cannot be used to amend or change an order actually made.

[Ed. Note.—For other cases, see Motions, Cent. Dig. § 72; Dec. Dig. ⟸58.]

6. APPEAL AND ERROR ⟸624—TRANSCRIPT—TIME TO FILE—EXTENSION—NUNC PRO TUNC ORDER.

An order reciting that the court previously orally ordered that time for filing transcript on appeal be extended from day to day and ordering that appellant have an extension of ten days after the date when the court reporter should file a typewritten transcript of his stenographic notes of the testimony, operated not only as a nunc pro tunc order, but also as a new order further declaring the limits of time within which the transcript might be filed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2737-2742; Dec. Dig. ⟸624.]

7. APPEAL AND ERROR ⟸624—RECORD—TIME TO FILE TRANSCRIPT—EXTENSION.

Under Laws 1913, p. 619, as to extension of time for filing transcript, providing that no such order shall extend it beyond the next term of the appellate court, the expiration of such term automatically ends the right of defendant to file his transcript, whether or not specified by order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2737-2742; Dec. Dig. ⟸624.].

8. APPEAL AND ERROR ⟸1—RIGHTS ON APPEAL—LIBERAL CONSTRUCTION.

An appeal being a remedy, the laws and actions of courts in respect thereto should be liberally construed with a view to make the remedy effective.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1-4; Dec. Dig. ⟸1.]

In Banc. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Lulu R. White, administratrix, against East Side Mill and Lumber Company. Judgment for plaintiff, and defendant appeals. On motion to affirm judgment. Motion overruled.

See, also, 155 Pac. 364; 158 Pac. 173; 158 Pac. 527.

In this case a judgment was rendered in the circuit court in favor of the plaintiff on October 6, 1916. On the 21st of that month defendant served its notice of appeal, which was perfected on the 31st. No transcript having been filed in this court, the plaintiff moves for an affirmance of the judgment on the ground that the appeal has been abandoned. Resisting this motion, the defendant shows that the circuit court made an order on December 18, 1916, which, omitting the title of the cause, here follows:

"The above-entitled cause having come on regularly to be heard upon motion of Hamilton Johnstone, Esq., one of the attorneys for the above-named defendant, and it appearing to the court that heretofore, to wit, on October 21, 1916, the said Hamilton Johnstone Esq., having appeared in open court before me in support of a motion for extension of time within which to file transcript on appeal in the Supreme Court, and within which to file and settle bill of exceptions herein, the said defendant appearing on said October 21, 1916, by said Hamilton John-

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stone, its attorney, and plaintiff appearing by R. A. Sullivan, Esq., her attorney, and it further appearing that the court on said October 21, 1916, did order that the defendant be allowed an extension of time from day to day in this cause within which to file a transcript on appeal in the Supreme Court and to file and settle bill of exceptions herein, but that no written memorandum of said order was made on October 21, 1916, and entered in the journal of this court, and the court having at the time of said order assured Hamilton Johnstone, Esq., attorney for said defendant, that no advantage would be taken of him or said defendant because of any delay in procuring extension of the stenographic notes of the testimony taken at the trial of the above cause, and it further appearing that the reason for the failure of the defendant heretofore to file a transcript on appeal and to file and settle bill of exceptions is due to no fault of the defendant or its attorneys, but to the unavoidable pressure of business devolving upon the court reporter of this department, and the court being fully advised in the premises, it is hereby ordered that said defendant have, and it is hereby granted, an extension of time to a date ten days from and after the date when the court reporter of this department shall file in this court a typewritten extension of the stenographic notes of the testimony taken at the trial of the above-entitled cause, within which to file a transcript on appeal in the Supreme Court, appealing from the judgment heretofore rendered in the circuit court of the state of Oregon, for the county of Multnomah, in this action, and within which to file and settle bill of exceptions herein.

"And it is further ordered that this order be made and entered nunc pro tunc as of October 21, 1916, the date when this court made said order.

"Dated Portland, Oregon, December 18, 1916.

"[Signed] Henry E. McGinn, Judge."

Asher & Johnstone, of Portland, for appellant. Raymond A. Sullivan, of Portland, for respondent.

BURNETT, J. (after stating the facts as above). In the act of February 28, 1913, it is laid down as a rule that:

"If the transcript or abstract is not filed with the clerk of the appellate court within the time provided, the appeal shall be deemed abandoned, and the effect thereof terminated, but the trial court or the judge thereof, or the supreme court or a justice thereof, may, upon such terms as may be just, by order enlarge the time for filing the same; but such order shall be made within the time allowed to file transcript, and shall not extend it beyond the term of the appellate court next following the appeal."

Earlier in this enactment it is said:

"Upon the appeal being perfected the appellant, shall, within thirty days thereafter, file with the clerk of the appellate court a transcript or such an abstract as the law or the rules of the appellate court may require, of so much of the record as may be necessary to intelligently present the question to be decided by the appellate tribunal, together with a copy of the judgment or decree appealed from, the notice of appeal and proof of service thereof, and of the undertaking on appeal. * * *"

[1] In the present juncture there is a wealth of affidavit on both sides declaring the versions of respective counsel of what occurred in the circuit court on October 21st. With these in that respect we are not concerned as they amount to mere bickerings between court and counsel. The order above quoted, being the solemn act of a court, imports absolute verity which we cannot question. Therefore the matter must be determined by the proper construction to be given to that judicial utterance. It is contended that in fact the court made no order on the date last mentioned. But the certified exemplification before us declares in these words:

"That the court on said October 21, 1916, did order that the defendant be allowed an extension of time from day to day in this cause within which to file a transcript on appeal in the Supreme Court and to file and settle bill of exceptions herein."

It is argued that this is of no effect because made before the commencement of the thirty day period. The statute, indeed, says that such order shall be made within the time allowed to "file the transcript." This language, however, has been construed in Wolf v. City Railway Co., 50 Or. 64, 85 Pac. 620, 91 Pac. 460, 15 Ann. Cas. 1181, and in Vincent v. First Nat. Bank, 76 Or. 579, 143 Pac. 1100, 149 Pac. 938. In the latter case the court said:

"The contention made that this order can only be made after the appeal has been perfected and before the time to file the transcript has expired we think not sound. This construction is far too narrow. The context shows that it was meant that the order should be made before the time had expired to file the transcript, and not to restrict it to the time after the appeal had been perfected. We think this order was made within the proper time."

[2] Substantally the same language is used in the Wolf Case. In that instance several orders were made each before the expiration of the time specified in the one next preceding so that the time was extended on several occasions, and yet this court held that it had jurisdiction.

[3] Having shown that the order was actually made on October 21st, allowing extension of time from day to day, we next consider the effect of that order. "From day to day" means from one day to its succeeding day. 2 Words and Phrases (2d Ser.) 671. It must be held, therefore, that the court's order operated to extend the time from day No. 1 to day No. 2 and from that to No. 3, and thenceforward, and was limited only by the provision that the time shall not be extended beyond the next term of the appellate court. The order was self-executing so as to carry the time on day by day with the restriction noted. The court did not say that the time should be extended from October 21st to October 22d, in which event it would have been necessary to make a second order on the latter date and so following. But a fair construction of the judicial direction would be that without further order the time would go on day after day until it reached the legal limit noted. The effect of this is to retain within the bosom of the circuit court jurisdiction to make further order respecting the matter under consideration, provided it was made before the statutory lapse of the extension already granted.

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We come then to the force of what was done December 18th. It is urged against the order quoted that it does not enter of record nunc pro tunc the same order that the court says it made on October 21st. More concretely explained the contention is that, whereas the court should have again declared that "the time is extended from day to day" without saying more, it entered a different direction, viz. that the defendant have an extension of time to a date ten days from and after the date when the court reporter shall file extension of his stenographic notes of the testimony.

[4-6] A journal entry is the prescribed memorial of what the court actually did. It must speak the real truth. If the court did not in fact make an order on the earlier date, one cannot be supplied by any subsequent journal entry. Moreover, the authority to make an order nunc pro tunc cannot be used to amend or change the order actually made. Here, however, we have spread upon the journal on December 18th the statement that:

On October 21st the court "did order that the defendant be allowed an extension of time from day to day in this cause within which to file a transcript on appeal in the Supreme Court and to file and settle bill of exceptions herein."

By this recital written upon the journal by authority we are officially informed that the court made the order quoted. In precise words we have a memorial of what the court actually did on October 21st, and it is sufficient as a nunc pro tunc order to show that on December 18th jurisdiction to make further order respecting the time was within the breast of the circuit court. Thus empowered, the trial judge had a right to make a new order as was done in the Wolf Case differently declaring the time within which the transcript might be filed. Consequently he was within the sanction of the law when he said:

"It is hereby ordered that the said defendant have, and it is hereby granted, an extension of time to a date ten days from and after the date that the court reporter of this department shall file in this court a typewritten extension of the stenographic notes of the testimony taken at the trial of the above-entitled cause within which to file a transcript on appeal in the Supreme Court."

The quoted extract from the journal of the court operates not only as a nunc pro tunc order, but likewise as a new order further declaring the limits of time within which the transcript may be filed. Of course, all this is subject to the limitation established by the statute to the effect that the time shall not be extended beyond the succeeding term of the appellate court. Without anything further being said, the expiration of that term will automatically end the right of the defendant to file its transcript. An appeal is a remedy, and the laws and actions of courts in respect thereto should be liberally construed with a view to make the remedy effective. The circuit court evidently intended to grant an extension of time. We cannot presume that the judge arbitrarily held out allurements to the defendant as to a Tantalus, that its right to appeal should be protected, yet at the same time intending to let the privilege lapse by limitation.

We conclude then that, as a matter of fact, the court on October 21st made an order extending the time "from day to day"; that this operated without further direction of the court to continue the matter subject to the restriction prescribed by law relating to the next term of the appellate court; that the effect was to retain in the bosom of the circuit court the right to make further orders relating to the extension of time; that the journal entry of December 18th operates not only as an official statement of what was indeed transacted on October 21st, but also as a further order controlling the matter to the present time.

The motion to affirm the judgment is overruled, and the application of the defendant to cure the diminution of record is allowed.

(173 Cal. 750)

HONTZ v. SAN PEDRO, L. A. & S. L. R. CO. et al. (two cases). (L. A. 3759, 3761.)

(Supreme Court of California. Dec. 4, 1916.)

1. NEGLIGENCE ⇐=44—DANGEROUS PREMISES—DUTY TO INVITEES.

A lumber company was not under a duty to deceased, its invitee and a member of a railroad switching crew working in its yards, to maintain its premises in a perfectly safe condition, but owed him only duty of reasonable care to see that the premises were in a safe condition, and hence the maintenance of a drawbridge which leaned over railroad tracks in the yard, the dangers of which were known to deceased, did not constitute negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 59; Dec. Dig. ⇐=44.]

2. RAILROADS ⇐=278(3)—INJURY TO INVITEE—CONTRIBUTORY NEGLIGENCE.

Where an experienced brakeman and switchman, an invitee in yards of defendant lumber company, attempted to board a moving flat car in momentary forgetfulness of the known danger of a leaning drawbridge over the track, and was struck by the bridge and killed, such forgetfulness was negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 898; Dec. Dig. ⇐=278(3).]

3. RAILROADS ⇐=278(3)—INJURY TO INVITEE—CONTRIBUTORY NEGLIGENCE.

If deceased, knowing of the danger of the leaning drawbridge, took the chance that he was agile enough to board and reach the top of a moving box car before it passed under the bridge, and was struck thereby and killed, he was negligent as a matter of law.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 898; Dec. Dig. ⇐=278(3).]

4. MASTER AND SERVANT ⇐=238(3)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

When a safe way has been provided an employé for the performance of an act, and he chooses to take another and dangerous way and is injured, he is negligent as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 745; Dec. Dig. ⇐=238(3).]

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5. MASTER AND SERVANT ⟸101, 102(8)—INJURY TO SERVANT—SAFE PLACE TO WORK.
It is not the duty of an employer to furnish his employé with an absolutely safe place to work, but only to use reasonable care to make it reasonably safe in view of the nature of the employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 179; Dec. Dig. ⟸101, 102(8).]

6. MASTER AND SERVANT ⟸240(3) — INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.
If an experienced railroad brakeman and switchman after throwing a switch left his position of safety, not in the performance of any duty, and climbed on the side of a moving box car when near a leaning drawbridge which he knew came dangerously near the car and was struck thereby and killed, he took a visible unnecessary risk, and was negligent as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 753; Dec. Dig. ⟸240 (3).]

7. NEGLIGENCE ⟸101—INJURY TO SERVANT—COMPARATIVE NEGLIGENCE—STATUTE.
St. 1911, p. 796, providing that the fact an employé was negligent does not bar recovery when his negligence was slight and that of the employer was gross in comparison, had no application to a case where a railroad switchman was guilty of gross negligence in leaving a place of safety and boarding a moving box car when near to a dangerously projecting drawbridge which caused his death, and the negligence of the railroad if any was extremely slight.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164, 167; Dec. Dig. ⟸ 101.]

Department 2. Appeals from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by Edith E. Hontz, as administratrix of the estate of George A. Hontz, deceased, against the San Pedro, Los Angeles & Salt Lake Railroad Company and the Southern California Lumber Company. From a judgment for plaintiff, and from the order denying their motions for a new trial, defendants take separate appeals. Judgment and order reversed as to each appeal.

James E. Kelley and Wilfred M. Peck, both of Los Angeles (A. S. Halsted, of Los Angeles, of counsel), for appellant San Pedro, L. O. & S. L. R. Co. E. S. Williams, of Los Angeles, for appellant Southern California Lumber Co. Crouch & Crouch, of Los Angeles, for respondent.

HENSHAW, J. George A. Hontz, an experienced brakeman, in the employ of defendant San Pedro, Los Angeles & Salt Lake Railroad Company, while a member of a switching crew engaged in moving cars in the lumber yard of defendant, Southern California Lumber Company, was killed. His administratrix sued both corporations for damages. Trial before a jury resulted in a verdict in her favor. From the judgment which followed and from the order denying their motions for a new trial the defendants have taken their separate appeals. Certain of the legal questions presented upon these appeals are common to both cases. Others arising out of the fact that the deceased was the employé of one of the defendants and was but a licensee under invitation upon the premises of the other defendant are different. But as, of course, the facts in both cases are identical, the appeals for convenience may be considered together.

Deceased, as has been said, was an experienced brakeman and member of a switching crew, whose duty it was to go upon the premises of the lumber company, place empty cars at desired positions for loading in the lumber yard, and carry away onto the main line the loaded cars. The tracks of the railway company, for convenience in the handling of the lumber, were sunken below the surface of the lumber yard in a trench or pit or open subway. This was at such a depth as to bring the flat cars to about the level of the lumber yard floor, the box cars of course standing many feet above it. Across this pit was a drawbridge which, when the railroad operations were not under way, was lowered to facilitate the transportation of lumber from one part of the yard to the other. The pit extended in an easterly and westerly direction; the drawbridge in a northerly and southerly direction. It was hinged upon its southerly side and was raised to an upright position when the switching was in progress. At times it sagged somewhat and leaned a trifle out over the pit. This sagging presented no feature of peril when flat cars only were being handled, but it brought the bridge in perilous proximity to the sides of box cars. This was all known and thoroughly understood by the switching crew, including the deceased, and had been a matter of not infrequent conversation and comment between them. What may be called the main line of the switching track lay to the east of this bridge. A short distance to the west of the bridge this main line switch track forked into spur tracks known as 3 and 2. The switch which was thrown to shift the cars from one spur to the other was to the west of the bridge, and the switch bar was in a pit also to the west of the bridge, but on an open platform north of the track. The bridge at the time of the accident was raised. There was evidence that it leaned slightly toward the track. Facing east the track curved to the left hand or northerly, and one standing upon the north platform opposite the bridge was therefore visible from the engine. The switch train on spur track 3 began, under orders, to move easterly. It was composed of the engine, two flat cars, and a box car. It was to carry these cars past the switching point. The switch was then to be thrown and the cars backed down on spur track 2, where the train was to pick up other cars. The deceased, in the performance of his duty, was standing upon the open platform on the north side of the track, some distance to the west of the bridge and near to the switch pit. He

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was alone there and when the rear box car had passed the switch could have signaled to the train to stop and could have thrown the switch, thus enabling the train to back down onto the spur track 2. He was the only man there, and it is in evidence that his duty called upon him to do these things. However, for some reason utterly unexplained, as the train was thus moving slowly eastward, the deceased ran across one of the flat cars and proceeded to climb the ladder on the southerly side of the box car. It was broad daylight. Hontz had been engaged in this occupation for several months and in switching for 25 years. It was the fact, and he knew the fact, that the switching operations, so far as track 3 were concerned, were conducted from the switching lever and pit on the north platform. He knew of the bridge. Indeed, it was conspicuously before him as he stood upon the north platform. He knew that when raised it sometimes sagged or leaned forward. He had himself spoken of the danger to be anticipated from this. He had talked with other members of his crew about it. Nevertheless, under no sudden stress of excitement or fear—indeed, under no call of duty—he left this position of absolute safety, where he both could signal to the engineer and throw the switch, and attempted to climb up the ladder of the box car which was moving toward the bridge. The foreman of the switching crew, who was present and in charge of the crew, and who last saw the deceased upon the north platform, declared that:

"There was no duty I could conceive or that I knew of that called upon Mr. Hontz at the time of the accident or immediately before to be on the south platform of track No. 3."

Hontz himself gave the signal that set the train in motion. He was at that time standing approximately 80 feet west of the switch. Thereafter he must have crossed to the south side over a moving loaded flat car and then have essayed to climb the ladder of the box car which was upon the south side of that car at the end nearest to the bridge. His distance from the bridge when he made this attempt necessarily was much less than 80 feet. He had not reached the top when he was struck by the leaning bridge and killed.

Los Angeles No. 3761.

[1-3] Appellant contends that absolutely no negligence upon its part is shown in this case; that even if the raised drawbridge could be said to be a danger, it was, first, an obvious danger well known to deceased, and, second, it was only a danger to one recklessly attempting to mount to the top of a box car under the circumstances here presented, and appellant owed him no duty other than to exercise reasonable care and caution to see that the premises were in safe condition. Schmidt v. Bauer, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580; Means v. Southern Cal. Ry. Co., 144 Cal. 473, 77 Pac. 1001, 1 Ann. Cas. 206. So unanswerable is this that the case of the lumber company may well be rested upon this single proposition and a reversal ordered accordingly. For it was not incumbent upon this appellant to maintain its premises in a perfectly safe condition, and conceding that the drawbridge presented a danger, it was a danger known to the deceased—a danger whose risk he accepted and a danger for which injury could befall him only because of his own heedlessness. But even if it be assumed, as for the purposes of the consideration to follow, it will be assumed, that the lumber company was negligent in the maintenance of this bridge, still it must be equally clear that deceased's negligence, amounting to recklessness, was a direct and contributing cause to his death. Of course, as against this, respondent presents the familiar argument that the question whether or not one has been guilty of contributory negligence is usually a question of fact for the jury, and that in this case it was for the jury to say whether or not the deceased was so guilty. It is quite natural, indeed it is necessary, that this contention should be advanced. But if, in cases such as this, it is to be said that the question of contributory negligence is one of fact, it is extremely difficult to conceive of a case where it could be one of law. Here the material facts are absolutely without conflict, and it is impossible to see how a rational mind can from that evidence draw any other conclusion than that the uncalled for action of this experienced brakeman in thus running a race with the moving train to reach the top of this car—an act which from all the evidence it was wholly unnecessary for him to perform—could be anything but negligence. Omitting from consideration the untenable proposition that the deceased's act was prompted by a desire for self-destruction, only one of two other views is at all possible. He either attempted to mount the box car in momentary forgetfulness of the presence of the drawbridge, with which he was familiar and which a few moments before was confronting him, or, with memory of the situation, he took the chance and risk that he was agile enough to reach the top of the car before its ladder passed under the drawbridge. Respondent contends for both propositions and insists further that the question whether the deceased was negligent, if he made the attempt under either view, was a problem to be resolved by the jury. Touching momentary forgetfulness, respondent concedes the general rule to be, as unquestionably it is, that such forgetfulness is in and of itself contributory negligence. But it is sought to place this case within the category of exceptions to this general rule—as in a case where the contributory negligence of a trainman was held to be a matter of fact for the jury when the man was injured by climbing the ladder of a car and was injured by

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a cattle chute which the train was passing. But in that case the court, indulging in some general discussion as to whether or not as matter of law such a trainman should be charged with the duty of carrying in his mind every real and possible danger along a main line track, rested its decision upon the proposition that it was debatable under the evidence whether the injured man knew of the danger, and approved an instruction to the following effect:

"But if, on the contrary, you find that he did not know of this structure and its risks, and did not have sufficient means of knowledge so as to charge him with the consequences of actual knowledge—in other words, that the structure was unknown to him, and he had not sufficient opportunity to learn of it, and the danger that it occasioned to operatives—then you ought to find for the plaintiff." Dorsey v. Phillips & Colby Con. Co., 42 Wis. 591.

Such reasoning manifestly can have no applicability to the case at bar. Nor can the case of Jacobson v. Oakland Meat, etc., Co., 161 Cal. 430, 119 Pac. 655, Ann. Cas. 1913B, 1194, upon which also respondent relies. The general rule is there declared that momentary forgetfulness is no excuse. The cases so holding are cited, and the Jacobson Case is differentiated and distinguished from them in the following language:

"Undoubtedly there was one element in all of those cases which is missing in this one, and that is the plaintiff's familiarity with the danger which he forgot. Plaintiff in this case had relied on his understanding with Monson that the guard would be replaced, and lulled by his confidence in the performance of a clear duty by his superior [officer] had forgotten its removal."

But that the Jacobson case was not pronouncing and was not meant to pronounce any different rule from the familiar one is made manifest by the later cases of Ergo v. Merced Falls Gas & Elec. Co., 161 Cal. 334, 119 Pac. 101, 41 L. R. A. (N. S.) 79, Brett v. Frank & Co., 162 Cal. 735, 124 Pac. 437, and Reynolds v. Los Angeles Gas & Elec. Co., 162 Cal. 327, 122 Pac. 962, 39 L. R. A. (N. S.) 896, Ann. Cas. 1913D, 34.

Upon the second proposition respondent contends that if the deceased took the chance and risk, it was still for the jury to say whether he was negligent in so doing. Herein respondent argues that it would not be disputed that "if a man was a quarter of a mile away in boarding the train, under such circumstances he would be in the exercise of ordinary care," and that therefore whether he was in the exercise of such care, having boarded it at a lesser distance from a known danger, was a matter of fact for the jury. The argument is self-destructive. If he boarded the car at a distance that made it safe for him to do so, neither he nor the lumber company was guilty of any negligence. If he boarded it at a distance which entailed risk, then manifestly this was his negligence, since he knew that risk and took the chance of avoiding it. For it is to be borne in mind that it was no call of duty which put the deceased under any compulsion to do the act which caused his death.

[4] It is a universal principal that when a safe way has been provided for an employé for the performance of an act, and another and dangerous way exists, if the employé chooses to take the dangerous way and is injured he is guilty of contributory negligence as matter of law. Kenna v. Central Pac. R. R. Co., 101 Cal. 26, 35 Pac. 332; Douglas v. Southern Pac. Co., 151 Cal. 242, 90 Pac. 538; Richmond, etc., Co. v. Bivens, 103 Ala. 142, 15 South. 515. Directly in point upon this proposition is the case of Ramsay v. Eddy & Sons, 123 Mich. 158, 82 N. W. 127. It is unusual to find a case which so closely parallels a case at bar. In that case, quoting from the syllabus:

"Lumber in defendant's yard was piled close to the railroad track, leaving only a small space between it and the sides of passing cars, and plaintiff, an experienced brakeman and switchman, threw the switch to enter the yard, and climbed on the side of the car when it was within a short distance of the lumber, and was injured by being crushed between the car and the lumber."

It was held that he was guilty of contributory negligence as matter of law. Such, also, is the declaration in Baugham, Plaintiff in Error, v. N. Y., P. & N. R. R. Co., 241 U. S. 237, 36 Sup. Ct. 592, 60 L. Ed. 977. In that case the deceased was a brakeman, between 18 and 20 years of age. On the second day of his employment, while mounting a freight car that was being transferred from the wharf of the company to a barge moored at the wharf he was killed by being crushed between that car and other cars upon the barge. The car tracks on the barge converged. By reason of this convergence the moving cars came in close and deadly proximity to each other. It was under these circumstances that deceased was caught and killed. The company pleaded as special defenses that the deceased was guilty of contributory negligence and had assumed the risk. The trial court held as matter of law that these pleas were well taken, and the judgment of the trial court was affirmed by the Supreme Court without dissent.

It follows herefrom that the judgment and order against the appellant Southern California Lumber Company must be and is hereby reversed.

Los Angeles No. 3759.

[5] This is the appeal of the railroad company, the employer of the deceased. The only circumstance differentiating this case from the appeal of the lumber company arises from the fact that the deceased was in the employ of this appellant. Touching the duty of the employer to furnish this employé with a safe place to work, it should be unnecessary to point out that this duty bears intimate relation to the nature of the work itself. It is not a part of the duty of the employer to furnish his employé with an absolutely safe place to work. It is to be rea-

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sonably safe so far as reasonable care can make it in view of the nature of the employment. Here the employé had an exceptionally safe place for the performance of his duties. He could throw the switch from the north platform. He could have crossed over to the south platform by way of the flat cars, or crossed the pit after the cars had passed, or he could have mounted a flat car and remained thereon until the train was brought to a stand beyond the bridge. He was under no compulsion of duty, as has been said, to climb the box car ladder. This appellant was therefore not negligent, but upon the other hand the deceased took a visible, obvious, and unnecessary risk from which his death resulted. To the authorities above cited upon this proposition may be added Kanawha & Mich. R. R. Co. v. Kerse, 239 U. S. 576, 36 Sup. Ct. 174, 60 L. Ed. 448; Reese v. Phil. & Reading R. R. Co., 239 U. S. 463, 36 Sup. Ct. 134, 60 L. Ed. 384; Jacobs v. Southern Ry. Co., 241 U. S. 229, 36 Sup. Ct. 588, 60 L. Ed. 970.

[6, 7] Something is said in respondent's brief touching the applicability to the facts of this case of the Roseberry Act. Stats. 1911, p. 796. The particular provision relied upon is that:

"The fact that such employé may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross in comparison."

It is clear that this provision can have no applicability where, if the employer was guilty of negligence at all it was extremely slight as compared with the very gross negligence of the employé.

It follows herefrom that the motions of this appellant for nonsuit and for a directed verdict should have been granted, and that the verdict rendered by the jury does violence to the instructions which the court gave to the jury, and is therefore against law. Declez v. Save, 71 Cal. 552, 12 Pac. 722.

The judgment and order appealed from are therefore reversed.

We concur: MELVIN, J.; LORIGAN, J.

(173 Cal. 765)

STRAND IMP. CO. v. CITY OF LONG BEACH. (L. A. 3750.)

(Supreme Court of California. Dec. 9, 1916.)

1. JUDGMENT ⇐567—CONCLUSIVENESS—TITLE TO LAND.

A judgment by a court having jurisdiction of the city, entered by consent in an action against the city to quiet title, which declared plaintiff therein owner of land claimed by the city by virtue of an alleged dedication for public use, was as conclusive to establish title in fee in the plaintiff as if the city had held the land in its proprietary capacity, or as a natural person, even if erroneous in point of law, and bars both the city and the state.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1011, 1012; Dec. Dig. ⇐567.]

2. ATTORNEY AND CLIENT ⇐70—AUTHORITY OF ATTORNEY—PRESUMPTION.

In the absence of evidence of fraud or want of authority, the authority of an attorney is presumed.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 95; Dec. Dig. ⇐70.]

3. NAVIGABLE WATERS ⇐44(3) — GRANT BY STATE—PROPERTY CONVEYED.

St. 1911, p. 1304, by which the state granted to the defendant city all tidelands and submerged lands, whether filled or unfilled, within the present boundaries of the city, and situated below the line of mean high tide, in trust for purposes of navigation, being a present grant and referring to conditions existing in 1911, did not convey to the city land claimed by plaintiff, consisting of accretions between the time of the issue of patent to an adjoining ranch and the grant of 1911 to the city and lying above the mean high tide line in 1911, and the city, having no title, is not prejudiced by a prior judgment that plaintiff is the owner of the land in fee.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 270, 277, 281; Dec. Dig. ⇐44(3).]

4. NAVIGABLE WATERS ⇐44(1)—ALLUVION—STATUTES—SEASHORE.

Civ. Code, § 1014, establishing the law on the subject of alluvion in rivers, but not purporting to apply to alluvion on the seashore, cannot be so extended by construction, either under the maxim, "expressio unius exclusio est alterius," or under section 4, declaring that the rule of common law that statutes in derogation thereof are to be strictly construed has no application to this Code, and that the Code establishes the law respecting the subject to which it relates, and is to be liberally construed.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 266, 271, 278, 281; Dec. Dig. ⇐44(1).]

5. NAVIGABLE WATERS ⇐44(3)—ALLUVION—COMMON LAW—SEASHORE.

In view of Pol. Code, § 4468, declaring that the common law shall be the rule of decision where not repugnant to Constitution or statutes, and the absence of state law providing for the ownership of alluvion and accretions on the seashore, the upland owner of land abutting on the ocean is entitled to additions by alluvion or accretions.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 270, 277, 281; Dec. Dig. ⇐44(3).]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by the Strand Improvement Company against the City of Long Beach. From an order denying its motion for new trial, defendant appeals. Affirmed.

W. H. Jamison and Anderson & Anderson, all of Los Angeles, and Stephen G. Long, of Long Beach, for appellant. Joseph H. Call, and Call, Variel & Call, all of Los Angeles (John E. Daly, of Long Beach, on the brief), for respondent. William, Goudge & Chandler, of Long Beach, amicus curiæ.

SHAW, J. The defendant appeals from an order denying its motion for a new trial.

The case concerns the ownership of a parcel of land in the city of Long Beach situated on the sand beach above the line of ordinary

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high tide, and between that line and a bluff a few hundred feet north of it, near the ocean front. Two main questions are presented by the appellant in opposition to the claims of the plaintiff. The first question is whether or not the particular tract in controversy was dedicated to public use as a street, park, or pleasure ground by the former owners of the property and is still subject to such use. The second question is whether or not the doctrine that land added to the upland by accretion, or alluvion, applies to land bordering upon the ocean.

1. The asserted dedication to public use is based on a map filed for record in 1882 by the former owners, showing a survey and subdivision into blocks, lots, streets, and alleys of a large tract of land now comprising a part of the city of Long Beach. The land was a part of a Mexican grant patented by the United States and known as Rancho de Los Cerritos, bounded on the south by the Pacific Ocean. The southern boundary of the map was a reproduction of the meander line of the United States patent, surveyed to indicate the approximate position of the line of ordinary high tide forming the real boundary of the rancho. The line of actual high tide was not shown. Between this meander line and the southern lines of the tier of blocks nearest to it the map showed a space of irregular width, varying, according to the map scale, from 200 to 300 feet. Along this space there was a crooked line from 120 to 200 feet, by the scale, south of the south lines of the first tier of blocks. The map did not contain any legend or words denoting the purpose of this line. There was parol evidence that it was intended to indicate the line of a bluff 15 to 20 feet high extending along the ocean front north of the land in controversy. In the space between this bluff line and the tier of blocks there were the words "Ocean Park Avenue." Nothing further appears that tends to define the width of the space intended to be embraced in Ocean Park avenue, except a note on the margin that, "All streets running east and west are 80 ft. wide." As all the other east and west streets are denominated "streets" and the one in question as an "avenue," the map leaves the width of the avenue in doubt.

The contention of the city is that the filing of this map and the sale of lots referring to it, by the owners of the subdivision, under whom the plaintiff derives its title, operated as an offer to dedicate to public use, as a street and park, or pleasure ground, the whole of the space between the front tier of blocks and the line of ordinary high tide. In March, 1886, before the incorporation of Long Beach, the board of supervisors of the county passed a resolution that the "streets and alleys" in Long Beach shown on this map, "are hereby declared public highways." It is claimed that by this offer and acceptance the space above described became dedicated to the aforesaid public use. The city of Long Beach was incorporated in February, 1888. Soon afterwards the same claim was made by the city against the Long Beach Land & Water Company, the predecessor in interest of the plaintiff, and who then held the record title to the space in question. The company claimed that the dedication included only a strip 100 feet wide, adjoining the lines of said tier of blocks.

Said company, in February, 1889, began an action in the superior court of Los Angeles county against the city of Long Beach to quiet its title, alleged to be in fee simple, to all of the space between said tier of blocks and the ocean, except the strip 100 feet wide, which it designated as Ocean Park avenue. After this action was begun the dispute was settled by agreement between said company and the city, whereby the city was to abandon the claim that the entire space, or any more than the northerly 100 feet of it, was dedicated to public use, and the company was to convey to the city certain strips of land between the 100-foot street and the bluff, to be used as a public park or pleasure grounds, and not to be obstructed by structures which would cut off the view of the ocean from the front lots in said tier of blocks. This agreement was not in writing, and it was not directly proven, but it is fairly inferable from the evidence. In pursuance of this settlement, the city, by its attorneys, appeared in the action and filed an answer disclaiming any interest in the land claimed in the complaint, and stipulating that judgment might be given for the plaintiff. Judgment was thereupon entered on May 13, 1889, declaring that the said company was the owner in fee of all of the space between said 100-foot street and the ocean and quieting its title thereto against all claims of the city for public purposes or otherwise. On the same day the said company executed to the city a deed purporting to convey to it, upon the conditions above stated, the strips of land above mentioned lying between the street and the bluff. Thereafter the company continued to assert title to the land, except that conveyed by it to the city, and has conveyed parcels of it to divers persons who have used the same for private purposes exclusively. The plaintiff has succeeded to one of these parcels, being the land here in controversy.

[1] The judgment is a determination, conclusive upon the city and the public, that the land in question is free from public use, and that it then belonged to the Long Beach Land & Water Company, to whose title plaintiff has succeeded. A judgment by a court having jurisdiction of the city as one of the parties operates to divest the public use and establish title in fee in the plaintiff, as fully as if the city held the land in its proprietary capacity, or as if it were a natural person, and even if the judgment is erroneous in point of law, upon the facts shown. It bars both

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the city and the state. People v. Holladay, 93 Cal. 251, 29 Pac. 54, 27 Am. St. Rep. 186; San Francisco v. Holladay, 76 Cal. 22, 17 Pac. 942; People v. Smith, 93 Cal. 490, 27 Pac. 57, 247.

[2] The attack on the judgment was on the ground that it was obtained by fraud, and was given on the consent of attorneys who had no authority from the city. There was no evidence of fraud, nor of the want of authority of the attorney. In the absence of such evidence, the authority of the attorney is presumed. The objections on these grounds are completely answered by the decision in Carpentier v. Oakland, 30 Cal. 446. See, also, Deegan v. Deegan, 22 Nev. 197, 37 Pac. 360, 58 Am. St. Rep. 742; Wandling v. Straw, 25 W. Va. 708; 1 Freeman on Judgments, § 128; Code Civ. Proc. § 283.

[3] 2. The court found that the land claimed by the plaintiff consists of accretions along the seashore made since the year 1882. The evidence indicates that the land lies south of the high tide line as it existed in 1867 when the Cerritos rancho was patented. By the act of May 1, 1911 (Stats. 1911, p. 1304), the state granted to the city of Long Beach "all the tidelands and submerged lands, whether filled or unfilled, within the present boundaries of said city, and situated below the line of mean high tide of the Pacific Ocean," in trust for purposes of navigation. The city claims title under this grant. Counsel assert the doctrine that the patent for the Cerritos rancho, although it established the line of mean high tide as the southern boundary thereof, granted only the lands lying north of said tide line as it was then situated; that all lands then lying below mean high tide line were the property of the state; that accretions subsequently formed, or, in any event, all that have been formed along the ocean front since the adoption of section 1014 of the Civil Code in 1872, remain the property of the state, and did not become the property of the owner of the adjacent upland, and that the grant from the state to the city in 1911, included not only the land lying below said tideland at that time, but also all of the land that lay below said line in 1872, and since then converted into upland by accretions or alluvion.

It must be admitted that the language of the granting act does not have that effect. It purports to be a present grant and to refer to conditions existing in 1911, and it is limited to lands "situated below the line of mean high tide of the Pacific Ocean." This means the line as it was situated at that time. The land claimed by plaintiff was then situated above the mean high tide line, and it was therefore not included in the grant to the city from the state. If the city has no title, the judgment that the plaintiff is the owner of the land in fee is not prejudicial to the city. The state alone could complain, if it has any right or interest under the doctrine above referred to, and it is not a party to the action. This action was begun on May 23, 1911, three weeks after the passage of the act granting the tidelands to the city. The evidence shows that no accretions were made in the interval.

There was evidence showing that after the action was begun and before the trial was ended accretions were made adding several feet to the land above mean tide line. The judgment was entered on January 6, 1913. It declares the line of mean high tide to be the south boundary of the land adjudged to plaintiff. It, therefore, becomes necessary to determine whether accretions formed since the passage of the act of May 1, 1911, belong to the plaintiff or to the city.

The claim of the city to such accretions is based entirely on the proposition that the law of this state is that land formed by alluvion along the shore of the sea does not belong to the owner of the adjoining upland, but remains the property of the state in virtue of its sovereignty, as it was while the tides flowed over the space covered by the alluvion. The proposition, considered in the light of its practical application and consequences, is certainly a most extraordinary one. California has more than 1,000 miles of seashore to which land is continually being added by alluvion, and from which land is continually being taken away by reliction. The actual line of mean high tide, as it existed when the state was formed, or as it was in 1872, when the Civil Code was enacted, has never been surveyed, and in places where relictions or alluvions have changed the shore line, the original line is unknown, and cannot be ascertained with any degree of certainty. If the doctrine is correct, the state is the real owner of innumerable parcels of land added to the shore by alluvion which hitherto have been supposed to belong to the respective owners of the upland to which they have been added, and the boundaries of which cannot now be ascertained. It is not difficult to see that great uncertainty, confusion, and much litigation would ensue if such doctrine were established and enforced.

The proposition is contrary to the great weight of authority. The act of April 13, 1850, declared that the common law of England shall be the rule of decision in this state, where it is not repugnant to the federal or state Constitution or to the statutes of the state. Stats. 1850, c. 95. This provision is now a part of our Political Code. Section 4468. The law of alluvion is thus stated by Blackstone:

"And as to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make terra firma, or by dereliction, as when the sea shrinks below the usual water marks; in these cases the law is held to be that if the gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For 'de minimus non curat lex'; and besides, these

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owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss." 2 Bl. Com. 262.

This is practically the universal rule. 3 Wash. Real Prop. (6th Ed.) § 1884, p. 74; 1 Am. & Eng. Ency. of Law, 468; Camden, etc., Co. v. Lippincott, 45 N. J. Law, 410; Mulry v. Norton, 100 N. Y. 434, 3 N. E. 581, 53 Am. Rep. 206; Shively v. Bowlby, 152 U. S. 35, 14 Sup. Ct. 548, 38 L. Ed. 331; St. Clair v. Lovingston, 90 U. S. (23 Wall.) 57, 23 L. Ed. 59; Hagan v. Campbell, note, 33 Am. Dec. 277. There is a statement of Chancellor Kent that land gained by accretion belongs, "in the case of the sea or navigable rivers, to the sovereign." 3 Kent, Com. 428. This is part of a passage defining the law of accretion. It is directly contrary to the cases cited by the author to support it. In a footnote to the fourteenth edition, Mr. Gould, the annotator, cites Zeller v. Southern Yacht Club, 34 La. Ann. 837, as sustaining the doctrine. The opinion in that case is not clear on the question whether the land in controversy was upland made by accretion, or was land under the waters of Lake Pontchartrain. So far as it refers to the right to accretions, it appears to be based on the authority of article 510 of the Louisiana Civil Code, which it gives as declaring that the right of the upland owner to land left dry by derelictions "does not take place in case of derelictions of the sea." That state has not, so far as we are aware, adopted the common law. The case is therefore, not in point here. It is contrary to all common-law authority.

[4] The city relies on the application of the maxim, "Expressio unius exclusio est alterius," to section 1014 of the Civil Code. This section is as follows:

"Where, from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank."

The argument is that since this section mentions the banks of a "river or stream," and does not mention the seashore, it must be taken as abrogating the common law, so far as alluvion upon the seashore is concerned. This theory would make an omission to say anything on a subject operate as an affirmative declaration repealing an existing law on the subject not mentioned. We do not think the rule of construction relied on should be carried so far in this case, if, indeed, it could be done in any case. The doctrine that the right to alluvion exists in the owner of the seashore, as well as elsewhere, has been recognized in our decisions. Dana v. Jackson St. W. Co., 31 Cal. 120, 89 Am. Dec. 164; Wright v. Seymour, 69 Cal. 126, 10 Pac. 323. The United States Circuit Court of Appeals seems to have reached the conclusion that section 1014 covered the entire law of the state on the subject of alluvion, that it was exclusive in its character, and that it abrogated the common law of alluvion as applied to the seashore, in its decision in Western Pac. Ry. Co. v. Southern Pac. Co., 151 Fed. 397, 80 C. C. A. 606. This conclusion was founded upon section 4 of the Civil Code, declaring that:

"The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed, with a view to effect its objects and to promote justice."

Doubtless section 1014 establishes the law of this state on the subject of alluvion deposited in rivers and streams. But that section does not purport to establish the law with regard to alluvion on the seashore, nor to declare that neither alluvion, nor the rights growing out of it by the common law, shall exist on land abutting upon the ocean. There is nothing in section 4, nor in the maxim above mentioned, that requires that section 1014 should be given that effect. We do not approve the construction given to it in the above-cited case.

[5] Our conclusion is that the right of the upland owner to additions to his land by alluvion or accretions exists where the land abuts upon the ocean, and that section 1014 of the Civil Code has no application to alter the common-law rule in that respect.

There are no other points that require notice or affect the merits of the case.

The order is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; LAWLOR, J.

(173 Cal. 787)

CITY OF SACRAMENTO v. PACIFIC GAS & ELECTRIC CO. (Sac. 2275.)

(Supreme Court of California. Dec. 12, 1916. Rehearing Denied Jan. 11, 1917.)

1. HIGHWAYS ⟸153 — OBSTRUCTION — CONVENIENCE.

No argument of convenience nor even of necessity justifies an unauthorized obstruction or interference with free use by the public of one of its highways, but such obstruction can be based only on legal right.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 299, 417, 419; Dec. Dig. ⟸153.]

2. STREET RAILROADS ⟸28(4) — STREETS — FRANCHISES—CONSTRUCTION.

Where a franchise to one corporation authorized construction of tracks east on K and south on T. street, and another franchise to a different company authorized construction west on K and north on T. streets, although the franchises were afterwards acquired by a single company, and although both included the power to build "all necessary or convenient tracks for curves, turnouts, switches, side tracks, stations, turntables and appendages" the company had no right to construct a straight track across K

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street connecting the two branches on T. street, since a grant of franchise must be strictly construed and fair doubt resolved in favor of the public.

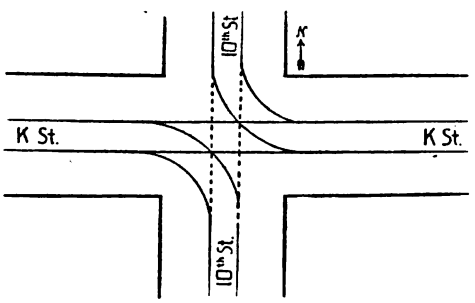
[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 61, 65; Dec. Dig. ⟸ 28(4).]

Department 2. Appeal from Superior Court, Sacramento County; N. D. Arnot, Judge.

Injunction by the City of Sacramento against the Pacific Gas & Electric Company. Decree for complainant, and defendant appeals. Affirmed.

Wm. B. Bosley and Thos. J. Straub, both of San Francisco, and L. T. Hatfield, of Sacramento, for appellant. Archibald Yell, R. T. McKisick, and V. A. McGeorge, all of Sacramento, for respondent.

HENSHAW, J. The appellant, operating an electric street railway in the city of Sacramento, undertook to construct across K street in that city two tracks, directly connecting its existing tracks on Tenth street, which extended north and south from K street. The accompanying diagram will facilitate an understanding of the situation:



[1] K street extends east and west, and upon it, across Tenth street, defendant has for many years operated its railway. Approaching Tenth street along K from the west there is at Tenth street a curve to the right and southerly, whereby cars on K street may be and are diverted to Tenth street and run southerly thereon. As defendant's street cars reach Tenth street on K from the east, similar curves bear off to the right hand and northerly, whereby the K street cars are diverted onto Tenth street north of K street. These street car tracks are indicated upon the diagram in solid black lines, a single line in each instance for convenience in delineation, representing two tracks. Over the right of defendant to maintain these tracks there is no controversy. Defendant undertook to make a direct connection across K street for its lines on Tenth street. That portion of the new track which it designed to build and was in process of building to accomplish this direct connection is indicated by the dotted lines. This work was arrested by this action in injunction brought by the city of Sacramento. It prevailed, and defendant has taken this appeal. Appellant insists that it has the legal right to construct this disputed portion of the track. It repudiates the suggestion that its argument is more one of convenience than of right, but it is undoubtedly true that running through its argument, like an accompaniment to a theme, is the contention adverted to. Thus it is said that appellant can and does transfer its cars from North Tenth street to South Tenth street, or vice versa, by the cumbrous method of running them onto K street, backing them across K street to the curve upon the other side of the street, and then turning them down that street, that the intersection of Tenth and K streets is a busy and populous center of traffic, and that it would be much more expedient for the appellant, much more convenient for the traveling public, and a much more expeditious way of clearing the interruption to travel occasioned by the presence of these cars to permit the direct crossing. However, as it is only in this inferential way that appellant advances the argument of convenience, it is sufficient to say that, so far as any such use of a public street is concerned, the only reasoning to which a court can listen is reasoning based on legal right. No argument of convenience nor even of necessity justifies an unauthorized obstruction on or unauthorized interference with the free use by the public of one of its highways, and all such arguments are to be addressed to the lawmaking power. Omnibus R. R. Co. v. Baldwin, 57 Cal. 160; Amestoy v. E. R. T. Co., 95 Cal. 311, 30 Pac. 550; City Store v. San Jose, etc., Co., 150 Cal. 277, 88 Pac. 977; Davis v. Mayor of New York, 14 N. Y. 506, 67 Am. Dec. 186; Commonwealth v. Vermont & Mass. R. R. Co., 4 Gray (Mass.) 22; L. & N. R. R. Co. v. Mobile, Jackson, etc., Co., 124 Ala. 162, 26 South. 895; Burlington v. Penn. R. R. Co., 56 N. J. Eq. 259, 38 Atl. 849; Fanning v. Osborne, 102 N. Y. 441, 7 N. E. 307; Bangor v. Traction Co., 147 Mich. 169, 110 N. W. 490, 7 L. R. A. (N. S.) 1187, 118 Am. St. Rep. 546, 11 Ann. Cas. 293; Edmonds v. Baltimore & Potomac R. R. Co., 114 U. S. 453, 5 Sup. Ct. 1098, 29 L. Ed. 216; Joyce on Nuisances, § 246; Dill. Mun. Corp. (5th Ed.) § 1244; Elliott, Roads and Streets, § 1046.

[2] We come then to a consideration of the asserted right of the defendant to lay the tracks in question. It is said that this right exists by virtue of a grant contained in two ordinances of the city. By the first of these the predecessors in interest of appellant were empowered to construct the existing double-track street car line which extends along K street, across Tenth, and thereon easterly. They were also empowered to build and operate the existing line from Tenth and K connecting with the existing line on K, thence at Tenth street southerly along Tenth street, and in connection with the construction and operation of this system were empowered to build "all necessary or convenient tracks for curves, turnouts, switches, side tracks, stations, turntables and appendages."

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By the second ordinance the predecessor in interest of appellant was authorized to operate electric cars on K street westerly "to a connection with the tracks of the Central Electric Railway Company at the intersection of K street and Tenth street, thence on Tenth street to a connection with the tracks of the Central Electric Railway Company on J street," etc. This is the connection indicated upon the diagram by the northerly curve. The franchise grants contained in these ordinances, it is to be noted, were grants not to the same, but to different persons or corporations. The power conferred by them was exercised to the extent indicated in the construction of the curves leading into the tracks to the north and south on Tenth street. The single question is whether those ordinances, separately or together, granted the right to build the straight track across K street on Tenth, and the question, we think, relieved from the pressure of the argument of convenience, is an extremely simple one which must be answered in the negative. Clearly by none of the language used in either ordinance is the right and power to do this thing directly declared and granted. Appellant finds that power in the use of the word "appendages." That word is employed in the second ordinance in precisely the same manner as it is used in the first ordinance where its context is quoted. Appellant argues that, since it can in fact transport its cars on Tenth street to the north or south of K street by the cumbrous method of switching, the direct cross-track to accomplish the same result comes justly within the meaning of the word "appendage." But is this so? A reading of the ordinances discloses that they are drawn with particularity. The routes are carefully defined. The franchises which they granted were given to different persons at different times. There is, as has been said, nothing in either of them which specifically authorizes a line of railroad directly across K street, and yet one would certainly look for such an authorization to be expressly given. Moreover, the circumstances under which the franchises themselves were given are repellant to this suggestion. By the first the cars were authorized to run easterly to K street and then southerly down Tenth. By the other they were authorized to run westerly on K street and then northerly on Tenth. The fact that by subsequent purchase or traffic arrangement the control of these various lines has come into a single hand of course cannot operate to modify or control the terms of the grant. And, finally, if doubt can be entertained upon the proposition, and it is certainly little enough to say that doubt can be entertained, that doubt, under all the authorities and under every principle governing the interpretation of such grants, must be construed in favor of the sovereign—the granting power—whose mandatory the city of Sacramento is.

"A grant of a franchise to construct and operate a railroad or other utility in the street is to be strictly construed, and, in cases of a fair doubt, in favor of the public as against those claiming under the grant." Dill. Mun. Corp. (5th Ed.) § 1233.

"The grant to a railway company of a right to occupy a street, whether by ordinance or by charter, must plainly appear. It should not be left to implication from general language which does not clearly show an intent to give the permission." Chicago, etc., R. R. Co. v. Chicago, 121 Ill. 176, 11 N. E. 907.

And without multiplying quotations upon so well-settled a proposition, suffice it to cite Hannibal & St. Joseph Ry. Co. v. Mo. River Co., 125 U. S. 260, 8 Sup. Ct. 874, 31 L. Ed. 731; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. Ed. 773; Strawbridge Canal v. Wheeley, 23 B. & A. 794; Dubuque, etc., Ry. Co. v. Litchfield, 64 U. S. (23 How.) 66, 16 L. Ed. 500; Fertilizing Co. v. Hyde Park, 97 U. S. 666, 24 L. Ed. 1036.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(173 Cal. 733)

TURNER v. TURNER et al. (L. A. 3757.)

(Supreme Court of California. Dec. 12, 1916. Rehearing Denied Jan. 11, 1917.)

1. PLEADING ⟸53(2)—INCONSISTENCY.

Where the divorced wife sued in two counts, one of which alleged a fraudulent deed made by the husband, during the community, of community property to two sons, and sought recovery of one-half of such property, and the other alleged that one of the sons, subsequent to the death of the other, fraudulently secured a deed from the plaintiff of her interest in the property and sought recovery of an undivided half of the son's share, though the second count was not consistent with the first, such pleading was not improper, and plaintiff could, before trial, withdraw the first count, in the absence of evidence to support it, and still recover on the second.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 114-117; Dec. Dig. ⟸53(2).]

2. DEEDS ⟸58(1)—REQUISITES OF DELIVERY —DEEDS TO INFANTS.

A deed to an infant requires no delivery to or acceptance by the grantee, and delivery to a third person for his benefit is sufficient to vest title.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 130, 133, 135; Dec. Dig. ⟸58(1).]

3. DEEDS ⟸208(1) — DELIVERY — EVIDENCE —SUFFICIENCY.

Where the grantor of land to infant grantees delivered the deed to a notary and subsequently, in petition for letters of administration upon the estate of one grantee, the grantor expressly stated that the estate consisted of an undivided half of the land deeded, there was ample evidence to support a finding of delivery of the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625, 630; Dec. Dig. ⟸208(1).]

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Department 2. Appeal from Superior Court, Inyo County; William D. Dehy, Judge.

Suit by Anna Turner against J. S. Turner, for himself and as administrator of the estate of Edgar M. Turner, and George W. Turner. Judgment for complainant, and defendants appeal. Affirmed.

S. E. Vermilyea, S. L. Carpenter, and Wm. B. Himrod, all of Los Angeles, for appellants. Wm. Lair Hill and James P. Montgomery, both of Oakland, and Frank C. Scherrer, of Independence, for respondent.

HENSHAW, J. Plaintiff alleged that for many years prior to 1889 she had been the wife of defendant J. S. Turner. In that year they were divorced, the divorce decree containing no adjudication of property rights. She took upon herself the custody, care, and support of two daughters of the marriage, and the husband took upon himself the like custody, care, and support of two other daughters and two sons, Edgar M. and George W. During the existence of the community and before the divorce much community property had been accumulated. In 1882 the husband secretly conveyed a ranch known as the Howard ranch to the two infant sons, Edgar M. and George W. In 1894 the son Edgar M. died intestate. He had attained his majority. He was childless, unmarried, and his heirs at law were his father and his mother. His estate consisted of an undivided one-half of the Howard ranch, the other moiety of which was owned by his brother, defendant George W. Turner. J. S. Turner, the father, sued for and obtained letters of administration upon the estate of his deceased son, and in the course of administration caused to be filed his verified inventory and appraisement of the property of the estate, wherein it was shown that the only property was an undivided one-half of the Howard ranch. In October, 1904, the defendant George W. Turner, who had attained his majority, executed to his father his deed of grant, bargain and sale, conveying to him all of the Howard ranch. This son had been brought up by his father, and for many years had never seen nor communicated with his mother. She was 62 years old and stricken with poverty, and was compelled to support herself by laboring from day to day in the most humble and menial employments. In October, 1909, her son, the defendant George W. Turner, called upon her in Stockton, Cal., where she was residing. He greeted her with manifestations of fond affection, expressed the most ardent filial love for her, deplored her impoverished condition, and urged her to make a deed to him of her interest in the Howard ranch, in consideration of which and of his love and pity for her he would contribute to her support during the remainder of her life. Under these circumstances she executed the deed which he had prepared. He gave her $50 and went his way. She has never seen him since, nor has he ever contributed anything to her support. The falsity of these representations of love and affection are averred, and it is charged that the son, under the influence of his father, designedly and fraudulently, and in conspiracy with his father, took these means to induce the ignorant, fond, and confiding mother so to part with her land. Another phase of this complaint charged that the execution of the deed by defendant J. S. Turner to his infant sons made during the coverture of the parties was fraudulently designed and executed to deprive plaintiff of her share of the community property. A decree was sought, establishing all of these things and seeking an award to the plaintiff of her share of the community property and of its rents, issues, and profits. When the cause came on for trial the plaintiff's attorneys announced their abandonment of all the contentions going to the nature and extent of the community property, because of their inability to prove the facts. With this also fell their contention that the deed executed by J. S. Turner to his infant sons was executed in fraud. There was left in the case the controversy over the asserted fraudulent procurement by the son of the deed from his mother to the undivided one-fourth of the Howard ranch. Upon the issues presented by this controversy the trial was had, and the court found in accordance with the allegations of the complaint. It found that the deed executed by the father to his two minor sons had vested in them the fee-simple title to the whole of the Howard ranch, and the defendant Turner was estopped from denying the validity and due execution of this deed; that by the death of the son Edgar M., title to his undivided one-half of the farm vested in equal moieties in his father and mother; that the son George W. did, by the fraudulent devises above indicated, secure from his mother a deed to her one-fourth of the Howard ranch. The judgment of the court, following these findings, and its conclusions of law denied to the plaintiff any right by virtue of a community interest in and to the property of the Howard ranch, and annulled the deed made by plaintiff to her son.

Upon appeal the grievance of appellants is based upon the assertion and argument that the court erred in allowing plaintiff to abandon her contention, touching her right to the community property, and to rest her action upon a demand for relief against the deed, which had been fraudulently obtained from her by her son. It is said that under the first cause of action she had charged that the deed made by the father to his infant sons was itself fraudulent and void, and that therefore no title passed to the sons; that she changed her attitude and successfully sought to have this deed declared valid, and then sought to obtain an undivided one-

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fourth of the ranch as heir at law of her deceased son, Edgar M., by force of the validity of this deed from the father to his minor children. The procedure of the court by which this was allowed to be done is declared to be violative of all sound and well-settled rules of law, in that the plaintiff was allowed to change her legal position as the wind changes (Davis v. Winona Wagon Co., 120 Cal. 244, 52 Pac. 487), in that the judgment is not warranted by the pleading, and in that plaintiff is given a recovery upon a case not pleaded. Ellis v. Rademacher, 125 Cal. 556, 58 Pac. 178; Davis v. Pac. Tel. Co., 127 Cal. 312, 57 Pac. 764, 59 Pac. 698.

[1] It is quite true that if plaintiff had succeeded in avoiding the deed made by her husband to the minor sons upon the ground that it did violence to her rights in the community property and was conceived and executed in fraud of those rights, the sons themselves would have been stripped of title, and she, the mother, would have recovered one-half of the Howard ranch directly from her former husband, as being her community interest therein. Upon the other hand, she charged with equal particularity that she had been fraudulently deprived of her one-fourth interest in the Howard ranch, which one-fourth interest could be hers only upon the theory that the father's deed to his minor sons vested title in them. Her atttitude, then, amounted to this: That if she should succeed in establishing her community interest in the property and the fraudulent character of her husband's deed to her sons, she recovered without regard to the swindle subsequently perpetrated upon her by her son. If, however, she failed in this, so that it was decreed that title to this ranch did vest in the sons, then it was still open to her to recover her one-fourth as heir at law of her deceased son, by having the court in equity set aside as fraudulent the deed which she had been induced to make. There is nothing in our system and rules of pleading which forbids such a complaint, even if the positions taken in it may seem to be inconsistent. Tanforan v. Tanforan, 159 Pac. 709.

[2, 3] When it was made known that the plaintiff would abandon her effort to avoid the deed made by J. S. Turner to his minor children, J. S. Turner, in turn, strenuously insisted that he had not parted with title to the Howard ranch, and that his deed conveyed no title for lack of delivery; that it was recorded without his authority, and more to like effect. A deed to an infant requires no delivery to or acceptance by the grantee. Delivery to a third person for the benefit of the infant is, in all cases, sufficient to vest the title. Sneathen v. Sneathen, 104 Mo. 201, 16 S. W. 497, 24 Am. St. Rep. 326; Colee v. Colee, 122 Ind. 109, 23 N. E. 687, 17 Am. St. Rep. 345; Walker v. Walker, 42 Ill. 311, 89 Am. Dec. 445. Turner delivered the deed to the notary public for his children, and it was thus placed upon record. Turner further in his petition for letters of administration upon the estate of his son Edgar M. expressly stated that that estate consisted of an undivided one-half of the Howard ranch which he had deeded to his son. Under oath in the inventory of the estate he swore that one-half of this ranch belonged to the estate of his son. Here was ample evidence to support the finding of the court of delivery.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(174 Cal. 37)

RED RIVER LUMBER CO. v. PILLSBURY et al., Members of the Industrial Accident Commission. (Sac. 2478.)

(Supreme Court of California. Dec. 15, 1916.)

MASTER AND SERVANT ⊂=398 — WORKMEN'S COMPENSATION ACT — PROCEEDINGS BEFORE COMMISSION—LIMITATIONS—WAIVER.

Under Workmen's Compensation Act (St. 1913, p. 287) § 16, barring proceedings before the Commission not commenced within six months after the injury, and section 23, providing for filing answers, the defense that a claim is barred by the six-month period is waived by failure to answer.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⊂=398.]

In Bank. Proceedings under the Workmen's Compensation Act by Thomas E. Wilson against the Red River Lumber Company. After an award the Red River Lumber Company applies for a writ of review against A. J. Pillsbury and others, members of the Industrial Accident Commission. Award affirmed.

Pardee & Pardee, of Susanville, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

SHAW, J. This is a proceeding to review and annul an award for disability indemnity made by the Industrial Accident Commission against the plaintiff in favor of Thomas E. Wilson.

The proceeding before the Commission was instituted by Wilson more than six months after the date of the accident which caused the injury and more than six months after the making of any payment or agreement by said company on account of the injury and disability. The plaintiff here contends that this lapse of time deprived the Commission of jurisdiction to make an award to the injured employé.

The company did not file any answer before the Commission, and did not raise the objection that the application for relief was filed too late, at any time during the hearing, nor at all, except in a petition to the Industrial Accident Commission for a rehearing, after the award was made. It is

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now claimed on behalf of the Commission that the lapse of time does not oust the jurisdiction, but is only matter of defense, and that it was waived by the failure to assert it before the close of the hearing before the Commission.

The provision relied on by the Red River Lumber Company in support of its contention is found in section 16 of the Workmen's Compensation, Insurance and Safety Act, particularly clause (a), which reads as follows:

"Unless compensation is paid or an agreement for its payment made within the time limited in this section for the institution of proceedings for its collection, the right to institute such proceedings shall be wholly barred."

The time limited for the institution of proceedings to collect disability indemnity is limited by clause (b) to "six months from the date of the accident," or from the date of the agreement or last payment, where such agreement or payment is made.

Section 23 of the act provides that if the defendant in such a proceeding desires to bring any fact to the attention of the Commission as a defense to the claim, he must, within five days after service of the application upon him, file with the Commission his answer setting forth such fact.

The general doctrine that the statute of limitations affects only the remedy and does not extinguish the right, and that it is a matter of defense which is waived if it is not pleaded, is too well known and settled to require discussion. We find no authority in the act for the application of a different rule to judicial proceedings before the Industrial Accident Commission. The fact that the application was filed too late, if true, is clearly a matter which may be relied on as a defense to the claim. Section 23 requires the defendant to file an answer stating such fact, if he intends to rely on it. The reasonable deduction, in view of the well-known doctrine referred to, is that the failure of the defendant to file an answer bringing that fact to the attention of the Commission was a waiver of that defense.

There are cases relating to actions to recover damages for injuries causing death, recoverable only under a statute creating the cause of action therefor, and fixing a limitation within which such actions must be begun, in which it is said that the limitation "is a condition attached to the right to sue," and that "the right is lost if the time be disregarded." The Harrisburg, 119 U. S. 214, 7 Sup. Ct. 140, 30 L. Ed. 358; Rodman v. Missouri, etc., Co., 65 Kan. 645, 70 Pac. 642, 59 L. R. A. 704. Also that the condition presented by such limitation "must be met by pleadings on the part of plaintiff and by plaintiff's proofs." Boston, etc., Co. v. Hurd, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193. In the last case the statute was pleaded, the question of a waiver, therefore, did not arise, and the remark quoted, so far as it may imply that the failure to plead it does not waive such defense, is obiter dictum. In the other cases the question of the effect of a failure to plead the bar of the statute was not discussed. In The Harrisburg it does not appear that there was no such plea. In the Kansas Case the statute was pleaded. The only case that we find holding that such defense is not waived by the failure to plead it is Pittsburg, etc., Co. v. Hine, 25 Ohio St. 629. The statute there considered was construed to declare the limitation as an express condition of the right to sue, and to require the plaintiff to allege and prove that it was begun within the time prescribed. The Workmen's Compensation Act is so widely different in its terms from the Ohio Act that the case is of no force as authority. The language of our statute is that the right to institute the proceeding is "wholly barred" by the lapse of time. This does not mean that the provision relates back and avoids the claim from the beginning, or forfeits the right. The use of the word "barred" in itself implies that the lapse of time constituting the bar must be raised in some manner as a defense. If the bar is not raised, it will be of no avail.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.; LAWLOR, J.

(173 Cal. 773)

SCHALICH v. BELL. (S. F. 6943.)

(Supreme Court of California. Dec. 12, 1916. Rehearing Denied Jan. 11, 1917.)

1. MECHANICS' LIENS ⟸271(15) — ACTION — PLEADING.

A complaint in an action on a mechanic's lien averring that defendant entered into a contract with plaintiff whereby she agreed to employ him to perform work and furnish material, and that he did perform the work and furnish the material "pursuant to said contract," was not open to the objection on demurrer that it appeared that plaintiff was not an original contractor and did not file his lien within the time limited for a subcontractor.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 509; Dec. Dig. ⟸271(15).]

2. MECHANICS' LIENS ⟸271(5) — ACTION — PLEADING.

A complaint in an action on a mechanic's lien averring that plaintiff was to perform labor and furnish material necessary "in and about the repair of the improvements on said lot" was not defective as not specifying a lien upon a "building or other structure," upon which alone lien for labor done is allowed by Code Civ. Proc. § 1185, in view of section 452, requiring liberal construction of pleadings, since the mechanic's lien law itself frequently uses the word "improvement," as in sections 1187, 1192.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 498; Dec. Dig. ⟸271(5).]

3. MECHANICS' LIENS ⟸271(3)—PLEADING—CLAIM OF LIEN—DESCRIPTION OF LAND.

A complaint in an action on a mechanic's lien describing the land on which the improve-

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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ment was, and averring that plaintiff's claim of lien was filed against "said land," and that the lien contained a description of the property to be charged therewith, sufficiently made it appear that the claim of lien was filed upon and against the land described in the complaint.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 496; Dec. Dig. ⇐271(3).]

4. APPEAL AND ERROR ⇐882(5)—CONSTRUCTION—MECHANIC'S LIEN SUIT.

Defendant's admission that material facts appeared only by recital and inference in a complaint in action on mechanic's lien is a concession that the complaint is sufficient to sustain an attack under general demurrer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3596; Dec. Dig. ⇐882(5).]

5. MECHANICS' LIENS ⇐276(1)—PLEADING—AMENDMENT—DESCRIPTION.

Leave to amend answer in action on mechanic's lien is discretionary.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 539; Dec. Dig. ⇐276(1).]

6. APPEAL AND ERROR ⇐959(1)—REVIEW—DISCRETION.

The action of the trial court in refusing to allow amendment of answer in action on mechanic's lien will not be reviewed unless plain abuse of discretion appears.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825, 3826; Dec. Dig. ⇐959(1).]

7. MECHANICS' LIENS ⇐276(2)—PLEADING—AMENDMENT—DESCRIPTION.

Refusal to permit defendant at beginning of trial to amend the answer to deny sufficiency of lien claim as filed, defendant claiming to have originally supposed the claim of lien was in accordance with the allegations of the complaint, which he found on examination was not true, was not abuse of discretion; the lien being matter of record open to defendant's inspection.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 540–544; Dec. Dig. ⇐276(2).]

8. MECHANICS' LIENS ⇐280(6) — ACTION — EVIDENCE.

Exclusion of original claim of lien was proper in action on mechanic's lien, where there was no issue over the validity and sufficiency of the lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 563; Dec. Dig. ⇐280(6).]

9. EVIDENCE ⇐142(5)—VALUE OF SERVICES—UNION SCALE.

In action on mechanic's lien, the union rate of wages for workmen was admissible as bearing on the reasonable value of the labor furnished, although the contract of employment was not based on the union scale.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 422; Dec. Dig. ⇐142(5).]

10. APPEAL AND ERROR ⇐1048(3) — HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In action an mechanic's lien, it was not prejudicial error to refuse to allow answer to question to one of defendant's experts as to what would be the value of "setting up and making proper connections, the articles being furnished by the owner, to wit, one bathtub and two closets in the house," at the corner of certain streets, where the court pointed out it would entertain all questions touching the value of the particular service which plaintiff rendered; such ruling being merely a suggestion to defendant that her questions be made more specific and more directly applicable to the reasonable value of the particular services rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4141, 4151; Dec. Dig. ⇐1048(3).]

11. EVIDENCE ⇐354(2)—ACCOUNT BOOKS.

In action on mechanic's lien, plaintiff's contemporaneous book of accounts was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1438, 1439, 1442; Dec. Dig. ⇐354(2).]

Department 2. Appeal from Superior Court, City and County of San Francisco; John E. Richards, Judge.

Action by John A. Schalich against Teresa Bell. From judgment for plaintiff and order denying new trial, defendant appeals. Affirmed.

T. Z. Blakeman, of San Francisco, for appellant. Daniel A. Ryan, of San Francisco, for respondent.

HENSHAW, J. Plaintiff sued on a mechanic's lien to recover for labor and materials furnished. He alleged a balance to be due him under his contract of $481.87. Defendant interposed a general demurrer to the complaint which was overruled. Thereafter answering, she denied that plaintiff had ever furnished labor or material of other or greater value than $300, which $300, less $20 paid on account thereof, she tendered. The findings of the court and its conclusions of law favored plaintiff. The judgment followed, and from that judgment and from the order denying her motion for a new trial, defendant appeals.

[1] Touching the general demurrer, it is insisted that plaintiff was not an original contractor and did not file his lien within the time limited for a subcontractor. But the complaint averred that defendant entered into a contract with plaintiff whereby she agreed to employ him to perform work and furnish material. And it further avers that he did perform the work and furnish the material "pursuant to said contract." This was sufficient.

[2, 3] It is next contended: That the complaint was radically defective because it averred that he was to perform labor and furnish the material necessary "in and about the repair of the improvements on said lot of land." The mechanics' lien law, it is said, permits such a lien only for labor done upon "any building or other structure." Code Civ. Proc. § 1185. Moreover, that while the improvements may take the form of buildings or other structures, there may be improvements not contemplated within the provisions of this lien law—flower beds, grass plots, etc. Lothian v. Wood, 55 Cal. 163. Nevertheless, with the liberality with which the courts are told to construe pleadings under our system (Code Civ. Proc. § 452), it is not unduly extending the meaning of the Code section to hold that the pleader meant an improve-

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ment for the doing of work upon which a lien is provided. The mechanics' lien law itself not infrequently uses the word "improvement." Code Civ. Proc. 1187, 1192. It is urged that the complaint is insufficient in failing to allege that the claim of lien described the lot of land upon which the improvements alleged to have been repaired were situated. The complaint adequately described the land. It next averred that the plaintiff had filed his claim of lien against "said land," meaning necessarily thereby the land described in the complaint. It is next alleged that the lien contained a description of the property to be charged with the lien. Reading these averments together, while the form of the pleading is susceptible of improvement, it sufficiently appears that the claim of lien was filed upon and against the land described in the complaint.

[4] It is further urged that several material facts appear in the complaint only by recital or inference, but admission that they do so appear is a concession that the complaint is sufficient to sustain an attack under a general demurrer.

[5-7] At the beginning of the trial the defendant asked leave to file an amendment to her answer, stating in support thereof that she had thought that the claim of lien was in accordance with the allegations of the complaint, but upon examination she found that such was not the case, and she therefore asked leave to amend by denying the allegations in the complaint touching the sufficiency of the lien claim as filed. The court refused leave; the ground of opposition being that the lien was a matter of record, open to the inspection of defendant, and the objection to it, if objection existed, was one that could and should have been known to the defendant. Such amendments are permitted, within the discretion of the court, and its action in refusing to allow the amendment will not be reversed unless a plain abuse of this discretion appear. County of Siskiyou v. Gamlich, 110 Cal. 94, 42 Pac. 468; In re Redfield, 116 Cal. 637, 48 Pac. 794. No such abuse of discretion is here shown.

[8] Defendant sought to introduce in evidence the original claim of lien. Upon objection of plaintiff it was excluded. There being no issue over the validity and sufficiency of the lien claim, the ruling was proper.

[9-11] Questions were asked touching the union rates of wages for journeymen plumbers. Over objections the court permitted answers. It is insisted that this was error, in that it was not contended that the contract of employment was based upon the union wage scale. The controversy, however, was over the reasonable value of the labor furnished, and the scale of union wages, taken with the other evidence in the case, had a pertinent bearing upon this question. Appellant complains that the court refused to allow one of its experts, shown to be a master plumber, to answer the question:

"What, in your opinion, would be the value of setting up and making proper connections, the articles being furnished by the owner, to wit, one bathtub and two closets, in the house at the corner of Octavia and Bush streets?"

It may be that the court was overtechnical in sustaining the objection to this question. Nevertheless in so doing it committed no prejudicial error, since it pointed out that it would entertain all questions touching the value of the particular service which plaintiff rendered. It was merely a suggestion, therefore, to defendant that her questions be made more specific and more directly applicable to the reasonable value of the particular services here rendered. Defendant objected to the introduction in evidence of plaintiff's contemporaneous book of accounts. The objection was overruled. The account book was properly admitted.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

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174 Cal. 20)

CARUTHERS BLDG. CO. et al. v. JOHNSON et al. (L. A. 3754.)

(Supreme Court of California. Dec. 15, 1916.)

1. NEW TRIAL ⇐138—MOTION—NOTICE OF INTENTION—SERVICE—"ADVERSE PARTY."

Under Code Civ. Proc. § 659, requiring filing and service of intention to move for a new trial upon the adverse party, the "adverse party" is every party whose interest in the subject-matter of the motion is adverse to, or will be affected by, the granting of the motion or changing of the former decision of the court.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 280, 281; Dec. Dig. ⇐138.

For other definitions, see Words and Phrases, First and Second Series, Adverse Party.]

2. NEW TRIAL ⇐138—MOTION—NOTICE OF INTENTION—SERVICE.

In view of Code Civ. Proc. § 659, failure to serve notice of intention to move for a new trial upon all adverse parties deprives the superior court of jurisdiction to grant the motion except in so far as it can do so without affecting the rights of an adverse party not served.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 280, 281; Dec. Dig. ⇐138.]

3. NEW TRIAL ⇐138 — MOTION — NOTICE OF INTENTION—SERVICE.

In an action to have deeds declared mortgages in which plaintiff was successful, service of a notice of intention to move for a new trial upon a mortgagee of plaintiff's successor in title being necessary to vest the court with jurisdiction to entertain the motion, upon failing to give such notice, the purchaser at the mortgage sale was entitled to treat the first judgment as a final adjudication.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 280, 281; Dec. Dig. ⇐138.]

4. NEW TRIAL ⇐163(3)—MOTION—NOTICE OF INTENTION—SERVICE.

The purchaser at a sale under deed of trust executed by the successor in title of the successful plaintiff in an action to have deeds to real estate declared mortgages, being the real

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party affected, could object that the steps taken in procuring a new trial in the case affecting his chain of title were defective, because of failure to give notice to adverse party as required by Code Civ. Proc. § 659.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 332; Dec. Dig. ⟸163(3).]

5. MORTGAGES ⟸372(1) — FORECLOSURE — TITLE OF PURCHASER.

In the absence of notice, the title of a purchaser of real estate at a sale under power in a deed of trust would not be affected by defects in the title of the mortgagor's grantor consisting of lack of consideration and of false representations.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1102; Dec. Dig. ⟸372(1).]

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Suit to quiet title by the Caruthers Building Company and another against Parley M. Johnson, in which defendant filed a cross-complaint, bringing in H. M. Corlette and others as parties defendant. From a judgment for plaintiff and cross-defendant, and from an order denying a motion for a new trial, defendant appeals. Reversed.

Flint, Gray & Barker, Gray, Barker & Bowen, and Donald Barker, all of Los Angeles, for appellant Parley M. Johnson. Guy S. Pratt and J. P. Chandler, both of Los Angeles, for respondents Caruthers Bldg. Co. and another. Guy S. Pratt, of Los Angeles, for respondent H. M. Corlette. D. Z. Gardner, of Los Angeles, for respondent C. B. Williams. Cleveland Schultz, Paul W. Schenck, and Richard Kittrelle, all of Los Angeles, for respondent Frank Whittaker. Denio & Hart, of Long Beach, for respondents Robert S. Nelson and Olaf M. Nelson.

SLOSS, J. This action was brought against Parley M. Johnson to quiet the title of Caruthers Building Company to certain land in the county of Los Angeles. Johnson filed a cross-complaint, bringing in as parties various purchasers of portions of the property from Caruthers Building Company. Judgment went in favor of the building company and its grantees. Johnson appeals from the judgment and from an order denying his motion for a new trial.

All of the respondents, other than Caruthers Building Company, derive their rights from that corporation, and we shall, therefore, in this opinion treat the controversy as if it were one between Johnson as appellant and Caruthers Building Company as the sole respondent.

Both of these parties claim under William Reid as the common source of title. In 1890 Reid executed a conveyance of the land to one Wannop. In 1906, Wannop and Reid made quitclaim deeds of the land to C. B. Williams. All of these deeds were duly recorded, and they vested the record title, from 1906, in Williams. He claimed to own the property in fee by virtue of them. In June, 1906, Williams borrowed of the German American Savings Bank the sum of $3,500, for which he gave his promissory note, secured by a deed of trust to Union Trust & Realty Company as trustee. In November, 1906, Reid brought an action against Williams, German American Savings Bank and Union Trust & Realty Company, in which he sought an adjudication that his conveyance to Wannop and the subsequent deeds from Wannop and himself to Williams, although absolute in form, were in fact mortgages. The trial resulted in findings in favor of this contention, and judgment was rendered an March 17, 1909, directing the plaintiff to pay to the German American Savings Bank the sum of $3,500, with interest, due it under the note of Williams; directing said German American Savings Bank, upon payment of said sum, to cancel and deliver to Williams his promissory note and to give him a release of the indebtedness, and requiring the Union Trust & Realty Company, upon payment of said moneys to the savings bank, to reconvey the property to the plaintiff Reid. No appeal was ever taken from this judgment.

On October 22, 1909, Reid conveyed the land by deed of grant to one Hunter, and on August 24, 1909, Hunter conveyed by a like deed to Ilex Realty Company, a corporation. On November 3, 1909, Ilex Realty Company made a deed of trust to Union Trust & Realty Company in favor of the German American Savings Bank to secure a loan of $3,200. On or about the same date, the $3,500 required to be paid under the judgment of March 17, 1909, was paid to the savings bank, the releases provided for in that judgment were duly made, and Union Trust & Realty Company executed its deed to Reid. The evidence shows that the payment to the savings bank was made by Ilex Realty Company. Thereafter the Ilex Company defaulted in the payment of its $3,200 debt, and Union Trust & Realty Company sold the property under the power conferred upon it by the deed of trust from Ilex Realty Company. The appellant, Johnson, purchased at such sale, paying for the land the sum of $6,250. The trustee's deed to Johnson was executed under date of October 24, 1910. The time to appeal from the judgment declaring Reid to be the owner of the land had expired when the trustee's sale to Johnson was made.

After all of these transactions, however, the court granted a motion of Williams for a new trial in the action of Reid v. Williams, and subsequently entered a judgment declaring Williams to be the owner of the property. This judgment was entered on the 25th day of May, 1911, and it, too, became final. Plaintiff claims under subsequent conveyances from Williams.

At the time of Johnson's purchase the papers on file in the action of Reid v. Williams

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included a notice of intention on the part of Williams to move for a new trial. There was nothing to show that this notice had been served on German American Savings Bank or on Union Trust & Realty Company, and the undisputed evidence in the case at bar is that there was no such service. Nor was there any file or record in the case of Reid v. Williams to indicate that anything further had been done with regard to the proposed motion. The granting of Williams' motion for a new trial and the rendition of judgment in his favor were the result of an agreement between the guardian of Reid (who had been adjudged incompetent) and Williams, the motion for new trial having been granted by consent and the subsequent judgment rendered upon stipulation.

The parties to the present appeals argue a variety of propositions bearing upon the ultimate question whether Johnson, purchasing Reid's title after the time to appeal from the first judgment had expired, is in the position of an innocent purchaser for value or whether he had constructive notice of the pendency of a motion for new trial which might result in the vacating of the judgment on which he relied. We find it necessary to consider only one of the points made by the appellant in this behalf. Let it be assumed that the existence, among the papers on file, of a notice of intention to move for new trial imparted information of everything to which such notice, if properly given, might lead, including the possible vacating of the judgment in Reid's favor. It appears, however, that the notice in Reid v. Williams was not such as to confer upon the court jurisdiction to grant a new trial.

[1-3] A proceeding for new trial is initiated under our statute (Code Civ. Proc. § 659) by filing and serving upon the adverse party, within a given time, a notice of intention to move for such new trial. The "adverse party" upon whom the notice is to be served is "every party whose interest in the subject-matter of the motion is adverse to or will be affected by the granting of the motion or changing the former decision of the court." Herriman v. Menzies, 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81. The failure to serve the notice upon all adverse parties deprives the superior court of jurisdiction to grant the motion. Herriman v. Menzies, 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81; Johnson v. Phenix Ins. Co., 146 Cal. 571, 80 Pac. 719; Niles v. Gonzalez, 155 Cal. 359, 100 Pac. 1080. The failure to serve a given party will not deprive the court of jurisdiction to grant the motion in so far as it can be granted without affecting the rights of the party not served. Here, however, the findings and judgment in Reid v. Williams were such that no favorable action could be taken upon the motion without impairing the rights of the German American Savings Bank, one of the parties not served. The judgment directed the plaintiff Reid to pay to that party the sum of $3,500, the amount of its mortgage. The situation is substantially the same as that presented in Johnson v. Phenix Ins. Co., supra, and Niles v. Gonzalez, supra, in each of which it was held that the party occupying a relation analogous to that of the savings bank here was an adverse party, service upon whom was necessary to vest the court with jurisdiction to entertain a motion for new trial.

[4] Regardless, therefore, of the question of constructive notice to Johnson, the proceedings looking to a new trial were nugatory and Johnson was entitled to stand upon the first judgment as a final adjudication of the rights of the parties. The respondents do not dispute the soundness of appellant's contention that service of the notice of intention upon the savings bank was necessary. They contend, however, that Johnson, not being a party to the action of Reid v. Williams, is not in a position to raise the point. This contention cannot be sustained. The action was one to determine the title to real property. Although Reid was the original plaintiff, he had parted with his title and it had become vested in Johnson before the motion for new trial was presented. Johnson was therefore the real party affected by any proceedings in the case of Reid v. Williams, and it must certainly be open to him to object that any steps taken in that case, affecting his claim of title, were unauthorized.

The findings and rulings based upon the theory that the interest of Johnson could be impaired by the granting of a new trial and the rendition thereafter of a judgment in favor of Williams cannot, accordingly, be upheld.

[5] The court made further findings that the conveyances from Reid to Hunter and from Hunter to Ilex Realty Company did not convey any title to said real estate, because the deed from Reid to Hunter was without consideration and was procured by means of a false representation by Hunter. These findings are without support in the evidence. Even if supported, however, they would not justify a judgment against Johnson in the absence of a further finding that Johnson took with notice of the alleged defects in Hunter's title. There is no pretense of any evidence that he did so take.

We do not feel called upon to go into the further question, raised by appellant, that the granting of a new trial in Reid v. Williams, and the rendition of the second judgment in that action were fraudulent as to him. It may be said, however, that we find it difficult to see how, in fairness and justice, Johnson's title can be swept away in favor of the subsequent purchasers from Williams. Under the original judgment Reid was declared to be the owner of the prop-

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erty and was required to pay a note for $3,500 given by Williams to the savings bank. Reid's title passed to the Ilex Realty Company, which paid this note and the mortgage. Williams obtained the benefit of this payment and was released from his obligation on the note. Johnson claims under Ilex Realty Company and he paid $6,250 for the land. After all this Williams comes in, and without restoring the benefit which he has received by the payment of his debt or offering any reimbursement to those who have advanced money on the faith of Reid's ownership, claims (through himself and his grantees) title to the land under an order setting aside the judgment by virtue of which he has received and retained benefits. It cannot be that the law will permit such an effort to succeed.

The judgment and the order denying the new trial are reversed.

We concur: SHAW, J.; LAWLOR, J.

(173 Cal. 777)

LA GRANDE LAUNDRY CO. v. PILLSBURY et al., Industrial Accident Commission. (S. F. 7568.)

(Supreme Court of California. Dec. 12, 1916.)

MASTER AND SERVANT ⇐362 — "USUAL COURSE OF BUSINESS"—MASTER AND SERVANT—INJURIES TO SERVANT — WORKMEN'S COMPENSATION.

Under Workmen's Compensation Act (St. 1913, p. 284) § 14, excluding from the definition of "employé" any person whose employment is both casual and not in the usual course of the employer's business, an assistant carpenter hired temporarily by a laundry company, and killed while at work upon the house of a stockholder, which was an accommodation undertaken without charge by the laundry company, was a casual employé and not employed in the usual course of business of the laundry company, and his widow was not entitled to compensation under the act.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⇐362.

For other definitions, see Words and Phrases, First and Second Series, Usual Course of Business.]

In Bank. Proceeding under the Workmen's Compensation Act by Mary E. English to obtain compensation for the death of her husband, Richard English, opposed by the La Grande Laundry Company, employer. Compensation was awarded by the Industrial Accident Commission, and the employer brings certiorari. Award annulled.

Eugene F. Conlin, of San Francisco (Neal Power, of San Francisco, of counsel), for petitioner. Christopher M. Bradley, of San Francisco (W. H. Pillsbury, of Oakland, of counsel), for respondents. Samuel Knight, F. E. Boland, and James J. McKenna, all of San Francisco, for New England Equitable Ins. Co.

MELVIN, J. A writ of certiorari was issued for the purpose of reviewing the action of the Industrial Accident Commission in awarding to Mary E. English compensation from La Grande Laundry Company (a corporation) because of the death of her husband.

There is very slight conflict with reference to the facts. It appears from the testimony taken before the Industrial Accident Commission that Charles P. Cain was the president and manager of La Grande Laundry Company, and he and his wife were stockholders. There was no formal proof of the sort of business in which the corporation was engaged, but the name furnishes some hint at least upon that subject. Indeed there can be no reasonable doubt that the principal business of the corporation was running a laundry, as the witnesses spoke of the "laundry" not merely as a corporation, but as a place of business. There was testimony at the hearing given by Mr. Cain to the effect that the company was not in the business of repairng houses. It was the custom, however, for Mr. Cain to send a carpenter regularly employed by the La Grande Laundry Company to make necessary repairs about the private properties of the stockholders. When the work required less than two days of the carpenter's time upon any given piece of property, no charge was made against the owner, but when more time was necessary the expense was charged to the stockholder receiving the benefit of the labor. This custom arose, as Mr. Cain said, when the laundry was operated by a brother and a sister in partnership. They owned a number of pieces of property before the fire of 1906 and the carpenter who was employed at their place of business used to make necessary repairs on their houses. After a sort of family corporation was organized this custom was kept up. It did not appear how often such services had been performed for stockholders prior to March, 1915.

Mr. William English was a carpenter regularly employed by the La Grande Laundry Company. At some time in February, 1915, Mr. Cain directed him to go to a house in San Francisco owned by Mrs. Cain, one of the stockholders of the corporation, and there to tighten some plate glass in certain doors. The carpenter informed Mr. Cain that he could not perform the work unaided owing to the weight of the doors, and accordingly he was instructed to employ as an assistant his brother, Richard E. English, who had been hired once or twice before by the corporation for similar services. He did as directed, and on March 2d, while the work was in progress, William English went away from the house for a short time. On his return he was told by his brother that there were some leaks in the roof which had been called to the latter's attention by painters

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who were at work there. Richard English returned to the roof while his brother was employed on some work about the premises, and while there said Richard lost his footing and fell to the ground below and was killed.

The Industrial Accident Commission found that deceased was a casual employé of the La Grande Laundry Company, but that the accident and death "arose out of and happened in the course of said employment."

In the recent case of Maryland Casualty Co. v. Pillsbury et al., 158 Pac. 1031, we had occasion to discuss section 14 of the compensation statute which excludes from the definition of "employé" any person whose employment is both casual and not in the usual course of the employer's business. We there held that a workman engaged upon the task of repairing a tractor to be used in drawing plows and wagons for the farming work was not in the usual course of his employer's business. The proof in this case did not support the finding that Mr. Richard English was engaged in the usual business of the laundry. On the contrary the evidence fairly showed that work of this sort was a mere accommodation undertaken, without charge, by the corporation for its stockholders and not at all as a part of the laundry business. If Mrs. Cain had employed the carpenter to perform a job of repairing her doors and he had been killed under the circumstances shown by the record, she would be exempt from liability under the fourteenth section of the statute relating to workmen's compensation. The corporation acting for her may not be charged with liability unless making repairs was a part of its "usual business," as that term is commonly understood. Uncompensated favors extended occasionally to its stockholders surely do not constitute a "business" of a corporation "usual" or otherwise. The English statute is even broader in its scope than ours because it omits the word "usual." In Bargewell v. Daniel, 98 L. T. R. 257, the court was considering the case of a workman who earned his living doing repair work for people residing in the community in which he lived. Mrs. Daniel, the defendant, owned certain cottages which were let to tenants. She collected her own rents, made her own repairs, and she had no other business or occupation. She hired Bargewell to make repairs on one of the cottages, and while so employed he was injured. Compensation was awarded, and defendant appealed, urging the same defense as that put forward by petitioner here. The court said by Cozens-Hardy, M. R.:

"I think this appeal must be allowed. * * * The learned county court judge has found here that the work was casual work, and the employment temporary, and of a casual nature. Therefore the plaintiff was not a workman within the act unless he was employed for the purposes of the employer's trade or business. It is not suggested the defendant was carrying on a trade. Was she carrying on a business in which the plaintiff could be employed? It seems to me she was not. * * * The learned judge appears to have treated her as carrying on the business of a house agent. But section 13 of the act provides that a workman within the act does not include a person whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business. The intention was that the act should not apply in such a case to the ordinary owner of property, who was not carrying on any trade or business. On that short point, it seems to me that this appeal must be allowed."

Kelly v. Buchanan, 47 Ir. L. T. R. 228 (cited in Workmen's Compensation Reports [1913] p. 727), was a case very similar in its facts to this. Defendant was a shopkeeper, but he owned certain dwellings adjoining his place of business. These were let to tenants. Plaintiff was hired for some work on one of these houses, and while performing it he was injured. The award of compensation was reversed, the court saying:

"The facts are very plain. Here we have a man who carries on the business of a shopkeeper in a house, and at the back there are some houses converted from cow houses into residences; he brings in a man to repair one of them, and we are asked to say that this casual laborer was employed for the purposes of the employer's trade or business. The decision of the county court judge was wrong, and we must allow the appeal."

The same principles are announced in McCann v. McDonnell, reported in Workmen's Compensation Reports (1913) under note to Kelly v. Buchanan, supra. Rennie v. Reid, 1 B. W. C. C. 324, was the case of a window cleaner injured by a fall from a physician's residence in which was also located the office of the medical man. The claimant sought relief upon the theory that he was engaged in his employer's business. Compensation was denied, and on appeal to the House of Lords, in discussing this phase of the matter, Lord Stormont Darling said:

"I am of the opinion that the appellant was not employed for the purposes of the respondent's business. It was argued that the fact that the appellant cleaned the windows of the rooms in the house used by the respondent in connection with his medical practice was sufficient to satisfy this requirement. I cannot agree with this argument, and in my opinion it would be absurd to make the respondent's liability to compensate the appellant turn upon the question whether the appellant had or had not, on the particular occasions on which he went to the house, cleaned the windows of the surgery as well as the other windows of the house. Essentially the employment was in connection with the respondent's private residence, and not for the purposes of his business. On the whole matter I am of opinion that we should answer the question of law in the negative."

Respondents have cited Howard v. Massachusetts Employers' Insurance Association, reported in 2 Massachusetts Workmen's Compensation Decisions, at page 8. That was a case in which an electric lighting company employed a number of men to trim trees where the branches interfered with the wires by which the electricity was conveyed to customers. Howard, one of these men, was directed by the foreman of the employer

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corporation to trim some trees in the yard of a church some distance from any of the lines of the lighting comppany. An award of compensation was granted upon the theory that Howard was acting as an employé of the company; that his work was not casual; and that it was not outside the usual course of the business of his employer. The case is not in point. The workman's regular business, acting for the company, was trimming trees under orders of the foreman, and this was as much a part of the corporation's business as the stringing of wires, the operation of machinery for the production of electric current, or any of the other incidents to the safe transmission of electricity to customers. When he was ordered to work at a distance from the wires he was not told and he had no means of knowing that he was not doing pioneering work preparatory to stringing wires for his employer. In the instant case, however, the carpenter knew that he was hired to assist in a mere casual task of repairing, and that his employer, the laundry company, was not in the house-repairing business.

It follows that the award must be annulled, and it is so ordered.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

(174 Cal. 26)

NEW METHOD LAUNDRY CO. v. MacCANN. (S. F. 6905.)

(Supreme Court of California. Dec. 15, 1916.)

1. APPEAL AND ERROR ⇐⇒179(1)—RECORD.
Matters occurring after issuing of preliminary restraining order cannot be considered on appeal where no supplemental pleadings are filed.

[Ed. Note.—For other cases, see Appeal and Error, Cent.Dig. §§ 1137–1140; Dec.Dig. ⇐⇒179(1).]

2. EQUITY ⇐⇒17—PROPERTY RIGHT—RIGHT TO PURSUE CALLING.
The right of a citizen to pursue any calling, business, or profession he may choose is a property right to be guarded by equity as zealously as any other form of property.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 38–42, 45; Dec. Dig. ⇐⇒17.]

3. INJUNCTION ⇐⇒56—SALE OF BUSINESS.
One selling a laundry route and being employed by the purchaser to solicit on such route retains the right, on leaving such employ, to work for a rival laundry if he chooses, or, having established a laundry business himself, to serve all persons voluntarily offering him their trade; but in such competition he must act with the utmost fairness, resolving every doubt rather in favor of the interests of his former employer than against them.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 110; Dec. Dig. ⇐⇒56.]

4. CONSTITUTIONAL LAW ⇐⇒276—LIBERTY — DUE PROCESS OF LAW.
The constitutional guaranties of liberty include the privilege of every citizen to freely select those tradesmen whom he may desire to patronize, and equity cannot invade or take away this right, either directly or indirectly, without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 845, 846; Dec.Dig. ⇐⇒276.]

5. INJUNCTION ⇐⇒157—FORM.
In an injunction against a driver who had sold a laundry route to plaintiff and worked for plaintiff thereon, restraining the driver from soliciting laundry work from plaintiff's customers along the route, it was improper to insert the words "but not from receiving" before the words "laundry work," etc., where defendant's right to receive such work unsolicited was not in issue.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 340, 342; Dec. Dig. ⇐⇒157.]

6. APPEAL AND ERROR ⇐⇒1043(5)—HARMLESS ERROR—FORM OF INJUNCTION.
Such phrase, however, was harmless, in view of other terms of the injunction correctly delimiting defendant's rights.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4119; Dec.Dig. ⇐⇒1043(5).]

Department 1. Appeal from Superior Court, Alameda County; William S. Wells, Judge.

Action by the New Method Laundry Company against John W. MacCann. From a judgment, plaintiff appeals. Affirmed.

John R. Tyrrell, of San Francisco, for appellant. Henry B. Lister, of San Francisco, for respondent.

LAWLOR, J. This is an appeal upon the judgment roll in an action for an injunction.

The case involves the same general equitable doctrines considered in Empire Steam Laundry v. Lozier, 165 Cal. 95, 130 Pac. 1180, 44 L. R. A. (N. S.) 1159, Ann. Cas. 1914C, 628, and Cornish v. Dickey (Feb. 16, 1916) 155 Pac. 629. It was held in the former case that a certain list of customers along a laundry route constituted a trade secret which was the absolute property of the laundry operating the route, and that the laundry was entitled to a judgment perpetually enjoining a driver, who had left its employ, "from in any manner soliciting or *receiving* laundry work from any of the persons" who had been such customers along the route assigned to him. (Italics ours.) In Cornish v. Dickey a solicitor, having left the employ of a bakery, was enjoined from soliciting and supplying his former patrons and the patrons of the bakery with the products of its rival. The soundness of these decisions is not questioned. But the proposition is now expressly advanced for the first time that, notwithstanding a court of equity has the authority to enjoin an employé from "soliciting" business of his former patrons under such circumstances, it is not authorized to issue an injunction restraining him from merely "receiving" laundry work from such customers if they voluntarily seek him out and hire him to do their work.

The salient facts presented here are in most respects identical with those of the Empire Steam Laundry Case, and require, therefore, only brief mention. The court found that plaintiff is a corporation engaged in the laundry business in the city of Oakland, con-

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ducting its business in substantially the same fashion as did the Empire Steam Laundry. The defendant, formerly the independent owner of a certain laundry route in Oakland, known as route No. 4, had, on April 5, 1908, sold all his right and title in the route to the plaintiff, and thereafter became one of its drivers and solicitors. He was supplied with an automobile by the plaintiff and everything necessary to enable him to serve well the plaintiff's customers and discharge the duties for which he was employed, without cost or expense to himself. For about five years he was employed to canvass orders for laundry work along route No. 4 from house to house, to collect and return the clothes, and to keep confidentially, in a list specially prepared by the plaintiff, all the names and addresses of plaintiff's customers, together with the day of the week when their laundry should be called for, and the place where the same should be gathered up and delivered. It is not questioned that the information thus obtained by the defendant constituted trade secrets of great value to the plaintiff. On April 5, 1913, the defendant left the plaintiff's employ without notice or warning, and immediately thereafter commenced soliciting for a rival laundry the patronage of the persons whose names he had ascertained while in the employ of the plaintiff. Thereafter he called for and gathered up bundles of laundry and unlaundered goods, but "so far as plaintiff has been able to ascertain by inquiries from its said patrons, said patrons did not know that the unlaundered goods called for by defendant were being collected for and being laundered by a laundry other than the laundry of plaintiff herein." It does not appear, however, that the defendant had entered into any contract of employment prohibiting such action on his part. But the court further found:

"That if defendant is not restrained from soliciting, diverting and taking away said customers of plaintiff, seventy (70) per cent. of said trade will be forever lost to plaintiff, to its great damage."

[1] Other facts are pleaded and referred to in the briefs, but were not found to be supported by the evidence. And certain matters occurring after the issuing of the preliminary restraining order are mentioned by counsel, but no supplemental pleadings were filed. None of these matters can properly be considered.

Upon the findings made, plaintiff was awarded a permanent injunction—

"restraining and enjoining said defendant, his agents and employés * * * from in any manner soliciting, *but not from receiving*, laundry work from any of the persons who were customers of plaintiff prior to the 5th day of April, 1913, along or upon that certain route known and designated by plaintiff and defendant as route No. 4, of the New Method Laundry Company, in the city of Oakland, and attended to by said defendant, while said defendant was employed by plaintiff; and from in any manner attempting to induce any of said customers of said plaintiff, either directly or indirectly, to withdraw any of their business, custom, or patronage from plaintiff." (Italics ours.)

The court did not award damages for the injuries alleged in the complaint to have arisen out of the immediate loss of trade. The appeal, however, is taken solely from the refusal to include in the judgment an order restraining the defendant from receiving laundry work of the persons designated.

While it is required that equity should lend its aid to the fullest extent to protect the property rights of employers, whether existing in the form of trade secrets or otherwise, considerations of public policy and justice demand that such protection should not be carried to the extent of restricting the earning capacity of individuals on the one side, while tending to create or foster monopolies of industry on the other. In recent years, as noted in Empire Steam Laundry v. Lozier, the matter of protecting the business world against unfair competition has received careful consideration by the highest courts. It has been determined that if a person establishes a trade or business which depends for its continuance upon keeping secret the names of customers, or other valuable information known to such person no agent or employé, having been intrusted with such secrets in the course of his employment, can thereafter utilize his secret knowledge against the interests or to the prejudice of such person. See 14 R. C. L. p. 401, §§ 102-105. As is aptly stated in H. B. Wiggins Sons' Co. v. Cott-A-Lap Co. (C. C.) 169 Fed. 150: "If he does so, he robs his employer." This was our conclusion in the Empire Steam Laundry Case, and with what is there said in support thereof we are in full accord. It was also the conclusion of the court in the more recent case of People's Coat, Apron & Towel S. Co. v. Light (March 17, 1916), 171 App. Div. 671, 157 N. Y. Supp. 15, 1142, where an injunction was granted, under circumstances similar to the facts presented here, restraining a rival firm from soliciting through Light, one of the plaintiff's former employés, any of plaintiff's former or present customers, and from serving the same on behalf of the rival firm. The court said:

"There is no evidence that Light had a written list of them [the plaintiff's customers]. There was in his head what was equivalent. They were on routes, in streets, and at numbers revealed to him through his service with plaintiff. Their faces were familiar to him, and their identity known because of such employment. He had entry and introduction, and solicited them, not as strangers, but as persons known to him. He used what he had gained through plaintiff to take away its customers."

[2, 3] But coincident with the right of the employer to the protection of his trade secrets against their unwarranted disclosure to or unconscionable use by persons not entitled thereto, is the right of all persons, in the absence of negative covenants to the contrary, to follow any of the common occupations of life. This right of a citizen to pursue any calling, business, or profession he may choose is a property right to be guarded by equity as zealously as any other form of property. See Dent v. West Virginia, 129

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U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623. "Labor is property. The laborer has the same right to sell his labor, and to contract with reference thereto, as any other property owner." Gillespie v. People, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 283, 80 Am. St. Rep. 176. It cannot, indeed, be questioned that an employé, in a case such as this, retains the right to work for a rival laundry if he so chooses, or, having established a laundry business himself, to serve all persons who voluntarily offer him their trade. But in such competition, he must act with utmost fairness, resolving every doubt rather in favor of the interests of the former employer than against them, and exercising, at all times, every precaution to avoid violating, in letter or spirit, the confidence reposed in him. In Grand Union Tea Co. v. Dodds, 164 Mich. 50, 128 N. W. 1090, 31 L. R. A. (N. S.) 260, a solicitor along a business route for a tea merchant engaged to work for a competitor and sought to take with him the list of patrons, and secure their patronage, which for the most part he had, himself, obtained for the tea merchant while in the latter's employ. Counsel contended:

"This defendant cannot be restrained from soliciting or selling these people goods so long as he does so in an open and fair manner."

A decree enjoining the solicitor "from using any list or copy of list which has been made or retained, or giving or showing them to others" was affirmed. The court then continued:

"We are of the opinion, however, that he cannot be restrained from selling his commodities for himself or for any employer in any part of the city, or to any person, so long as he does not use any property belonging to the complainant, or copies thereof that were surreptitiously made. So far we think ourselves well within equity jurisdiction, on general principles."

See, also, note to Empire Steam Laundry v. Lozier, in 1 Cal. Law Rev. 385, and comment on People's Coat, etc., v. Light, supra, 25 Yale Law J. 499.

[4] The judgment of the lower court also finds support in sound principles of public policy. To restrain a person, lawfully engaged in a laundry business, from receiving unlaundered goods from certain former patrons is to sanction, to that extent, the establishment of a trade blacklist, thereby depriving such patrons, without any fault on their part, of the right to have their laundry work done where they will. The constitutional guaranties of liberty include the privilege of every citizen to freely select those tradesmen to whom he may desire to extend his patronage, and equity cannot invade or take away this right, either directly of indirectly, without due process of law.

There are, however, some authorities which are relied upon by the plaintiff to support his contention that he is nevertheless entitled to the injunctive relief prayed for. But in none to which we are referred was it necessary for the court to pass upon the precise point raised here (Witkop & Holmes Co. v. Boyce, 61 Misc. Rep. 126, 112 N. Y. Supp. 874), while generally approving an injunction restraining the defendant, among other things, "from calling upon, canvassing, soliciting, accepting, or filling orders for goods similar in kind to those carried by the plaintiff from the persons, * * * being customers of the plaintiff upon whom the defendant had been accustomed to call to obtain orders," was concerned principally with defendant's efforts to unfairly entice away plaintiff's customers. In that case, reliance was placed also upon an express agreement entered into between the parties which contained covenants against the defendant engaging in a similar line of business for the period of two years, as well as upon a penal statute forbidding an employé to use information gained under such circumstances for his own benefit or advantage. A second decision in the case (Id., 64 Misc. Rep. 374, 118 N. Y. Supp. 461) broadly restrains the defendant from "calling" upon the former customers for trade purposes, which term would include calling on legitimate as well as illegitimate business. But the facts indicate that the court was only considering a "gross betrayal of confidence by an unscrupulous employé" resulting in unfair competition. The employé was actually calling to solicit the trade of the former customers. The proposition of "calling" for the purposes of delivering goods or filling orders which had been received in an honest and equitable conduct of a rival business was not involved. A later case (Witkop & Holmes Co. v. Great Atl. & Pac. Tea Co., 69 Misc. Rep. 90, 124 N. Y. Supp. 956) sums up the two previous decisions as holding that the driver "will be restrained from canvassing and soliciting trade from plaintiff's customers formerly served by him from plaintiff's lists of names and addresses for the benefit of a competing concern." See, also, comment on these cases in Boosing v. Dorman, 148 App. Div. 824, 133 N. Y. Supp. 910. Nor does it seem to us that People's Coat, etc., v. Light, supra, is opposed to the conclusion reached herein.

In other New York cases we find expressions which support our view that the respondent herein cannot be restrained from "receiving" laundry of his former patrons. In Peerless Pattern Co. v. Pictorial Review Co., 147 App. Div. 715, 132 N. Y. Supp. 37, injunctive relief restraining the manager of a rival firm from soliciting or filling orders from plaintiff's customers was expressly denied. The court remarked:

"All that clearly appears is that he undertook to use in his new employment the knowledge he had acquired in the old. This, if it involves no breach of confidence, is not unlawful, for equity has no power to compel a man who changes employers to wipe clean the slate of his memory."

It was there held that the defendant could "enter into competition with plaintiff, even for the business of those who had formerly

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been plaintiff's customers, providing such competition is fairly and legally conducted." Finally in Boosing v. Dorman, supra, the court, finding that the names of plaintiff's customers, retail dealers in butter and eggs, were all listed in public directories and were not, under the facts shown, trade secrets, went on to say:

"The other knowledge which Dorman acquired by calling upon these customers in the course of his employment, with regard to their habits of buying, their financial worth, and their individual characteristics and preferences, can hardly be denominated 'trade secrets' which an employé is prohibited from using for his own benefit after the termination of his employment, in the absence of an express contract."

Nor does Lamb v. Evans, [1893] L. R. 1 Ch. Div. 218, require a different conclusion. The judgment in that case was to affirm, as regards the general question involved here, the former decision in the case by Mr. Justice Chitty (Id., [1892] L. R. 3 Ch. Div. 462), where an injunction was granted against canvassers for a trades directory. It was suggested by the evidence, so the learned justice observes, that unless the defendants be entirely restrained from soliciting advertisements from the list of traders published in the plaintiff's directory, such traders will be misled into believing that the defendants were still canvassing for the plaintiff. But the court, while recognizing the difficulty in framing a proper injunction touching these matters, held the defendants could not be restrained in such manner. The learned justice said:

"To use the popular expression, they may go and legitimately tout for advertisements for the rival production, and legitimately use the plaintiff's work for the purpose of discovering the traders and showing them the kind of advertisement these same traders formerly approved of, and may be desirous of inserting in the rival work."

We find nothing in the later decision in any sense modifying this holding.

It must be admitted that the injunction issued by the lower court in the Empire Steam Laundry Case, and approved by the decision of this court, does restrain an employé from "receiving" laundry of his former employer's customers. But the facts show the employé was actually disclosing and making use of the secret knowledge and information he had acquired in the confidence of his former employer, and that, by this means, had been able to carry the patronage of many of the former customers to the new employer. The employé's conduct, under the facts shown, clearly constituted an unconscionable and unwarranted use of the trade secrets belonging to his former employer, as well as a violation of the contract which he had entered into. It was to restrain this conduct that the injunction was issued. While the opinion does not qualify the term "receiving," which appears in the injunction, there is nothing therein which indicates that the court intended to hold that an employé, in the absence of an express contract, could be restrained from carrying on a rival business in a fair and equitable manner, and in the course of such competition receiving laundry of such customers of the former employer who may voluntarily come to him. Indeed the opinion does not discuss the term "receiving," and an examination of the briefs shows that the point was not urged for consideration.

But it is insisted by the appellant that "without the word 'receiving' the judgment would be practically worthless, in that it affords little or no relief." "It does not require a very vivid imagination," it declares, "to see the agents and friends of the defendant, or even the defendant himself, within an hour after the court has granted an injunction restraining defendant from soliciting, but not from 'receiving' laundry work, busily engaged in calling upon, or ringing up various customers, advising them of the court's order, but further stating to them that the driver will be pleased to call in the event of the customer sending for him." But appellant overlooks the comprehensive relief granted it by the court. The decree expressly forbids defendant from in any manner soliciting or attempting to induce, directly or indirectly, such customers to withdraw their patronage from plaintiff. Clearly, conduct on the part of the defendant, his agent, or others in his behalf, such as suggested, would be contra bonos mores and a deliberate invasion of the injunction issued to plaintiff. Discussing this point, the court, in E. I. Du Pont, etc., v. Masland (D. C.) 216 Fed. 271, said:

"The line which terminates the limits where the rights of the plaintiffs end and those of the defendants begin is a difficult one to draw. The iniquity of an employé who takes away with him the property of his employer, existing in the form of valuable processes, is as clear as if he asported any other form of property. The right of the employé to use his abilities, developed through his experiences, to the utmost of his capacity, is equally clear. This right of the employé and his obligation to preserve to the full the property rights of his employer are shaded into each other by lines so fine that it is doubtful whether anything but a nice sense of honor can keep them distinguished."

Injunctive relief, in any case, must depend upon broad principles of equity rather than on the particular wording of any decree. Conceivably, cases may arise where the court would be warranted in restraining a person, engaged in a business, from "receiving" trade of certain members of the community. But the facts presented here do not demand such relief. In H. B. Wiggins Sons' Co. v. Cott-A-Lap Co., supra, the court refused to restrain a rival firm from utilizing certain trade secrets, where the relief was prayed for solely because the rival had employed one of plaintiff's confidential employés who was in possession of the secrets. What the court there said applies with equal force to the additional injunctive relief sought here:

"If the injunction issues, it means that hereafter no man can work for one and learn his

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business secrets, and after leaving that employment engage himself to a rival in business, without carrying on his back into that business the injunctive mandate of a court of equity. There is nothing whatever in the facts of this case, except opportunity to do wrong, and a suspicion in the mind of the rival that wrong will be done. The remedy asked for is an extraordinary one and should not be lightly indulged in. The chancellor ought never to come into such a frame of mind that he assumes human nature to be essentially and inherently evil."

Judgment affirmed.

SHAW and SLOSS, JJ. (concurring). [5, 6] The phrase, "but not from receiving," should not have been inserted in the judgment. The defendant's right to receive laundry work from former patrons of the plaintiff along route No. 4, provided such work came to him without his direct or indirect solicitation, was not in issue and was not disputed or attacked. The phrase was not necessary for the protection of the defendant in that right, for he would possess the right as fully under the decree without those words as with them. If defendant caused their insertion with the expectation that thereby he would be able to receive laundry work from said patrons, obtained or coming to him through any secret or clandestine use by him, or by his agents or friends, of the list of patrons of plaintiff along that route, or of his memory or knowledge thereof derived from his former employment with plaintiff, he will be disappointed, if the judgment is enforced according to its true intent. Notwithstanding that phrase, it enjoins him from in any manner attempting by any means, direct or indirect, to induce any of the patrons of plaintiff along route No. 4, formerly attended to by him, to withdraw any of their business, custom, or patronage from plaintiff. Under this provision he would be guilty of contempt if he received any laundry work so withdrawn, and the phrase in question does not limit the effect of the judgment in that respect. If he should merely go along the route to receive such laundry work of said patrons as they should offer him, he would be soliciting their patronage and would be inducing them to withdraw from plaintiff all of their patronage that he might receive by so doing, and would thereby violate the injunction. Hence, although the phrase might better have been omitted, we believe it to be harmless, and for that reason we concur in the judgment.

(32 Cal. App. 21)

GUNTER v. SACKETT. (Civ. 1790.)

(District Court of Appeal, Second District, California. Nov. 9, 1916.)

PLEADING ⟸245(7)—AMENDMENT AFTER MOTION FOR JUDGMENT—DISCRETION OF TRIAL COURT.

In an action on a note, after answer, plaintiff moved for judgment on the pleadings, and defendant consented and requested that the court grant judgment on the pleadings in accordance with the prayer of defendant's answer that plaintiff take nothing, etc. After argument and submission of the motion, the judge announced that he would give judgment for defendant because the complaint did not state a cause of action. Plaintiff then asked leave to withdraw his motion and amend, and the court struck the motion from the calendar and granted plaintiff leave to amend by supplying an allegation of nonpayment of the note in suit. *Held,* that allowing the amendment was within the power and discretion of the court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 668, 669; Dec. Dig. ⟸245(7).]

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by J. W. Gunter against R. E. L. Sackett. From a judgment for plaintiff by default, defendant appeals. Judgment affirmed, and plaintiff ordered to recover $50 damages on account of delay caused by the appeal.

Kendrick & Ardis, of Los Angeles, for appellant. Isaac Pacht, of Los Angeles (Joseph M. Bernstein, of Los Angeles, of counsel), for respondent.

CONREY, P. J. The plaintiff commenced this action to recover judgment upon a promissory note executed to him by the defendant. After answer filed, the plaintiff moved for judgment on the pleadings. The defendant consented, and requested that the court grant judgment upon the pleadings in accordance with the prayer of defendant's answer, to wit, that plaintiff take nothing, etc. After argument by counsel and submission of the motion, the judge announced from the bench that he would have to give judgment for the defendant on the ground that the complaint did not state facts sufficient to constitute a cause of action. Thereupon the plaintiff asked leave to withdraw his motion and amend his complaint. The court took the matter under advisement, and thereafter made an order striking said motion from the calendar and granting plaintiff leave to amend his complaint; to which action of the court the defendant duly objected and excepted. Thereafter an amended complaint was served and filed, and the legal time for answering having expired without answer or demurrer by the defendant, judgment by default was entered, from which judgment the defendant appeals.

The amended complaint is like the original complaint, with the addition of an allegation of nonpayment of the note. The original complaint had alleged refusal to pay, but had not specifically alleged nonpayment. Appellant insists: (1) That the complaint did not allege that the note had not been paid, and hence stated no cause of action; (2) that the motion for judgment having been decided in favor of the defendant, and the court having so announced from the bench, it was then too late for the plaintiff to withdraw his mo-

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tion for judgment, and that the court erred in not entering judgment in favor of the defendant upon the pleadings, and that the court had no jurisdiction to allow the amended complaint to be filed, and the defendant could not be in default for not answering such amended complaint.

Assuming, without deciding, that the first complaint did not state a cause of action, we are of opinion that under the circumstances above stated the court had not lost jurisdiction to permit the filing of an amended complaint. On the contrary, that matter was within the power of the court and the discretion vested in it was appropriately exercised in the interest of justice. The appeal is frivolous, and apparently made for purposes of delay.

The judgment is affirmed; and it is ordered that, in addition to the costs, the respondent recover $50 damages on account of delay caused by the appeal.

We concur: JAMES, J.; SHAW, J.

(31 Cal. App. 793)

PEOPLE v. CARRELL. (Cr. 357.)

(District Court of Appeal, Third District, California. Nov. 3, 1916. Rehearing Denied by Supreme Court Jan. 2, 1917.)

INDICTMENT AND INFORMATION ⟸71—SUFFICIENCY OF ACCUSATION—STATUTORY OFFENSE.

An information charging accused with committing "the acts technically known as fellatio," made a felony by 1915 Pen. Code, § 288a, is fatally defective because not stating the offense so as to enable a person of ordinary understanding to know what is intended, as required by Pen. Code, § 950.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 144, 174, 193, 194; Dec. Dig. ⟸71.]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

J. E. Carrell was convicted of a felony, and appeals from the judgment of conviction and an order denying a new trial. Judgment and order reversed.

R. M. Quackenbush, of Santa Rosa, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was convicted of a felony under section 288a of the Penal Code, and was sentenced to imprisonment at San Quentin for the period of seven years. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

The charging part of the information is as follows:

"Did willfully, unlawfully and feloniously commit the acts technically known as fellatio upon the person of one Ethel Carrell, a human being, by force and violence and against the will of the said Ethel Carrell, contrary," etc.

Section 288a of the Penal Code was passed in 1915, and is as follows:

"The acts technically known as 'fellatio' and 'cunnilingus' are hereby declared to be felonies and any person convicted of the commission of either thereof shall be punishable by imprisonment in the state prison for not more than fifteen years."

Defendant demurred to the information on the ground that it "does not contain a statement of the acts constituting the offense, in ordinary and concise language, and in a manner to enable a person of common understanding to know what is intended," that the information is not direct and certain "as it regards the crime charged therein," and, that the facts stated do not constitute a public offense. The demurrer was overruled. The motion for a new trial was on the grounds that the court misdirected the jury, in that the offense defined by the court "is not included in the word 'fellatio' as defined in its technical use"; also on the ground that the prosecuting witness was an accomplice, and her testimony was not corroborated, as required by section 1111 of the Penal Code. Upon the denial of defendant's motion for a new trial, he moved in arrest of judgment on the foregoing grounds, which motion was also denied. Neither the statute nor the information defines what is meant by the term "fellatio." No definition of this word have we been able to find in any English dictionary. The particular acts constituting the crime of fellatio are not set forth in the information, and, as none of the ordinary sources of information would enlighten defendant on the subject, how can it be said that "the acts constituting the offense" were charged in such a manner as to enable "a person of common understanding to know what is intended"? Pen. Code, § 950. In People v. Ah Sum, 92 Cal. 648, 28 Pac. 680, the information was held insufficient and judgment arrested because in a portion of the information the lottery ticket involved in the transaction was set out in Chinese characters. The court said:

"An indictment or information must contain 'a statement of acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended.' Pen. Code, § 950. An information partly in English and partly in Chinese cannot be said to be in ordinary language. The Constitution requires judicial proceedings to be conducted, preserved, and published in no other language than the English language. Const. art. 4, § 24. Mr. Bishop says: 'In some of our states there are statutes expressly excluding all languages but the English, and such is clearly the general American law.'"

See, also, Stevens v. Kobayshi, 20 Cal. App. 153, 128 Pac. 419, where the rule was applied in a civil case for libel.

Unexplained, the word "fellatio" would, to a man of common understanding (indeed, we think also to one of uncommon understanding) be as cabalistic as if written in Egyptian

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or Mexican hieroglyphics or in Japanese or Chinese characters. The attorney for the defendant says in his brief:

"The defendant entered into the trial of this case, and so did his attorney, without any knowledge of what the word 'fellatio' would be defined to mean as used in the statute, or what the elements constituting the offense might be, but rather supposed" the court would instruct in accordance with a definition the attorney found in Andrew's Latin-English Lexicon.

In this sense the definition might not meet the act proven, but would seem to apply to the woman rather than the man. This is mentioned to emphasize the soundness of the statutory rule that the offense must be so stated as to be intelligible to a person of common understanding. Under no other rule could a defendant safely go to trial. The circumstance is mentioned also for the reason that it is by no means certain what acts the Legislature intended to characterize as the crime of fellatio. We do not find it spoken of in any work on criminal law, and its introduction into our statutes is of so recent a date that the courts have not been called upon to deal with it so far as we are aware until this case arose.

The exigencies of the case do not seem to require that we should stain the pages of our reports with the definition as given, or to enlighten the profession or the public as to what the learned trial judge found it necessary to inform the jury the Legislature meant when it announced "fellatio" as a felony.

We are entirely satisfied that the defendant should not have been forced to trial upon this information; that his demurrer should have been sustained, failing in which his motion in arrest of judgment should have been granted, and a new trial accorded him.

The judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

(32 Cal. App. 1)

GAULT v. WIENS et al. (Civ. 1788.)

(District Court of Appeal, Second District, California. Nov. 6, 1916.)

1. EVIDENCE ⟸80(1) — FOREIGN LAW — PRESUMPTIONS.

In an action on notes transferred to plaintiff in another state, where there was no showing to the contrary, the law of the other state governing the transfer is presumed to be the same as that of the state in which suit was brought.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. ⟸80(1).]

2. EXECUTION ⟸35 — PROPERTY SUBJECT — NOTES.

Under Code Civ. Proc. § 688, providing that any interest in either real or personal property is liable to execution, the interest of the payee in notes which he has pledged as collateral security for his own note may be seized under execution.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 103; Dec. Dig. ⟸35.]

3. PLEDGES ⟸25—LOSS OF LIEN—LEVY OF EXECUTION.

Under Civ. Code, § 2988, making the lien of a pledgee dependent on possession, the lien of a bank to whom notes were pledged as collateral security was lost when the bank, after maturity of the notes, levied execution thereon, and had them sold by the sheriff, and the purchaser before such sale took only the payee's interest therein, subject to the defense that they were obtained by fraud.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 51–57, 60; Dec. Dig. ⟸25.]

4. PLEDGES ⟸25 — RIGHT OF PLEDGEE — WAIVER BY PLEDGOR.

The provision of Civ. Code, § 3006, that the pledgee of notes has no right to sell them, but must collect them and apply the proceeds on the pledge, is for the benefit of the pledgor, who may waive it.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 51–57, 60; Dec. Dig. ⟸25.]

5. PLEDGES ⟸29 — BREACH BY PLEDGEE — PERSONS ENTITLED TO OBJECT—PURCHASER AT SALE.

One who acquired title to notes at an execution sale cannot, in an action against the maker, raise the objection that the pledgee had no right to sell them.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 64, 74; Dec. Dig. ⟸29.]

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by C. E. Gault against J. D. Wiens and another. From an order granting defendant's motion for a new trial, after judgment for the plaintiff, plaintiff appeals. Affirmed.

Thomson & Spencer, of Los Angeles, for appellant. Melrose & Ames, of Anaheim, and Davis, Kemp & Post, of Los Angeles, for respondents.

SHAW, J. This is an appeal from an order granting defendants' motion for a new trial.

The facts are as follows: About December 10, 1908, defendants executed three promissory notes of $500 each, payable one year after date to Henry J. Martens, who, on January 9, 1909, indorsed and delivered the same, with other notes amounting in all to $34,000, to the Bank of Topeka, Topeka, Kan., as collateral security for the payment of a note of $16,000 made by him to said bank, which by its terms matured six months thereafter, and which at maturity was renewed for six months. Upon Martens making default in the payment of his renewal note for $16,000, the bank brought suit thereon and secured judgment upon which it had an execution issued, and caused the sheriff of Shawnee county, Kan., to levy the same upon the $34,000 in notes so deposited as collateral security, all of which notes, including those made by the defendants and constituting the subject of this action, were by the sheriff, under and by virtue of the levy so caused to be made, sold in September, 1910, for the sum of $100 to plaintiff, who at the time of commencing this action was the legal owner and holder

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thereof. The execution and delivery of the notes, negotiable in form, so made by defendants to Martens, were procured by the fraudulent acts and representations of the latter; but the bank took them in the usual course of business as such collateral security, without notice of such facts. As a conclusion of law, the court found that the Bank of Topeka, prior to the commencement of the action, transferred and assigned all of its right, title, and interest in and to said notes to the plaintiff, and that plaintiff acquired all of the right, title, and interest of the Bank of Topeka in and to said notes sued upon; and that plaintiff became the lawful owner and holder of said notes, free from any equities on the part of said defendants against said Martens, in accordance with which conclusion judgment was entered in favor of plaintiff. The motion for new trial was made upon the ground that the evidence was insufficient to justify the decision, and that the decision was against law. The order granting the motion is general.

[1] In the absence of any showing to the contrary, the law of Kansas, where the transaction took place, must be deemed the same as that of this state.

[2] Under section 688, Code of Civil Procedure, the interest of Martens (the judgment debtor) in the promissory notes, was subject to seizure and sale under levy of the execution. Hoxie v. Bryant, 131 Cal. 85, 63 Pac. 153; Davis v. Mitchell, 34 Cal. 81; Donohoe v. Gamble, 38 Cal. 352, 99 Am. Dec. 399. Martens was the owner of the notes subject to the lien thereon of the bank as pledgee. Such lien, however, as provided in section 2988, Civil Code, was dependent on possession of the notes by the pledgee. In Jacobs v. Latour, 5 Bing. 130, it is said (quoting from the syllabus):

"A party, who having a lien on goods, causes them to be taken in execution at his own suit, loses his lien thereby."

To the same effect is Latta v. Tutton, 122 Cal. 279, 54 Pac. 844, 68 Am. St. Rep. 30. In Wingard v. Banning, 39 Cal. 543, it was held that if a common carrier sues out and procures to be levied a writ of attachment against property on which he has a lien, he thereby abandons and forfeits his lien.

[3] When the bank surrendered the pledged notes to be sold upon an execution sued out by it upon the judgment obtained against Martens, it thereby abandoned and forfeited all right and claim to a lien upon the same, so that when plaintiff purchased the property he purchased only the right, title, and interest of Martens in and to the promissory notes, thus acquiring the same at execution sale after the maturity thereof, and hence took the notes subject to all equities which might have been pleaded in an action thereon brought by the original payee. Since, as found by the court, they were procured by fraud and misrepresentation of Martens, who could not have enforced payment, it must follow that plaintiff is in no better position to enforce payment.

[4] Conceding, as appellant insists, that under section 3006, Civil Code, the pledgee had no right to sell the notes or do otherwise than collect the same at their maturity and apply the proceeds upon the liability of Martens, for the payment of which they were held as security, nevertheless, such provision is designed for the benefit of the pledgor, who may waive it. McArthur v. Magee, 114 Cal. 126, 45 Pac. 1068.

[5] In no event is plaintiff, who acquired title to the notes at the execution sale, in position to complain because the bank violated its obligation to Martens.

The order appealed from is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(31 Cal. App. 778)

PEOPLE v. BLUNKALL et al. (Cr. 346.)

(District Court of Appeal, Third District, California. Nov. 2, 1916.)

1. CRIMINAL LAW ⟸511(2)—EVIDENCE—ACCOMPLICES—CORROBORATION.

In a prosecution for crime, the testimony of an accomplice is corroborated within the intent of Pen. Code, §. 1111, if there is some competent independent evidence fairly tending to connect the defendant with the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1129; Dec. Dig. ⟸511(2).]

2. CRIMINAL LAW ⟸511(3)—EVIDENCE—ACCOMPLICES—CORROBORATION.

The corroborating testimony required under Pen. Code, § 1111, to warrant a conviction upon the testimony of an accomplice may properly be made by circumstantial as well as by direct evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1130; Dec. Dig. ⟸511(3).]

3. CRIMINAL LAW ⟸780(4)—INSTRUCTIONS—TESTIMONY REQUIRED TO CORROBORATE ACCOMPLICE.

An instruction that testimony to corroborate an accomplice is sufficient "if it tends to connect defendants with commission of the offense, though of itself, standing alone, it would be entitled to but little weight," *held* to correctly state the rule as to the quantum of proof required under Pen. Code, § 1111.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1862; Dec. Dig. ⟸780(4).]

4. CRIMINAL LAW ⟸814(18)—INSTRUCTIONS.

In a prosecution for grand larceny, where the defendants did not testify in their own behalf, an instruction as to the competency of defendants as witnesses and the credibility of their testimony was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1890, 1979; Dec. Dig. ⟸814(18).]

5. CRIMINAL LAW ⟸811(6)—INSTRUCTIONS.

An instruction that a defendant in a criminal case is competent as a witness and the fact that he is a defendant is not, of itself, sufficient to impeach or discredit his testimony, though his interest may be considered in determining his credibility, *held* properly refused,

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as singling out the testimony of a particular witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1971; Dec. Dig. ⟸ 811(6).]

6. CRIMINAL LAW ⟸829(10)—APPEAL AND ERROR—INSTRUCTIONS—HARMLESS ERROR.

The refusal of the court to charge that one of the defendants testifying against the others was an accomplice *held* not prejudicial error, although it was established beyond controversy that he was such an accomplice, where the court gave a clear definition of accomplice, and instructed that the other defendants could not be convicted upon the uncorroborated testimony of an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⟸829 (10).]

7. CRIMINAL LAW ⟸829(1)—APPEAL AND ERROR—REFUSAL OF INSTRUCTIONS.

Error cannot be predicated upon the refusal of instructions, the principles of which are clearly stated in other instructions given by the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⟸S29 (1).]

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Henry J. Blunkall and Oliver L. Blunkall were convicted of grand larceny, and they appeal. Affirmed.

James T. Matlock, of Red Bluff, for appellants. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendants were jointly charged by information duly filed in the superior court of Tehama county with the crime of grand larceny. The defendants Henry J. Blunkall and Oliver L. Blunkall were convicted of the crime so charged, and prosecute this appeal from the judgment of conviction and the order denying their motion for a new trial.

The defendant Scott who was not on trial in this case, was made a witness for the people, and as such gave testimony against his codefendants, the Blunkalls, and it is claimed by the latter: (1) That the verdict is not supported by the evidence, because the testimony of Scott was not corroborated as required by section 1111 of the Penal Code; (2) that the court committed prejudicial error in its action in disposing of certain instructions proposed by the respective parties.

The information charges and the evidence shows that the crime of which the defendants were accused and found guilty was committed on or about the 27th day of August, 1915, and that it consisted of the unlawful and felonious stealing, taking, and driving away of 7 head of cattle, which were the property of one H. W. Purcell. Purcell owned 12 head of cattle and kept them on an inclosed range near a place called Red Bank, about five miles southwest from Red Bluff, Tehama county. The defendant Scott resided at Burbank, and Purcell's home was about 3 miles from that place. Scott knew the Purcell herd of cattle, they having ranged up and down near where he resided, and knew that Purcell owned said cattle. Late on the afternoon of August 26, 1915, Purcell went to the range and there saw the cattle. On the last day of August, 1915, he again visited the range, and thereupon discovered that 7 head of his herd were missing. He proceeded to search for the missing cattle, and, on the 8th day of September, 1915, after several days of continuous prosecution of the search, found the 7 head on a range in the mountains, in what is generally known as Mill Creek canyon, approximately 30 miles from the range from which they were taken. The defendants, the Blunkalls, had ranged their own cattle on the range on which the missing cattle were found. The cattle taken from Purcell, before they were driven away, bore the earmarks of Purcell, but did not up to that time carry a brand of any character. When found in the mountains, it was discovered that the earmarks upon the cattle had been changed so that they no longer resembled those of Purcell, and that some of the 7 head had been branded with a double "B" brand, viz.: "BB," while others had been branded with the letter "S."

The defendant Scott testified that he and the defendants Henry and Oliver Blunkall stole and drove the cattle off the Purcell range on the night of August 26, 1915, to the range in Mill Creek canyon. Scott's story as he told it on the witness stand is, briefly, this: That, prior to the occasion on which the cattle were taken from the Purcell range, he had talked with Henry and Oliver Blunkall, who are brothers, about "picking up" cattle whenever an opportunity for safely taking them presented itself. Thereafter Scott visited Chico and there met the Blunkalls. He told them that there were grazing near his place several head of unmarked and unbranded cattle. The Blunkalls replied that they would go to the Scott house within a few days and take the cattle referred to by Scott. In pursuance of this understanding, the Blunkalls went to Scott's home on the 26th day of August, 1915, arriving there in the early morning, long before daybreak. They drove there in a spring wagon, taking with them saddles and other equipments for horseback riding. On reaching the Scott place they retired to bed, and remained about the place during most of the 26th day of August. Scott and Oliver Blunkall went out over the range during that day to inspect the cattle and the situation generally. They found that there were only 2 head of unmarked cattle on the range. Scott expressed the fear that if they took the marked cattle they would readily be detected, but Oliver Blunkall said that they might as well take the marked cattle; that he could so change the marks they then bore that they could not be identi-

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fied, so far as the marks were concerned. At a late hour of the night of the 26th day of August, the three defendants, each riding a horse, went to the range, and drove therefrom 8 head of cattle, 1 of the 8 being the property of another party. On their way to the Mill Creek canyon with the 8 head, they took a calf from a neighboring range which belonged to one Barney Bauder. Thus they drove to the mountains 9 head of cattle. Scott said that the agreement between the Blunkalls and himself was that the stock should be equally divided, each to take 3 head; that when they arrived at the canyon, the Blunkalls changed the marks on all the marked cattle and branded them. The 6 which were taken by the Blunkalls as their share were branded with the Blunkall brand, viz.: "BB." Scott's 3 were branded with his brand, viz.: the letter "S."

The wife and daughter of Scott testified that the Blunkall brothers were at the Scott house on the 26th day of August, arriving there in a spring wagon early in the morning and immediately retiring to bed; that they brought with them their saddles, and remained about the house most of the time during that day. Both testified that they heard Scott and the Blunkalls "planning" the taking of the cattle pasturing "out on the plains." Mrs. Scott said she heard the three defendants say that they intended "to take those cattle on the plains" to Mill Creek canyon. Both mother and daughter testified that a Mrs. Baldwin and a Mr. Eckert, who resided in the neighborhood of the Scotts, visited the house of the latter on August 26th, in the daytime, and that the Blunkalls attempted to avoid being seen by them. The daughter said that Henry Blunkall, upon observing Eckert coming to the Scott home, went into the house, whereupon Mrs. Scott asked him, "What is the matter?" to which Henry replied that he did not desire to be seen by any one, "especially Mr. Eckert, as he would know he was up there doing something, and he did not want him to see him when he was out doing that kind of business." The young woman also testified that a social dance in the district schoolhouse was scheduled for the evening of the 26th of August, and that Oliver Blunkall asked her about the dance, and whether she thought there would be a large attendance thereat, and that she replied, expressing the opinion that the affair would be largely attended. "He then said he guessed they wouldn't interfere with the business of taking the cattle." Both the mother and daughter testified that the three defendants left the Scott place on horseback late on the night of the 26th day of August, and that Scott did not return to his home after that night until the following Sunday, which was the 29th day of August.

Both Mrs. Scott and her daughter detailed other circumstances connected with the presence of the Blunkalls at the Scott home which tended to show that those defendants had gone there for the purpose of carrying out the scheme of the three men to take the cattle of Purcell or "the cattle pasturing on the plains"; but we have already presented in substance enough of the testimony of those witnesses to demonstrate that the testimony of Scott was fully corroborated. Indeed, we make bold to say that if there was no other testimony in the case tending to connect the Blunkalls and Scott with the commission of the crime charged but the testimony of Mrs. Scott and that of her daughter, as it is briefly stated above, a reviewing court would go beyond its legitimate function in setting aside a verdict predicated thereon.

Section 1111 of the Penal Code provides, in part:

"A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

[1] If there be some independent evidence fairly tending to connect the defendant with the commission of the crime, then the testimony of the accomplice is corroborated within the intent of the above section. People v. Garnett, 29 Cal. 622; People v. Clough, 73 Cal. 348, 15 Pac. 5; People v. Miller, 65 Iowa, 60, 21 N. W. 181; People v. Mayhew, 150 N. Y. 346, 44 N. E. 971. In People v. McLean, 84 Cal. 480, 482, 24 Pac. 32, it is said:

"The corroborating evidence is sufficient if it, of itself, tends to connect the defendant with the commission of the offense, although it is slight, and entitled, when standing by itself, to but little consideration. See People v. Melvane, 39 Cal. 616."

[2] It is true, as is contended, that the "corroborating testimony" in this case consists of circumstantial evidence, but the corroboration required by the section named may properly be made by circumstantial as well as by direct evidence. The circumstances detailed by the corroborating witnesses here are of the most incriminatory character, and, as above stated, sufficient of themselves to fasten guilt upon the accused. They, therefore, went beyond the requirement of the rule relative to the corroboration of the testimony of an accomplice.

[3] The appellants complain of the following instruction, and declare that it involves an erroneous statement of the rule:

"While corroborating evidence must create more than a mere suspicion, it is not required that it be of itself sufficient to convict, nor need it extend to every fact and detail covered by the statements of the accomplice. It is sufficient if, standing alone, it tends to connect the defendants with the crime. It is sufficient if it tends to connect the defendants with the commission of the offense, though of itself, standing alone, it would be entitled to but little weight."

The objection to said instruction may best be stated in counsel's own language as follows:

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"The words 'it would be entitled to but little weight' are an erroneous instruction. The court should have given the jury the positive instruction that such testimony is not sufficient upon which to convict."

We confess that we are not entirely clear regarding the precise point which counsel thus attempts to urge as the ground of his objection to the instruction. If he means to contend that the court should have stated it as a general proposition to the jury that evidence offered for the purpose of corroborating the testimony of an accomplice can never be sufficient to justify a conviction, the obvious reply is that there is no legal ground or reason upon which such a proposition may be supported. That evidence corroborative of the testimony of an accomplice might be sufficient to justify a conviction, there can be no possible doubt, and no better illustration of this proposition can be found than in the present case. The instruction clearly and correctly states the rule as to the quantum of proof essential to the corroboration of an accomplice, and plainly told the jury, in effect, that, while corroborative evidence need not and might not, when taken alone, be sufficient to warrant the conviction of a person charged with crime, it would meet the test as corroborative proof if it merely tended to connect the defendant with the commission of the offense. This involved an accurate statement of the rule as the Legislature has written it.

[4] The court refused to adopt and read to the jury a number of instructions proposed by the defendants, and it is insisted that in its action in so doing it erred to the serious detriment of the defendants' rights at the trial. One or two only of the assignments under this head merit special attention.

[5] The following is one of the refused instructions preferred by the accused:

"The jury are instructed that a defendant in any criminal case is a competent witness on his own behalf, and the fact that he is a defendant is not of itself sufficient to impeach or discredit his testimony, though the jury are entitled to take into consideration his interest in the event of the prosecution in determining his credibility."

The instruction was wholly inapplicable to the case, inasmuch as neither of the defendants on trial was called to testify. Moreover, the instruction, if pertinent, would be subject to the objection that it singles out the testimony of a particular witness, and instructions which purport to state the tests or rules by which the credibility of witnesses or the weight of evidence is to be determined should be made applicable, not to a single witness or his testimony only, but to all the witnesses or all the testimony.

[6] The defendants requested an instruction, declaring that the witness W. A. Scott, one of the defendants, was an accomplice and the court denied the request. We perceive in the court's refusal to so instruct the jury no prejudicial error. It is true that it was established beyond controversy that Scott was an accomplice, if the crime charged was committed as he declared it to have been; still, the court clearly explained to the jury who an accomplice in crime is under our law, and with equal clearness stated that the Blunkalls could not legally be convicted upon the uncorroborated testimony of an accomplice.

[7] We have now considered all the objections to the action of the trial court in disallowing instructions proposed by the accused which we think deserve special notice. It is sufficient to say of the other instructions so proposed and rejected which were pertinent to the issues of the case that they involved the statement of principles which the court, in clear language, announced to the jury in its charge. And, in this connection, it is to be said that the charge of the court contained a full and correct statement of every rule or principle of law applicable to the issues or vital facts developed by the proofs.

The appellants appear to have been accorded a fair and impartial trial, the verdict seems to be supported by ample evidence, and the record is free from prejudicial error.

The judgment and the order are therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(32 Cal. App. 23)

JONES v. MAYDEN. (Civ. 1550.)

(District Court of Appeal, Third District, California. Nov. 9, 1916.)

1. CORPORATIONS ⟸306 — CONTRACTS — PARTIES—QUESTION FOR JURY.

In an action against an individual defendant for breach of a written contract, where the body of the contract referred to defendant as a party thereto, but it was signed in the name of a corporation by defendant, and the evidence showed that plaintiff at all times dealt with defendant personally, and that defendant had never stated that any other person had any interest in the contract and had personally offered to pay plaintiff part of the amount due, stating that if plaintiff did not accept he would beat him out of all of it, it was a question for the jury whether the contract was made with defendant personally or with the corporation, and it was error to grant a nonsuit against plaintiff.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1457, 1458; Dec. Dig. ⟸306.]

2. TRIAL ⟸165—NONSUIT—MOTION—EFFECT AS ADMISSION.

A motion for nonsuit admits the truth of plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom, interpreting the evidence most strongly against the defendant, where it is fairly susceptible of two constructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. ⟸165.]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by J. C. Jones against J. L. Mayden. Judgment for defendant on nonsuit, and plaintiff appeals. Reversed.

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P. H. Johnson, of Sacramento, Chas. W. Gillespie, and John R. Cronin, of Stockton, for appellant. Johnson & Lemmon, of Sacramento, for respondent.

CHIPMAN, P. J. This is an action for the recovery of the balance due on a conditional contract of sale of an ice machine. At the close of plaintiff's evidence the court granted a motion for nonsuit and entered judgment for defendant. Plaintiff appeals from the judgment.

The contract is pleaded in hæc verba, and its opening paragraph reads as follows:

"It is agreed, between J. C. Jones, the vendor, hereinafter called vendor and J. L. Mayden, the vendee, hereinafter called vendee, as follows: Said vendor has agreed to sell, and said vendee has agreed to buy the following property, to wit: One ice machine known as the Polar Wave Ice Machine, and equipment for the same as follows" (description of sundry parts).

Then follow the payments to be made and the various conditions and throughout the contract defendant Mayden is referred to as the only vendee. The attesting clause is as follows:

"In witness whereof the vendor and vendee have caused their names to be subscribed hereto on the day and year first above written.

"J. C. Jones, Vendor.
"Sutter Candy Co., Vendee,
"Per J. L. Mayden."

It is alleged in the complaint that on the 14th day of June, 1915, the said defendant, Mayden, made, executed, and delivered to the plaintiff "the foregoing instrument in writing," that "plaintiff installed the said machine and apparatus described in said contract on the premises of said defendant, and that defendant failed, neglected, and refused to pay" the price therein agreed to be paid, except the sum of $50.00, which defendant paid plaintiff. It is alleged that the name "Sutter Candy Co." signed by the defendant to the said contract, "was and is a fictitious name, under which defendant, J. L. Mayden, was, during all the times herein mentioned, and is now, doing business, and that said defendant, J. L. Mayden, is now and was during all the times herein mentioned, the sole and only owner of the said 'Sutter Candy Co.,' and the only person interested in any way in the business of said 'Sutter Candy Co.,' or the carrying on of the same, or in the said contract." A general and special demurrer was overruled, and defendant answered; denied that he executed the said agreement; denied that the plaintiff installed said machine on the premises of defendant, or that he refused to pay the sum demanded, and alleged that he is not indebted to plaintiff under said contract; denied that there is now due and owing plaintiff from defendant on said contract, or at all, the sum of $535 or any other sum; denied that the name "Sutter Candy Co.," signed by defendant to said contract, "was and is a fictitious name under which the said defendant, J. L. Mayden, was, during all the times mentioned or any other time or at all, or is now, doing business"; denied that defendant is the sole owner of said candy company, and is the only person interested in its said business, "and denies that the said defendant is the only person interested in said contract"; alleged that said candy company "now is, and for some time past has been, and at all the times mentioned in the complaint has been, a corporation organized under the laws of the state of California." The answer does not allege that said Sutter Candy Company has any interest in said business or said contract; the averment is that defendant is not the only person interested in said contract.

Plaintiff testified that he installed the machine as called for in the contract at 1011 K street, Sacramento, where defendant was doing business, and that the machine was used in connection with the business, and that defendant paid $50 the first payment; that no other payments were made.

The contract was introduced in evidence and plaintiff testified that defendant signed it. A motion was made for a nonsuit, pending which the following testimony was taken:

"The Court: Mr. Jones (plaintiff), you may take the stand. I want to ask some questions about this. Q. You came up here soliciting business, didn't you? A. Yes, sir. Q. How did you come first to meet Mr. Mayden? A. I heard he wanted a machine. Q. And you went to that place, 1009 K street? A. Yes, sir. Q. And interviewed him? A. No. I asked the soda water mixer what the owner's name was, and he told me. He said I could come in, and I went in and looked the place over and came back. I told him I would make out a contract, so I made out the contract at home and brought it up to him to sign, and he said he could not sign this then, but I could come back after a while, that he had to see a lawyer first. That was 2 o'clock in the afternoon, and I came back at 4; he said he had not seen the lawyer yet, and asked if I could come back at 7. I said yes. So I came back at 7 o'clock at night, and he signed the contract, said that he had seen his lawyer, and that the contract was good without the notes. That is the reason I never got the notes. Q. Did he say anything to you about any associates in the business? A. No, sir; never mentioned anything at all. Q. When he came to sign it, 'Sutter Candy Co.' did you make any comment on that, or ask him if that was his own name? A. I never paid much attention to it. I seen it was the Sutter Candy Company, and his name was at the bottom of it. I never asked him any questions about a company. Q. In negotiating with him, did you address him exclusively? A. Yes, sir; I made the contract with him. Q. And he said nothing about any associates? A. No, sir. The contract was made out on top. Q. He did not say that the company would accept? A. He said he would accept. He never mentioned the company to me whatever. Q. And all his talk was in the first person, was it? A. Yes, sir.

"Mr. P. H. Johnson: Q. Mr. Jones, did you go to the place of business of Mr. Mayden and try to collect this money afterwards? A. Yes, sir. Q. What happened at that time? A. When the machine was installed, he gave me $50, and said give him ten days more to see how the machine would run. Q. Did you go to his place of business to collect any money? A. Yes,

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sir. Q. Did he offer you any money? A. He offered me $300 at that time. Q. Tell the court just what Mr. Mayden said at that time. A. Mr. Mayden said the machine did not do what he thought it would do, and he didn't think he ought to pay the bill, and I said: 'Well, I didn't guarantee the cabinet at all, but I will put in more pipe and do my share.' I sold it to him pretty near at what it cost me, but I wanted it to be satisfactory to him, the first one I had in this town, so I got some more pipe, and after it was over, I come to see him again, and he offered me $300 and told me that was all he would pay me, and if I took it to court, he would beat me out of all of it. Q. Did he say he would or the company? A. He would. Q. Did he lay the money down there, $300? A. Yes, sir. Q. And he said if you did not take that, he would beat you out of all of it? A. Beat me out of all of it. So I went to Stockton and hired an attorney.

"The Court: Is that all, Mr. Johnson? Mr. P. H. Johnson: That is all."

Thereupon, the court took the motion under advisement, and subsequently granted it and entered judgment for defendant.

[1] The agreement states that:

"It is agreed, between J. C. Jones, the vendor, hereinafter called the vendor, and J. L. Mayden, the vendee, hereinafter called the vendee," that "said vendor has agreed to sell, and said vendee has agreed to buy" the property in question.

No mention is made of the Sutter Candy Company in the agreement, and this name appears only in connection with defendant's signature. The testimony of plaintiff, which we must, under the rule, accept as true, shows that plaintiff was dealing with defendant personally, and not with the Candy Company; that defendant personally made the first payment and personally offered a certain sum less than that due under the contract, and personally stated, unless accepted, he would beat plaintiff out of all of it in the court. He at no time after signing the contract claimed that it was signed by him for the candy company, or that the candy company was the person for plaintiff to look to. In his answer defendant evasively stated that "he was not the only person interested," but did not state who was the interested party.

[2] The motion for nonsuit admits the truth of plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom, and upon which motion the evidence should be interpreted most strongly against the defendant. Where the evidence is fairly susceptible of two constructions or if any of several inferences may reasonably be made, the court must take the view most favorable to the party opposing the motion. O'Connor v. Mennie, 169 Cal. 217, 146 Pac. 674; Boyle v. Coast Imp. Co., 27 Cal. App. 714, 151 Pac. 25.

The learned trial judge seems to have attached undue significance to the signature of the vendee and to have given too little heed to the rule we have just stated. If we were to look alone to the contract, the opening paragraph can more safely be taken as showing the intention of the parties than the manner in which the defendant signed the contract. Besides, we have the uncontradicted testimony of the plaintiff that the contract was made between himself and defendant and no other person, and that he was dealing directly with defendant. The payment made by defendant and his offer to settle on a certain basis and his failure at any time to claim that he was not personally liable, all goes to show that there was ample evidence from which an inference might legitimately have been drawn by the court that this contract was between plaintiff and defendant.

Under such state of the evidence, it was error to grant the nonsuit.

The judgment is reversed.

We concur: BURNETT, J.; HART, J.

(31 Cal. App. 774)

PEOPLE v. RENWICK. (Cr. 512.)

(District Court of Appeal, Second District, California. Nov. 2, 1916.)

1. CRIMINAL LAW ⟸369(1)—EVIDENCE—OTHER CRIMES—ADMISSIBILITY.

In a prosecution for robbery, evidence that on the same night an automobile was stolen and was seen in the vicinity of the robbery in the possession of persons with whom accused was alleged to have consorted on that night was inadmissible; the case not being one wherein the prosecution could aid its proof of the charge by proof of previous commission of another crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 822; Dec. Dig. ⟸369(1).]

2. CRIMINAL LAW ⟸1144(12) — APPEAL — PRESUMPTIONS.

On appeal from a conviction of robbery, where permission to call back a witness was denied, the court must presume that if the witness had been permitted to testify, her original testimony would have been modified as claimed by the accused in his request to recall her.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2901, 3029, 3030; Dec. Dig. ⟸1144(12).]

3. CRIMINAL LAW ⟸1168(2)—HARMLESS ERROR—EVIDENCE—ADMISSIBILITY.

In a prosecution for robbery, where the defense was an alibi, and another witness testified that accused was not at the house at which the witness making the alibi testified he was, but that he had been there previously, refusal to permit the accused to recall such witness to show that she could not remember within a month the time when accused had been at the house was prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3124, 3124½, 3129–3136; Dec. Dig. ⟸1168(2).]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Frank Renwick was convicted of robbery, and from the judgment and order denying motion for new trial, he appeals. Reversed.

Guy Eddie, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

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CONREY, P. J. Defendant was convicted of the crime of robbery, and now appeals from the judgment and from an order denying his motion for a new trial. The grounds of appeal are that the evidence was insufficient to justify the verdict, and that the court erred in some of its rulings upon objections to offered testimony.

At between 7 and half past 7 o'clock on the evening of February 28, 1916, three masked men went into a butcher shop on Stephenson avenue in the city of Los Angeles, no other persons being present at the time except the proprietor, Mrs. Rosenbusch. They locked Mrs. Rosenbusch into a refrigerator, took from the till the money (about $5) that was there, and speedily left the place. Mrs. Rosenbusch testified to these facts, and gave some description of the young men, but the description was not sufficient to identify any of them. According to the testimony of a police officer named Raymond, who had been trailing and watching the defendant and certain other young men, one Burns came to the corner of Tenth and Los Angeles streets at 6:35 p. m. in a Ford automobile. At that place four men, Bill Shank, Frank Shank, Fleming, and Renwick, got into the car with Burns and they drove east on Tenth street. According to the testimony of Earl Whitney, employed at a garage on Stephenson avenue about 600 feet east from the Rosenbusch shop, a Ford automobile coming from the east stopped near that garage at between 7 and 7:15 p. m., where Renwick and Frank Shank got out of the machine and walked west toward the Rosenbusch shop, and Burns was driving the machine. As they walked along Renwick signaled for the machine to follow, and the machine passed along in the same direction. It is in evidence that that is a much-frequented highway, and there is no evidence that these were the only persons who passed along the street at about the same time.

Over objections made by the defendant, one Gronsky was permitted to testify that he was the owner of a Ford machine which he left at the corner of Ninth and Spring streets at 4 o'clock that afternoon; that the machine was gone when he returned there to get it at about 8 o'clock p. m., and that he found it at another place some hours later. There is no evidence identifying Gronsky's automobile with the one in which the defendant was seen by the other witnesses, except that all three of these witnesses describe a Ford machine which was not new, and each witness states that the isinglass was out of the back of the machine which he saw. One Frank Richards testified that at about a quarter after 7 he passed along Stephenson avenue opposite the Rosenbusch shop, and his attention was attracted to two men standing alongside of a building opposite; that one of them pointed across the street toward the shop, where Mrs. Rosenbusch was in the act of rolling up a parcel for a customer. He testified that these men, whom he afterwards saw at the police station, were Burns and Shank, not stating which one of the Shanks. Mrs. Rosenbusch stated that immediately before the robbery she had waited upon a customer, who had just gone out. Two of the men who robbed the butcher shop had revolvers and threatened to shoot Mrs. Rosenbusch if she made resistance. It was proved by the testimony of police officers that between 8 and half past 8 o'clock the defendant and the other men who had been in the automobile at Tenth and Los Angeles streets, came in separate groups to the apartments at 1022 South Hill street, where the defendant and his wife were living. These men were arrested separately when they came from the apartment house at separate times during the course of the evening. The officers found in the Renwick apartment two revolvers, three rifles and two shotguns.

While the evidence is sufficient to establish the existence of suspicious circumstances concerning the defendant, it is barely, if at all, sufficient to justify the verdict that Renwick participated in the Rosenbusch robbery. Assuming it to be legally sufficient, the evidence of that fact is purely circumstantial, and leaves the case in that condition where errors in the admission or rejection of testimony would easily turn the scale and be seriously prejudicial to the defendant.

[1] The testimony of Gronsky had no relation to the case, unless it was introduced for the purpose of showing that the defendant or some of his associates had stolen Gronsky's automobile and were using a stolen automobile at the time of the Rosenbusch robbery. The evidence was insufficient to establish that fact, and, even if it had been sufficient therefor, the evidence was not admissible for that purpose in this action. It was not a case wherein the prosecution was entitled to aid its proof of the charge on which Renwick then was being tried by proving that he had previously committed some other crime. Nevertheless, this would very probably have the effect of creating prejudice against the defendant in the minds of the jurors, and render it easier to obtain from them a verdict that the defendant was guilty of the robbery at the butcher shop.

On behalf of the defendant, Edward Biehl and his wife, Frances Biehl, testified that Renwick and his wife, some months before the date of this robbery, had occupied rooms in their apartment house at the corner of Washington street and Maple avenue; that Renwick came to that apartment house at about a quarter before 7 o'clock on the evening of February 28th and made inquiry to find out whether they would again permit him to occupy an apartment in their house; that Renwick remained there with them until at least as late as half past 7; that prior to the evening of February 28th Renwick had

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not been there since the latter part of January. In rebuttal of this testimony the prosecution introduced as a witness Mrs. Gertrude Gorham, who had occupied rooms in the apartment house of the Biehls on February 28th. She stated that she saw Renwick call at Mrs. Biehl's on the morning of February 28th. She also stated that she saw Mr. and Mrs. Biehl that evening at their supper between 6 and 7 o'clock, and that at that time Mrs. Biehl told her that Renwick had been back there to rent rooms. Mr. and Mrs. Biehl had testified that they did not have their dinner that evening until a quarter to 8.

Mrs. Gorham was the last witness at the trial, and her testimony seems to have been given at the close of the day, and the last thing occurring before adjourning was the district attorney's statement, "We rest." On the opening of court the next morning defendant's counsel requested that he be permitted to call back Mrs. Gorham in surrebuttal. The court responded:

"I will not open the case for any more evidence."

Defendant's attorney replied:

"I did not close last night, your honor; I didn't rest my case, and I have positive information that the jury ought to hear from this witness, Mrs. Gorham, that she does not know within a month's time of the 28th whether the defendant Renwick was at the house there, and she will so testify if I put her on the stand."

[2, 3] The court again refused the request, and no further evidence was introduced. It can easily be seen that if the testimony of the witnesses Biehl was true, the defendant could not be guilty in this case. The testimony of Mrs. Gorham furnished the only evidence directly contradicting those two witnesses. It may have been the turning point in the case, and may have been the controlling reason why the jury determined that the defendant's alibi was not proven. Since the request to call back Mrs. Gorham was denied, we must assume that if she had been permitted to testify further, she would have modified her former testimony by admitting that she did not know, within a month's time of February 28th, whether the defendant Renwick was at that house. If this were so, then the time to which Mrs. Gorham referred might have been on or about the 31st of January, which was the time when Mrs. Biehl testified that Renwick had been there before. We cannot avoid the conclusion that the defendant was entitled to that additional testimony of Mrs. Gorham, and that the refusal to admit it was so prejudicial that the error must be held to constitute a miscarriage of justice by denying the defendant an important and very substantial right in a matter vital to his defense.

The judgment and order are reversed.

We concur: JAMES, J.; SHAW, J.

(31 Cal. App. 789)

LEVY v. HENDERSON. (Civ. 1587.)

(District Court of Appeal, Third District, California. Nov. 3, 1916. Rehearing Denied by Supreme Court Jan. 2, 1917.)

1. LANDLORD AND TENANT ⟸231(6)—EXECUTION OF LEASE—EVIDENCE—SUFFICIENCY.
Evidence *held* to warrant inference of an agreement for use and occupancy of premises, made orally, and of entry into possession by lessee.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 933, 934; Dec. Dig. ⟸231(6).]

2. LANDLORD AND TENANT ⟸285(4) — FAILURE TO PAY RENT—WITHHOLDING POSSESSION—EVIDENCE.
Where the tenant's goods were at the time of suit in the premises and he held the key to the building, a finding that he was withholding possession of the premises was justified.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1197; Dec. Dig. ⟸285(4).]

3. LANDLORD AND TENANT ⟸283 — ACTION FOR POSSESSION—DENIAL OF RELATIONSHIP—EFFECT—"TRESPASSER."
Where, in an action for rent and restitution of the premises, the alleged tenant denied the relationship, no notice to quit is necessary, since the tenancy is forfeited by such denial and the tenant becomes a trespasser.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1189–1192; Dec. Dig. ⟸283.

For other definitions, see Words and Phrases, First and Second Series, Trespasser.]

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by M. Levy against Orrin S. Henderson. Judgment for plaintiff, and defendant appeals. Affirmed.

A. H. Carpenter, of Stockton, for appellant. Gordon A. Stewart, of Stockton, for respondent.

BURNETT, J. The action was for rent and for restitution of premises. The court found that on or about the 28th day of September, 1913, the plaintiff leased to defendant the ground floor of certain premises in Stockton known as the Aurora Flour Mills, from month to month, at the rental of $15 per month, and that said lease was not in writing; "that by virtue of said lease the defendant went into the possession of said floor space of said premises, and continued to occupy and hold the same as the tenant of the plaintiff until the month of July, 1914, at which time, by the mutual consent and agreement of the plaintiff and defendant, the plaintiff leased and demised to the defendant and the defendant leased from the plaintiff, the annex to the Aurora Flour Mills, which annex is a building annexed to and forming a part of the Aurora Flour Mills upon the same rental, to wit, $15 per month * * * and that the said defendant ever since the said month of July, 1914, and up to the present time has been, and he is now, in the exclusive possession and occupancy of said an-

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nex" as tenant of said plaintiff and "under said agreement." Then follows a finding that no part of said rent has been paid, and that the amount owing is $405, and that on or about April 25, 1916, plaintiff served upon defendant a written notice that he pay said rent or surrender said premises, but that defendant refused to do either, and that he "still withholds from the plaintiff the possession of said premises and still refuses and neglects to pay the plaintiff said rent or any part thereof as well as the accruing rent." Judgment followed for plaintiff in accordance wtih the prayer of his complaint.

There is no merit in the contention that the evidence is insufficient to support the finding as to the execution of the lease. Mr. Levy testified:

"Mr. Henderson asked me, telling me that he had to leave his place, if I want to rent him the Aurora Flouring Mill; I say I have no objection, but I will rent to him on one proviso, that I don't take any risk regarding fire, theft, destruction, and so on, but he to vacate as soon as I got a permanent tenant or sell the property; and he was satisfied. He said all right. Then he asked me what I would charge him; I told him I will charge him $15 per month. I called my man, Mr. Terry, and introduced him to Mr. Henderson. Mr. Terry had the keys, and he gave one of the keys to Mr. Henderson, the key for the front door of the Aurora Flour Mills."

Mr. Terry testified:

"Mr. Levy called me and gave me an introduction to Mr. Henderson and said: 'This is our new tenant,' he mentioned the fact, and he said: 'Mr. Henderson was going to take over part of the mill to use as his part.' * * * So I took one of the keys and gave Mr. Henderson one of the keys; one of the keys was supposed to be in Mr. Henderson's possession and I had this other key for the privilege of going in there and turning the water into the large tank which was there for the purpose of fire, and I did this every two weeks."

There is also testimony to the effect that in July, or at least the summer of 1914, the lease, with the consent of the appellant, was modified so as to give him the use and occupancy of the annex instead of the main building, on the same terms as in the original agreement. Mr. Levy testified that there was no change in the terms of the original agreement, and Mr. Terry's testimony in reference to a conversation with Mr. Henderson in the summer of 1914 was:

"I went out to Mr. Henderson's house a couple of times. I couldn't find him, so I telephoned out and I met Mr. Henderson at the door, and I told Mr. Henderson in a quiet way, Mr. Levy had requested us to move the stuff, and Mr. Henderson said he would be down in the morning. He was to move his stuff and clean the place out. He moved it into the annex."

Mr. Henderson, the defendant, was asked if his equipment was moved at the time he received from Terry notice to move it out of the main building into the annex, and he replied that it was so moved under his supervision, and that he still had his merchandise there.

[1] It is certainly a fair inference from the foregoing that there was an agreement for the use and occupancy of the premises as claimed by plaintiff, and that under said contract defendant went into said possession. There is also evidence, which we need not set out, that defendant's occupancy of said annex was exclusive, he being in the sole occupancy of the same. The theory of appellant, it may be said, is that the transaction constituted a bailment, that he never took possession of the premises, but on the contrary delivered his goods to the respondent and that the latter from that time on held the goods in his possession. We need not enter upon a consideration of the principles involved in such bailment, for it is sufficient to say that conceding there is some evidence in support of such theory, it is clear that the findings of the court to the contrary were entirely warranted.

[2] It is equally plain that the evidence justified the finding that defendant was withholding the possession of the premises at the time of the commencement of the action. He still had the key to the annex of the building and his goods were even, to the time of the trial, within the premises. It is also undisputed that the rent was unpaid. The defendant himself so testified as to his possession and the nonpayment of the rent.

[3] It is objected by appellant that the three-day notice was ineffectual for the reason that more than one year had elapsed since the defendant had been in arrears in the payment of his rent. This position is taken by virtue of section 1161 of the Code of Civil Procedure. We deem it unnecessary to attempt elucidation of that provision, although we venture the suggestion it was not intended to protect a tenant from month to month in the indefinite withholding of the leased premises. The forbearance of the landlord for more than a year to press his claim for rent or to obtain possession would surely not defeat his action altogether in a proceeding of this kind, but might result in the loss of the rent accruing in the period antedating the 12 months. But this need not be decided as the notice can be entirely disregarded. This follows from the consideration that the relation of landlord and tenant was denied by defendant, and hence no such notice was required. The principle applies that was announced in Cox v. Delmas, 99 Cal. 121. Therein it was said:

"When the time has come for the doing of an act which it is the duty of the defendant to do unconditionally, no demand other than the suit itself is necessary; nor is a demand before suit required where it appears that it would have been unavailing, and would not have changed the rights and relations of the parties, or where the answer denies the relation on which the action is founded, although a demand and refusal would otherwise be a condition precedent to the right of the plaintiff to maintain the action."

Moreover, it has been expressly held in this state that notice is waived by a denial of the relation of landlord and tenant. By such denial the tenancy is, in fact, forfeited,

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and the tenant becomes a trespasser. Smith v. Ogg Shaw, 16 Cal. 88; Dodge v. Walley, 22 Cal. 225, 83 Am. Dec. 61; Bolton v. Landers (No. 1) 27 Cal. 104; Simpson v. Applegate, 75 Cal. 345, 17 Pac. 237.

We think the judgment is just and legal, and it is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(32 Cal. App. 4)

THOMPSON v. SCHOLL. (Civ. 2013.)

(District Court of Appeal, Second District, California. Nov. 8, 1916.)

BROKERS ⊂=94—SALE OF LAND—AUTHORITY—CONVEYANCE TO PURCHASER.

A written instrument, authorizing an agent to sell certain property at the price and on the terms mentioned and to receive any deposit made on the purchase price, the authority to be exclusive and to continue 30 days and until notice of revocation, authorizes the agent only to procure a purchaser to whom the owner may make the sale, not to enter into a contract for the sale, so that the purchaser is not entitled to specific performance of a contract of sale made by the agent.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 136; Dec. Dig. ⊂=94.]

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Suit by W. B. Thompson against Mrs. Bessie L. Scholl for specific performance. Judgment for the plaintiff, and defendant appeals. Reversed.

Kendrick & Ardis, of Los Angeles, for appellant. Haas & Dunnigan, of Los Angeles, for respondent.

CONREY, P. J. In this action plaintiff seeks to obtain a decree enforcing specific performance of an alleged contract for the sale of real property. The defendant Bessie L. Scholl appeals from the judgment and from an order denying her motion for a new trial.

The complaint alleged ownership by the defendant of the land described therein; that on August 26, 1912, she appointed one I. C. Butler as her agent to sell said property, the authorization being in writing as follows:

"Los Angeles, Calif., Aug. 26th, 1912.

"I hereby authorize I. C. Butler to sell for me, at the price and on the terms below mentioned, the following described property, and to receive and receipt for any deposit made on the purchase price thereof. This authority to continue 30 days and until notice of revocation. The commission to be above purchase price. This is an exclusive agency. Purchase price to be $10,000 cash or $6,000 cash and $4,500 secured by a mortgage on below described property, payable on or before three years from date at 7%. [Here follows description of property.]"

Signed by Mrs. Bessie L. Scholl.

It is further alleged that within 30 days thereafter, and prior to any revocation of the authority, Butler did, as agent of the defendant and on her behalf, sell to the plaintiff the described property for the sum of $10,000 to be paid in cash. Other allegations follow, showing what was done by and between Butler and Scholl, and other usual and necessary allegations of a complaint for specific performance. The defendant demurred to the complaint upon the ground that the same did not state facts sufficient to constitute a cause of action and upon other grounds, and the demurrer was overruled. After answer, the case was tried, with resulting findings and judgment in favor of the plaintiff.

The complaint did not state a cause of action. The authority given by defendant to Butler did not authorize him to enter into a contract of sale on behalf of the defendant. The authorization extended no further than that the agent might find a purchaser to whom a sale might be made by the defendant at the price named. It was no more comprehensive or effective as empowering the agent to enter into a contract of sale than was found in the agent's appointment in Armstrong v. Lowe, 76 Cal. 616, 18 Pac. 758, where it was held that the agent was not authorized to execute a contract to convey. Other cases to like effect and enforcing the same rule are: Duffy v. Hobson, 40 Cal. 244, 6 Am. Rep. 617; Stemler v. Bass, 153 Cal. 791, 96 Pac. 809; Salter v. Ives, 171 Cal. 790, 155 Pac. 84; Church v. Collins, 18 Cal. App. 748, 124 Pac. 552. The authority given in the present case differed in essential particulars from the agency appointments discussed in Rutenberg v. Main, 47 Cal. 219, and Bacon v. Davis, 9 Cal. App. 83, 98 Pac. 71.

In view of the conclusions above stated, it is unnecessary to discuss other propositions relied upon by the appellant, which include, among other things, the contention that the agent did not enter into any sufficient written agreement with the plaintiff on behalf of the defendant, even if the agent had been authorized to make a contract of sale.

The judgment and order are reversed.

We concur: JAMES, J.; SHAW, J.

(31 Cal. App. 796)

VICTORS v. KELSEY, County Treasurer. (Civ. 1586.)

(District Court of Appeal, Third District, California. Nov. 4, 1916.)

WITNESSES ⊂=31 — LIABILITIES—WITNESS' FEES.

Under Pol. Code, § 4307, making expenses incurred by the district attorney county charges, and section 4041, subd. 12, authorizing the board of supervisors to allow county accounts, claim for expert witness fees allowed by the district attorney and board of supervisors is a valid claim against the county, although exceeding the usual witness fees prescribed by Pol. Code, § 4300g, and Pen. Code, § 1329.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 71; Dec. Dig. ⊂=31.]

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Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by Ernest A. Victors against E. C. Kelsey, County Treasurer of the County of Plumas. Judgment for plaintiff, and defendant appeals. Affirmed.

L. N. Peter and L. H. Hughes, both of Quincy, for appellant. F. L. Berry, of San Francisco, for respondent.

CHIPMAN, P. J. Mandate. Petitioner is a resident of the city and county of San Francisco, a physician and surgeon of many years' practice. The nature of the action sufficiently appears from the following findings:

"VI. That in the determination of the said cause 'People of the State of California v. Frank S. Cook,' and in preparing said cause for trial in behalf of the plaintiff therein, it became material and important to said plaintiff that certain experimental tests be made to determine whether or not certain specimens were or were not human blood stains; that the said district attorney of the said county of Plumas duly engaged and duly employed and subpœnaed the petitioner herein to make said experimental tests upon certain specimens then and there submitted to him prior to the trial of said action and for the purpose above stated, and in anticipation of calling the said petitioner as an expert witness at the trial of said cause to testify as to the results of said experimental tests; that the petitioner herein did make said experimental tests upon certain specimens duly submitted to him and in pursuance of his employment as aforesaid for the purpose of preparing as a witness in the trial of the said cause, and was duly and regularly subpœnaed therefor at the city and county of San Francisco, state of California, to attend, and did attend, upon the trial of said cause in the city of Quincy, county of Plumas, on the 10th and 11th days of February, 1915, and was then and there duly called as a witness in said cause, and testified as an expert witness thereat for the purpose of testifying to the result of said experimental tests above referred to, and his said testimony then and there became a part of the record of the trial and proceedings of said action.

"VII. That thereafter, to wit, on February 11, 1915, the petitioner herein filed and presented in due form to the board of supervisors of Plumas county his bill, claim, and demand for payment of his services rendered as referred to above for the making of said experimental test recited therein and above referred to, and for testifying in relation as set forth and referred to above and for his necessary expenses incurred in attending said trial; said bill, demand, and claim were filed in due form with the board of supervisors of said Plumas county on the 11th day of February, 1915; that said board of supervisors received said claim and demand, fully and duly considered the same, and duly acted thereon and approved the same, and allowed the same, and ordered the said claim be duly paid to the petitioner herein, and that the auditor of said Plumas county issue his warrant forthwith for the payment of said claim from the general fund of the treasury of said county; that thereupon said bill and demand was duly audited by said auditor of said county of Plumas, was duly allowed, and issued his warrant upon the said treasurer of said county of Plumas on the 2d day of March, 1915, payable to the petitioner for the sum of $272.20 in payment of said claim, demand, and bill, and said warrant provided that said payment should be made from the general fund of the treasury of said county; and that said bill, claim, and demand was in the form and as set forth and alleged in the first amended petition herein and as set forth and appended thereto in a copy thereof and marked as Exhibit A and made a part of said first amended petition herein.

"VIII. That immediately subsequent to March 2, 1915, and prior to the filing of the petition herein, the petitioner duly presented said claim and demand as allowed and as set forth above, and in the form alleged herein, to the said treasurer of said Plumas county at the office of said treasurer during the business hours thereof, and that said treasurer refused to pay the same, and still continues to refuse to pay the same, and offered as a reason for said refusal that the item in said claim designated 'February 10–11, one and one-half days' service as witness, $150.00,' was and is illegal, and does not and did not constitute a legal charge against the said county of Plumas. * * *

"X. That there was and is at all of the times mentioned in said petition sufficient money in the hands of the county treasurer, county of Plumas, state of California, in the proper fund in the hand of said treasurer with which to pay said demand."

No objection is made to the form of the claim. The items were:

"Date.	Items.	Amount.
Jan. 19	Examination and experimental tests of four specimens for the purpose of determining as to whether the same were human blood....	$100.00
Feb. 10–11	1½ days' service as witness $150.00 and expenses to Quincy, as a witness and return, $22.20	172.20
		$272.20"

Indorsed as follows:

"Expenditures authorized and approved by me,
"M. C. Kerr, Dist. Atty."

"Examined. A legal charge.
"M. C. Kerr, Dist. Atty.

"Allowed by board of supervisors March 2, 1915, for $272.20, payable out of the general fund.

"Countersigned: H. J. Treleaven,
"Chairman Board of Supervisors.

"Attest: F. R. Young,
"Clerk of Board of Supervisors.

"Warrant No. 577. Allowed March 2, 1915, for $272.20, payable out of the general fund.
"F. R. Young, County Auditor."

As conclusions of law, the court found that petitioner is entitled to a peremptory writ of mandate directed to E. C. Kelsey, treasurer of Plumas county, commanding him to pay said claim to petitioner with interest at 7 per cent. per annum from March 2, 1915, and judgment was accordingly entered. The appeal is from said judgment on the judgment roll alone.

The only item challenged for its illegality is the charge of $150 for per diem services as a witness. And appellant contends that petitioner was entitled only to the usual and ordinary witness' fees. Pol. Code, § 4300g; Pen. Code, § 1329.

It must be conceded that unless the district attorney was authorized by law to engage the services of petitioner in an expert capacity and agree to compensate him for his services as such, the contention of appellant must prevail. If, however, the district

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attorney had such authority, and no objection to the claim arising out of the exercise of that authority is made other than want of authority, it was the duty of the treasurer to pay the claim, and mandate will lie to compel its performance.

Section 4307 of the Political Code provides as follows:

"The following are county charges: * * * 2. The traveling and other personal expenses of the district attorney, incurred in criminal cases arising in the county * * * and all other expenses necessarily incurred by him in the detection of crime and prosecution of criminal cases, and in civil actions and proceedings and all other matters in which the county is interested." Same as section 228 of the County Government Act of 1897 (Stats. 1897, p. 575).

The board of supervisors are authorized:

"To examine, settle and allow all accounts legally chargeable against the county, except salaries of officers, and such demands as are authorized by law to be allowed by some other person or tribunal, and order warrants to be drawn on the county treasurer therefor." Pol. Code, § 4041, subd. 12, same as subdivision 11, § 25, County Government Act of 1897, supra.

These sections as found in the County Government Act were before the Supreme Court in County of Yolo v. Joyce, 156 Cal. 429, 105 Pac. 125. In that case the claim was for the transcription of certain testimony to be used in the prosecution of a criminal case which the district attorney certified was necessary "in the prosecution of Dean McGrew and was necessary in the conduct of the trial of said McGrew." It was contended in that case that the transcription could only be ordered by the judge under section 274, Code of Civil Procedure. But the court held that the power was not vested exclusively in the trial court, and that the authority could be exercised by the district attorney under the act cited. The court said:

"The district attorney is an executive officer charged with the detection of crime and the prosecution of criminal cases. In furtherance of the proper discharge of his duties the Legislature has, under the section of the County Government Act, enlarged his power so as to permit him to incur expense necessary to enforce the criminal law. His authority to do so for that purpose is not made subject to the control or supervision of any court or judicial officer, but is a matter for the consideration of the board of supervisors alone to the extent of determining whether the expense was necessarily incurred so as to constitute a county charge. Of course, the right of a district attorney to incur expense is not an arbitrary one. All that the section of the County Government Act permits is to give to the district attorney, in the first instance, the discretion to determine whether it is necessary in the detection of crime, or the prosecution of a criminal case, to incur an expense chargeable against the county. Any such claim, however, must be presented to the board of supervisors for allowance, and that body reviews the action of the district attorney and determines whether the expense was a necessary one and acts accordingly. And as the board of supervisors is vested with the authority to determine the question whether the expense was necessary or not, and is the tribunal to which is committed under the County Government Act the jurisdiction to supervise the action of the district attorney in incurring the expense, its determination that it was a proper and necessary expense is conclusive." Colusa County v. De Jarnatt, 55 Cal. 375; McFarland v. McCowen, 98 Cal. 330, 33 Pac. 113; McBride v. Newlin, 129 Cal. 36, 61 Pac. 577; County of Santa Cruz v. McPherson, 133 Cal. 282, 65 Pac. 574; County of Alameda v. Evers, 136 Cal. 132, 68 Pac. 475.

We regard this decision as conclusive of the question here. The district attorney acted under express authority given him by the statute, and the board of supervisors determined that the expense was necessary. We cannot go behind the finding of the supervisors to inquire whether they decided rightly or wrongly. We have nothing before us but the record of official action and the findings of the court. The supervisors might well have concluded that the time of the expert given as a witness was as valuable to him as the time given to his examination of the specimens, and as to this latter item no objection is made. The examination of the specimens submitted to the expert and his conclusion upon such examination would have been of no assistance to the state in the trial of the case without the expert's presence at the trial.

It is suggested in appellant's reply brief that the complaint does not allege that an agreement was made by the district attorney to pay the petitioner for his services in attending as a witness at the trial. There is no direct averment of such agreement, but the claim shows on its face that the expenditure was "authorized and approved by" the district attorney. This was sufficient to meet objection for the claim was made part of the complaint.

We do not think that the general law fixing the fees of witnesses is a limitation upon the power given the district attorney and the board of supervisors by the statutes above referred to.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

(32 Cal. App. 6)

MULLIA v. YE PLANRY BLDG. CO. et al.

(Civ. 1658.)

(District Court of Appeal, Second District, California. Nov. 8, 1916.)

1. APPEAL AND ERROR ⟹770(1)—FAILURE TO APPEAR AND PRESENT BRIEF—DUTY OF APPELLATE COURT—STATUTE.

Where respondent makes no appearance at the hearing had on an appeal, and presents no brief in opposition to that filed by appellants, no duty devolves upon the Appellate Court, under Code Civ. Proc. § 953c, to search the record for evidence to support the findings, the want of which is a ground on which appellants asked for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3106, 3107; Dec. Dig. ⟹770(1).]

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2. MASTER AND SERVANT ⊂⊃302(6)—SERVANT'S NEGLIGENCE—RESPONSIBILITY OF MASTER—STATUTE.

Under Civ. Code, § 2338, declaring a principal responsible for his agent's negligence in the transaction of the business of the agency, including wrongful acts committed by the agent in and as a part of the transaction of the business, and for his willful omission to fulfill the obligations of the principal, a building company which furnished an automobile to its superintendent of construction for use as a business car in carrying out its instructions and superintending its work was not liable to the owner of the taxicab into which the superintendent negligently ran while driving a friend into the city from a country club after having driven earlier in the evening to a theater in the city and from thence to the club, since the negligence of a servant, where he is not acting within the scope of his employment, is not attributable to his master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1220; Dec. Dig. ⊂⊃ 302(6).]

Appeal from Superior Court, Los Angeles County; A. J. Buckles, Judge.

Action by George L. Mullia against the Ye Planry Building Company, a corporation, and Hugh Keenan. From a judgment for plaintiff, defendants appeal. Judgment reversed.

Rupert B. Turnbull, of Pasadena, for appellants. Campbell & Moore, of Los Angeles, for respondent.

SHAW, J. This action was brought to recover damages alleged to have been incurred by plaintiff as a result of defendants' negligence in operating an automobile which collided with one owned by the former. Defendants filed separate answers, denying the alleged acts of negligence, and, in addition to its answer, Ye Planry Building Company filed a cross-complaint, wherein it alleged that by reason of plaintiff's negligence it had incurred damages therein set forth, which allegations the court found to be untrue. The court found in favor of plaintiff upon the issues tendered in the complaint, upon which judgment went for plaintiff, from which defendants, adopting the alternative method in presenting the record, appeal.

[1] Respondent made no appearance at the hearing had upon the appeal; neither has he presented any brief in opposition to that filed by appellants. Under these circumstances, no duty devolves upon the court to search the record for evidence to support the findings (section 953c, Code Civ. Proc.; Thompson v. Hamilton Motor Co., 170 Cal. 737, 151 Pac. 122; Williams v. Tingey, 26 Cal. App. 574, 147 Pac. 584), the want of which is one of the grounds upon which appellants ask a reversal of the judgment.

It appears that defendant Keenan was employed as superintendent of construction by Ye Planry Building Company, which furnished him with an automobile, instructing him to use it as a business car to carry out the company's instructions in superintending its work, which car, when not so used, was to be kept in a garage at Keenan's residence. On the day in question, after the close of his work, Keenan drove the car to his home, and that evening with a friend, drove to a theater in Los Angeles, which they left at about 11:30 p. m., going to a place known as the Vernon Country Club, where they remained until about 1:30 a. m. the next day. On their return to the city and while proceeding along the right side of an unlighted street known as Santa Fé avenue, Keenan operating the car with the lamps burning, his car ran into a taxicab owned by plaintiff, which car at the time was not running, but standing near the curb line of the street fronting in the direction that Keenan was running his car and on the same side thereof. It had no rear light burning to indicate its presence, by reason of which fact Keenan did not see it until so near that he was unable to turn or stop his automobile so as to avoid the collision.

[2] The evidence to which our attention is directed clearly tends to show, not only that plaintiff was negligent in leaving his car standing in an unlighted path of automobile travel without a rear light or other warning to indicate its presence, but also tends to show that had the rear light been burning the collision would not have occurred. Conceding, however, that the collision was due to Keenan's negligence, such negligence cannot be imputed to defendant Ye Planry Building Company, between which company and Keenan there existed the relation of master and servant. Section 2338, Civil Code, declares that:

"A principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal."

In Stephenson v. Southern Pacific Co., 93 Cal. 558, 29 Pac. 234, 15 L. R. A. 475, 27 Am. St. Rep. 223, it is said:

"The test of the master's responsibility for the act of his servant is, whether or not the act was done in the prosecution of the business that the servant was employed by the master to do, or in the execution of the authority given by the master, and for the purpose of performing what the master has directed."

By no stretch of the imagination can the case be brought within the rule thus laid down. The evidence conclusively shows that at the time of the accident, when Keenan was using the automobile, he was doing so contrary to the instructions of his employer and for his own private use and benefit and pleasure, not at the time being engaged in the course of his employment or in the performance of any duty imposed upon him by Ye Planry Building Company, his codefendant. The doctrine that the negligence of a servant, where not acting within the scope

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of his employment, is not attributable to his master, is fundamental and supported by authorities too numerous to call for mention. The case here presented is similar to that of Branch v. International & G. N. R. Co., 92 Tex. 288, 47 S. W. 974, 71 Am. St. Rep. 844, where it is said:

"If a railroad company intrusts the care of its hand car to its section foreman, it does not thereby become liable for an injury to a person at a public crossing, caused by a collision with such hand car through the negligence of such foreman while operating the car upon his private business, not in the line of the operation of the railroad, nor in the performance of a duty to the company, and in violation of its orders."

In Lotz v. Hanlon, 217 Pa. 339, 66 Atl. 525, 10 L. R. A. (N. S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731, it is said (quoting from the syllabus):

"The owner of an automobile is not, where the person in charge was not using it in the course of his employment and in the owner's business, answerable for injuries inflicted by it on a person on the highway."

To the same effect is Stewart v. Baruch, 103 App. Div. 577, 93 N. Y. Supp. 161, and Reynolds v. Buck, 127 Iowa, 601, 103 N. W. 946.

Clearly the judgment must be and is reversed.

We concur: CONREY, P. J.; JAMES, J.

(32 Cal. App. 9)

DEEBLE v. EXCHANGE NAT. BANK.

(Civ. 1804.)

(District Court of Appeal, Second District, California. Nov. 8, 1916.)

ASSIGNMENTS ⊂=73 — ORDER TO COLLECTING AGENT—LIABILITY.

Where plaintiff's debtor was the owner of certain land contracts, upon which amounts became due from the purchasers each month, and such contracts and the payments made thereunder were in the possession of defendant bank for the use of the debtor, and the debtor in writing directed the bank to set aside 20 per cent. of the money received from the first 40 acres and to pay plaintiff his share of one-third of such percentage until $1,460 should be paid, which direction the bank approved, the bank as the debtor's agent, while liable to plaintiff for his proportion of the money actually received, was not bound to retain the contracts in its possession until enough had been collected to satisfy plaintiff's claim, and where it delivered the contracts to its principal before collecting sufficient to satisfy plaintiff's claim was not further liable to plaintiff.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 139–142; Dec. Dig. ⊂=73.]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Thomas J. Deeble against the Exchange National Bank. Judgment of dismissal on sustaining a demurrer to the complaint, and plaintiff appeals. Affirmed.

P. D. Overfield, of Oatman, Ariz., and I. C. Louis and Alfred E. Dennis, both of Los Angeles, for appellant. Eugene C. Campbell, of Long Beach, for respondent.

JAMES, J. A demurrer in which special and general grounds were assigned was sustained to the third amended complaint of the plaintiff without leave to amend, and judgment of dismissal followed, from which this appeal was taken. It is recited in that judgment that plaintiff's attorneys stated to the court that they did not desire to further amend, and no question is made as to that part of the order which denied leave to amend the pleading. The question argued is as to whether the complaint contained a statement of facts sufficient to constitute a cause of action against defendant. It was first therein alleged that on the 1st day of July, 1913, one J. W. Young was the owner of certain written contracts for the sale of real property, upon which contracts amounts became due and payable each month from the purchasers; that the total amount of money due under such contracts was in excess of $80,000. The complaint then alleged:

"That said contracts and payments made under and pursuant thereto were at all the times aforesaid in the possession of and held by the defendant corporation to and for the use and order of said J. W. Young.

"That on or about July 1, 1913, said J. W. Young owed plaintiff the sum of fourteen hundred and sixty ($1,460) dollars for labor and services performed for said J. W. Young during a period of one year next preceding said date, at his special instance and request.

"That plaintiff and said J. W. Young on or about the said 1st day of July, 1913, entered into an agreement whereby said plaintiff accepted in full payment for said indebtedness of fourteen hundred and sixty ($1,460) dollars from said J. W. Young an order and assignment of certain moneys in the sum of fourteen hundred and sixty ($1,460) dollars due on contracts for the sale of lots in Industrial White City Tract, Long Beach, owned by said J. W. Young and held by defendant for collection for said J. W. Young.

"That on or about the 1st day of July, 1913, within the county of Los Angeles, state of California, the said J. W. Young, pursuant to said agreement with plaintiff set out in paragraph IV herein, executed to the defendant corporation a certain writing in words and figures hereinafter set forth. That the defendant corporation accepted the terms of the said writing and thereafter on or about the same day defendant delivered the same to the plaintiff and at the same time and place entered into an oral agreement with plaintiff that defendant, in consideration of plaintiff releasing said J. W. Young from payment of the said fourteen hundred and sixty ($1,460) dollars, would keep and retain the aforesaid contracts in its possession for a period of time sufficient to enable it to pay plaintiff the total sum of fourteen hundred and sixty ($1,460) dollars from moneys it might receive under and pursuant to the aforesaid contracts, and would pay the said sum of fourteen hundred and sixty ($1,460) dollars to plaintiff as so collected monthly. That the aforesaid writing is in words and figures as follows, to wit:

" 'Long Beach, Cal., July 1, 1913.

" 'Mr. C. H. Wiley, c/o Exchange National Bank, Long Beach, California—Dear Sir: I hereby instruct you to set aside twenty (20%) per cent. of all moneys received on the first forty (40) acres of Industrial White City from this date, and to pay to T. J. Deeble his share of one-third of said 20% set aside as above

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stated paid until the amount of fourteen hundred and sixty ($1,460) dollars shall have been paid. Said payments are to be made to the said Mr. Deeble every thirty (30) days.

"'Yours truly, J. W. Young.

"'Copy filed with us this 1st day of July, 1913, and approved by us. Chas. A. Wiley.

"'W. J. Gardiner.'

"That at all times herein mentioned the said Charles A. Wiley (mentioned as C. H. Wiley and Chas. A. Wiley in the aforesaid writing) and W. J. Gardiner, and each of them, were officers and agents of defendant corporation and were acting as officers and agents of defendant corporation at the time they and each of them placed their signatures on the aforesaid writing."

It was then alleged on information and belief that the defendant had received during the months of July and August, 1913, moneys due on said contracts amounting to the sum of $1,960, and that during said months "defendant corporation paid to plaintiff under and pursuant to the terms of the aforesaid writing and oral agreement with said plaintiff the sum of $130.05." It was further alleged on information and belief that on or about the 31st day of August, 1913, the defendant "disposed of, transferred and delivered to" J. W. Young all of the contracts, together with moneys theretofore paid to defendant and then in possession of the defendant; that from that time on the defendant was unable and refused to pay to the plaintiff any of the money becoming due under such contract. The prayer was for judgment in the sum of $1,329.95.

The contention of plaintiff is that upon the giving of the written direction signed by Young to the bank, the bank became obligated to retain in its possession the contracts until an amount sufficient had been collected to satisfy the debt due from Young to the plaintiff. The difficulty with this position is that the bank was in nowise a debtor to Young. It was acting merely as Young's agent, and the written direction given to it constituted no assignment of amounts due from the purchasers of the land. The effect of the arrangement, as we read the allegations of the complaint, was only that so long as the bank continued to act as collector for Young it would pay over to the plaintiff, out of the proceeds of the contracts in its hands, the amounts directed to be paid by Young. The contract holders, debtors of Young, would have been in no way estopped from paying the money due from them directly to their creditor. Under the facts shown there could have been no release of the principal debt worked by the giving of the order by Young directing his agent to pay to his creditor, the plaintiff, enough money, if such was collected, to satisfy the debt. No doubt, as to the money actually collected by the bank, plaintiff was given the right to claim such a proportion as it was agreed should be paid therefrom, and to that extent the order might perhaps be said to work an equitable assignment in favor of plaintiff of the right to take that money. The contracts, as it appears, were held by the bank without any interest given to the defendant therein and were held subject to the right of Young to retake them into his own possession upon demand. We think that the court's ruling on the demurrer was correct, and that the judgment should be affirmed.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(31 Cal. App. 746)

COLUSA & H. R. CO. v. SUPERIOR COURT OF GLENN COUNTY et al.

(Civ. 1414.)

(District Court of Appeal, Third District, California. Oct. 31, 1916. Modification of Opinion, Nov. 28, 1916.)

1. EMINENT DOMAIN ⟸245—JUDGMENT—ENFORCEMENT.

Code Civ. Proc. § 1251, providing that plaintiff in condemnation proceedings "must within 30 days after final judgment pay" the damages assessed, refers to the preliminary judgment entered in the superior court, and not to the final determination of the case upon appeal.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 637; Dec. Dig. ⟸245.]

2. EMINENT DOMAIN ⟸249 — EXECUTION — ISSUANCE.

Under Code Civ. Proc. § 1252, providing that execution may issue in condemnation cases as in civil cases if the damages be not paid or deposited within 30 days after final judgment, execution may ordinarily issue 30 days after judgment in the superior court.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 646; Dec. Dig. ⟸249.]

3. EMINENT DOMAIN ⟸258—JUDGMENT—EFFECT.

A judgment in condemnation proceedings where plaintiff may elect to abandon the proceedings within 30 days thereafter under Code Civ. Proc. § 1255a, is not a money judgment within section 942, providing that appeals therefrom do not stay execution unless an undertaking be given, etc.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 672; Dec. Dig. ⟸258.]

4. EMINENT DOMAIN ⟸258—APPEAL—STAY OF JUDGMENT.

An appeal by plaintiff from a judgment in condemnation proceedings taken within 30 days and while it could still elect to abandon the proceedings under Code Civ. Proc. § 1255a, stays further proceedings on the judgment pending its final determination on appeal.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 672; Dec. Dig. ⟸258.]

Petition for a supersedeas writ by the Colusa & Hamilton Railroad Company against the Superior Court of Glenn County, Wm. M. Finch, Judge thereof, and Charles H. Glenn. Writ denied. On rehearing, writ issued.

See, also, 25 Cal. App. 807, 144 Pac. 993.

Frank Freeman and George R. Freeman, both of Willow, for petitioner. Charles L. Donohoe and W. T. Belieu, both of Willow, for respondents. T. T. C. Gregory, of San Francisco, Meredith, Landis & Chester, of

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Sacramento, Frank H. Short, of Fresno, and Edward F. Treadwell, of San Francisco, amici curiæ.

BURNETT, J. In the above-entitled cause a rehearing was ordered by this court. The facts may be stated as follows: Petitioner is a railroad corporation, and as such it brought in the superior court of Glenn county a suit in eminent domain to secure a right of way over respondent's land. With the assistance of a jury, a trial was had on April 26, 1915, which resulted in a verdict awarding plaintiff (petitioner herein) the 12.18 acres sought to be condemned, fixing the value of said land at the sum of $2,801.40, and assessing the damages, by reason of severance to that portion of the land of defendant not taken, at the sum of $14,130, making a total of $16,931.40 damages. Thereafter, on June 2, 1915, the Honorable Wm. M. Finch, judge of said superior court, made and entered a judgment adopting said verdict and containing the usual formal recitals, and also certain stipulations of the parties as to how the road should be constructed and concluding as follows:

"It is further ordered, adjudged, and decreed that upon the payment of the said sum of $2,801.40 and the said sum of $14,130, to wit, the sum of $16,931.40 assessed, the plaintiff shall be entitled to a final order of condemnation which shall describe the property condemned and the purpose of such condemnation, which property shall be as described in the complaint herein, and which purpose shall be as stated in the complaint herein, and that said railroad on said right of way shall be constructed in the manner prescribed in this decree, and the said property hereinafter described is hereby taken as a public use for the purposes described and set forth in the complaint, reference to which is hereby made, upon the said payment of the said total sum being made."

And then followed a description of the land condemned. On June 11th the plaintiff filed with the clerk of said court a notice of appeal, and on June 16th said plaintiff filed a proper undertaking for costs on appeal. The petition for supersedeas herein alleged:

"That notwithstanding the said perfecting of said appeal * * * defendant has applied to the superior court of the state of California in and for the county of Glenn, and Hon. Wm. M. Finch, judge of said court, for an order directing and compelling the clerk of said superior court to issue an execution in said action on said judgment for the said sum of $16,931.40 and costs of suit, and the said superior court and the said judge thereof has entertained said motion and said application and threatens to grant the same and order said clerk of said court to issue said execution, to the end that it may be levied upon the property of your petitioner, the plaintiff in the above-entitled action, and the said defendant is not entitled to such order or such execution, and your petitioner is entitled to a writ of supersedeas, for the reason that the appeal taken from said judgment has suspended said judgment and the jurisdiction of said superior court; * * * and said judgment has by reason of said appeal been stayed until after the final determination of said appeal; * * * that your petitioner, the plaintiff in the above-entitled action, has not taken possession of the land involved in said action or any portion thereof, and has not made and is not now making any attempt to take possession of said land."

In the opinion hereinbefore filed, for reasons therein stated, an order was directed denying the writ. The decision was based largely upon our conception of what had been held by our Supreme Court in certain cases to which attention was directed. The fundamental principles leading to the conclusion which we reached are manifestly that the judgment rendered in the superior court is "a money judgment" in the sense of section 942 of the Code of Civil Procedure, and that such judgment is the "final judgment" contemplated by section 1251 of said Code.

We venture to consider again the various decisions cited and to endeavor to clear up what seems to be a somewhat complicated situation. In doing so, we shall not attempt to segregate these decisions as they bear more directly upon one or the other of these propositions, but it will be more convenient to view them rather indiscriminately as they relate to one or both of these principles.

At the outset, it may be said that of course there is no contention that the judgment has become final in the sense of a "final conclusion of the litigation." It is admitted by both parties that, as said in Gillmore v. American C. I. Co., 65 Cal. 63, 2 Pac. 882:

"Until litigation on the merits is ended, there is no finality to the judgment, in the sense of a final determination of the rights of the parties, although it may have become final for the purpose of an appeal from it."

It is, though, claimed by respondent that section 1251 of the Code of Civil Procedure, providing that "the plaintiff must within thirty days after final judgment pay the sum of money assessed," does not refer to the end of litigation, but to the judgment as entered or rendered in the superior court, and, of course, it is contended that this judgment is one directing "the payment of money" in the sense of section 942 of said Code. If it were res integra, I should be inclined to the conclusion that said expression used in said section 1251, "after final judgment" has the same signification as "after judgment becomes final." The peculiar form of expression, the definite article "the" being omitted before the word "final" is a significant circumstance in this connection. Respondent's interpretation would be more persuasive if the Legislature had provided that the money should be paid within thirty days "after *the* final judgment."

Again, the use of the term "final" is of great importance. Why should the word be used at all if it was intended to make the judgment of the superior court the initial point for computation of the time? Is it not fair to say that, if such had been the intention, it would have been provided that the money should be paid within 30 days "after judgment" or "after the judgment" or "after judgment in the superior court"? Any of these expressions or equivalent ones would

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have placed the matter beyond question, and it seems hardly credible that the deliberate use of the qualifying term "final" was not for the purpose of postponing the declared effect of the judgment until finality had attached to it.

Again, according to a cardinal rule of construction, the section should be considered, if possible, so as to harmonize with other provisions of the law. If a certain interpretation leads to unreasonable or absurd results, it should, of course, be regarded with suspicion and distrust. Section 1255a of said Code provides that:

"* * * Failure to comply with section 1251 of this Code shall constitute an implied abandonment of the proceeding. Upon such abandonment, express or implied, on motion of defendant, a judgment shall be entered dismissing the proceeding and awarding the defendant his costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees."

If section 1251 requires plaintiff to pay the money within 30 days after judgment is entered upon the verdict, unless he does so, of course, he has failed to comply with said section, and the action may be dismissed, notwithstanding the Code gives a party 60 days within which to appeal. If he appealed the next day after the judgment or moved for a new trial, it would avail him nothing, since there could be no determination of either proceeding within said time. Even if a motion for a new trial were made, heard, and granted within said 30 days, it would not operate to vacate the judgment until the expiration of the 60 days allowed defendant to appeal from the order. Pierce v. Birkholm, 110 Cal. 669, 43 Pac. 205.

In the meantime, if he has not paid the money within said 30 days, there is an implied abandonment of the action, and the whole proceeding may be dismissed. The only alternative would seem to be the payment of the money, no matter how excessive the amount or erroneous the judgment. But if he pays the amount awarded, and it is accepted by the defendant, the judgment would be satisfied and the proceedings are at an end.

It may be that plaintiff could prevent this result by giving an undertaking to stay execution. Even this, however, is doubtful, as the statute unqualifiedly provides that the failure to pay the sum of money assessed within the time prescribed "shall constitute an implied abandonment of the proceeding." The giving of an undertaking is obviously not the payment of the money, and, although it would stay the execution of the money judgment, it would not render the failure to pay the money within the prescribed time any the less "an implied abandonment of the proceeding." At any rate it is manifest that the interpretation insisted upon by respondent might greatly hamper, if not defeat, the remedy by appeal or motion for a new trial.

Again in section 1254, where the Legislature had in mind the judgment as rendered in the superior court, it is interesting to notice the nomenclature used. Therein it is provided:

"At any time after trial and *judgment* entered or pending an appeal * * * to the Supreme Court, whenever * * * plaintiff shall have paid into court, for the defendant, the full amount of the *judgment*, and such further sum * * * the court * * * may * * * authorize the plaintiff * * * to take possession of and use the property during the pendency of and until *the final conclusion of the litigation.* * * * The defendant, who is entitled to the money paid into court upon any *judgment*, shall be entitled to * * * receive the same * * * upon obtaining an order therefor from the court. It shall be the duty of the court * * * upon application * * * by such defendant, to order and direct that the money so paid into court for him be delivered to him upon his filing a satisfaction of the *judgment*," etc.

It is *the judgment* or *judgment* rendered in the superior court, not *final judgment*, as in the previous quotation. Herein is also reference to an *appeal* and *the final conclusion of the litigation.* Such contingency, we may reasonably conclude, was also in the mind of the Legislature when it used the terminology "final judgment" in said section 1251, and that it contemplated "the final conclusion of the litigation." However, it has been decided otherwise by the Supreme Court, as we shall presently see, and we are bound by that decision.

Moreover, it is not proper to say that the judgment under consideration is one directing the payment of money. It is rather an adjudication that upon payment of a certain sum plaintiff may acquire the property. It did not vest the title to the money in defendant nor the real property in plaintiff. It is rather a conditional award to plaintiff upon the payment of a certain price for the land. It cannot be fairly construed as creating or evidencing a present and unqualified obligation to pay any sum of money. When said judgment was rendered, plaintiff had the right to decline to take the land at the price fixed. No doubt, the payment was purposely made contingent in view of the further proceedings that were open to the parties. Thus it is provided in section 1255a that:

"Plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment, by serving on defendant and filing in court a written notice of such abandonment."

It is therefore plain that plaintiff was not "required to perform the directions of the judgment" at the time it was rendered. It could not, therefore, be enforced by a writ of execution, and it has been held that said section 942 applies only to a judgment which directs the payment of a specific amount of money and which can be directly enforced by a writ of execution. Estate of Schedel, 69 Cal. 241, 10 Pac. 334; Born v. Horstmann, 80 Cal. 452, 22 Pac. 169, 338, 5 L. R. R. 577; Pennie v. Superior Court, 89 Cal. 31, 26 Pac. 617; McCallion v. Hibernia Sav. & Loan

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Soc., 98 Cal. 442, 33 Pac. 329; Kreling v. Kreling, 116 Cal. 458, 48 Pac. 383; Owens v. Pomona Land Co., 124 Cal. 331, 57 Pac. 71; Los Angeles v. Pomeroy, 132 Cal. 340, 64 Pac. 477.

We may now take up the leading authorities cited by petitioner and respondent as relating directly to the two propositions aforesaid.

In section 785 (3d Ed.) of Lewis on Eminent Domain it is said as to the character of the judgment:

"Some cases hold that it is proper to render a personal judgment upon the verdict of a jury in condemnation cases, and to award execution, the same as in common-law suits. If the statute is so far silent upon the subject as to leave the matter open for judicial construction, then the proper judgment to be entered will depend upon the following considerations: If the possession has already been taken of the property, either by consent or otherwise, or if the property has already been taken by virtue of an instrument of appropriation, as it may be in some states, before the compensation is paid, then a personal judgment with all its incidents may properly be entered. But, if the property has not been entered upon and cannot be until compensation is made, and the effect of the proceedings is to fix a price at which the petitioner can take the property if it elects so to do, then a personal judgment is improper and should not be entered."

And in section 955 the same learned author says:

"The weight of authority undoubtedly is that, in the absence of statutory provisions on the question, the effect of proceedings for condemnation is simply to fix the price at which the party condemning can take the property sought, and that even after confirmation or judgment the purpose of taking the property may be abandoned wihout incurring any liability to pay the damages awarded."

A large number of cases bearing upon the text is reviewed and an extended quotation made from the opinion of Chief Justice Beasley of the Court of Errors and Appeals of New Jersey in the case of O'Neill v. Freeholders of Hudson, 41 N. J. Law, 161, concluding with the declaration that:

"The legal effect of" the proceedings for condemnation "should be held that they compel the landowner to offer the public the required land at the ascertained price, and that when such price has been finally ascertained, the public has a reasonable time within which to make an election either to accept or reject the offer."

Judge Beasley's language applies to the situation here. Until 30 days after "final judgment" such election may be exercised, and until the expiration of said period the judgment does not operate as conclusive evidence of an unconditional or absolute obligation to pay the amount assessed. It would seem, therefore, that until said period had expired it could not be regarded as a "personal judgment" with all its incidents. It is at least clear that at the time said appeal was taken no execution could issue on said judgment, and it could be regarded as simply "fixing the price at which the condemning party could take the land."

We proceed to other citations. In California Southern Railroad Company v. Southern Pacific Railroad Company, 67 Cal. 59, 7 Pac. 123, it is said:

"The judgment based in part on the assessment of damages, and adjudicating that the use is public, and the taking necessary, etc., is the 'final judgment' from which an appeal may be taken. The sum of money assessed must be paid within thirty days after 'final judgment.' Code Civ. Proc. § 1251. It may, as suggested, be an inaccurate use of terms to designate as final a judgment, which the court may set aside (with all the proceedings on which it is based) if the sum of money assessed is not paid. Code Civ. Proc. § 1252. And ordinarily a judgment is not final when the law contemplates further and subsequent proceedings in the same court to precede the absolute determination of the rights of the parties. But the question is not what is or is not a final judgment, within the appropriate meaning of the terms, but what is intended to be designated as the final judgment in the title treating of eminent domain."

In Lincoln Northern Railway Company v. Wiswell, 8 Cal. App. 578, 97 Pac. 536, the question was whether the plaintiff could, within 30 days after the entry of judgment on the verdict, abandon the route set out in the complaint, and in holding that it had such privilege, the court said:

"The final judgment mentioned in section 1251 as to payment of which reference is made in section 1252, is the judgment fixing the amount of damages, and is a final judgment in the proceeding and is an appealable judgment (California Southern R. R. Company v. Southern Pacific R. R. Co., 67 Cal. 59, 7 Pac. 123); the subsequent final order of condemnation (section 1253) being an order after final judgment."

The statutes of Idaho on eminent domain seem to be the same as ours, and in Big Lost River Irrigation Company v. Davidson, 21 Idaho, 160, 121 Pac. 88, it is said:

"The statute does not provide the form of judgment to be entered for the damages fixed and assessed by either the court, jury, or referee, under the provisions of section 5220; but under that section of the statute there could be but one form of judgment, and that would be a common, ordinary form of judgment for the recovery of money, the amount determined by the court, jury, or referee, and is the final judgment mentioned in section 5223 of the Revised Codes, and is a judgment in personam against the plaintiff, and upon which an execution may issue as provided by section 5224 of the statute. * * * After a final judgment has been entered the plaintiff has 30 days within which to pay the same, and if payment is not made then execution may issue, as in civil cases. Glenn County v. Johnston, 129 Cal. 404, 62 Pac. 66; County of Madera v. Raymond G. Co., 139 Cal. 128, 72 Pac. 915. * * * There would be no reason for the provisions found in section 5224, providing for an execution, if there was to be no judgment entered for the damages assessed, either by the court, jury, or referee. The very fact that an execution is authorized to be issued presupposes and presumes that an entry of a personal judgment for the damages assessed will be entered upon which such execution is to be issued."

In Union Ry. Co. v. Standard Wheel Company, 149 Fed. 698, 79 C. C. A. 386, the question involved was whether, after judgment assessing damages, plaintiff or petitioner was authorized to dismiss the proceedings as to a portion of the land sought to be condemned merely because in its opinion the

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damages assessed were too high, and in holding to the contrary the court said:

"When a party undertakes to subject another's property to his own use, he must be deemed to be willing and intend to pay a fair price for it, and that such fair price shall be fixed by the verdict of a jury to be approved by the court. Good faith requires that he shall not use the power of the court to vex the other party with successive experiments in the effort to get what he wants at his own price. And the public has an interest in the finality of the judgment. It will endure one litigation between parties, but not a repetition of it, to give one of them a chance to get a better result."

And as to the judgment fixing the price to be paid for the land, it was declared that the jury was to assess the damages and the court to render judgment, and "the defendant is bound by it, and so is the petitioner on principle as we think, but also by force of the statute." Drath v. B. & M. R. R. Co., 15 Neb. 367, 18 N. W. 717, and Neal v. Pittsburgh & Connelsville Railroad Co., 31 Pa. 19, declare a similar doctrine. However, it may be permissible to notice these cases a little more specifically.

In the first the Southern Pacific Railroad Company, one of the defendants, appealed from the preliminary order, and also from the final order of condemnation, and the real question presented, as far as the judgment is concerned, was whether the preliminary order or the final order of condemnation was the judgment from which the appeal should be taken. The Supreme Court held that the preliminary order of condemnation "is the 'final judgment' from which an appeal may be taken," and dismissed the appeal from the final order of condemnation because not taken within 60 days. The question of what is contemplated by "final judgment" as referred to in the first clause of said section 1251, or when the money must be paid, was not discussed in the briefs, and had no bearing upon the disputed points involved in the appeal.

In the Lincoln Northern Railway Company case, supra, the court on motion of plaintiff dismissed the proceeding within 30 days after the preliminary order of condemnation, and the defendant appealed from that order. It is apparent that under any possible construction of said section 1251 plaintiff was not required to deposit the money before the expiration of 30 days from the preliminary order of condemnation. Hence it could not be said that plaintiff was in default or that it did not have the right to abandon the proceedings, whether "after final judgment," as used in said section 1251, has the meaning attributed to it by petitioner or by respondent.

In the Idaho case,

"The only issue presented by the pleadings," as stated by the court, "was the value of the land to be taken. The right to take the land described in the complaint and the necessity for such taking is admitted by the answer, and the description of the land as alleged in the complaint is also admitted by the answer, and the allegation in the answer as to the necessity for taking 80 additional acres is not denied or put in issue, and therefore must have been admitted by the appellant, leaving for determination the value of the land described in the pleadings as the only issue to be determined in said cause."

The jury returned a verdict "for the defendants" and assessing "defendants' damages in the sum of $55,593." Whereupon the trial court, after reciting the formal and preliminary matters, entered the following judgment:

"Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that the said defendants have and recover from said plaintiff the sum of $55,593, with interest thereon at the rate of 7 per cent. per annum from the date hereof until paid," etc.

From that judgment an appeal was taken by plaintiff, and the language hereinbefore quoted appears to have been used with reference to the contention of appellant:

"That the court erred in entering an unconditional personal judgment against the appellant."

The question as to the import of the phrase "final judgment" or when the money had to be paid was not involved, but the court was called upon to determine the character of the judgment to be entered, and it did hold that "a judgment in personam" was authorized, treating the amount of the award as damages. As to the Idaho case, it may also be said that the judgment in form created a present obligation for the immediate payment of a definite sum of money upon which an execution could issue. It was not conditional and tentative as in the case at bar.

Of the California cases cited in the Idaho decision the first, Glenn County v. Johnston, 129 Cal. 404, 62 Pac. 66, involved a motion to dismiss a condemnation proceeding brought by Glenn county for the reason that more than 30 days had elapsed since the entry of the judgment and payment had not been made to defendants. The court below denied the motion, but the Supreme Court reversed it, thus virtually holding that "after final judgment" refers to the entry of the preliminary order of condemnation in the superior court. It may be admitted, as claimed by petitioner, that there was no discussion in the briefs as to what constituted the "final judgment" within the purview of said section; the principal subject of controversy being as to whether the sections in question applied to counties, but, as stated, the point was necessarily involved in the decision. County of Madera v. Raymond G. Co., 138 Cal. 244, 71 Pac. 112, did not call for the determination of the question considered herein, although said first clause of said section 1251 was quoted in the opinion in connection with the discussion of the form of judgment required, the conclusion being reached that, "even if the form of the judgment was not as it should be, defendant was not injured thereby and cannot complain, and

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plaintiff makes no objection to the form of its judgment."

In Bensley v. Mountain Lake Water Co., 13 Cal. 317, 73 Am. Dec. 575, it is said:

"The right to take on the terms adjudicated, which is a compulsory statutory sale, accrues from the legal proceedings, the petition, the report, the confirmation; then the price becomes fixed. But no right of entry, much less a title, accrues so far. The party condemning, the representative of a state, is then in a condition to be a purchaser; the other party is in a situation of a vendor making an agreement of sale on condition precedent, but retaining his title and possession until payment."

The theory thus presented harmonizes with petitioner's claim that the award constitutes the determination of the price that must be paid for the property, if it be taken, rather than a personal judgment for the direct payment of money.

In Lamb v. Schottler, 54 Cal. 319, it was held that:

"The right of the state to take private property for public use in no sense depends upon any contract between the owner and the public, nor is there any vested right to compensation, until the property is taken; nor is the government under any obligation to take the property, if the terms, when ascertained, are not satisfactory."

But the case most strongly relied upon by petitioner is Pool v. Butler, 141 Cal. 46, 74 Pac. 444. Therein the appeal was from an order dismissing the action made upon plaintiff's motion. The action was to condemn a strip of land for a ferry landing. There was a prior appeal from the judgment condemning the land for said purpose in which the judgment was affirmed. In that case the trial court gave judgment to the plaintiff condemning the land to the burden of the easement, and assessing the damages at $285. The defendants upon the trial reserved several exceptions and moved the court for a new trial upon all the issues, and the motion was denied. From this order also an appeal was taken. The plaintiff deposited with the clerk the said sum of $285, and costs, within 30 days after the entry of judgment. The defendants did not accept the money so deposited, but took and perfected their appeal, and did not abandon all defenses except for greater compensation, and could not demand or obtain the money until the appeal should be determined. It is to be observed that in that case the appeal was taken by the defendants, and under section 1254 of the Code of Civil Procedure they could not get the money without abandoning all the defenses they had to the action except as to the sufficiency of the damages awarded; and such defenses were not abandoned, but were pressed upon the motion for new trial and in the Supreme Court on appeal. As stated in the opinion:

"If they had applied to the court for an order directing the clerk to pay over the money, it could not have been granted pending the motion for a new trial, or at any time after the appeal was taken until the judgment was affirmed or the appeal dismissed."

It is thus to be seen how different that case is from this in the very important consideration that therein it was not doubted that the appeal operated to suspend or stay the judgment, and the persons who were entitled to the money refused to accept it. As the court said:

"The court had no power to make the requisite order for the payment of the money, the judgment having been suspended by the appeal, which was a refusal to accept the money, or to treat the judgment as a final determination of the rights of the parties, though it was in form final."

Judgment in the court below was entered June 21, 1898, and the appeal was decided December 3, 1901, and became final, according to the declaration of the Supreme Court, January 2, 1902, a period of 3½ years after judgment in the court below. Furthermore declared the court:

"Such delay may have furnished in this case, and might in many others, sufficient reasons for an abandonment of the enterprise. During all that time defendants were protesting against the judgment, and when plaintiffs finally relieved them from what they insisted was a wrong, oppressive, and erroneous judgment by dismissing the proceeding, now appeal from the order relieving them from it. The ultimate question, however, is whether the court erred in dismissing the action."

And it is in view of this situation that the court entered into a learned discussion of the nature of condemnation proceedings and came to the consideration of the question at what stage of such proceedings a plaintiff may abandon an enterprise or decline to take the property. It was clearly right to hold that during the pendency of the motion for a new trial and of the appeal by the defendants the plaintiffs had the right to abandon the enterprise and refuse to pay the compensation. But it was contended that, having deposited the money with the clerk of the court, they could not withdraw it, and that upon the affirmance of the appeal the defendants were entitled to receive it, and this is the vital point of the whole case. As to that contention, it was said:

"I think plaintiffs had the right to abandon at any time before the defendants were willing to receive it, or were in a position to demand it."

Thus far it would seem no one could disagree with the court. Furthermore said the court:

"The deposit under the circumstances was only a tender, and in such cases the money tendered does not vest in the person to whom it is tendered unless it is accepted. In this case the deposit was not accepted. The defendants persisted in their contention that the judgment was erroneous and invalid, and sought to have it reversed, and could hardly contend that the money or the right to it was vested in them so long as they contended that the plaintiffs had no right to the land."

No such contention is made by the defendant here. On the contrary, he was satisfied with the judgment and seeks to obtain the money. He claims also that said judgment was not stayed by the appeal for reasons already stated. The court proceeded:

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"The vesting of the title to the deposit in the defendants is coincident with the vesting of the right to the land for the purposes for which it was sought, but pending the appeal the plaintiffs could assert no right to the land or its use under the judgment which had been stayed and suspended by the appeal, during which time the court was powerless to enforce it; nor could the defendants say: 'The right to the money is vested in us, but you shall not have the land.'"

The foregoing, as applied to the facts of that case, cannot be disputed, but here the defendant asserts the title to the money for the reason that the judgment has not been stayed, that he is willing for plaintiff to take the land at the assessed price and that, by virtue of the express provisions of the statute, he is authorized to reduce the money to his possession. The opinion proceeds:

"The title to the land does not vest in the plaintiffs until 'the final order of condemnation' is made by the court and a copy of the order filed in the office of the county recorder, 'and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified.' Code Civ. Proc. § 1253."

After citing certain decisions, the court then comes to the consideration of the question as to when or within what time the plaintiff in condemnation proceedings may abandon them and decline to take the property, and it quotes said statement of Lewis as to the weight of authority, and Dillon on Municipal Corporations (4th Ed.) § 608, as follows:

"Under the language by which the power to open streets and to take private property for that purpose is usually conferred upon municipal corporations, they may at any time before taking possession of the property under completed proceedings, or before the final confirmation, recede from or discontinue the proceedings they have instituted. This may be done, unless it is otherwise provided by legislative enactment, at any time before vested rights in others have attached."

And quotation is made from the case of St. Louis, etc., R. R. Co. v. Teters, 68 Ill. 144, to the effect that:

"Where the company has not appropriated the land at the time of the trial, it would be improper to render a judgment for the recovery of the money, or to award execution, because it could not be known that the company will ever enter upon the land. It is, under the statute, the payment of the money found by the jury, and not the order of the court alone, that confers the right. Although the petition has been filed, the damages assessed, and the order of the court pronounced and entered, the money must be paid before the right to enter attaches, and until they pay the damages, they have the right to abandon the location of the route thus made, and adopt some other. Hence it is improper to render a judgment of recovery or award execution, unless the jury find, or it conclusively appears, from the record, that the company has entered and is in possession of the land sought to be condemned."

The court adds:

"Justice requires that, where possession has not been taken and the purpose for which condemnation was sought has been abandoned, the award of damages should not be enforced, especially where the defendants have prevented for an unreasonable time the accomplishment of the purpose."

If this doctrine is to be applied to all cases where the plaintiff has not entered into possession, of course, that would end the controversy, and the writ should issue. But the aforesaid statements must be accepted with some qualification. Even where the plaintiff has not entered into possession, he is limited in time within which he must exercise his option to abandon the proceedings. It must be exercised at least within 30 days after the judgment becomes final. Section 1255a, Code Civ. Proc. In construing the language of this interesting decision, we must not lose sight of its peculiar facts or else we may run counter to the plain provisions of the statute.

In Reed Orchard Co. v. Superior Court, 19 Cal. App. 648, 128 Pac. 9, 18, it was held that:

"Where a railroad company had obtained a judgment in eminent domain, and, in compliance with section 1254 of the Code of Civil Procedure, had made the full amount of the deposits thereby required to secure all demands, * * * the court had jurisdiction under that section to permit the railroad company to take possession of and use the property pending the litigation, and the appellate court will not issue a writ of supersedeas of such order for possession pending an appeal from the judgment."

It was in view of that situation that it was declared an appeal would not postpone plaintiff's right to take possession of the property. The decision was grounded upon the peculiar provisions of said section 1254, which would, manifestly, be rendered nugatory if its operation was suspended during an appeal. The case really has no application to the facts involved herein.

It is manifest that the different cases cited cover variant aspects of condemnation proceedings, and the peculiar situation of each must be regarded to avoid being misled into a general application of the statements made in the several opinions.

Here, we may reiterate, the situation is this: Plaintiff was dissatisfied with the award, has not taken possession, but has taken an appeal from the judgment. Said appeal has not been determined, and hence said judgment has not become final. No undertaking was given to stay execution; it being the claim of plaintiff that no such undertaking was required to effect said purpose. The defendant was willing to accept the award, took no appeal, but after the expiration of 30 days from the entry of the preliminary order of condemnation sought execution.

The determination of the controversy then depends upon the following considerations:

[1] 1. Does the phrase "after final judgment" in said section refer to the preliminary judgment of condemnation as entered in the superior court? That has been answered in the affirmative by the Supreme Court in Glenn County v. Johnston, supra, where the question was necessarily involved and we must follow it.

[2] 2. Was the judgment of such character

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that execution could issue upon it? This is plainly answered by said section 1252, providing that, if the money be not so paid or deposited (that is, paid or deposited within 30 days after the preliminary judgment of condemnation), execution may issue as in civil cases. This is a matter that the authorities hold can be regulated by statute. If execution can issue to enforce the payment of the amount of the award, the judgment must at that time be equivalent to a personal judgment for the payment of money. Prior, however, to this period, beginning 30 days "after final judgment," the judgment amounts to no more than an order fixing the price at which plaintiff may or may not take the property. It is, in effect, an adjudication of the amount which plaintiff should pay as a just compensation for it to be entitled to take the property for the purpose claimed, but if the status is not changed by some other proceeding, after the expiration of said 30 days, it becomes substantially a personal judgment for the direct payment of money.

[3, 4] 3. What, then, was the effect of said appeal? It stayed the operation of the judgment for the reason that the character of said judgment must be determined as of the time when the appeal was taken. It was not then a judgment requiring the payment by plaintiff of a specific amount of money, and which could then be enforced by a writ of execution. It was the adjudication of a conditional liability which might or might not become a fixed and absolute obligation. It was not, therefore, within the exception noted in said section 942.

The effect of the appeal being to remove the subject-matter of the order from the jurisdiction of the lower court, that court is without power to proceed further as to any matter embraced therein until the appeal is determined. Vosburg v. Vosburg, 137 Cal. 496, 70 Pac. 473. If the appeal had been taken after the expiration of said 30 days without a stay bond, a different conclusion would probably be required.

In conclusion it may be suggested that, even if the appeal bond did not operate to stay proceedings, it would be proper for this court to allow petitioner to file an effective bond for that purpose. The authority for such procedure is found in Hill v. Finnigan, 54 Cal. 494. Such request is made by petitioner if such action be deemed advisable by the court, but it is believed that the appeal has accomplished that result, and we think the writ should issue; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

Modification of Opinion.

PER CURIAM. That portion of the opinion beginning with the word "again" in line 7 and concluding with the word "trial" in line 2 from the bottom of page 1013 of volume 161 of the Pacific Reporter, embracing the consideration of section 1255a of the Code of Civil Procedure, is hereby stricken out and withdrawn. The same order will be made as to the following sentence found on page 1018 of said opinion:

"If the appeal had been taken after the expiration of said 30 days without a stay bond, a different conclusion would probably be required."

Said portions of the opinion are not necessary to the decision, and the questions therein suggested had better be reserved until the exigency of the case demands their consideration.

(32 Cal. App. 13)

SOWASH v. EMERSON. (Civ. 1561.)

(District Court of Appeal, Third District, California. Nov. 8, 1916.)

1. WORK AND LABOR ⟸4(2)—CONTRACT FOR PERSONAL SERVICES—IMPLIED CONTRACT.

Although to recover for personal services the complaint must show an express agreement for hire, where an agreement for personal services is shown without an agreement for compensation, an implied, and not an express, contract is disclosed, and recovery must be upon quantum meruit.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 4; Dec. Dig. ⟸4(2).]

2. WORK AND LABOR ⟸4(2)—CONTRACT FOR PERSONAL SERVICES—IMPLIED AGREEMENT.

The general rule is that an agreement to pay for services rendered and accepted is presumed unless the parties are members of the same family or near relatives.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 4; Dec. Dig. ⟸4(2).]

3. EXECUTORS AND ADMINISTRATORS ⟸221 (2)—CONTRACT FOR PERSONAL SERVICES — EVIDENCE—BURDEN OF PROOF.

In an action against the estate of a decedent for compensation for special extra services rendered decedent, the burden of proof that the services were rendered voluntarily, or that they were within the scope of the original employment, rested upon the defendant.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1858, 1861–1863; Dec. Dig. ⟸221(2).]

4. WORK AND LABOR ⟸13 — CONTRACT FOR PERSONAL SERVICES—EXTRA SERVICES.

Although, where the extra services are the same as those required by the original agreement, to entitle a servant to recover for such extra services, an express contract or agreement to pay extra compensation must be shown, where the special services are dissimilar from those to be performed under the original contract of employment, proof of the performance of such services with proof of acceptance by the master will raise an implied promise on the part of the master to pay the reasonable value of such special services.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 28; Dec. Dig. ⟸13.]

5. EXECUTORS AND ADMINISTRATORS ⟸221 (5)—CONTRACT FOR PERSONAL SERVICES — EVIDENCE—SUFFICIENCY.

In an action against the estate of a decedent for special services as nurse rendered in addition to an express contract to furnish board and lodging, evidence *held* to sustain findings that the plaintiff rendered to the deceased services as nurse, and that decedent accepted them

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and received the benefits flowing therefrom, raising an implied contract to pay for such services.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 903½, 1874, 1876; Dec. Dig. ⊂⊃221(5).]

6. WORK AND LABOR ⊂⊃13—CONTRACT FOR PERSONAL SERVICES—EXTRA SERVICES.

As an agreement to furnish board and lodging does not necessarily include nursing, unless the contract to furnish the former expressly includes the latter or is in language from which no other conclusion may be drawn, a promise to pay extra compensation for the services of a nurse will be implied.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 28; Dec. Dig. ⊂⊃13.]

7. APPEAL AND ERROR ⊂⊃1010(1)—REVIEW—FINDINGS.

Findings of fact based on sufficient evidence are conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3981; Dec. Dig. ⊂⊃1010(1).]

Appeal from Superior Court, Humboldt County; Clifton H. Connick, Judge.

Action by Gladys M. Sowash against T. H. Emerson, as administrator of the estate of Thomas R. Emerson, deceased. From a judgment for plaintiff and an order denying a motion for new trial, defendant appeals. Affirmed.

Frank McGowan, of San Francisco, and Denver Sevier, of Eureka, for appellant. George H. Burchard, of Eureka, for respondent.

HART, J. Paragraph 2 of the complaint in this action alleges that the plaintiff, between the 1st day of October, 1913, and the 20th day of September, 1914, at the city of Arcata, county of Humboldt, rendered certain special services for the defendant's intestate, Thomas R. Emerson; that said special services consisted of taking care and personal charge of said Thomas R. Emerson during all of the period mentioned, "looking after him and giving him a home and personal attention all of said time, frequently when said Emerson was in a besotted and drunken condition, and helpless from overindulgence in intoxicating liquors." It is further alleged that during the said period of time the plaintiff contracted to give and did give to said Emerson room and board, "but that the aforesaid special services set forth and referred to in paragraph 2 hereof formed no part of said contract, but were of a special character, rendered necessary by the drunken, beastial, and often nauseating and repulsive physical and mental condition in which said Emerson was frequently during said period." It is then alleged:

"That said special services were rendered by said plaintiff at the request of said Thomas R. Emerson, and were reasonably worth the sum of $100 per month, and were rendered as aforesaid for a term of 11 months and 19 days, and were reasonably worth in all the sum of $1,157; that no part of the same has been paid."

It is further alleged that the said Emerson died on the ——— day of September, 1914, and that his son, T. H. Emerson, the defendant herein, was, after due proceedings, appointed by the superior court of Humboldt county administrator of the estate of the said Thomas R. Emerson, deceased.

The complaint states that the plaintiff and her husband entered into an agreement whereby it was agreed and understood between them that all money earned by her by reason of the special services rendered for and in behalf of said Thomas R. Emerson should be her separate property, and that said earnings are her separate property.

It is alleged that the plaintiff, within legal time after the publication of notice to the creditors of Thomas R. Emerson, deceased, presented to the administrator of the estate of the said deceased, in due form and verified, the claim upon which this action is based, and that the said administrator rejected the same. The prayer is for judgment for the sum of $1,157.

The answer specifically denies each and all the material allegations of the complaint, and, in addition thereto, sets up several distinct special defenses, the substance of which may thus be stated: (1) That the contract for the services mentioned, if any such contract was at all made, was not to be performed during the lifetime of the deceased, that the consideration for said services was that the decedent was to devise property to the plaintiff or make provision in his will for plaintiff, "and that such contract, if any was entered into as aforesaid, is invalid as neither said contract nor any note nor any memorandum thereof is in writing or subscribed by the decedent or his agent"; (2) that the services referred to in the complaint, if such services were rendered at all, were so rendered for and in expectation that the decedent would provide for the plaintiff through a devise or bequest or provision in the decedent's last will; (3) that prior to the commencement of this action and to the presentation of any claim herein "plaintiff received and accepted in full satisfaction, payment, and discharge of the cause of action set forth in the amended complaint and all claims that she had or claimed against this estate a carpet of the value of $125 or thereabouts."

The court found:

"That all the allegations of the plaintiff's first amended complaint herein are true, except that said services so rendered and performed as alleged were reasonably worth the sum of $494; that all the denials and allegations of the answer herein to the first amended complaint are untrue."

Conclusions of law were filed and judgment was rendered and entered accordingly. The defendant appeals from said judgment and the order denying him a new trial.

It appears from the evidence that the deceased, a resident for many years of the city of Arcata, in Humboldt county, and a man of considerable means, had become so ad-

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dicted to the use of intoxicating liquors as that he practically developed into a dipsomaniac. He had a wife and a son (the defendant in this action), but it appears that at all the times referred to in the complaint they resided in one of the Eastern states, and that, so far as his family were concerned, he lived alone in the city of Arcata. For a long period of time prior to his death he was, it is made to appear, in an almost uninterrupted condition of inebriety, so much so, indeed, that Dr. McKinnon, one of the local physicians, was frequently called in to professionally attend and so relieve him of the effects of the drinking "sprees" which seem to have grown into a custom with him.

The deceased was a personal friend of the plaintiff and her husband, and there is evidence which shows that the plaintiff, against the advice of her husband, agreed to furnish the deceased with board and lodging at their home. The deceased, while in a very serious condition physically as the result of long continued intoxication, was taken to the home of the plaintiff on the 1st day of October, 1913, and remained there as boarder and lodger until the 20th day of September, 1914, or until a few days prior to the date of his death, which was on some day in the latter part of said month and year.

The testimony does not disclose the extent of the compensation which the deceased agreed to pay the plaintiff or that she received for the board and lodging so furnished. It is very clear from the testimony, however, that, after the deceased took up his residence with the plaintiff, he continued to indulge excessively in alcoholic liquors; that as a result thereof he was during much of the time sick and wholly unable to take care of himself, and consequently required attention and assistance, both during the day and the night time after his retirement; that medicine prescribed by his physician had to be given him, and his food often brought to his room; that on occasions when inordinately intoxicated he was exceeding filthy in his personal habits, often soiling his outer clothes with undigested matter ejected from his stomach, and his undergarments and person with excrements from his bowels and the contents of his bladder, he being unable to control himself in those particulars by reason of the helpless physical and mental condition in which his inebriety placed him. Thus he required almost constant care and attention, and the evidence shows that the plaintiff bestowed upon him during the period that he boarded and lodged at her home the attention required. She watched, cared for, fed, and administered to him medicine when he was confined to his bed. She often bathed him when in the filthy condition above described. She would, when he was absent from the house when he ought to be there, go out and search for, find and assist him to her home and his room. In brief, there is evidence to support the conclusion that she as solicitously and tenderly cared for him in his helplessness as if he were her father or a son or a brother.

The trial court was clearly warranted by the evidence in finding the facts as above recited notwithstanding that there was an adversary showing from which, it may be conceded, the court might have found the claim of the plaintiff to be spurious.

The position of the appellant is, however, that while the complaint declares upon an express contract, no evidence was presented showing an express contract for the performance of the services described in the complaint, nor is there any evidence showing whether the claim as presented to the administrator was based upon or the outgrowth of an express or an implied contract. The argument from this postulate is that, since the plaintiff was under employment of the deceased to perform the service of providing him with board and lodging, "the plaintiff must fail, because the rule is inexorable that plaintiff must show an express contract to pay for these 'special services'" claimed.

It is very clear that the plaintiff counts upon an implied, and not upon an express, contract. It is true, as must always be so in a case of an implied contract for personal services, that the complaint must show, as the complaint in this case states, that there was an express agreement for the hiring, but such an averment of itself does not disclose an express as contradistinguished from an implied contract. If the pleaded facts show, as should always be shown or pleaded to avoid the implication that the services were to be performed gratuitously, that there was an agreement by one of the parties to employ the personal services of another, and it is further shown that there was no agreement as to the compensation to be paid for such services, then an implied, and not an express, contract is disclosed, and to recover thereon the plaintiff must count upon a quantum meruit, or sue for the reasonable value of his services, or, as the words describing that common count plainly signify, for whatever his services may reasonably deserve or merit.

[1] The rule sought to be invoked and applied here by the defendant, however, does not, in a case where an employé under a contract to perform certain stipulated services for a fixed compensation sues to recover for special services rendered to his master of a dissimilar nature to those for the performance of which he was originally employed, require such employé to show that such extra services were rendered in pursuance of an express contract, whereby the master agreed or promised to pay extra compensation therefor, to entitle the servant to recover such extra compensation. If he can show that dissimilar special services were by him performed and that the master accepted the same and the benefits thereof, then the law will imply a promise to pay therefor, and

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thus there is shown a contract upon which he is entitled to recover. Hay v. Petersen, 6 Wyo. 419, 45 Pac. 1073, 34 L. R. A. 581.

[2] The general rule is that an agreement to pay for services rendered and accepted is presumed unless the parties are members of the same family or near relatives. Lawson on Evidence, § 77.

[3] In this case the burden of proving that the services were rendered voluntarily, or that they were within the scope of the original employment, rested upon the defendant. Schroeder v. Schroeder, 119 Iowa, 67, 93 N. W. 78.

One of the cases relied upon by the defendant is Cany v. Halleck, 9 Cal. 198, 203, wherein the Supreme Court quoted approvingly and applied the following rule, as stated in Smith's Master and Servant, pp. 101, 102:

"Upon similar principles it is equally clear that, where a stipulated remuneration has been agreed upon, the servant has no claim to additional remuneration on the mere ground of his performance of additional services. Unless he can prove some contract, either express or implied, on the part of his master to pay him an increased salary for his additional services, he can recover no remuneration for them."

Again the defendant cites the cases of Ins. Co. v. Goodrich, 74 Mo. App. 355, 362, and Pew v. Bank, 130 Mass. 391, wherein the rule is laid down that:

"The presumption of the law is that all services rendered by an employé during the period for which he is employed, of a similar nature to those of his regular duties, are paid for by his salary, and to overcome this presumption he must show an express agreement for * * * compensation."

[4] We think the true rule may be stated, as we have above indicated it to be, as follows: That, where the extra services are of the same kind as those which the original agreement requires the servant to render, then the latter, to entitle him to recover for such extra services, must show an express contract or agreement or promise on the part of the master to pay him extra compensation therefor; but that, where the extra or special services are dissimilar to or wholly different in kind from the services to be performed under the original contract of employment, then proof of the fact of the performance of such extra services, together with proof of the acceptance thereof by the master, will raise an implied promise on the part of the master to pay the reasonble value of such extra or special services.

[5] The testimony in this case is of a somewhat desultory character, but in a case like this it is by no means surprising that it should be so. The plaintiff herself was, most naturally, more familiar with the facts, circumstances, and terms of her employment and the extent of her services to the deceased as a nurse than any other person; but, under the law—a most salutary rule, indeed—she was precluded from giving any testimony in the case bearing upon the circumstances and terms of her employment to render the special services for which she here seeks the recovery of reasonable remuneration. Section 1880, subd. 3, Code Civ. Proc. However, as before declared, the evidence was such as to warrant the trial court in finding, as it did find, that the original agreement between the plaintiff and the deceased was that she was to provide the latter with board and lodging, and nothing more. And there is sufficient support for the finding that the plaintiff rendered to the deceased services as a nurse, and, while there is no direct proof that the deceased expressly requested the plaintiff to perform for him those services, or that he promised to pay her additional compensation for the same, yet it is very clear that she did render those services, and that he accepted them and received the benefits flowing therefrom.

[6] That the services the plaintiff was to render the deceased under the original engagement, or the contract as it was originally made, are not similar in nature or kind to the duties required of a nurse, seems to us to be a very obvious proposition. Abstractly speaking, the distinction between the two kinds of services is the same as the distinction between a house or a hotel maintained exclusively for the purpose of furnishing board and lodging to the public and a hospital, whose sole and exclusive function is to care for and minister to the sick or physically infirm. While board and lodging are ordinarily furnished patients in a hospital maintained for the care of the physically sick, still they are but essential incidents to the paramount or main purpose or object or business of such an institution, viz. to nurse the physically sick. Indeed, nursing is a distinct scientific profession, the right and the ability to practice which are justly recognized as proper subjects of regulation by the state. It is a profession whose peculiar duties are more nearly allied or analogous to those of the profession of medicine than to those of the business of furnishing board and lodging for pay, and yet is wholly independent of and materially different in nature from the medical profession. The courts have therefore well said, when occasion has called for a judicial expression upon the subject, that the mere agreement to furnish board and lodging does not necessarily or by logic of the fact include nursing, and that, unless the contract to furnish the former expressly includes the latter, or is expressed in language from which no other just conclusion may be drawn, a promise to pay extra compensation for the services of a nurse in such a case as this will be implied. See Pfeiffer v. Michelsen, 112 Mich. 614, 71 N. W. 156; Cates v. Gilmer (Tenn. Ch. App.) 48 S. W. 280.

[7] The defendant introduced no proof in support of the several special defenses set up in the answer. He did, however, introduce some evidence tending to overthrow the

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presumption, arising from the fact of the rendition of services as a nurse and the fact of the acceptance thereof by the deceased, of a promise on the latter's part to pay the plaintiff increased compensation for such additional services, but the trial court, to which the determination of the questions of fact was submitted, was not satisfied with the showing so made; and, since it was for the trial court in this case to say, from all the circumstances brought to its attention through the evidence, viewed by the light of the rules of law above stated, whether there was or was not an agreement between the parties that the plaintiff should receive extra or additional compensation for the extra or special services described in her complaint, this court is concluded by the finding of said court upon that proposition, there being, as stated, sufficient evidence to support said finding.

The judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(32 Cal. App. 28)

MILLER et al. v. LOGAN et al. (Civ. 1525.)

(District Court of Appeal, Third District, California. Nov. 9, 1916.)

1. APPEAL AND ERROR ⟸933(4) — ORDER GRANTING NEW TRIAL—PRESUMPTIONS.
On appeal from an order granting a new trial after verdict on conflicting evidence, the appellate court must presume that the trial judge, acting impartially, believed that justice and equity required a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3426, 3775; Dec. Dig. ⟸933(4).]

2. APPEAL AND ERROR ⟸977(3) — ORDER GRANTING NEW TRIAL—REVIEW.
The discretion of the trial court in granting a motion for a new trial is very broad, and the order will be upheld by the appellate court if it may be supported upon any of the grounds assigned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3862; Dec. Dig. ⟸977(3).]

3. APPEAL AND ERROR ⟸1015(2) — ORDER GRANTING NEW TRIAL—REVIEW.
The appellate court will not disturb an order granting a motion for new trial where there was at the trial a conflict of evidence upon material issues, unless they can say that a verdict in favor of the moving party would not have found sufficient legal support in such evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3866; Dec. Dig. ⟸1015(2).]

4. APPEAL AND ERROR ⟸1015(1) — ORDER GRANTING NEW TRIAL—REVIEW.
The rule that an order granting a new trial for insufficiency of evidence to support the verdict will not be disturbed applies when made by a judge who did not preside at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3866; Dec. Dig. ⟸1015(1).]

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Henry Miller and another against Robert Logan and another. From an order granting a motion for a new trial, plaintiffs appeal. Affirmed.

L. G. Harrier, of Vallejo, and Philip McEnerney, of Fairfield, for appellants. P. B. Lynch, of Vallejo, and W. H. Morrissey, of San Francisco, for respondents.

BURNETT, J. The appeal is from an order granting the motion for a new trial. Appellant states that the appeal is taken—

"with full knowledge of the great discretion lodged in a trial judge in the matter of granting a new trial when the evidence placed before the jury is conflicting. But we desire to protest strongly against what seems to us to be the arbitrary undoing of all the labor and expense which necessarily goes into a trial by jury, in a case where no injustice was done, in which a fair and proper verdict was rendered by a jury selected and approved by both sides, in which the judge granting the new trial was not the judge who heard the testimony, and in which the testimony was not in actual conflict."

We can readily understand the disappointment of appellants' counsel, we have no doubt of their sincerity of purpose, and we have been deeply impressed by their able and earnest advocacy, but in view of the revelations of the record, and under the well-established rules of judicial procedure in this state, there remains nothing for us to do but to affirm the order.

[1] Before quoting from the record and the authorities, we may notice briefly this statement of appellant and the admitted facts in the case. In the first place, after reading the evidence we cannot say that the action of the judge in granting a new trial was arbitrary. To the contrary, we are bound to presume that he acted from the highest motives, believing that justice and equity required a new trial. We must assume that his attitude was that characterized by Burke as "the cold neutrality of an impartial judge," and that his only desire was that no wrong should be done to either litigant. Again, that "a fair and proper verdict was rendered in a case where no injustice was done" is, no doubt the belief of appellant, but upon the motion for a new trial that very question was presented to the judge for determination and his judgment to the contrary must be accepted here if there be substantial support for it. It may be added that on motion for a new trial the same rule applies to another judge as to the one who tried the cause, and an examination of the record convinces us that there was a substantial conflict in the evidence in a material matter.

Now a word as to the nature of the issues. The action was for services in remodeling and repairing a one-story frame building occupied as a saloon. In the first count of their complaint appellants alleged that the

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agreed price was to be $3,164.33, and claimed a balance due of $1,064.33. The second count was upon quantum meruit for the same amount. Defendants denied that they agreed to pay said sum of $3,164.33, or any greater sum than $2,100, denied that the reasonable value of said services was any greater than said latter sum, and alleged that plaintiffs agreed to do all the work for a sum not to exceed $2,100 "and for as much less as they could." It was admitted that defendants had paid the said sum of $2,100, and it cannot be denied that said allegation of a specific contract to do the work for said sum presented a defense to the action. If there had been a finding that such was the agreement, it would require a judgment in favor of defendants. The jury, though, rejected the theory thus set up in the answer, and brought in a verdict in favor of plaintiffs for the sum of $994.63.

The important question, then, is: Was there any substantial evidence to support defendants' contention? Of this, there can be no doubt when attention is directed to the following testimony of Robert Logan:

"In December, 1912, I had a conversation with Mr. Miller and Mr. Cassidy relative to remodeling the Acme Saloon, formerly called the Waldorf. I asked Mr. Miller and Mr. Cassidy to look the building over. I submitted a rough plan to them that I had drawn myself, and asked them to look it over and give me a figure on it. I think they must have, and afterwards, Mr. Miller said: 'We will do the work for $1,700, what you have laid out.' I said: 'If you will do the work for that, it is agreeable to me.' * * * I gave Miller & Cassidy the work to do for $1,700. Miller told me he would do the work for $1,700 and we agreed upon that price. We agreed upon the kind of work and what was to be done. The building was finally built along the lines we agreed upon, with the exception of cutting out what we call the reading room; it was a partition in the east end of the saloon that was cut out entirely. The pebble-dash front was not in the original, Mr. Cassidy made the suggestion to me that we put on a pebble-dash front, and I rather liked the idea myself, but I told him that I didn't think we could do it at that time, and, if possible, we might do it later on, and he explained to me that we would have to have it painted anyhow, and I better have it done now while the work was new. So I asked him how much more it would cost to complete the building with a pebble dash. He said it would cost $2,100, and he said: 'Should it cost less than $2,100, you will receive the benefit of it.' For all the work done in the building, we agreed upon the price of $2,100, including the pebble-dash front. There was nothing done in the building that was not included in the $2,100; the fixed sum agreed upon was $2,100. The change from $1,700 to $2,100 was talked over and agreed upon, and after that was agreed on, we did not order any additions; some were struck out. * * * I told him what I wanted, and submitted this plan to him with measurements. I told him how I wanted it about the marble baseboard and paneled walls and so forth. It was understood at the time, as near as I can remember, that we wanted everything that is now in the building."

He was subjected to a rigid cross-examination, but he held to the theory that the entire work was to be done for $2,100, with possibly the exception of some trivial alterations or additions. The testimony of his partner was to the same effect. The credibility of these witnesses is vigorously questioned by appellant. We can see in their statements, however, nothing inherently improbable. Such contracts are not unusual, nor does it appear necessarily unreasonable that plaintiffs should have agreed to do the work for the sum mentioned. At least, it involves a question of candid disputation. Much might be said on both sides of the proposition, and for such reason we cannot disturb the order granting the motion for a new trial.

[2, 3] As to the principle governing the case, we may refer to the latest expression of the Supreme Court in Tweedale v. Barnett, 156 Pac. 483, wherein it is said through Mr. Justice Melvin:

"It is a rule, so well understood that discussion of it seems almost superfluous, that the discretion of the court granting such a motion is very broad, and the order will be upheld by the court to which an appeal is taken if it may be supported upon any of the assigned grounds. Morgan v. Robinson, 157 Cal. 348–351 [107 Pac. 695]; Wurzburger v. Nellis, 165 Cal. 48–50 [130 Pac. 1052]; Cahill v. Stone, 167 Cal. 126–129 [138 Pac. 712]. We may not disturb such an order where there was at the trial a conflict of evidence upon material issues, unless we can say that a verdict in favor of the moving party would not have found sufficient legal support in such evidence. Empire Investment Co. v. Mort, 169 Cal. 732 [147 Pac. 960]."

[4] That the same rule applies where another judge hears the motion for a new trial is held in Jones v. Sanders, 103 Cal. 678, 37 Pac. 649, wherein it is said:

"It is claimed for appellant that as Judge Hoge presided at the trial his findings upon all the questions of fact should be treated as conclusive. We do not understand this to be the rule applicable to a case like this. It is true that this court will not review findings when there is a substantial conflict in the evidence, but it has been repeatedly held that upon motion for a new trial it is the duty of the trial court to examine the evidence, even though it be conflicting, and if dissatisfied with the conclusions reached, to grant a new trial. And the rule is the same whether the motion is heard by the judge who tried the case or by some other judge, whose only knowledge of the facts is obtained from the record. Macy v. Davila, 48 Cal. 646; Bauder v. Tyrrel, 59 Cal. 99; Blum v. Sunol, 63 Cal. 341; Wilson v. California C. R. R. Co., 94 Cal. 166 [29 Pac. 861, 17 L. R. A. 685]."

Respondents claim that the order can be justified on other grounds, but we deem it unnecessary to consider them. These involve the contention that certain errors were committed by the trial judge in his rulings upon the admissibility of evidence. They seem, however, comparatively unimportant, and the questions will probably not arise in the new trial. So we forego any specific notice of them.

We think the order should be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

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(29 Idaho, 661)

ROBINSON, Mayor, v. LEMP.

(Supreme Court of Idaho. Dec. 13, 1916.)

1. ADVERSE POSSESSION ⟸7(1), 8(1)—ACQUISITION OF TITLE BY MUNICIPALITIES.
While, as a general rule, title to property held by a municipality for public use cannot be acquired by adverse possession, the opposite rule prevails where the property is held by it for other than a public use.
[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 29, 30, 43, 51–55, 57; Dec. Dig. ⟸7(1), 8(1).]

2. ESTOPPEL ⟸62(4) — MUNICIPAL CORPORATIONS—CONDUCT.
A municipal corporation may, by its conduct or the conduct of its officers and agents, be estopped to assert its claim of title to property.
[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 153; Dec. Dig. ⟸62(4); Municipal Corporations, Cent. Dig. §§ 379, 632, 682, 918.]

3. ADVERSE POSSESSION ⟸114(1)—ESTOPPEL ⟸118 — ACTIONS — EVIDENCE — SUFFICIENCY.
Held that, under the facts in this case and the law applicable thereto, respondent's testator acquired title to the property in controversy by adverse possession, and that appellant and Boise City are estopped from asserting any title or claim thereto.
[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682, 683; Dec. Dig. ⟸114(1); Estoppel, Cent. Dig. §§ 306, 308; Dec. Dig. ⟸118.]

Appeal from District Court, Ada County; Ed. L. Bryan, Judge.

Action between Jeremiah W. Robinson, Mayor and Trustee, and Herbert Lemp, executor of the estate of John Lemp, deceased. From a judgment for the latter and an order denying a new trial, the former appeals. Affirmed.

Chas. F. Reddoch and J. B. Eldridge, both of Boise, for appellant. Alfred A. Fraser and C. H. Lingenfelter, both of Boise, for respondent.

MORGAN, J. This action has heretofore been before this court upon appeal from a judgment of dismissal entered by reason of the refusal of the plaintiff to further plead after an order was made sustaining a demurrer to the complaint. The judgment was reversed, and the cause remanded, with direction to the trial court to overrule the demurrer and to permit the defendant to answer. Hodges v. Lemp, 24 Idaho, 399, 135 Pac. 250.

The purpose of the action is to procure a decree annulling and canceling two certain deeds, one made by James A. Pinney, as mayor of Boise City and, as such, successor to the trust created by the laws of the United States (U. S. Rev. Stats. § 2387 [U. S. Comp. St. § 4791]) and of the state of Idaho (Rev. Codes §§ 2147 to 2169) relative to government town sites and the disposal of lots and parcels of land situated therein, and certain special and local laws enacted by the territorial Legislature (Special and Local Laws of Idaho, pp. 30 and 33). The other deed was made by John M. Haines, as such mayor and trustee. These deeds conveyed to John Lemp, respondent's testator, certain lands in Boise City, as will more fully appear from the decision of this court above cited.

The defendant answered and filed a cross-complaint wherein he prayed that the cross-defendant, and his successors in interest, one of whom is appellant, he having been substituted for the original cross-defendant, be perpetually enjoined from claiming title to or interfering with his possession of the property, that he be decreed to be the owner thereof, and that his title be quieted. The cross-complaint was answered, and a trial was had which resulted in a decree for the defendant, from which, and from an order overruling a motion for a new trial, this appeal is prosecuted.

Section 2387, U. S. Rev. Stats., provides for the entry at the proper land office, by the authorities of a town, if incorporated, of portions of the public lands of the United States which have been or may be settled upon and occupied as a town site, in trust for the several use and benefit of the occupants thereof, according to their respective interests, and that the execution of the trust, as to the disposal of the lots and the proceeds of the sale thereof, shall be conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which the same is situated.

By the territorial act of January 6, 1871 (Special and Local Laws, p. 30), the mayor of Boise City was designated as trustee to execute the trust above mentioned, and he was directed to make and deliver to the occupants of lands within the town site who were entitled thereto deeds of conveyance according to their respective interests, and, with that end in view, to cause to be made and filed in his office a plat of the town site and to give notice requiring all persons claiming lands to present their respective claims to him in writing. It was further provided that the occupants of the town site might, at any time within 60 days after the filing of the plat and the publication of the notice, make their applications for title to the property claimed by them. The act directed what proceedings should be had in the event of conflicting claims, and provided that, if no adverse claim was filed, upon payment of a specified sum of money, the mayor should execute and deliver a deed of conveyance to the claimant. It was further provided that all lots and blocks, or portions thereof, remaining unclaimed for a period of 3 months after the first publication of the notice above mentioned should be sold by the mayor, at public auction, to the highest bidder, for cash, and the proceeds of the sale

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should be paid by him into the treasury of Boise City.

The act of the territorial Legislature of January 15, 1875 (Special and Local Laws, p. 33), directed the mayor of Boise City to publish notice for 30 days that he would, within 90 days from the first publication, sell all lots and blocks, or portions thereof, within the city for which a mayor's deed had not been taken, at public auction, and to so sell and dispose of such property and pay the proceeds thereof into the city treasury, unless, within the time specified in the notice, the parties claiming to own the property came forward and paid for and took deeds as provided by the act of 1871 supra.

Section 2169, Rev. Codes, provides, among other things, that the successor in office of the mayor or other officer who has entered lands under the town-site laws of the United States, or is trustee for the execution of the trust in that behalf, whether acting as such under general law or a local or special act relating to any city or incorporated town, shall succeed to the trust and have authority to execute the same as fully as his predecessor, the original trustee, might have done while in office; also that, when a mayor's or other trustee's deed of any block, lot, share, or parcel of a town site has been lost or cannot be found, and there is no record thereof in the office of the county recorder, such successor, upon proper application to him showing that no such deed can be found to such property, and that no deed thereto is of record in the office of the county recorder, and that the applicant, his ancestor, or predecessor or grantor, has been in the quiet, peaceable, and undisputed possession of the premises under claim of title for the full period of 5 years next before the application, must grant and convey the title to the applicant.

On January 13, 1868, the mayor of Boise City made application at the proper land office for a public land entry pursuant to the provisions of section 2387, supra, and on May 2, 1870, patent was issued to him in trust, conveying, for the purposes mentioned in that act, the town site of Boise City, including that portion of the land here in controversy mentioned and described in the first cause of action stated in respondent's amended complaint, but it does not appear that the tract in question was deeded to any one prior to June 5, 1891, at which time appellant's predecessor conveyed it to John Lemp.

One of the allegations contained in the first cause of action stated in the amended complaint is to the effect that said tract of land was vacant, unclaimed, and unoccupied at the time of entry of the town site, and that it remained so until about the year 1886, when, for the first time, Lemp asserted some claim over it. The trial court found that respondent failed to establish these facts by a preponderance of the evidence, or to the satisfaction of the court, and that the allegation is not true.

The evidence as to whether or not the land was occupied at the time of entry is, as might well be expected in view of the many years which elapsed between that date and the trial of the cause, exceedingly unsatisfactory, and we are not disposed to disturb the finding of the trial court in that particular, nor do we believe, in view of other facts disclosed by the record and of our conclusions relative to the law governing this case, that the point is one of controlling influence.

In 1897 Walter E. Pierce, mayor of Boise City, made application for an additional town-site entry, and in 1898 a patent was issued to him in trust, pursuant to section 2387, supra, conveying 1.13 acres as such additional town site, being the land which forms the subject of the second cause of action stated in the amended complaint. Thereafter, and in 1908, Mayor Haines, as successor to the trust, conveyed by deed the land in question to John Lemp.

As we understand the record, the land involved in this action was inclosed with a substantial fence about 1873. In 1878 Thomas D. Cahalan, who believed it to be a portion of a tract he owned, but whose property, in fact, adjoined it, included the land in controversy, together with other lands, in a deed to John Lemp, and in 1886 again included it in a deed of other lands to him. Since the date of the first-mentioned conveyance until the tract was platted into town lots and portions of it were sold it was in the open, notorious, adverse, and exclusive possession, control, and occupancy of Lemp, who held it under claim of title. The unsold portion was so held and possessed by him until his death, and since then has been, in like manner, possessed, controlled, and claimed by respondent as executor of his estate, and at no time has Boise City, or any of its mayors offered to sell it, or any portion of it, as unclaimed lands under the town-site laws of the United States and of the territory and state of Idaho, but have, during many years prior to the commencement of this action, in various ways recognized the Lemp title to it.

The municipality accepted a plat and dedication of the tract under the name and style of Lemp's Triangle addition to Boise City. It purchased a portion of it, erected a fire station thereon, and still retains title thereto and possession thereof. It obtained an option, in writing, to buy the entire property and therein it is recited that John Lemp is the owner. During the years since respondent and his testator have claimed title to and have occupied, controlled, and possessed this property, and before the time of the trial of this case in the district court, taxes, general and special, amounting in principal and interest to the sum of $9,366.70, being all taxes assessed against it, have been

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collected, and a portion of them have been levied by and paid to Boise City. It is true appellant has offered to reimburse respondent for the taxes paid, and interest thereon, but this can only be viewed in the light of an offer to do equity, and does not affect the fact that the city and its officials have for many years recognized the Lemp title.

These facts suggest the questions: Are the claims of appellant and his cestui que trust, the city, defeated by estoppel, and, have respondent and his testator acquired title by adverse possession, even though their claims under the town-site laws were not well founded originally? While a number of other points have been ably argued by counsel, we believe an answer to the foregoing questions will dispose of the case, and that the other matters presented need not be discussed in this opinion.

[1] The rule is established by the great weight of authority that title to property held by a municipality for public use, such as for streets, parks, public building sites, etc., cannot be acquired by adverse possession, but the opposite rule prevails where the property is held by it for other than a public use. Volume 3, McQuillan on Municipal Corporations, § 1158; Ames v. City of San Diego, 101 Cal. 390, 35 Pac. 1005.

[2] It is also well established that a municipal corporation may by its conduct or the conduct of its officers and agents be estopped to assert its claim of title to property. Volume 3, McQuillan on Municipal Corporations, § 1159; Davenport v. Boyd, 109 Iowa, 248, 80 N. W. 314, 77 Am. St. Rep. 536; Reuter v. Lawe, 94 Wis. 300, 68 N. W. 955, 34 L. R. A. 733, 59 Am. St. Rep. 892; Boise City v. Wilkinson, 16 Idaho, 150, 102 Pac. 148.

[3] Upon consideration of the foregoing facts and the law applicable thereto, we conclude that the property here in controversy is not, and cannot be, claimed by either appellant or Boise City for such a public use as would preclude respondent's testator from acquiring title thereto by adverse possession, that appellant and the municipality are estopped from asserting the claim here sought by them to be asserted, and that the judgment and order appealed from must be affirmed.

It is so ordered. Costs are awarded to respondent.

SULLIVAN, C. J., and BUDGE, J., concur.

(29 Idaho, 714)

CASADY v. STUART et al.

(Supreme Court of Idaho. Dec. 15, 1916.)

APPEAL AND ERROR ⟸1001(1)—REVIEW—VERDICT.

Where there is substantial evidence to support the verdict of a jury, the verdict will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928–3933; Dec. Dig. ⟸ 1001(1).]

Appeal from District Court, Idaho County; Edgar C. Steele, Judge.

Action by W. H. Casady against James Stuart and Harriet Stuart. From a judgment for plaintiff, defendants appeal. Affirmed.

Clay McNamee, of Lewiston, and J. L. McClear, of Boise, for appellants. J. F. Ailshie, of Cœur d'Alene, and W. H. Casady, of Lewiston, for respondent.

SULLIVAN, C. J. This action was brought to recover attorney's fees for services performed in certain litigation before the Commissioner of Indian Affairs and the Department of the Interior of the general government, involving title and succession of Indian lands and for procuring an adjudication in favor of appellants, vesting title in them to lands of the conceded value of about $20,000, for which services plaintiff claimed the sum of $2,500. The issue was joined on the reasonableness of the attorney's fee claimed. The court with a jury tried the case, and the jury returned a verdict for the plaintiff in the sum of $1,750, for which sum judgment was entered in favor of the plaintiff. A new trial was denied, and the appeal is from the order denying a new trial and from the judgment.

It was contended on the argument that the court erred in overruling the appellants' motion for a new trial. The other assignments of error go to the instructions given to the jury and the exclusion of certain testimony and the sufficiency of the evidence to support the verdict. The main contention, as we view it, involves the sufficiency of the evidence. On an examination, we find there is a substantial conflict in the evidence as to the value of the respondent's services. That being true, the verdict of the jury will not be set aside.

We have considered the other errors assigned by appellants, and we conclude that there is no real merit in any of them.

The judgment must therefore be affirmed; and it is so ordered, with costs in favor of the respondent.

BUDGE and MORGAN, JJ., concur.

(29 Idaho, 670)

STATE v. NATIONAL SURETY CO. (COFFIN, Intervener).

(Supreme Court of Idaho. Dec. 13, 1916. Rehearing Denied Jan. 4, 1917.)

1. COURTS ⟸95(1) — PRECEDENTS — FOLLOWING OF PRECEDENTS.

The right to enforce an attorney's lien against the proceeds of a judgment in favor of the state, in this jurisdiction depends upon constitutional and statutory provisions. This court will not be bound by, or follow, decisions of appellate courts of other jurisdictions in the enforcement of attorney's liens against the proceeds of a judgment in favor of the state and in the custody of the court, where such deci-

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sions are directly in conflict with the Constitution and statutory provisions of this state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 322; Dec. Dig. ⟸95(1).]

2. ATTORNEY AND CLIENT ⟸174 — LIENS — RECOVERY BY STATE.

Section 4900, Rev. Codes, as amended by Sess. Laws 1911, c. 167, p. 563, fails to provide for an attorney's lien in favor of an attorney who appears on behalf of the state, which attaches to a verdict, report, decision, or judgment in favor of the state, or to the proceeds thereof. Said statute makes no reference to the sovereign power and the sovereign is not included within the foregoing statutory provisions, either by express words or by necessary implication. As the government of the state is established for the good of the whole, and can only be supported by means of its revenues, courts in the construction of general laws will not ordinarily apply to the state such as upon their face seem to have been intended only to declare or regulate the rights and remedies of individuals and which, if so applied, would have the effect of obstructing the speedy collection of the public revenues.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 378–380, 382, 385; Dec. Dig. ⟸174.]

3. ATTORNEY AND CLIENT ⟸174 — LIENS — STATE.

Held, that no equitable lien attaches in favor of an attorney for services alleged to have been rendered the state that is enforceable against the proceeds of a judgment in the custody of the court, where the Constitution and the provisions of the statutes in express terms provide the procedure that must be followed in order to authorize the payment of any claim against the state.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 378–380, 382, 385; Dec. Dig. ⟸174.]

4. ATTORNEY AND CLIENT ⟸174—LIENS—RECOVERY BY STATE.

Section 18, art. 4, of the Constitution, provides that: "The governor, Secretary of State, and Attorney General shall constitute * * * a board of examiners, with power to examine all claims against the state, except salaries or compensations of officers fixed by law," etc. This clause of the Constitution is supplemented by the statutes (section 146, Rev. Codes, as amended by Sess. Laws 1913, c. 15, p. 58), as follows: "It shall be the duty of the state board of examiners to examine all claims against the state, except salaries and compensation of officers fixed by law. * * *" All claims of whatever character against the state must be submitted to the state board of examiners for their approval or rejection. To permit state officers to be harassed and hindered in the recovery of moneys embezzled by public officials, and to stop such moneys in transitu and charge the same with an attorney's lien for alleged services rendered the state in procuring said judgment, would be contrary to good public policy and detrimental to the due administration of the affairs of the state.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 378–380, 382, 385; Dec. Dig. ⟸174.]

5. STATES ⟸120—INDEBTEDNESS—VALIDITY.

Any indebtedness created or attempted to be created against the state, by a state officer, whose duty it is under the law to represent the state in an action to recover moneys embezzled by a state officer, in excess of the appropriation made to such officer, is void.

[Ed. Note.—For other cases, see States, Cent. Dig. § 119; Dec. Dig. ⟸120.]

6. STATES ⟸114—INDEBTEDNESS—AUTHORITY OF STATE DEPOSITORY BOARD.

Held, that there is a total absence of constitutional or statutory authority, authorizing the state depository board to create an indebtedness of the character sought to be recovered by appellant in this action, and all expenses authorized by law to be incurred by said board, in the performance of its official duty, must be audited and allowed as provided by law, by the state board of examiners.

[Ed. Note.—For other cases, see States, Cent. Dig. § 113; Dec. Dig. ⟸114.]

Sullivan, C. J., dissenting.

Appeal from District Court, Ada County; Charles P. McCarthy, Judge.

Action by the State of Idaho against the National Surety Company, in which T. C. Coffin intervened after judgment for plaintiff. From an order denying the intervener's asserted lien on the judgment, he appeals. Affirmed.

Action in intervention, to subject the proceeds of a judgment in favor of the state to an attorney's lien for services rendered and expenses incurred. Temporary restraining order issued and thereafter vacated.

Richards & Haga and V. P. Coffin, all of Boise, and T. C. Coffin, of Pocatello, for appellant. J. H. Peterson, Atty. Gen., and A. A. Fraser and J. T. Pence, both of Boise, for the State. Hawley & Hawley, of Boise, for respondent National Surety Co.

BUDGE, J. One O. V. Allen was elected at the biennial election held on November 8, 1910, to the office of state treasurer of the state of Idaho for the years 1911 and 1912, and on November 5, 1912, Allen was re-elected to said office for the years 1913 and 1914. The National Surety Company of New York, to insure the faithful performance of all the duties of the office of state treasurer by Allen, furnished a bond to the state of Idaho in the penal sum of $200,000. During Allen's terms of office as such state treasurer he embezzled from the state of Idaho large sums of money that came into his hands. Suit was brought by the state of Idaho, as plaintiff, against the National Surety Company, a corporation, as defendant, in the district court of the Third judicial district to recover the moneys so embezzled, which resulted in a judgment being entered in favor of the state of Idaho and against the National Surety Company in the sum of $145,264.34, and it was further ordered in said judgment that the state of Idaho do hold and retain, in addition to said sum of $145,264.34, the payments made to the state depository board of the state of Idaho by and on behalf of the Bank of Nampa, namely, $7,414, together with costs and disbursements incurred in the action, amounting to the sum of $648.25.

The appellant herein appeared as one of the attorneys for the state in the trial of said cause in the district court. Shortly after the entry of the above-mentioned judg-

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ment, appellant, upon learning that the National Surety Company through its attorneys was about to pay to the state depository board the amount of the judgment recovered and thereby procure a satisfaction thereof, made and filed his application in the district court wherein said judgment was rendered for permission to file a complaint in intervention, wherein he sought to subject a portion of said judgment to the payment of his attorney fees, alleged in his complaint in intervention to be due him for services rendered to the state in procuring said judgment, and for certain costs and expenditures made by him, alleged to have been incurred in connection with the preparation and trial of said cause. Permission was granted to appellant by the trial judge to file his complaint in intervention and his affidavit in support thereof, whereupon the trial court granted a temporary injunction wherein it was ordered that the National Surety Company, its attorneys, and each and all of them, were temporarily restrained from paying either to the state or its representatives the entire amount of said judgment, and directed that so much thereof as appellant claimed was due him for legal services rendered, to wit, $12,500, together with fees and expenditures alleged to have been incurred by appellant in connection with the preparation and trial of said cause, namely, $1,556.93, be retained by counsel for said National Surety Company until the further order of the court. The foregoing order was made on the 15th day of September, 1916. On the same date, the state of Idaho, by its Attorney General, J. H. Peterson, and A. A. Fraser, Esq., and J. T. Pence, Esq., moved, upon the minutes of the court, to dissolve the temporary restraining order theretofore issued. Said motion came on for hearing before the court, the state of Idaho being represented by the attorneys heretofore named; Messrs. Hawley and Hawley appearing as counsel for the National Surety Company, and Messrs. Richards and Haga, and V. P. Coffin, Esq., and T. C. Coffin, Esq., appearing as counsel for intervener. Said motion was argued by counsel for the respective parties and taken under advisement.

On September 19th the appellant, by his attorneys, moved the court for permission to file an amended complaint in intervention; said motion being supported by his affidavit, which motion was granted by the court. Whereupon the amended complaint in intervention and affidavit were filed. On the same day the trial court entered an order:

"That the temporary restraining order theretofore issued should be vacated and the money should be permitted to be paid to the state depository board; that the court should order the state depository board to then deposit the amount of $14,056.93 in a special fund in the state treasury, to be designated as State of Idaho v. National Surety Company Fund, to be kept in such fund until the petitioner's claim is acted on in due course, or until further orders of the court; * * * that the balance of the proceeds of said judgment be paid to the state depository board and by them into the public treasury of the state of Idaho; that the plaintiff and defendant be not required to answer the petition of intervener herein; that this court entertain no further jurisdiction in said case other than such as may be necessary to carry this order into effect."

It was further provided in said order that, whereas it appeared to the court that the petitioner would perfect an immediate appeal from the order to the Supreme Court, that said order is an appealable order, that one ground of such appeal will be that the court should have ordered the sum of $14,056.93 of the proceeds of said judgment paid into that court, and should then have proceeded to try the issues between the petitioner and the state of Idaho as to whether the state should be compelled to pay petitioner for legal services rendered and expenses incurred out of the proceeds of the judgment in favor of the state, and, if so, how much, * * * and that "whereas, the petitioner has applied to this court for a stay of the judgment entered herein, pending the determination of his appeal, so far as the same relates to the payment of said sum of $14,056.93 into the special fund in the state treasury, whereas it appears possible that in the event said sum is paid into the state treasury, even though it be into a special fund, said appeal would be fruitless so far as the question just above mentioned is concerned, now, therefore, for the purpose of keeping said amount of $14,056.93 in statu quo until said appeal is perfected and the matter comes within the jurisdiction of the Supreme Court, it is hereby ordered that a stay of proceedings be and is hereby granted until 12 o'clock noon, Saturday, September 23, 1916, as to that portion of this order which requires $14,056.93 of the proceeds of said judgment to be paid to the state depository board and by said board to be paid into a special fund in the state treasury, and the operation of this order * * * to that extent and to that extent only, is suspended for that length of time." Said order further provided that appellant should immediately perfect his appeal to the Supreme Court and furnish an undertaking on such appeal. Whereupon counsel for intervener duly perfected an appeal to this court from the order made and entered in the district court, on September 21, 1916.

After the appeal had been duly perfected, T. C. Coffin, Esq., intervener below and appellant here, made an application for an order that the fund heretofore referred to be kept within the control and jurisdiction of this court until the appeal be determined. Thereupon this court, upon the filing of a good and sufficient bond, made an order to John W. Eagleson, as state treasurer of the state of Idaho, that he, as state treasurer, receive said amount of $14,056.93 from the defendant, and deposit and hold the same in a special fund, subject to the orders of this court.

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This appeal is prosecuted from the order of the district court, dissolving the temporary restraining order heretofore referred to and refusing to take further jurisdiction of the proceedings in intervention instituted by the appellant. For a reversal of said order, the appellant assigns and relies upon the following assignments of error:

(1) The court erred in that it ordered and adjudged that said temporary restraining order be vacated and dissolved. The court also erred in that it did not grant the prayer of the amended complaint in intervention, that said temporary restraining order be continued in full force and effect pending the final judgment of the court herein.

(2) The court erred in that it ordered and adjudged that the defendant pay the full amount of said judgment to the state depository board. The court also erred in that it did not grant the prayer of the amended complaint in intervention, that said defendant National Surety Company, a corporation, and its attorneys Hawley and Hawley and James H. Hawley, Esq., their servants and agents, and each and all of them, be ordered to forthwith deposit with the clerk of said court said sum of $14,056.93, proceeds of said judgment, there to await the further orders of said court.

(3) The court erred in that it ordered and adjudged that the plaintiff and defendant be not required to answer the petition of intervener herein. The court also erred in that it did not grant the prayer of the amended complaint in intervention that all parties herein who have or claim to have interests or rights adverse to this intervener be required to answer the amended complaint in intervention within ten days of the service upon them or their attorneys of the same.

(4) The court erred in that it ordered and adjudged that said court entertain no further jurisdiction in said cause other than such as might be necessary to carry the order appealed from into effect.

The question presented to this court upon the record in this case is, in substance and effect: Conceding for the purposes of this case that there is no fund or appropriation in the state treasury out of which the attorney's fee and expenses necessarily incurred in obtaining the judgment heretofore mentioned, in favor of the state, can lawfully be paid, can the fund arising from the judgment itself be stopped in transitu by order of the court, and charged while in the custody of the law with the payment of the attorney fees and costs incurred in creating the fund, by asserting an attorney's lien against it?

As we view it, if, under the Constitution and statutes of this state, an attorney's lien for services rendered the state may be asserted against funds arising from a judgment procured in favor of the state, the trial court erred in dissolving the temporary injunction, in refusing to retain jurisdiction of the case, and refusing to require the state of Idaho and the National Surety Company to answer the amended complaint in intervention of the appellant herein. The various assignments of error heretofore stated, being all directed to the above propositions, may be considered collectively.

At the outset it may be conceded that if this were an action between individuals or private corporations, and notice were duly given to the judgment debtor as provided by law, the fund arising from the judgment would be subject to and chargeable with the attorney fee, and the same would be an enforceable lien against the proceeds of said judgment, together with costs and expenses incurred in obtaining the same. Kerns v. Washington Water Power Co., 24 Idaho, 525, 135 Pac. 70.

[1] It will therefore be unnecessary for us to discuss that particular phase of this case, and we will confine ourselves to the question of the application of attorney's liens against the state or funds belonging to it. In doing so, we are not unmindful of the numerous cases that have been cited by able counsel in their brief and so earnestly argued upon presentation of this cause, for the purpose of establishing the right of an attorney to a lien upon the proceeds of a judgment in favor of his client for his fees and necessary and proper expenses, even where the client is the sovereign. There were a number of cases cited by counsel in their brief which would seem to bear out their theory, in the absence of constitutional provisions and statutory enactments directly in conflict with the doctrine announced therein. Upon examination we find some of these cases are not in point for the reason that prior to the employment of the attorneys who represented the sovereign, necessary appropriations were made by the Legislature to meet the expenses and attorney fees, in advance of the services rendered and expenses incurred. In other cases attorney's retaining liens have been upheld upon the theory that these liens existed from the necessities of commerce and the necessities of the public service. In our opinion the right to enforce a lien of the character sought to be enforced in this case, if any exists, against the state in this jurisdiction, must depend upon constitutional and statutory authority, and we are not inclined to follow the decisions of appellate courts of other states where they directly conflict with the Constitution and statutory provisions of our own commonwealth.

[2] The common law as to the compensation of attorneys has been abrogated in this state by statute and is now a matter of contract, either express or implied. Section 4900, Rev. Codes, as amended by the Session Laws of 1911, c. 167, p. 563, is as follows:

"The measure and mode of compensation of attorneys and counsellors at law is left to the agreement, express or implied, of the parties, which is not restrained by law. From the commencement of an action, or the service of an

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answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosoever hands they may come, and cannot be affected by any settlement between the parties before or after judgment; but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided."

The foregoing statutory provision fails to provide for an attorney's lien in favor of an attorney who appears on behalf of the state, which attaches to a verdict, report, decision, or judgment in favor of the state, or to the proceeds thereof. In other words, the statute makes no reference to the sovereign power, and the sovereign is not included within the foregoing statutory provision either by express words or by necessary implication.

In the case of Hendrick v. Posey et al., 104 Ky. 8, 45 S. W. 525, 46 S. W. 702, it appeared that appellant was Attorney General of the state of Kentucky from September 7, 1891, to January 6, 1895, and as such during that time instituted suits against the Kentucky Midland Railway Company and recovered judgments aggregating $11,000; that appellant had said judgments made a prior lien in favor of the state; that the property of the railway company was sold after the expiration of appellant's term of office; that the master commissioner under the order of the court was directed to pay to the commonwealth $7,578.65, its pro rata share of said judgment; that appellant, believing that he had a right so to do, received the money from the commissioner as the attorney for the commonwealth, and contended that inasmuch as the auditor and Governor had refused to fix the amount of his compensation according to statute, he had a right to receive and retain the money paid him by appellee, and that he had a special lien thereon by virtue of section 107, Ky. St. The Supreme Court of Kentucky did not agree with his contention, but to the contrary held that section 107, Ky. St. (which is similar to section 4900, Rev. Codes, as amended, supra), had no application to the commonwealth, and cited in support thereof Commonwealth v. Cook, 8 Bush (Ky.) 220, 8 Am. Rep. 456, where the court held that:

"The commonwealth is not embraced by an act which is made to operate between individuals, unless there is something in the act which shows an intention to subject the state to the same rule. * * * As the government of the state is established for the good of the whole, and can only be supported by means of its revenues, courts in the construction of general laws will not ordinarily apply to the state such as upon their face seem to have been intended only to declare or regulate the rights and remedies of individuals, and which if so applied would have the effect of obstructing the speedy collection of the public dues." Divine v. Harvie, 7 T. B. Mon. (Ky.) 439, at page 443, 18 Am. Dec. 194.

This rule of law the court in its opinion held to be founded—

"not only upon the highest public policy, but as warranted by the firmly established maxim that 'general statutes do not bind the sovereign unless expressly mentioned in them.' Laws are prima facie made for the government of the citizen, and not of the state herself." Compton v. State, 38 Ark. 601.

The appellant is seeking to recover an alleged indebtedness due him, or in other words to enforce a claim against the state, and it is immaterial that the moneys out of which he seeks to compensate himself have not yet found their way into the state treasury. It is a claim against the state nevertheless. It is quite evident that a debt cannot be recovered against the state under any general statute regulating the recovery of debts, unless the statute by express terms or necessary implication authorizes such a procedure. "It is a settled rule that in general statutes which regulate the recovery of debts the government is not bound unless they are made applicable to it in express terms or by necessary implication." This is no invidious or prerogative right, but a rule founded on well-ascertained public policy, necessary to protect the public interest against the negligence of public officers, and especially to guard the public revenue. It is a rule adopted in many, if not all, of the states, and probably in most other countries, and has been sanctioned by repeated judicial decisions. United States v. Wilson, 8 Wheat. 256, 5 L. Ed. 610; United States v. Hoar, 2 Mason, 314, Fed. Cas. No. 15,373; United States v. Greene, 4 Mason, 433, Fed. Cas. No. 15,258; United States v. Hewes, Fed. Cas. No. 15,359; Stoughton v. Baker, 4 Mass. 528, 3 Am. Dec. 236; People v. Rossiter, 4 Cow. (N. Y.) 143; Com. v. Baldwin, 1 Watts (Pa.) 54, 26 Am. Dec. 33; King v. Allen, 15 East, 340.

This same principle is announced in the case of Wood v. State, 125 Ind. 219, 25 N. E. 190, where the court held that:

"The law will not permit the administration of governmental affairs to be embarrassed by the seizure of public property or public funds to pay debts due individuals."

[3] The proceeds of the judgment recovered against the National Surety Company is a public fund, which had been embezzled by a public official, and recovered back. It belongs to the state, and it is out of this fund that appellant seeks the payment of the claim which he contends is due him, and insists that his claim became a lien, and enforceable as such, against the moneys of the state, and that he has a right to stop this money in transitu and subject it to his lien before it reaches the state treasury; that his right to have a portion of said fund paid to him by order of the court is not limited by the provisions of section 4900, Rev. Codes, as amended, supra, but that he has an equitable lien, which should be enforced by the trial court, whose duty it is to protect its officers in the matter of the payment to them of such fees and disbursements as may be found to be due them by the court. With this contention we are not in accord, for

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the reason that no equitable lien attaches in favor of the appellant where the Constitution and statutes in express terms provide an adequate remedy and where the procedure for pursuing this remedy is expressly provided it must be followed in order to authorize the payment of any claim against the state.

[4] Section 18, art. 4, of the Constitution provides that:

"The Governor, Secretary of State, and Attorney General shall constitute * * * a board of examiners, with power to examine all claims against the state, except salaries or compensations of officers fixed by law. * * *"

This clause of the Constitution is supplemented by the statutes (section 146, Rev. Codes, as amended by Sess. Laws 1913, c. 15, p. 58), as follows:

"It shall be the duty of the state board of examiners to examine all claims against the state, except salaries and compensation of officers fixed by law. * * * The board may approve or disapprove any claim or demand against the state, or any item thereof, or may recommend a less amount in payment of the whole, or any item thereof, and a decision of a majority of the members shall stand as the decision of the board."

The above sections of the Constitution and statutes require all claims against the state of an unliquidated character to be submitted to the state board of examiners for approval or rejection.

To adopt a different rule in this case or any case, no matter how just the claim might be, to permit state officers to be harrassed and hindered in the recovery of moneys embezzled by public officials by way of attorney's liens for services alleged to have been rendered the state, would be contrary to good public policy and detrimental to the due administration of the affairs of the government.

But even if the position taken by learned counsel were correct, there must be a valid claim. The lien is merely ancillary to the claim. If there is no valid claim there can be no lien.

It is quite evident that the appellant must rely upon a contract of employment, either by the Attorney General or the state depository board, or both. That being true, it becomes necessary to determine to what extent these officials may bind the state for the payment of claims made against it for such services rendered as the appellant seeks to recover for.

Section 1827, Rev. Codes, provides:

"The state auditor and Attorney General may employ other counsel than the county attorney, and the expenses must be paid out of the state treasury."

Section 13, art. 7, of the Constitution provides that:

"No money shall be drawn from the treasury, but in pursuance of appropriations made by law."

The latter clause of section 1827, supra, namely, "* * * And the expenses must be paid out of the state treasury," this court held in the case of Kingsbery v. Anderson, 5 Idaho, 771, 51 Pac. 744, did not make an appropriation for the payment of such services, and in the absence of an appropriation the auditor properly refused to issue a state warrant in payment for legal services of counsel employed by the state auditor under the provisions of section 1827, supra.

[5] Therefore, if appellant's contract of employment was made with the Attorney General it must have been understood by appellant that it was in pursuance of an appropriation made by law. It will be recalled that the Legislature convened in regular session subsequent to the discovery of the embezzlement of the state funds by Allen, and the presumption is that they made ample provisions for the payment of such expenses as would necessarily be incurred in recovering the moneys so embezzled. The Legislature at its biennial session in 1915 made an appropriation for the Attorney General's office for that and the ensuing year of $29,200, for the payment of the salary of the Attorney General, the salary of assistant attorneys, stenographers, and other expenses, and provided in said act, among other things, that:

"Any indebtedness created, or attempted to be created, against the state * * * in violation of the provisions of this act or any indebtedness attempted to be created against the state * * * in excess of the proper appropriation, whether made by this act or by other provisions of law, shall be void." Sess. Laws 1915, c. 159, § 6, p. 350.

It is therefore quite evident that the Attorney General was without authority to create any indebtedness against the state in excess of the appropriation for his office, and if there was no appropriation out of which the claim of the appellant could be paid, any attempt to create an indebtedness in favor of appellant by the Attorney General, if the Attorney General did attempt to create any indebtedness against the state in excess of his appropriation, would be absolutely void.

[6] An examination of the statutes with reference to the duties of the state depository board convinces us at once that there is a total absence of statutory or any authority given it, whereby it is authorized to create an indebtedness of the character sought to be enforced by the appellant, and such expenses as they are authorized to incur in connection with the performance of their duties as members of such board, and in carrying out the provisions of the statutes defining their powers and duties, must be audited and allowed as provided by law, by the state board of examiners, and paid out of the general fund of the state.

From what has been said it follows that the Attorney General would be without authority to employ appellant, and thereby charge the state with a claim for services rendered in excess of the appropriation made for his office for the years 1915 and 1916; but admitting that the Attorney General had authority to employ appellant, under the con-

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stitutional and statutory provisions heretofore cited, the claim for services rendered, being one against the state, and not being a fixed salary, would necessarily have to be submitted to the state board of examiners for allowance or rejection.

The presumption is that the state will pay all valid claims properly presented against it, and for that purpose has provided a method whereby all claims against the state may be presented to a constitutional board with exclusive power to examine, audit, and allow such claims, in whole or in part, as are found to be legal charges against the state, and as was announced by this court in the case of Rathbun v. State, 15 Idaho, 273, 97 Pac. 335, a laborer or materialman may have a claim against the state within the meaning of that term, and yet be entitled to no lien to secure the payment of the same. That is, in our opinion, the position that appellant, as well as all other claimants against the state, occupies, under the Constitution and laws of this state. They must present their claims to the properly constituted board for allowance or rejection, or for the procurement of a recommendatory judgment for submission to the Legislature.

From what has been said it follows that the trial court did not err in refusing to continue in full force and effect the temporary restraining order issued and heretofore referred to, and requiring the National Surety Company, and its attorneys, to deposit with the clerk of said court the sum of $14,056.93, a portion of the proceeds of the judgment recovered in favor of the state, and to require the state and the National Surety Company to answer the amended complaint in intervention of the appellant. The order of this court, heretofore made, directing that John W. Eagleson, as state treasurer, receive said sum of $14,056.93 from the National Surety Company, and place the same in a special fund, subject to the order of this court, as directed in its order of September 22, 1916, is hereby vacated and the state treasurer directed to place the above-mentioned sum into the proper fund as provided by law.

The judgment of the trial court is affirmed. Costs are awarded to respondent.

MORGAN, J., concurs.

SULLIVAN, C. J. (dissenting). I am unable to concur in the conclusion reached by the majority of the court. The majority opinion proceeds upon the theory, as I understand it, that under certain constitutional provisions and under the laws of this state an attorney who has been engaged to prosecute a claim in favor of the state and obtains judgment for the state has not an equitable, charging lien against said judgment before it is paid over to the state.

The lien claimed in this case is not claimed under the attorney's lien law of the state, and the main question to be determined is whether the attorney is entitled to the payment of a reasonable attorney's fee for the services rendered in procuring a judgment amounting to nearly $154,000 in favor of the state. The amount of attorney's fee is not involved in this appeal.

If it were held on this appeal that the attorney's fee and certain costs were payable out of the proceeds of said judgment, the matter would then have to be sent back to the district court to determine the value of the attorney's services.

In limine, since the matter involved in this case has been injected largely into the politics of the last campaign, and great injustice done the appellant by reason of misrepresentations made, as has appeared from the public press of the state and otherwise, I shall state the facts involved in considerable detail and the law applicable to those facts.

The main action against the surety company by the state to recover the loss occasioned by the defalcation on Allen's official bond was commenced in November, 1915. It appears from the record that appellant was employed as special counsel for the state in said matter on or about the 15th day of December, 1915, by the Attorney General and the state depository board of the state of Idaho. At the time of said employment, the compensation of appellant was not fixed, but it was mutually understood that he should be paid the reasonable value of his services. He began his work under such employment about the 17th day of December, 1915, and was engaged therein practically without intermission from said date until the 22d day of July, 1916. In the course of his employment, he worked under the direction of the state depository board and pursuant to directions received by him from said board, he was permitted to have the assistance of a former deputy state treasurer, who was then confined in the state penitentiary and was very familiar with the books kept by the state treasurer Allen, since he had kept said books of account and knew where all the false entries had been made. With such assistance the appellant made a complete examination into the affairs of the state treasurer during the whole of said Allen's term as state treasurer, covering the years of 1911, 1912, 1913, and 1914. Said examinations were made upon the orders of the state depository board for two purposes: First, to ascertain and report whether everything irregular in said office had been discovered and pointed out by certain experts; and, second, to obtain data and information upon which to file an amended complaint in said action. During that time appellant was called upon by said depository board to act in the capacity of special guard of the penitentiary during the entire time that said deputy state treasurer was assist-

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ing appellant in said work, and during the entire trial was called upon by said board to act in the capacity of special guard for said ex-treasurer and his said deputy, who were in attendance during the trial. The appellant had entire charge of the preparation of said cause for trial, and the entire charge of said case at said trial. He drew all pleadings of the plaintiff in said cause, including the findings of fact and conclusions of law and decree.

Appellant is a resident of Pocatello, Idaho, and has been a resident there since the 8th day of December, 1915, and maintains an office there. Pursuant to his said employment and the wishes of the Attorney General and the state depository board, he has been away from his office in Pocatello from December 17, 1915, up to the time of the trial of said cause in July, 1916, with the exception of perhaps two weeks. In the preparation of said cause for trial, certain depositions were taken in Chicago, Ill., and appellant personally went to Chicago and was present at the taking of said depositions.

While acting as special guard for said Allen and his deputy, who were then confined in the state penitentiary, he incurred certain expenses for meals while they were in the city and certain expenses for taxicab to take them to and from the penitentiary and to and from the court, such expenses amounting in all to $168.85, no part of which has been paid by the state.

The stenographer who reported said case charged over $900 for his services, which has not been paid, and it appears that there are no appropriations available out of which said expenses can be paid, and that unless they can be paid out of the proceeds of said judgment, deficiencies will be created in violation of the provisions of the law. Sess. L. 1915, p. 361. The appellant has no other remedy than the subjecting of said judgment to the payment of his expenses and fees, and if all of the proceeds of said judgment are paid in to the state treasurer, petitioner claims that he will be remediless.

Appellant claims that his services were reasonably worth $12,500, but concedes that he has not the right to fix the value of such services, and states in his complaint in intervention as follows:

"That this affiant concedes that it is not his right to fix the amount of his compensation, and is likewise of the opinion that it is not right and just, under the circumstances, that the state depository board should be permitted to fix the same, and this affiant asks nothing more than his day in court, with an opportunity to have this honorable court [the district court] after full hearing, determine the right of this affiant to compensation out of said judgment, and the fair and reasonable amount of such compensation; and that a portion of the proceeds of said judgment be placed in such shape that should this honorable court decide in favor of this affiant the means of enforcing such judgment will not be taken away."

The appellant thus admits that he cannot fix his attorney's fee in said matter, but claims that the reasonable value of his services is $12,500, and all that he asks is to have the question submitted to a court of competent jurisdiction in order to have it determine the value of his services.

It appears from the record that he was regularly employed to perform this service; that he performed it with honor to himself and with great profit to the state. The state accepted his services, and ought it not in common fairness and honesty be willing to pay the reasonable value of such services? But the majority holds that the contract of employment between the state depository board and the appellant was absolutely void, for the reason that no appropriation had been made for the payment of such services. The majority opinion states:

"Therefore if appellant's contract of employment was made with the Attorney General, it must have been understood by appellant that it was in pursuance of an appropriation made by law."

Why say "it must have been understood" that such contract of employment was in pursuance of an appropriation made by law when it was known to all concerned that no such appropriation had been made?

Then for the majority to argue "that it must have been understood," etc., is certainly very remarkable when we take into consideration that for the purposes of this appeal the allegations of the complaint in intervention must be taken as true. The majority opinion, after quoting that part of Laws 1915, § 6, p. 350, declaring any indebtedness created or attempted to be created in excess of the appropriations made shall be absolutely void, states:

"It is, therefore, quite evident that the Attorney General was without authority to create any indebtedness against the state in excess of the appropriation for his office, and if there was no appropriation out of which the claim of the appellant could be paid, any attempt to create an indebtedness in favor of appellant by the Attorney General, and against the state, would be absolutely void."

It might be inferred from the foregoing quotation from the majority opinion that the Attorney General alone made the contract of employment with the appellant, but that idea is not borne out by the first paragraph of the complaint in intervention, which is as follows:

"That he was employed as special counsel for the plaintiff in the above-entitled cause on or about the 15th day of December, 1915, by J. H. Peterson, Attorney General of the state of Idaho, and by the state depository board of the state of Idaho."

The record therefore clearly shows that the appellant was employed to perform the services he did perform by the Attorney General and the state depository board.

As I view it, there was no effort made in this matter to create a claim against the state. The Attorney General, the depository board, and the appellant all well knew that

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there was no attempt in this matter to create a claim against the state. If the officers so understood it, they are clearly guilty of a crime. They knew that if they did undertake to do that, they were violating the provisions of Sess. L. 1915, p. 361, which declares:

"No officer, employé or state board * * * shall enter, or attempt or offer to enter into any contract or agreement creating any expense, or incurring any liability, moral, legal or otherwise, or at all, in excess of the appropriation made by law for the specific purpose or purposes for which such expenditure is to be made, or liability incurred. * * * Any indebtedness attempted to be created against the state in violation of the provisions of this act, or any indebtedness attempted to be created against the state in excess of the appropriation provided for in any act, shall be void."

Section 3 of said act provides that:

"Any person or persons violating the provisions of this act shall be deemed guilty of a misdemeanor, and shall be disqualified from holding any state office," etc.

The parties to this contract certainly knew of those provisions and they all knew that the only way that the cost and expense and attorneys' fees in this action could be legally paid would be out of the judgment recovered against the surety company. It seems to me to be most unreasonable to contend in this matter that the compensation of the appellant in procuring said judgment is a claim against the state that necessarily must be presented to the board of examiners and could not be paid until an appropriation had been made therefor, unless that was the contract between the parties, and a contract was distinctly made that the compensation should not be paid out of the proceeds of the judgment obtained.

That section of the law of 1915 above quoted clearly contemplates and refers to matters or purposes for which an appropriation has been made, since it is declared that:

"No officer * * * shall enter, or attempt or offer to enter into any contract or agreement creating any expense, or incurring any liability, moral, legal or otherwise, or at all, in excess of the appropriation made by law for the specific purpose or purposes for which such expenditure is to be made, or liability incurred."

That section of the statute clearly does not apply to a case like the instant case, for no specific appropriation was ever made for the employment of counsel in the instant case.

In a similar case, that of Kirby v. State, 68 Misc. Rep. 626, 125 N. Y. Supp. 742, the court in considering a statute like the one above quoted said:

"That it was not the intention of the Legislature that the provisions of the finance law quoted should be applicable to such a case as the one at bar."

I shall not presume that it was the intention of the depository board to violate that statute and thus become liable to be deprived of their offices. The reasonable presumption is that there being no specific appropriation for the payment of counsel fees and expenses in prosecuting the instant case, the board contemplated that the attorney's fees and costs must be paid out of the judgment rendered. Under the statute, as it now stands, the claims against the state must be filed with the state auditor, and before they are presented to the board of examiners for allowance, the state auditor must certify as follows:

"I certify that the above account has been audited and found correct; that there is authority of law for its payment; that there is sufficient money in the proper fund for its payment; and that proper receipts for each item charged accompany the account.

If the act of the Legislature requiring such a certificate from the auditor before any claim may be presented to the board of examiners is a valid act, it would be impossible to have any claim passed upon by the board except those for the payment of which appropriations had been made.

Is it reasonable to presume that the depository board in the employment of the appellant to prosecute said case intended that he should never receive anything for his services, or that he should not be reimbursed for the necessary cash he paid out in the preparation of the case for trial? I think not; and I do not believe that it was the intent that he should prosecute said case at his own cost and expense and the state go scot-free from paying for his services and the necessary expense for court stenographers and other legal costs involved in the case.

The depository board employed two attorneys to resist this claim of the appellant in the district court, and the record shows that those two attorneys were paid out of the proceeds of this very judgment that the board now claims is too sacred to be touched in any manner for the payment of legal costs or for the value of the attorney's services in procuring said judgment. Said attorneys urged upon this court the proposition that the intervener must present his claim to the board of examiners, when as a matter of fact they were paid their attorneys' fees for urging that proposition out of this very judgment and without having presented their claims to the board of examiners. It has been said that consistency is a jewel.

When a reasonable view of this case is taken, under the law, as it stands, when it is considered that no appropriation was ever made for attorneys' fees or the cost of the prosecution of this case, for the reason that the Legislature did not foresee that it would be necessary to go to such an expense, no reason appears why the state authorities should not protect the interests of the state, even though it required a part of the judgment recovered in favor of the state to pay the costs and expense of such prosecution, and this could be done without creating any claim against the state that would require an appropriation to be made to pay it.

Every one knows, every lawyer knows, and the state authorities know the persistency with which surety companies contest their liability upon any of the bonds given by

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them, and the necessity of having a lawyer to prosecute such case who is able to cope with the best lawyers in the land, such as surety companies usually employ, and the danger of loss to the state unless such cases are thoroughly tried—these and many other things conclusively show the wisdom of the depository board in employing counsel who could properly protect the interests of the state. The further fact that the depository board knew that it had no authority to enter into any contract or agreement creating an expense or incurring any liability in excess of the appropriation made by law for any specific purpose is convincing to me that they did not intend to violate the law, but did intend that the attorney's fee, as well as the other legal costs of this prosecution, should be paid out of the judgment and thus create no claim against the state.

It is true no money can be drawn out of the treasury of the state without an appropriation, but the money represented by this judgment never was in the treasury of the state, and there is the distinction. The majority opinion holds that it is a part of the revenue of the state, when in fact it clearly could not become a part of the revenue of the state in the state treasury until it had been paid into the state treasury, and it has never been in the state treasury. The state brought this action in the district court against the surety company. It recovered a judgment, and about $14,000 of that judgment is still in the hands of the court and has never been in the possession of the state.

Section 13, art. 7, of the state Constitution is as follows:

"No money shall be drawn from the treasury, but in pursuance of appropriations made by law."

The money represented by the judgment in question never has been in the treasury, and that section has no application whatever to the payment of attorney's fees and the legal costs of the prosecution of this case. The district court has full authority to require attorney's fees and all legal costs to be paid out of said judgment before the balance is turned in to the treasury of the state. The money stolen from the state by the ex-treasurer and his deputy was taken from the state treasury, but the money represented by this judgment was never in the state treasury until a portion of it was paid there under the direction of the court. The balance of about $14,000 never has been in the state treasury. It is now held in the hands of the court. It never has become a part of the revenue of the state held by the treasury of the state; hence it is clear that said section of the Constitution above quoted has no application whatever to said fund now in the hands of the court.

I will now proceed to cite authorities which, as I view it, fully sustain the position above taken.

The doctrine is well established that an attorney's general or retaining lien is a common-law lien which has its origin in the inherent power of courts over the relation between attorneys and clients. The courts have the power to enforce the performance by the attorney of his duties toward his client and this power enables the court to protect the rights of an attorney against his client. This lien is one which the courts have long recognized and protected. See Everett et al. v. Alpha P. C. Co., 225 Fed. 931, 141 C. C. A. 55; In re Wilson (D. C.) 12 Fed. 235.

The equitable charging lien, which is the one involved in this case, is entirely different from the common-law lien, and it will be noted from the authorities that all characteristics of a charging lien are in their inherent nature equitable. As long ago as 1795, Lord Kenyon, Chief Justice, said that:

"The principle * * * was settled long ago, namely, that the party should not run away with the fruits of the cause without satisfying the legal demands of his attorney, by whose industry, and in many instances, at whose expense, those fruits were obtained." Read v. Dupper, 6 Term Reports, 361, 101 Full Reprint, 595.

The case of Louisville, etc., Co. v. Wilson, 138 U. S. 501, 11 Sup. Ct. 405, 34 L. Ed. 1023, quotes with approval the following from the Supreme Court of West Virginia (Renick v. Ludington, 16 W. Va. 392):

"The lien (even in cases of quantum meruit) is in the nature of an equitable lien (3 Cooper's Tenn. c. 23), and is based on the natural equity, that the plaintiff ought not to be allowed to appropriate the whole of the judgment in his favor without paying thereout for the services of his attorney in obtaining such judgment."

If the proceeds of the judgment in this case had been paid over to the state, a different case would be presented, but since the fund, on which the lien is claimed, is still in the hands of the court, and never has been in the treasury of the state and never has been a part of the state's revenue, it ought not to be permitted to be withdrawn from the court without first paying the appellant a reasonable compensation as attorney's fee.

The question now presented is whether or not the principles which establish the right of an attorney to a lien upon the proceeds of a judgment in favor of his client for his necessary and proper expenses, and for his fees, apply where the client is the sovereign state.

At the time the Legislature was in session in 1915, the only claim which it was known that the state of Idaho had against the former state treasurer and his sureties was a claim of $93,000, being the actual shortage in cash in the treasurer's office that had been taken from the state treasury, and the Legislature, if they considered the matter at all, which it is not at all likely they did, no doubt concluded that it was a very simple matter to establish the state's case against the surety company; but the state depository board and the executive officers having

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this matter in charge, after the adjournment of the Legislature, made certain investigations which led them to believe that the claim of the state against the surety company was greatly in excess of said sum, and considered it highly essential that the state's interests should be placed in the hands of counsel skilled in mathematics and possessing some knowledge of bookkeeping. They certainly knew that proper preparation was essential to ultimate success against the surety company and that the case could not be prepared for trial and the evidence collected without incurring some expense. They also knew that legal counsel could not be obtained without some provision being made for his compensation, since the Legislature had made no provision therefor by appropriation. Thus an emergency was placed before the state officials. The rights of the state were here involved, which, not having been foreseen by the Legislature, was left unprovided for, and it was the bounden duty of the officers of the state to use their best judgment in obtaining for the state whatever it was entitled to recover from the surety company, and to do this certain expense must be incurred, including counsel fees. That existing appropriations were insufficient to meet the state's expenses in obtaining the large benefits which ultimately accrued from this litigation is clearly evidenced by the fact that necessary expenses were incurred amounting to $1,556.93 in excess of those appropriations, and counsel fees for which no appropriation whatever had been made.

The results of the litigation fully justified the state officers in the course pursued. At the very outset the state officers were confronted with the fact that there was an absence of an appropriation out of which to pay counsel or to pay the expenses of the trial. And is it more than fair to assume that no attorney would have been willing to take such a case if there were no means by which he could be paid? That no attorney would be willing to pay out of his own money for the necessary expenses of his client unless he relied upon some contract by which he could be reimbursed for his disbursements?

The state officers and the appellant, it must be presumed, knew that all the indebtedness incurred in excess of existing appropriations was void, and that he could have no claim against the state for his fees or expenses, unless there were appropriations available out of which they could be paid. He therefore did not rely upon a claim against the state, within the ordinary meaning or acceptation of that phrase. It is apparent that the officers of the state and the counsel employed realized that the compensation for services and reimbursements for expenses must be made a charge upon the fund recovered or they could not be paid at all.

Had no judgment been recovered in this case, counsel could not have recovered a single dollar, and under the decision of the majority, he is now unable to recover one cent of the money expended by him in procuring witnesses and in preparing said case for trial, to say nothing of his fees.

Appellant was employed and actually tried the case, and for his compensation no funds are available other than the proceeds of this judgment.

It will not be presumed that the officers of the state intended to put up a "job" on appellant and procure the great legal services he performed, and then beat him out of his compensation by claiming that their contract of employment was void.

A very similar case was presented to the Attorney General of New York where an action was instituted to test the constitutionality of what was known as the "80-cent gas law," and it was most vital to the interests of the state that the law should be upheld. The Attorney General was confronted with the necessity of employing counsel with technical knowledge, the absence of any appropriation out of which his fees could be paid, and the following positive statutory enactment:

"A state officer, employé, board, department or commission shall not contract indebtedness on behalf of the state, nor assume to bind the state, in an amount in excess of money appropriated or otherwise available."

The Attorney General employed counsel in the case of Kirby v. State, 68 Misc. Rep. 626, 125 N. Y. Supp. 742, and the court, in the fact of such a situation, made use of the following language:

"A Legislature, in making appropriations for a current year for the Attorney General's office, could not foresee the exact amount required for all unanticipated emergencies and contingencies and provide specifically for the payment of each of them. It appropriated an amount for the contingent expenses of the office, and left the Attorney General clothed with the authority of the executive law to safeguard the interest of the state according to the necessities of each case as it arose. The Attorney General, being charged with a positive duty of defending actions brought against the state, could not justify a refusal to perform such duty on the ground that the Legislature had made no appropriation to meet an emergency which it could not foresee. If such were the case, the state might suffer great loss and the Attorney General would be derelict and culpable. Neither could the Legislature properly provide for the defense of an action not brought while it was in session, requiring the employment of special and technical counsel. * * * The claimant, under such agreement, rendered valuable services to the state, protected its interest, and the litigation ultimately resulted in the establishment of the validity of the law. The laborer is worthy of his hire; and the state, having accepted and received the benefit of the claimant's skill and services, should in fairness and equity pay their just worth."

The opinion in the above-quoted case is very instructive and peculiarly applicable to the facts of this case. The depository board accepted for the state the benefit of appellant's skill and services in the trial of the instant case, and it should in all fairness and equity pay the just worth or value of such services.

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It appears from the record that the state officers who have charge of this matter have offered to pay appellant an attorney's fee of $750, which is $157 less than the amount charged by the special court reporter in the case. It is alleged in the complaint in intervention, and so far as this proceeding is concerned is admitted as true, that said alleged offer to pay appellant $750 was not made by the depository board upon an impartial effort to set a fair and reasonable value upon appellant's services, but it was the result of willful failure to exercise an honest judgment, and was made for the express purpose of depriving appellant of a fair and reasonable compensation for the services rendered, thus presenting an issue of law and fact to be determined by the court.

As significant of the views taken by the depository board in other similar matters, the failure of the Bank of Nampa might be cited, since that matter has become a part of the history of the state. An unusual situation arose in that matter. The personal sureties on the depository bond of the bank turned over to the state a number of mortgages, real and chattel, and considerable personal property. To realize the greatest returns from these securities, it was necessary to take possession of and administer the property which consisted of live stock, crops, etc. No state official could perform those duties. No office was created and no appropriation existed designed by law to meet such a situation. Must the state lose the benefit of these securities, or were the executive powers of the sovereignty sufficient to meet those conditions? The Attorney General very properly ruled that the state depository board could employ such labor and assistance as were necessary and could pay all necessary compensation and expenses incurred in the administration and liquidation of these securities out of the funds thus created. The ruling of the Attorney General was evidently correct and is supported by ample authority. The soundness of the Attorney General's opinion in that matter is based upon the evident economic principle that the sole lawful interest of the state in that property was only the net profits after all proper expenses of administration and liquidation had been paid out of the property itself. In the absence of statutory command as to the methods to be employed, the executive branch of the government not only may, but in the discharge of its duty must, employ such practical business methods as will produce the best results for the state.

The view taken of that matter by the executive department was the only reasonable view to be taken, but suppose that department had concluded that there was no appropriation to pay the expense of administering on the estate of the defunct bank and thus occasion great loss to the state, the officers would certainly be held to be derelict in their duty. And so in the case at bar, if they neglected to perform their duty and prosecute this case with reasonable diligence, they would have violated their official duty.

I will now proceed to investigate the legal principles involved in applying to the state the general rule as to attorneys' equitable liens. Can a lien exist as a matter of right upon the property of the sovereign, and, if so, under what circumstances is the remedy available for its enforcement?

In the case of Briggs v. A Light Boat, 89 Mass. (7 Allen) 287, and 93 Mass. (11 Allen) 157, it was held that a lien did exist against the United States under the facts of that particular case and that a remedy for its enforcement was available. Three light boats had been built for the United States by a contractor. Upon completion they were paid for, and the United States had actual possession of them. Briggs and another claimed and perfected a statutory materialman's lien upon the boats for lumber furnished to the contractor to be used in their construction. They then petitioned for the enforcement of the lien, and the trial court held that no lien could exist against public property in the possession of the United States and used by them as an instrumentality of government. From that judgment the petitioners appealed and obtained a reversal. The Supreme Court held (7 Allen [Mass.] 287) that the lien had attached under the statute while the boats were in the possession of the contractor and that the United States was a purchaser from him, taking the property subject to the lien. The court said:

"The truth is, that when the government becomes the purchaser of property, it takes the title subject to the same rules as those which regulate the transfer of it to private persons. If it is subject to liens or incumbrances, it passes cum onere. So it is held in cases of ordinary maritime liens. If the government becomes the owner of the vessel by purchase, forfeiture or otherwise, it takes a title subject to the same liens for salvage, wages, bottomry and other claims as would attach to it if sold to private persons."

The matter was then referred to the assessor and auditor upon whose reports judgment was entered for the amount found due the petitioners. The United States then appealed and in the decision (11 Allen [Mass.] 157) the court said:

"The question which has now been argued is not of the petitioners' title, but of the mode of asserting it; not of right, but of remedy. The United States do not now deny that they took their title subject to the lien of the petitioners. That point was determined by this court, after full consideration, upon the former argument of one of these cases. * * *

"At that argument, the attention of counsel was chiefly, and of the court exclusively, directed to the question of title; it was assumed by the court that the lien carried with it the right to maintain this process; the effect of the possession of the United States upon the possibility of enforcing the lien in this form of proceeding, although involved in the ruling which the superior court had made at the trial, was not considered."

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It is there held that it is an elementary principle of English and American constitutional law that no direct suit can be brought against the sovereign without its consent, and the court among other things said:

"Nor is this case like one in which the government has, by bringing a civil action to enforce its own rights to property in the possession of an individual, submitted itself to the jurisdiction of the court, and, being itself the actor, needs the assistance of the court to recover its property.

"The United States have never, by general statute or special order, submitted themselves or their rights in this matter to the jurisdiction of the state courts. But, on the contrary, as soon as notified of these petitions, and before answering on the merits, they filed a special appearance, and a plea distinctly setting forth the grounds on which they claimed exemption from the state process."

The exemption of the state from suit in its own courts was held to apply also to the United States in the state courts, and after referring to the fact that the property subjected to this lien had been delivered to the United States by the contractor and the price paid by them to him the court said:

"The petitioners suffered the title to pass, and the possession to be delivered, to the United States, before they took one step in the state courts to establish their lien." 11 Allen (Mass.) 164.

The distinction between that case and one like the case at bar where the proceedings were instituted before the property came into the possession of the sovereign is then stated as follows:

"If they had filed their petitions and attached the vessels before these came into the possession of the United States, they might well have contended that the courts of the commonwealth had acquired a jurisdiction of the cases, which could not be devested until the object of the suits was accomplished."

In the case of U. S. v. Wilder, 3 Sumn. 308, Fed. Cas. No. 16,694, a lien asserted against goods of the United States, was upheld and enforced. Mr. Justice Story delivered the opinion in that case and it was argued on behalf of the government that it is a prerogative of sovereignty that no lien can exist against the sovereign. The court said:

"The argument rests the objection upon the ground of public inconvenience, if it should be held, that, whenever, a lien exists against a private person, it is to be held that the like lien attaches against the United States."

It was pointed out in that case that the law enforces a contribution in such a case upon the ground of justice and equity. The court said:

"And it gives a lien in rem for the contribution, not as the only remedy, but as, in many cases, the best remedy, and in some cases the only remedy. * * * It is said, that, in cases where the United States are a party, no remedy by suit lies against them for the contribution; and hence the conclusion is deduced that there can be no remedy in rem. Now I confess that I should reason altogether from the same premises to the opposite conclusion. * * * I cannot, therefore, but think, that the circumstance, that the United States can in no other way be compelled to make a just contribution of its share in the general average, so far from constituting a ground to displace the lien, created by the maritime law, does in fact furnish a strong reason for enforcing it. For I know no reason why this court should create by its own mere authority an exemption, nowhere found recognized in the maritime law, and standing upon no very clear or urgent ground of public policy. * * * The argument, therefore, addressed to this court, on behalf of the government, ab inconvenienti, does not seem to have any very solid foundation. On the other hand, the argument ab inconvenienti on the other side is very cogent and persuasive, for it is beyond doubt that if there be no lien, there is no remedy to enforce an incontrovertible right."

Mr. Justice Story then quotes from Vattel as follows:

"If there exists any difficulty on this account, it is equally conformable to prudence, to the delicacy of sentiment, which ought to be particularly conspicuous in a sovereign, and to the love of justice, to cause them to be decided by the tribunals of the state. This is the practice of the states that are civilized and governed by laws."

This state ought to be governed by laws, rather than by the mere caprice and whim of any board.

In The Siren Case, 7 Wall. 152, 19 L. Ed. 129, the steamer Siren was captured by the United States navy in February, 1865. A prize crew was placed in charge and she was ordered to Boston for adjudication. On her way she stopped at New York, and proceeding thence ran into and sunk the sloop Harper. On her arrival in Boston, a libel in prize was filed against her by the United States, and she was condemned and sold. The proceeds of the sale were deposited with the assistant treasurer of the United States, subject to the order of the court. In rendering the decision of the court Mr. Justice Field cites several authorities, and after reviewing the Light Boat Cases, says:

"A claim or lien existing and continuing will be enforced by the courts whenever the property upon which it lies becomes subject to their jurisdiction and control. Then the rights and interests of all parties will be respected and maintained. * * * So if the property belonging to the government, upon which claims exist, is sold upon judicial decree, and the proceeds are paid in to the registry, the court would have jurisdiction to direct the claims to be satisfied out of them."

Upon these principles the case was remanded "with directions to assess the damages and pay them out of the proceeds of the vessel before distribution to the captors."

The question as to whether a lien can be enforced in such cases was well considered by the courts in the Light Boat Cases, and in those cases after a full review of authorities it was held that such a lien cannot be enforced where, in order to do this successfully, it is necessary to bring suit against the United States. It is also held that no suit in rem can be maintained against the property of the United States when it would be necessary to take such property out of the possession of the government by writ or process of the courts. It is a well-established

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doctrine that proceedings in rem to enforce a lien against the property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the Unites States must be invaded under processes of the court. The doctrine is well established when the government itself seeks its rights at the hands of the court, equity requires that the rights of other parties interested in the subject-matter shall be protected.

In Cunningham v. Macon, etc., R. R. Co., 109 U. S. 446, 3 Sup. Ct. 292, 27 L. Ed. 992, it was said:

"It has been held in a class of cases where property of the state, or property in which the state has an interest, comes before the court and under its control, in the regular course of judicial administration, without being forcibly taken from the possession of the government, the court will proceed to discharge its duty in regard to that property. And the state, if it chooses to come in as plaintiff, as in prize cases, or to intervene in other cases when she may have a lien or other claim on the property, will be permitted to do so, but subject to the rule that her rights will receive the same consideration as any other party interested in the matter, and be subjected in like manner to the judgment of the court. Of this class are the cases of The Siren, 7 Wall. 157 [19 L. Ed. 129]; The Davis, 10 Wall. 20 [19 L. Ed. 875] * * * and others."

In U. S. v. Wickersham (C. C.) 10 Fed. 505, it was held that it may be assumed that the United States, whenever it comes into court and brings its suit against a citizen, consents to submit to and carry out whatever decrees may be lawfully made against it in the course of the legal procedure.

The principle upon which those cases rest applies to an attorney's lien. And it was so held in the case of State of Texas v. White (In re Paschal), 10 Wall. 483, 19 L. Ed. 992. In that case Mr. Paschal had been retained as special counsel for the state of Texas and had conducted to a successful conclusion a great deal of litigation in regard to certain indemnity bonds.

Out of moneys collected by Paschal, upon judgments which he had obtained for the state, he retained $47,325 to cover his counsel fees and disbursements. The state appeared by other counsel and moved the court to strike Paschal's name from the docket as its attorney, and to order him to deposit the $47,325 in court for its benefit. The defense of Paschal was that he had an attorney's lien upon this money, and that he held it under his lien for compensation and expenses. The argument of the state was that the United States Supreme Court was without jurisdiction to pass upon a claim set up by a citizen against the state of Texas, that it is a presumption of law that a sovereign power will do justice, and that those who contract with the state must rely on the discretion and good faith of the legislative body. The court in that case briefly reviews the authorities dealing with attorneys' liens as between private parties which it says are "decidedly in favor of his lien," and then says:

"As the original retainer was made in Texas, we are inclined to the opinion that the rights of the parties are to be regulated by the laws of that state. But if this be not the case, this court would be guided by what it deems to be the prevailing rule in this country; and, according to this rule, we are of opinion that the respondent has a lien on the fund in his hands for his disbursements and professional fees in relation to the indemnity bonds."

Here we have a direct decision that an attorney's lien was a valid and subsisting right even against the state. This case is practically on all fours with the instant case, since the funds are still in the hands of the court who rendered the judgment in favor of the state, and have not been turned over to the state. The court has jurisdiction of such funds to pay all proper costs and expenses incurred in such litigation.

In the case of State v. Ampt, 6 Ohio Dec. 699, 7 Am. Law Rec. 469, 5 Cent. Dig. Attorney and Client, column 1974, the court held that:

The "attorney has a lien upon the money of the state which comes into his hands, as the fruit of his services for his compensation and necessary expenses, the same as though his client were an individual, and he can apply the same in payment of such compensation and expenses."

Upon the principles laid down in the foregoing cases it is clear that a sovereign, as well as an individual, can obtain the services of an attorney under such circumstances as will give to the attorney the right to assert a lien for his disbursements and fees against funds in the hands of the court obtained upon a judgment in favor of the state.

The above cases, or the most of them, were discussed and applied by the Supreme Court of Minnesota in a case wherein the conclusion reached is precisely that contended for by the appellant. They were held to establish the right of an attorney as against his client, the sovereign, to assert and enforce a lien for his fees and expenditures under a contract of employment similar to that in the case at bar. Board v. Clapp, 83 Minn. 512, 86 N. W. 775. In that case it was held that the only part of the recovery which could be legally termed "public funds" was the amount remaining after the expenses of litigation were paid. So in the case at bar, the amount of this judgment belonging to the state as a part of its public funds would only be what remained after paying the entire cost of the litigation, including attorney's fees. In the Clapp Case the court said:

"There is no sound distinction to be drawn between money expended in such proceedings in the way of disbursements and in the way of attorney's fees. * * * It must be noted that the doctrine is founded upon the fact that such fund is created by the exertions of the attorney, and grows out of his contract relation with reference thereto, and has application only to such a condition. The statute (section 687, supra) does not prohibit such application as was made in this instance by respondents. If they had not retained their fees, but had paid over to

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the county the entire amount collected, then the method of collecting their claim against the county would be regulated by the section cited."

This case is directly in point, as I view it.

In the case of Union Pacific R. R. Co. v. United States, 2 Wyo. 170, goods belonging to the United States were shipped under the usual bill of lading contract over the lines of the railroad company from Omaha to Rawlins, Wyo. The goods were stored and held by the railroad company under claim of a common carrier's lien for freight charges. Without paying the charges, the federal government brought this action in replevin to recover the goods. The court held that had the ownership of this property been in a private citizen, "the company would have had the usual common carrier's lien upon it for these charges." The only question presented was whether the same lien was good upon the property of the United States. The court first considered the case upon the theory that government property is exempt from a common carrier's lien, and that the government can retain or waive this exemption. As to that theory it was held that in that particular case, if the exemption did exist, it had been waived. The court, however, goes directly to the real merits of the situation in a very able investigation as to whether such exemptions do exist, and said:

"But the exemption does not exist. The exemption would incalculably cripple the public service, the liability would equally promote it; no consideration of justice or policy favors, every consideration of justice and policy forbids, the exemption; the liability enlarges, the exemption narrows, sovereign action; the liability, not the exemption, is a privilege, and therefore an attribute of sovereignty. The learned counsel for the defense in error, has submitted to us no adjudication to the contrary, which we should follow as a guide, or respect as advisory; and we are convinced that such an adjudication does not exist. On the other hand, all the analogies of the commercial and maritime law, and the federal decisions under that law, are directly the other way. In 9 Wheat. 409 [6 L. Ed. 122] The St. Jago de Cuba, it was decided in 1824 that seamen and materialmen, who served and supplied the ship after her seizure as a slaver, had respectively liens upon her against the United States for wages and supplies, and that she stood pledged to them accordingly."

This is a very instructive case, and we quote further from it:

"The counsel for the government claims that the district court could render a judgment for, but not against, it; we have listened with attention and respect to his argument, advanced in favor of this proposition; and candor requires us to admit that he has presented it as well as it could be presented; but candor also compels us to say that the proposition is throughout and throughout a fallacy. To what consequence does the proposition lead? The United States may invoke the jurisdiction of the court; it may accept that which does, and discard that which does not, accord with its supposed interests; it may dictate the exercise of the administration of the law; it is not bound by the rules of equal justice; it is a privileged suitor; the district court having rendered a judgment against it, this court must reverse; having rendered one for it, this court can only affirm; it can sit in appeal, must mechanically obey, cannot revise; nay, further—having brought the suit, and effected a caption, its aim is accomplished; it needs no judgment, for but one judgment can be rendered in the case, and that in its favor; if having made the caption, it neglects to prosecute the writ, a motion to dismiss for want of prosecution will be unavailing; still further, the demand in the writ for judgment is meaningless, the undertaking of the sureties without force, the writ is superfluous; and the suit is farcical, because it is intended to effectuate under the forms of law what can as well be accomplished by the violent hand under an irresponsible will. Does not the proposition result in a pure reductio ad absurdum?"

It was there held that a suit cannot be instituted against the property of the government, if the bringing or the institution of the suit requires the issuance of process against the government, or the disturbance of its possession of its property; that the exemption is personal, and the will to retain is a will to waive it in the exercise of sovereign interests. When it does waive the privilege invoking the jurisdiction of the court it submits to that jurisdiction, presenting a claim for adjudication. It asks that the claim be adjudicated on its merits, and allowed or rejected accordingly. In closing the court said:

"Were we to send the case to the district court, we should direct it to embrace in its judgment the attorney fees, fixed at a reasonable amount upon the principle above stated."

The railroad company, however, waived the fees, and judgment was entered in the Supreme Court for the transportation charges and costs. See, also, U. S. v. Boyd (C. C.) 79 Fed. 858.

It must be borne in mind that the fund sought to be charged with the attorney's fee and expenses in this case has never been in the possession of the state, and in my view of the matter, under the facts and law of this case, there is ample authority for holding that the appellant is entitled to the payment of his legal expenses and attorney's fees out of the fund now in the hands of the court.

It has been contended by counsel for the state that this is a claim against the state, and that the Constitution and statutes provide an exclusive procedure for obtaining payment. There is nothing in this contention. If the appellant were seeking to have a claim presented to the state board of examiners and to have it paid out of the treasury, then there might be something in that contention; but such is not the case. Appellant is seeking to subject to the payment of his fees a fund that has never been in the state treasury, and the state's possession of the fund could not be disturbed by such payment.

In this case no process has ever been issued against the state of Idaho or any of its officers, no possession of the state has ever been or can be disturbed. No personal judgment can be given against the state upon which execution can be levied upon any state property. This is a proceeding in rem

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against the property not in possession of the state, but in the hands of the court, and any decree that may be rendered will be satisfied out of the property now in the hands of the court. The state was not brought into court by any process. It came in voluntarily, by itself, as plaintiff seeking the assistance of the court for the recovery of a judgment against the surety company. By so doing it submitted to the jurisdiction of the court, and cannot in one breath ask the court for its assistance in recovering a judgment against a surety company, and in the next breath deny to the court the right to protect its officers in that proceeding and to administer justice fairly and honestly in that case.

The state has accepted the services of appellant. The record shows that he served the state faithfully and well, and no sufficient reason is shown why the state should attempt to evade its liability to pay for his services. Can any good reason be offered why the state in this matter should be unaffected by considerations of morality and right which ordinarily bind the conscience? The observance of honesty and fair-dealing on the part of the state becomes of higher importance—of higher importance to the state—than the money involved in this case. It was said in Woodruff v. Trapnall, 10 How. 207, 13 L. Ed. 383, that:

"We naturally look to the action of a sovereign state, to be characterized by a more scrupulous regard to justice, and a higher morality, than belong to the ordinary transactions of individuals."

Is there any justice or morality in the state's attempting to avoid the payment of just compensation for services that it contracted for and received, and which services were of great value to the state? It seems to me that under the pleadings in this case the honor and good faith of the state is put to the test, and no hair-splitting statutory constructions should be made by the state to avoid the payment of an obligation where it has received the services.

Section 10, art. 5, and section 18, art. 4, of the state Constitution provide a process by which a claimant seeking to enforce a claim against the state may overcome two obstacles which in the absence of those provisions would make it impossible for him to obtain any remedy whatever. The first is to divert the possession of its personal property or money; the second, to bring the sovereign within the jurisdiction of the court. If neither of these obstacles are presented to a claimant seeking to enforce payment against the state, how can it be reasonably said that he must nevertheless pursue methods or a procedure that has no application whatever? The board of examiners may hear claims against the state in order that they may be paid out of the money in the possession of the state, or in its treasury. They cannot order such claims paid out of money that never was in the possession of the state treasury, and unless the claim presented to such board is to be paid out of the treasury, the board has no jurisdiction whatever, either under the Constitution or the law, to pass upon it. The board has jurisdiction of the money in the possession of the state in so far as the payment of claims against the state out of such money is concerned, but it has no jurisdiction whatever to pass upon any claim which has to be paid out of funds which are within the exclusive jurisdiction and control of the court and never has been in the state treasury.

The main question before the court is as to whether the attorney's fees and costs of the litigation in this case may be paid out of the judgment obtained, and it is clear to me that they ought to be so paid, and that the case should be remanded to the district court to determine a reasonable fee to be paid to the appellant.

(29 Idaho, 712)

KUHNEN v. KUHNEN.

(Supreme Court of Idaho. Dec. 14, 1916.)

DECREE OF DIVORCE—VACATION—DIVISION OF COMMUNITY PROPERTY—PROPRIETY.

Held, that the judgment of the trial court, refusing to set aside the decree of divorce theretofore granted, and granting a division of the community property, under the law and the facts, must be affirmed.

Appeal from District Court, Idaho County; Edgar C. Steele, Judge.

Action by Katerina Kuhnen against Andy Kuhnen to set aside a decree of divorce and make a division of community property. From a judgment refusing to set aside the decree of divorce, and granting a division of community property, defendant appeals. Affirmed.

L. Vineyard and E. M. Griffith, both of Grangeville, for appellant. Fred E. Butler, of Lewiston, for respondent.

SULLIVAN, C. J. This action was brought by the plaintiff, Mrs. Kuhnen, to set aside a decree of divorce theretofore granted to her husband, Andy Kuhnen, the defendant and appellant herein, and for a decree dissolving the bonds of matrimony between them, and for a partition and division of certain community property. After a trial the court refused to set aside the decree of divorce, but did partition and make a division of the community property, and this appeal is from that decree or judgment.

Several errors are assigned, but upon a careful consideration of each we find that there is no merit in them or either of them. The judgment of the trial court must therefore be affirmed, and it is so ordered, with costs in favor of the respondent.

BUDGE and MORGAN, JJ., concur.

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(94 Wash. 94)

STATE v. ROLETTE. (No. 13563.)

(Supreme Court of Washington. Dec. 29, 1916.)

LARCENY ⟸70(3) — INSTRUCTIONS—APPLICABILITY TO EVIDENCE—CLAIM TO PROPERTY.

In a prosecution for larceny as bailee where the evidence showed that defendant was engaged in the business chance brokerage business, that he sold a business to the prosecuting witness, stating that she could purchase it for a certain sum, which was $35 more than the owner agreed to sell it for, that after the purchase was made he induced her to pay him the rent for the balance of the month, it having been paid in advance, and a commission of $25, that defendant kept the $35 excess over the price the vendor received and the rent payment, but claimed that the seller had agreed to pay him as commission all that he could get above the net price and the rent, defendant was entitled to a requested instruction on the law contained in Rem. Code 1915, § 2608, which provides that in a prosecution for larceny it shall be a sufficient defense that the property was appropriated openly and avowedly under claim of title preferred in good faith, though the claim be untenable, the evidence being sufficient to take to the jury the question of defendant's good faith in claiming the right to the payments.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 185; Dec. Dig. ⟸70(3).]

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

A. R. Rolette was convicted of grand larceny as bailee, and he appeals. Reversed, and new trial granted.

G. C. Israel, of Seattle, for appellant. Alfred H. Lundin and Frank P. Helsell, both of Seattle, for the State.

PARKER, J. The defendant, Rolette, was charged by information filed in the superior court for King county with the crime of grand larceny in that he, having in his possession as agent and bailee of Alice Buttler the sum of $40.85 in money belonging to her, did feloniously withhold and appropriate the same to his own use with intent to deprive her thereof, in violation of the provisions of section 2601, Rem. Code 1915, reading as follows:

"Every person who, with intent to deprive or defraud the owner thereof— * * * (3) Having any property in his possession, custody or control, as bailee, factor, pledgee, servant, attorney, agent, employé, trustee, * * * shall secrete, withhold or appropriate the same to his own use or to the use of any person other than the true owner or person entitled thereto; * * * steals such property and shall be guilty of larceny."

His trial in the superior court resulted in a verdict of guilty. Judgment was rendered thereon sentencing him to a term of not less than 2 nor more than 15 years, from which he has appealed to this court.

The only contention here made in appellant's behalf is that the trial court erred to his prejudice in refusing to give to the jury the following requested instruction:

"The laws of the state of Washington provide that in any prosecution for larceny, it shall be a sufficient defense that the property was appropriated openly and avowedly under a claim of title preferred in good faith, even though the claim is untenable. Therefore, if you find from the evidence that the defendant withheld or appropriated to his own use the property or money described in the information, that he did so openly and avowedly under a claim of title preferred in good faith, that is, honestly, believing that he was legally entitled to it as his own, then your verdict should be not guilty."

It is argued that in view of appellant's claimed good faith and honest belief that he was legally entitled to the money he was charged with appropriating, he was entitled to have this requested instruction given to the jury to the end that the jury might be advised as to the law touching the question of his good faith as provided by section 2608, Rem. Code 1915, which reads:

"In any prosecution for larceny it shall be a sufficient defense that the property was appropriated openly and avowedly under a claim of title preferred in good faith, even though the claim be untenable."

At the time of the alleged commission of the offense appellant was engaged in what he terms the "business chance brokerage business," and which he describes as "selling of businesses that different people list with us for sale." He testified as to the manner of procuring commission or compensation for such services as follows:

"They [the owners] generally add a commission onto the price that they want; they say they will take so much net to themselves, and whatever we make over we can keep."

A day or two prior to the alleged commission of the offense Mrs. Buttler, the prosecuting witness, went to appellant's office where considerable talk was indulged in between her and appellant relative to her desire to purchase a cigar stand. She then made known to him that she desired to invest not to exceed $500 in such a business. At that time he did not have in mind any particular cigar stand that he regarded as one she would be likely to purchase, so they agreed that she should come back the next day when something more definite might be proposed. In the meantime he procured to be listed with himself for sale a cigar stand at a net price of $490 to the owner. Upon her return to appellant's office the following day she was told of this cigar stand and was informed that she could probably buy it for $525, appellant having in mind the earning of his commission or compensation in stating this price to her. Finally, after some considerable protestation upon her part that she did not want to invest that much and after appellant had taken her to see the property, a preliminary contract of purchase was signed by her, she paying $50 down thereon and agreeing to pay the balance upon final consummation of the deal and transfer of good title to her. Soon thereafter the title was transferred to her by bill of sale in pursuance of the preliminary contract, when she paid the balance of the purchase price

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and in addition thereto paid $5.85 which appellant informed her was the amount of the rent of the place for the balance of the ensuing month; the rent for the month having been paid in advance. We shall assume for argument's sake that these payments were all made by Mrs. Buttler to appellant and that he thereafter settled with the owners. At the time of thus closing the deal appellant seeming to be of the opinion that he was not making as much out of it as he should, said to Mrs. Buttler:

"I am not making enough commission out of this deal; will you give me $25 more for my commission? It is optional with you whether you want to do it, if you don't, don't. I think I ought to have it because I am not making enough."

After some hesitation she paid him $25, though at that time she did not know how much he was getting out of the purchase price she had paid. Up to that time no conversation had passed between appellant and Mrs. Buttler touching his commission, and apparently she had no thought up to that time of paying any commission. It was at that time that he induced her to pay the $5.85 on account of the rent which had been paid in advance and to which extent she would be benefited as the tenant of the place for the remainder of the month. So appellant thus got the $35 excess upon the purchase price Mrs. Buttler paid above the owners' net price, and also the $5.85 paid by her on account of the rent. Appellant says that the owners had agreed with him that he should not only have the excess that he would get over their net price of $490, but should also have whatever amount he collected from the purchaser on account of rent which would accrue to the benefit of the purchaser after a sale on account of the whole month's rent having been paid in advance. There was given upon the trial a large amount of testimony tending to show that appellant had misrepresented to Mrs. Buttler the value of the property and the net price the owners were to receive for it, all of which, however, was denied by appellant. There was also considerable evidence pointing to the existence of the relation of principal and agent between appellant and Mrs. Buttler, from which it might well be argued that such relation did exist from the beginning of the negotiations. He testified, however, positively that he was not her agent at any time. While this, of course, was a conclusion to be drawn from the facts, it in any event tended to show his belief as to his legal relation with her and has a bearing upon the question of his good faith touching his right to the money appropriated. The argument of the prosecuting attorney deals at considerable length with the facts and circumstances disclosed by the evidence pointing to appellant's guilt, which argument it seems to us deals more with the question of appellant's guilt than with the question of his being entitled to have this instruction given to the jury. However, it is sought to draw the conclusion therefrom that the requested instruction has no application to the facts and hence that its refusal was not prejudicial error. We are, however, not here concerned with the question of appellant's guilt or innocence. That was for the jury to decide. We are only concerned with the question of whether or not he was entitled under the theory of his defense to have the jury instructed as requested. Now it seems to us that to hold that the defendant was not entitled to this requested instruction would be in effect to hold as a matter of law that his defense of good faith was wholly unfounded. It may be that looking at the evidence as a whole such would be the fair conclusion of fact which the jury might be warranted in drawing, but that is quite a different matter from the court in effect so declaring as a matter of law by its refusal to give this instruction. Looking at the evidence as a whole we cannot escape the conclusion that appellant's theory of defense, that is, that "the property was appropriated openly and avowedly under a claim of title preferred in good faith," has sufficient support in the evidence to call for the submission of appellant's claim in that regard to the jury. It is conceded that the requested instruction fairly states the law as provided in section 2608, Rem. Code 1915, above quoted. It is not argued, and we think it could not be successfully argued, that the law as defined by that section was given to the jury in any of the instructions given by the court. It is easy to see that the jury might have found in appellant's favor had it been instructed as requested.

The judgment is reversed, the appellant is granted a new trial, and the cause remanded for further proceedings.

MOUNT and HOLCOMB, JJ., concur.

(93 Wash. 684)

WENDLER v. WOODWARD et al.

(No. 13392.)

(Supreme Court of Washington. Dec. 26, 1916.)

1. EXECUTORS AND ADMINISTRATORS ⟸130(2)—ACTION BY EXECUTOR.

Although title to land vests in heirs immediately on their ancestor's death, the administrator has the right of possession and the concomitant right to recover possession for the estate, including the right to any and all auxiliary and immediate and permanent equitable relief.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 535, 538–540; Dec. Dig. ⟸130(2).]

2. LANDLORD AND TENANT ⟸133(3)—INJUNCTION—INTERFERENCE WITH RIGHTS IN LAND.

Either the owner of land or the tenant may enjoin interference therewith.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 467–469; Dec. Dig. ⟸133(3).]

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3. WATERS AND WATER COURSES ⟸154(1)—EASEMENTS—ABANDONMENT.
Whether an easement or right of way for irrigation ditch is abandoned is a question of fact and intent.
[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 167–171, 173, 174; Dec. Dig. ⟸154(1).]

4. APPEAL AND ERROR ⟸1010(1)—REVIEW—FINDING OF COURT—QUESTION OF FACT.
In an action to establish water rights, where the evidence does not preponderate either way on the question whether plaintiff's ditch was changed with or without permission, the decision of the court will not be overturned on appeal.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3981; Dec. Dig. ⟸1010(1).]

5. EASEMENTS ⟸61(9)—PRESCRIPTION—BURDEN OF PROOF.
Where claimant shows an open, visible, continuous, and unmolested use of land for the statutory period for adverse possession, such use will be presumed to be under a claim of right, and the owner of the servient estate has the burden of rebutting this presumption by showing the use was permissive, in order to avoid the acquisition of an easement by prescription.
[Ed. Note.—For other cases, see Easements, Cent. Dig. § 143; Dec. Dig. ⟸61(9).]

6. EASEMENTS ⟸6—PRESCRIPTION—CONTINUITY OF USE.
Immaterial changes or variations in the use of an easement do not destroy its identity, as regards the acquisition of prescriptive title by such use.
[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 14, 15, 27–33; Dec. Dig. ⟸6.]

7. WATERS AND WATER COURSES ⟸26—APPROPRIATION.
Under Federal statute (U. S. Comp. St. 1913, § 4647) before there can be any title to a right of way for irrigation ditch across open and unappropriated public land, a definite quantity of water must have been appropriated and acquired lawfully.
[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 17; Dec. Dig. ⟸26.]

8. WATERS AND WATER COURSES ⟸26—UNAPPROPRIATED PUBLIC LANDS.
That land was vacant and unoccupied is some evidence that it was unappropriated in the absence of evidence to the contrary.
[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 17; Dec. Dig. ⟸26.]

9. WATERS AND WATER COURSES ⟸33—APPROPRIATION—BURDEN OF PROOF.
When his title is questioned the burden of proof is upon the appropriator to show that at the time of his appropriation the land on which the water was appropriated was vacant and unappropriated.
[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 23–26; Dec. Dig. ⟸33.]

10. WATERS AND WATER COURSES ⟸152(11)—APPROPRIATION—ACTION TO PROTECT RIGHTS—RELIEF AWARDED.
In action to establish title to 200 cubic inches of water per second and for injunction against interference by defendants, where it appeared that there were about 1,500 cubic inches flowing across defendants' lands to plaintiff's, defendants would not be enjoined from interfering with the entire flow, but the injunction would be limited to inhibit interference with 200 cubic inches, without interfering with defendants' beneficial use of the remainder.
[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 156; Dec. Dig. ⟸152(11).]

Department 2. Appeal from Superior Court, Stevens County; W. H. Jackson, Judge.

Suit by A. J. Wendler, as administrator, against Everett Woodward and others. From decree for plaintiff, defendants appeal. Modified and affirmed.

Hibschman, Dill & White, of Spokane, and Albert Kulzer, of Chewalah, for appellants. L. C. Jesseph, of Colville, for respondent.

HOLCOMB, J. Issue was joined in this cause by admissions and denials by the answers of the several defendants to the amended complaint of respondent alleging sufficient facts and praying that he be decreed title, to the extent of 200 cubic inches of water per second of time, of the waters flowing in a nonnavigable stream called Cottonwood creek, by right of prior appropriation thereof, and the title and right to the ditch or waterway through which he had conveyed the water from the place of diversion upon the lands now owned and occupied by some of the defendants, and over, upon, and across the lands now owned by others of the defendants to the lands now owned by the estate and heirs of respondent's intestate, and for temporary and permanent injunctive relief. After a trial of the facts by the court, decree was entered in conformity with the prayer of the amended complaint.

1. The first question to be determined is raised by appellants' demurrer to the amended complaint, which was overruled: (1) That the plaintiff has no legal capacity to sue; (2) that there is a defect of parties plaintiff; (3) that the complaint is insufficient in facts. The first two grounds are urged relying upon the statute (Rem. & Bal. Code, §§ 1341–1366), vesting title to real estate and hereditaments in the heirs immediately upon the death of the ancestor.

[1, 2] While it is true that the heirs take title immediately, the administrator has the right of possession and the concomitant right to recover possession for the estate. Gibson v. Slater, 42 Wash. 347, 84 Pac. 648; Smith v. Stiles, 68 Wash. 345, 123 Pac. 448. This would include the right to any and all auxiliary and immediate and permanent equitable relief. The claim that in any event, the lands of the estate of Wendler being under a lease for years, the lessee only could enjoin interference with any of his demised possessory rights, is also untenable. Crook v. Hewitt, 4 Wash. 749, 31 Pac. 28, does not limit the right to such remedy to the lessee only, but holds that either the owner or the tenant could enjoin such interference. Jones, Landlord & Tenant, § 644;

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24 Cyc. 930. The demurrer was properly overruled.

2. It is asserted upon the facts that no relief should be granted against appellants. In order to understand the matter a brief statement is necessary.

In 1886 or 1887 one Stephen H. Champ, having previously made settlement upon the northwest quarter of section 7, township 31 north, range 41 east, W. M., in Stevens county, commenced the construction of an irrigation ditch from Cottonwood creek. On June 1, 1887, he located 200 inches of water of Cottonwood creek by posting at the point of diversion his notice of appropriation, and on June 3, 1887, he recorded his appropriation notice in the office of the county auditor. The intake and place of diversion of the water was located on the south bank of the creek in the northwest quarter of the northwest quarter of section 8, township 31 north, range 41 east, W. M., in Stevens county, and was constructed thence in a westerly and southwesterly direction over and across a portion of the 40 in which the water was diverted, and across the northeast quarter of the northeast quarter and the northwest quarter of the northeast quarter of section 7, and thence to the northwest quarter of section 7, which had been settled upon and claimed by Champ. At the time of his appropriation and diversion of the water the northwest quarter of section 8, in which the appropriation was made, was vacant, open, unsettled, and apparently unappropriated government domain. These lands were within the land grant of the United States to the Northern Pacific Railroad Company, but the land in the odd-numbered section 7 settled on by Champ—the northwest quarter—passed to him from the government, and never passed to the Northern Pacific Railroad Company. The other lands in section 7 across which his irrigation ditch was built afterwards passed to the Northern Pacific Railroad Company. In 1899 Champ sold his land to another, and it was afterwards transferred to another, who in 1901 sold and transferred it to Gustav Wendler, respondent's intestate. In 1886 or 1887, the exact date being uncertain, the ditch had been constructed and water was flowing through it from the place of intake to the Champ land. In 1895 the ditch was still in use, and the water flowing in it was used by Champ for irrigation and household purposes and for watering stock. It was so used as long as Champ lived on the place, until 1899. From the time the Wendlers occupied the place in 1901 until the fall of 1913 they used the water flowing in the irrigation ditch for the same purposes as those above mentioned, except one year, 1911, when they, with the consent of the owners of the land where situated, turned the ditch further south for sawmill purposes. The ditch as constructed by Champ and as used by the subsequent purchasers of the land was 18 to 20 inches in width and probably 6 or 8 inches in depth, and the exact amount of water flowing through it was never measured during the time they used it. They used it to irrigate somewhere between 5 and 10 acres, though it was possible to irrigate about 20 acres more. During the 12 or 13 years that Champ occupied the land for which the water was appropriated no objection seems to have been made by any of the present defendants or their predecessors in interest to his use of the water flowing in the ditch and to his right to the waterway, and none seems to have been made as against Champ's successors to the same use and enjoyment, until about July, 1913, when appellants constructed a dam and irrigation ditch and prevented water from flowing down to the Wendler land.

Five propositions are advanced by appellants why no relief should be granted the respondent: (1) That Champ had no title to any right of way for a ditch by appropriation; (2) that the heirs of Wendler had no title to any ditch by adverse possession; (3) that the old ditch was abandoned; (4) that changes were made without permission; (5) that no rights had been proved in the water and there can be none in the ditch.

[3, 4] The third and fourth propositions are easily disposed of, being simply questions of fact upon which there was some conflict of evidence; the court finding in favor of respondent upon competent evidence. Whether the old ditch was abandoned is purely a question of fact and intent. Porter v. International Bridge Co., 200 N. Y. 234, 93 N. E. 716, 21 Ann. Cas. 684. It is true changes were made in the original line of the ditch, but it appears that these were made with permission. It is claimed by appellants that the permission was given conditionally and with qualifications, and respondent to the contrary. It was a question of fact, however, and the court decided that question in favor of respondent. The evidence not preponderating the other way, we will not overturn it.

[5, 6] The first proposition, that Champ had no title to any right of way for a ditch by appropriation, was dependent upon the fact of whether or not the land over which the ditch extended was at the time of its appropriation vacant and unappropriated public land. The land in section 7, other than that acquired by him, was not. It had been appropriated for railroad purposes to the Northern Pacific Railroad, although it had not been perfected in the Northern Pacific by the filing of its map of definite location. It was, however, appropriated. As to that land the claim of the respondent is that the estate of Wendler has title by adverse possession.

"The prevailing rule is that, where the claimant has shown an open, visible, continuous, and unmolested use of land for the period of time suf-

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ficient to acquire title by adverse possession, the use will be presumed to be under a claim of right, so as to place upon the owner of the servient estate, in order to avoid the acquisition of an easement by prescription, the burden of rebutting this presumption by showing that the use was permissive." 9 R. C. L. 781; Lechman v. Mills, 46 Wash. 624, 91 Pac. 11, 13 L. R. A. (N. S.) 990, 13 Ann. Cas. 923.

Immaterial changes or variations in the use of the easement do not destroy its identity. 9 R. C. L. 776.

We think that, under the facts in this case, there being nothing in the record to rebut the presumption of the continuous and uninterrupted, actual and open possession of the waterway by Champ and his successors in interest across the lands in section 7 owned by some of the appellants for more than the requisite statutory period, title by adverse possession was established.

[7-9] As to the land in section 8, which, for all that appears to the contrary, was open and unappropriated public land, before there could be any title to the right of way across that land, it was necessary to appropriate lawfully and to acquire a definite quantity of water. That right of way was acquired, if at all, by appropriation. 7 Fed. Stats. Ann. 1091 (U. S. Comp. St. 1913, § 4647). As the court below aptly observed, the evidence is very meager that the land in section 8, where the water was appropriated, was unappropriated. The only evidence there was in any way bearing on that matter was that of a witness, then the sheriff of Stevens county, who was acquainted with the land and the entire surroundings. He said that at that time there was no person living either on section 8 or on section 7; that in fact Mr. Champ had not yet got his buildings up on section 7, but was living temporarily with one Yenter on section 6 to the north, while he was improving his ditch and putting up his buildings; that there was no one in the neighborhood at that time. The fact that the land was vacant and unoccupied is some evidence that it was unappropriated, in the absence of evidence to the contrary. While the burden of proof is upon the appropriator, when his title is questioned, to show that at the time of his appropriation the land on which the water was appropriated was vacant and unappropriated, we know as a matter of fact that lack of improvement and settlement upon land within the public domain is some evidence that it is unappropriated. There was no controverting evidence or inference that it was appropriated when Champ made his appropriation of the water thereon. Champ made prior paper appropriation, and, as the evidence shows, followed it up diligently by making actual, beneficial use of the water prior to any other user or appropriator to the extent, as the evidence tends to show, of at least 200 cubic inches per second. He therefore under the federal statute supra, acquired title by appropriation to the water and to the right of way from the point of diversion through the unoccupied and unappropriated public land. This title was confirmed to him by the terms of the federal statute above cited. This determination disposes of the first, second, and fifth propositions advanced by appellants.

[10] A further question raised by appellants in their brief, but seemingly not raised by them in the pleadings, is that the decree of the lower court is inequitable because it does not permit the owner of the servient estate to use the easement for the ditch so long as long as that use does not interfere with the use by the owner of the dominant estate. The appellants contented themselves in their pleadings with denials of all the material allegations of the complaint going to afford the remedy prayed by the respondent. They denied the ownership of the water and of the ditch and of all the other material allegations. It appears from the evidence in the case that there were about 1,500 cubic inches of water per second of time, by actual measurement, flowing across the lands of appellants in 1913 when they restored the water to the irrigation ditch and cleaned out and repaired the ditch. Respondent only claims the right to approximately 200 cubic inches of water, which is about one-tenth of a cubic foot per second of time. This it seems, under their pleadings and under what seemed vague and indefinite evidence as to the precise amount of water they used continuously, is all that they can be awarded. While the pleadings of appellants were not so framed, respondent brought himself within the domain of equity to receive and to do only what equity awards. This is a case for the measuring of equities. The decree is too narrow in favor of respondent, or not sufficiently explicit. We think it inequitable to allow respondent to recover not only the easement of the waterway, but the entire amount of water flowing in the ditch, by reason of the injunction against appellants from interfering with the flow in the ditch in any way not even to carry the remaining water to and for the use of their own land. He, or the estate represented, not only would thus perpetually have the 200 cubic inches adjudged to belong to him, but would seem to prevent the beneficial use of the remaining water, allowing its nonuse or waste, which is contrary to public policy. The decree should be explicit that the respondent is entitled to the 200 cubic inches appropriated and used and to take it from Cottonwood creek at the established point of diversion, and to the easement of the waterway as acquired by occupation and prescription from the point of diversion to the place of use on the Wendler lands, to convey the 200 cubic inches, approximately, of water per second of time, and free from interruption, obstruction, or interference therewith by appellants or any of them; that the remainder of the 1,500 cubic inches of water, approximately, what-

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ever it may be, not otherwise appropriated, may be divided and separated at the intake or point of diversion of the respondent's and taken thence by their own ditches to and upon the lands of appellants for their beneficial use.

The decree is modified accordingly for precision and certainty, and in all other respects affirmed.

MORRIS, C. J., and PARKER and MAIN, JJ., concur.

(94 Wash. 104)

BIEL et al. v. TOLSMA. (No. 13590.)

(Supreme Court of Washington. Dec. 29, 1916.)

1. FRAUD ⇐65(1) — INSTRUCTIONS — BURDEN OF PROOF.

In an action for false misrepresentations as to an automobile sold to plaintiffs, instructions that fraud is never presumed, but must be proved, that the burden of proving it is on the plaintiffs, that fraud is never to be imputed where the transactions may be fairly reconciled with honesty, and that if the weight of evidence is in favor of that conclusion it should always be adopted, were correct.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 72–74; Dec. Dig. ⇐65(1).]

2. FRAUD ⇐22(1)—REPRESENTATIONS—DUTY TO INVESTIGATE.

When the property sold is at hand and its condition can be ascertained, a buyer cannot rely upon opinions and representations made by the seller concerning it.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 19, 20, 22, 23; Dec. Dig. ⇐22(1).]

3. FRAUD ⇐65(3) — INSTRUCTIONS — STATEMENTS AS TO VALUE.

In an action for fraudulent misrepresentations in the sale of an automobile, an instruction that, when parties are negotiating for the sale of property which there is an opportunity to examine, the seller has a right to exalt the value of his own property to the highest point the purchaser's credulity will bear, and that such boastful assertions and exaggerated descriptions are not fraud, but that the parties are on equal ground and must be guided by their own judgment, was correct.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 72, 73; Dec. Dig. ⇐65(3).]

4. FRAUD ⇐65(4) — INSTRUCTIONS — OPPORTUNITY TO ASCERTAIN TRUTH.

In an action for fraud in the sale of an automobile, an instruction that every false affirmation does not amount to fraud, that if by ordinary caution the buyer could have ascertained the falsity of the representations he is not entitled to a verdict, and that to entitle him to a verdict not only must the representations complained of have been made, but they must have been made under circumstances calculated to deceive a person acting with reasonable and ordinary prudence, and in determining that question the jury should consider all the circumstances under which the representations were made, was correct.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 72, 73; Dec. Dig. ⇐65(4).]

5. FRAUD ⇐65(4)—INSTRUCTIONS—OPINION AS TO VALUE.

In an action for fraud in the sale of an automobile, instructions that, when the seller states his opinion as to the value of the property merely as his opinion, not as a fact which he knows to be true, the buyer cannot rely on such opinion, but must exercise his own judgment, that the law imposes on the buyer that degree of caution in ascertaining the conditions of the property and all matters pertaining thereto which an ordinarily prudent man would exercise under like circumstances, and that as to all matters which are visible or which an ordinarily prudent man would ascertain the law charges the purchaser with constructive notice, were correct.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 72, 73; Dec. Dig. ⇐65(4).]

Department 1. Appeal from Superior Court, King County; John S. Jurey, Judge.

Action by William Biel and others against R. B. Tolsma, sole trader, doing business under the firm name and style of R. B. Tolsma & Co. Judgment for the defendant, and plaintiffs appeal. Affirmed.

William Wray, of Seattle, for appellants. Van Dyke & Thomas, of Seattle, for respondent.

HOLCOMB, J. On February 23, 1915, appellants purchased from respondent a certain Pope-Hartford automobile. Appellants sued to recover damages in the sum of $1,100, representing the sum paid for the car, upon allegations of fraud and deceit by way of false representations regarding the condition, price paid, and value of the car. The allegations of fraud and misrepresentation being denied by respondent and the cause tried to a jury, a verdict was found for respondent.

As ground for reversal appellants urge that the instructions upon the issue of fraud given by the court were erroneous. The instructions, which for convenience we have numbered consecutively, were as follows:

"(1) Fraud is never presumed, but must be proved. The law presumes that every person transacts business honestly and in good faith, and the burden of proving fraud is on the party who alleged fraud. In this case the burden of proving fraud is on the plaintiffs.

"(2) Fraud is never to be imputed where the transaction may be fairly reconciled with honesty, and if the weight of evidence is in favor of that conclusion it should always be adopted.

"(3) You are instructed that when a party capable of taking care of his own interests makes a bad or losing bargain, the law will not assist him, unless deceit has been practiced, against which ordinary care could not protect him.

"(4) You are instructed that when parties are negotiating a sale and purchase for property which there is an opportunity for examining, a party has a right to exalt the value of his own property to the highest point the purchaser's credulity will bear. Such boastful assertions and exaggerated descriptions do not amount to fraudulent misrepresentation or deceit. In such case the parties are upon equal ground, and their own judgment must be their guide in coming to conclusions.

"(5) You are instructed that every false affirmation does not amount to a fraud. If, by an ordinary degree of caution the party complaining could have ascertained the falsity of the representations complained of, then such party is not entitled to a verdict; and in this case, to entitle the parties to a verdict, you must believe from the evidence, not only that the representations complained of were made, but also that they were made under circum-

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stances calculated to deceive a person acting with reasonable and ordinary prudence and caution; and in determining this question the jury should consider all the circumstances under which the alleged representations appear from the evidence to have been made, and further under the circumstances the representations were such as a person of common and ordinary prudence would or should have relied upon, or such as would be likely to mislead such a person.

"(6) The jury are instructed that, when one person states to another his opinion as to the value of any property merely as his opinion, not as a fact that he knows to be true, then the person to whom such opinion is stated in this manner has no right to rely upon such opinion, but must exercise his own judgment.

"(7) You are instructed that the law imposes upon one purchasing personal property that degree of caution and diligence in ascertaining the conditions of the property and all matters pertaining thereto which are visible or which an ordinarily prudent man, in the exercise of ordinary prudence and caution would exercise under like circumstances would ascertain, and as to all such matters the law charges the purchaser with constructive notice of such facts only as by the exercise of such caution and diligence he would probably have discovered."

[1, 2] What the fault of the first three paragraphs of instructions is we are unable to understand. They certainly state the law correctly as well settled both here and generally, and were fairly pertinent to the issues and evidence. The third paragraph is criticized as being in the face of our holdings in Raser v. Moomaw, 78 Wash. 653, 139 Pac. 622, 51 L. R. A. (N. S.) 707, Agnew v. Hackett, 80 Wash. 236, 141 Pac. 319, and Rochfort v. Quikstad, 90 Wash. 432, 156 Pac. 522. The first and third of the above cases were decisions merely upon the sufficiency of pleadings alleging fraud and deceit to raise such issues of fact. In this case the pleadings were considered sufficient and issue of fact joined, and the facts were for the jury. In the Agnew Case above cited the instructions complained of and which were there sustained were not similar to those here assailed. We have never held, and indeed no reputable court has held, that in dealing for property, real or personal, when the property was at hand and the means of ascertaining its condition, its correspondence with the representations made concerning it by the seller, and its value, reasonably ascertainable, that a buyer could shut his eyes thereto, and blindly and recklessly rely upon any and all opinions or representations made concerning it by the seller. To establish such a rule would be to place a premium upon carelessness and indifference. Griffith v. Strand, 19 Wash. 686, 54 Pac. 613; Pigott v. Graham, 48 Wash. 348, 93 Pac. 435, 14 L. R. A. (N. S.) 1176; Stewart v. Larkin, 74 Wash. 681, 134 Pac. 186, L. R. A. 1916B, 1069; Parker v. Brainard, 91 Wash. 428, 157 Pac. 1078; Brickwood's Sackett, Instructions, § 1102.

[3] The same proposition in effect is involved in the fourth paragraph of instructions. It follows the principle well stated in 2 Cooley on Torts (3d Ed.) 921.

[4] The fifth paragraph gives the jury the test for determining actionable fraud and deceit from the facts. It is exactly reproduced from 1 Brickwood's Sackett's Instructions, § 1100, as an approved instruction upon such matter, and approved in Eames v. Morgan, 37 Ill. 260, Antle v. Sexton, 137 Ill. 410, 27 N. E. 691, and Com. Nat. Bank v. Pirie, 82 Fed. 799, 27 C. C. A. 171. We think it fair, and no contrary cases are called to our attention.

[5] The sixth and seventh paragraphs deal with expressed opinions as to value, in accord with the rule stated in 2 Cooley, Torts, p. 920, and with the same matters dealt with in the third and fifth paragraphs. We see no fault in them.

The record shows that there were no relations of confidence and trust existing between the parties. The subject of the sale was at hand and was examined and re-examined. There was some conflict in the evidence. The jury were properly instructed, and resolved the facts in favor of defendant.

The judgment must be affirmed; and it is so ordered.

MORRIS, C. J., and MAIN, ELLIS, and CHADWICK, JJ., concur.

(94 Wash. 61)

STILWELL BROS., Inc., v. UNION MACHINERY & SUPPLY CO.

(No. 13469.)

(Supreme Court of Washington. Dec. 29, 1916.)

1. ACTION ⇐48(3)—JOINDER—TORT AND CONTRACT—STATUTE.

Under Rem. Code 1915, § 296, providing that several causes of action may be united when they arise out of the same transaction, an action for rent due upon the lease of a pump and an action for the recovery of the pump, arising out of the same transaction, were properly joined.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 500, 503; Dec. Dig. ⇐48(3).]

2. REPLEVIN ⇐80—CLAIM AND DELIVERY—COSTS—STATUTE.

Under Rem. Code 1915, § 6059—194, providing that in all proceedings the party entitled to recover costs may include therein such reasonable sum as may have been paid for the execution of any bond or undertaking and as may be allowed by the court, plaintiff, recovering in an action of claim and delivery, might recover, as an item of costs, a charge of $10 paid to a surety company as compensation for the replevin bond furnished by it.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 310; Dec. Dig. ⇐80.]

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action under the claim and delivery statute by Stilwell Bros., Incorporated, against the Union Machinery & Supply Company. Judgment for plaintiff, and defendant appeals. Affirmed.

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Robert A. Eaton, of Seattle, for appellant. Beeler & Sullivan, of Seattle, for respondent.

CHADWICK, J. Respondent leased a pump to appellant upon a rental charge of $25 per month, with an option to purchase. The agreed rental was paid for four months. Upon default, respondent brought this action, under the claim and delivery statute, to recover its property and the accumulated rent.

[1] Appellant demurred to the complaint upon the ground that two causes of action, one in contract and the other sounding in tort, had been improperly joined, relying upon: Willey v. Nichols, 18 Wash. 528, 52 Pac. 237; Clark v. Great Northern Ry. Co., 31 Wash. 658, 72 Pac. 477; Sanders v. Stimson Mill Company, 34 Wash. 357, 75 Pac. 974. These cases, while sustaining appellant's contention, have been overcome by the act of 1907, amending section 4942 of Ballinger's Code (Rem. 1915 Code, § 296), providing that several causes of action may be united when they arise out of the same transaction. Since the passage of the amendatory act, the court has had occasion to hold contrary to the contention of appellant in Harding v. Ostrander R. & Timber Co., 64 Wash. 226, 116 Pac. 635; Littlefield v. Bowen, 90 Wash. 286, 155 Pac. 1053. The action for rent due, and for the recovery of the pump arise out of the same transaction, and the demurrer was properly overruled.

[2] Respondent submitted, as an item of costs in the court below, a charge of $10, paid to a surety company as compensation for the replevin bond furnished by it. It is complained that this is an improper charge. There has been some difference of opinion among the courts whether an item of this kind was within the legal meaning of the words "costs and disbursements," but we think there can be no question under our present statute (section 6059—194, Rem. 1915 Code), which was given an interpretation in Church v. Wilkeson-Tripp Co., 58 Wash. 262, 108 Pac. 596, 109 Pac. 113, 137 Am. St. Rep. 1059. It was there held that a premium on an appeal bond was a proper item to be taxed as costs, and that a proper construction of the statute mentioned required that we give meaning to the words:

"* * * In all actions and proceedings, the party entitled to recover costs may include therein such reasonable sum as may have been paid such company for executing or guaranteeing any such bond or undertaking therein as may be allowed by the court or judge before whom the action or proceeding is pending"

—thereby making a special provision for actions and proceedings and holding specifically that the statute was not limited, as there contended, to the recovery of premiums paid by receivers and others acting in a fiduciary relation.

We find in the record a motion to strike the statement of facts. No errors are assigned which require an examination of the testimony. It is therefore unnecessary for us to pass upon the motion.

We find no error. The judgment is affirmed.

MORRIS, C. J., and HOLCOMB and ELLIS, JJ., concur.

(94 Wash. 63)

HILLS et al. v. CITY OF HOQUIAM.

(No. 13501.)

(Supreme Court of Washington. Dec. 29, 1916.)

1. LIMITATION OF ACTIONS ⟸53(6)—COMPUTATION OF PERIOD—SEVERAL CONTRACTS.

There being no connection between different bills of goods sold the city, the rule against splitting causes of action does not apply so as to take the case out of the three-year statute of limitations (Rem. Code 1915, § 159), as to goods furnished before that period.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 294; Dec. Dig. ⟸53(6).]

2. LIMITATION OF ACTIONS ⟸54(2)—COMPUTATION OF PERIOD—"MUTUAL ACCOUNTS."

A mutual account within meaning of Rem. Code 1915, § 159, limiting the bringing of suit for balance due within three years from date of last item, is one that includes reciprocal demands, and claim for various bills of goods furnished, no payment being made, was not a mutual account.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 296; Dec. Dig. ⟸54(2).

For other definitions, see Words and Phrases, First and Second Series, Mutual Accounts.]

Department 1. Appeal from Superior Court, Grays Harbor County; Ben Sheeks, Judge.

Action by T. S. Hills and others against the City of Hoquiam. Judgment for plaintiffs, and defendant appeals. Affirmed.

James P. H. Callahan, of Hoquiam, for appellant. Sidney Moore Heath, of Hoquiam, for respondents.

PARKER, J. The plaintiffs, as assignees of Powell & Ross, copartners, commenced this action in the Superior court seeking recovery from the city of Hoquiam of the sum of $232.95, the alleged purchase price of goods furnished to the city by Powell & Ross during the nearly six-year period between March 9, 1908, and December 29, 1913. Trial before the court without a jury resulted in findings and judgment in favor of the plaintiffs for the sum of $35 only, being the value of goods furnished by Powell & Ross to the city within three years prior to the commencement of the action. From this disposition of the case the plaintiffs have appealed to this court.

It is contended in appellants' behalf that the trial court erred in holding that their right to recover for the goods furnished to the city prior to three years before the commencement of the action is barred by the

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three-year statute of limitations (section 159, Rem. 1915 Code), this being the city's principal defense.

The facts determinative of the rights of the parties in so far as the question of the statute of limitations is concerned may be summarized as follows: During the period of the furnishing of the goods as claimed Powell & Ross were engaged in the grocery business in the city of Hoquiam. On March 9, 1908, they furnished to the city the first bill of goods, amounting to 90 cents, and on December 29, 1913, they furnished to the city the last bill of goods, amounting to 25 cents. Between these dates at somewhat irregular intervals they furnished to the city over 200 bills of goods, none of which exceeded $7 in amount, the whole totaling $232.95. The goods were all charged against the city upon the books of Powell & Ross as they were furnished, in one account. There is nothing in the record, however, to indicate that the city knew in what manner the goods were charged upon the books of Powell & Ross, or that they claimed the purchase price thereof as one cause of action until the commencement of this action. It seems plain that no two or more bills of goods were furnished in pursuance of any one contract, express or implied; that is, no one bill had any connection with any other bill, other than by the fact that they were charged by Powell & Ross on their books in one account against the city. The goods consisted of brooms, brushes, mops, soap, gold dust, matches, lanterns, oil, etc., evidently being only such minor articles as were used by the city in caring for its buildings and bridges. It is so indicated in the bill of particulars. No demand was ever made, by the rendering of any bill or statement of any nature, for payment of any part of the purchase price of the goods so furnished until in April, 1914, over three months after the furnishing of the last bill of goods. All of the goods were furnished more than three years before the commencement of this action, except goods of the value of $35, for which judgment was awarded appellants as above noticed.

The theory of appellants' claimed right of recovery and avoidance of the effect of the statute of limitations invoked by the city is best shown by the following statement in their counsel's brief:

"Appellants' contention is that there was an open and outstanding account between the parties, and as such comprises one transaction until the same shall have been closed by one or the other of the parties. Such an account may run over a period of time so long as there is expectations of future transactions, and the statute of limitations will not begin to run until such account has been closed by one or the other of the parties, which in this case would be December 29, 1913."

[1] Counsel relies upon the rule which, as he claims, and we assume for argument's sake, would require appellants to sue for the recovery of the whole of the claimed indebtedness in one cause of action, or in any event prevent them from seeking recovery in different suits. We do not think that solely because appellants may have been so compelled to sue it follows that the statute of limitations is not a good defense to that part of the indebtedness accruing more than three years before the commencement of this action.

The rule and the reason therefor invoked by counsel for appellants is well stated in the early case of Guernsey v. Carver, 8 Wend. (N. Y.) 492, 24 Am. Dec. 60, where there was involved an effort to recover by separate suits upon separate items of an account covering a considerable period of time. The case appears not to have been disposed of upon the theory of the account being a mutual one. Judge Nelson, speaking for the court, said:

"The whole account being due when the first suit was brought, it should be viewed in the light of an entire demand, incapable of division, for the purpose of prosecution. The law abhors a multiplicity of suits. According to the doctrine of the court below, a suit might be sustained (after the whole became due) on each separate item delivered, and if any division of the account is allowable, it must no doubt be carried to that extent. Such a doctrine would encourage intolerable oppression upon debtors, and be a just reproach upon the law. The only just and safe rule is to compel the plaintiff on an account like the present to include the whole of it due in a single suit."

In Williams-Abbott Elec. Co. v. Model Elec. Co., 134 Iowa, 665, 112 N. W. 181, 13 L. R. A. (N. S.) 529, Chief Justice Weaver, speaking for the court, following citation of the Guernsey Case and other authorities, said:

"These authorities uphold the contention that an account consisting of one or more items, all of which are due and payable, constitutes but one demand, and if the party to whom the same is due sees fit to bring suit for a part thereof, and recovers judgment, such recovery will be a bar to further suit upon the remainder of the claim."

It seems to us that these observations of the learned writers of those decisions show that the rule is rested upon the rule of public policy which avoids multiplicity of suits so far as possible, rather than upon any strict or technical definition of what is a single cause of action.

[2] Other authorities called to our attention by counsel for appellants touching directly the question of limitation of actions relate to mutual accounts upon which the balance due from one of the parties to the other constitutes the cause of action rather than the several items from which such balance results. These authorities seem to be relied upon on the theory that this is, in substance, a mutual account. This account, as we have seen, does not consist of mutual debits and credits, there being no charge by the city against appellants' assignors, not even in the form of a single payment upon the alleged indebtedness. A mutual account within the meaning of section 166 of Rem. 1915 Code, the balance of which constitutes a single

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cause of action upon which the statute runs from the furnishing of the last item, is one "where there have been reciprocal demands between the parties." Manifestly this is no such account preventing the running of the statute until the furnishing of the last item. Garey v. Pasco, 89 Wash. 382, 154 Pac. 433; Bank of Blakely v. Buchannon, 13 Ga. App. 793, 80 S. E. 42; 1 R. C. L. 205; 1 C. J. 598.

It seems clear to us that the judgment must be affirmed.

It is so ordered.

MORRIS, C. J., and MAIN, CHADWICK, and ELLIS, JJ., concur.

(58 Okl. 477)

GAYMAN, County Treasurer, et al. v. MULLEN. (No. 7590.)

(Supreme Court of Oklahoma. Oct. 10, 1916. Rehearing Denied Dec. 19, 1916.)

(Syllabus by the Court.)

1. DRAINS ⟸32—STATUTES ⟸251—DRAINAGE DISTRICTS—APPOINTMENT OF VIEWERS—STATUTORY PROVISIONS.

The act of March 24, 1910 (Laws 1910, c. 79), amending sections 3046, 3049, 3050, 3053, 3054, and 3057, c. 32, Comp. L. 1909, relating to drainage and declaring an emergency, is within the provision of section 58, art. 5 (Williams, § 147a), of the state Constitution that an emergency measure shall not include, among other inhibited things, any provision for "the purchase or sale of real property," and the same did not take effect until 90 days after the adjournment of the session at which it was passed, that is, until June 18, 1910.

(a) The selection of drainage district viewers in accordance with the provisions of this act, on April 25, 1910, was invalid, and their services and report on June 22, 1910, under an order of the county commissioners made on April 25, 1910, was also invalid and afforded no basis for a hearing and for an assessment and lien against real property on account of drainage benefits.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 30–33; Dec. Dig. ⟸32; Statutes, Cent. Dig. § 332; Dec. Dig. ⟸251.]

2. DRAINS ⟸25 — STATUTES ⟸276(1) — ASSESSMENTS — REPEAL — PENDING PROCEEDINGS.

Where, on August 12, 1909, a board of county commissioners, acting upon a petition for drainage improvements, appoints drainage district viewers under L. 1907–08, p. 299 (section 2964, Rev. L. 1910), to make the first view and report thereon, required by the statutes relating to drainage districts, and where, on September 14, 1909, in accordance with the report duly made by such viewers, such county commissioners found in favor of said petition for drainage improvements and directed such viewers, with a designated surveyor, to make the second and final view and report required by the statute as the basis for the final hearing in such proceedings and the assessment of real property on account of the benefits it will receive from such improvements, and where, on June 22, 1910, said viewers, having performed the services required of them, made and filed their report and the county commissioners thereafter, upon due notice and hearing, approved and confirmed the same and made such assessment, such report and assessment is valid, notwithstanding the act of March 24, 1910, which took effect on June 18, 1910, provided a different method and manner of selecting viewers in such cases.

(a) Under section 54, art. 5 (Williams, § 144), of the state Constitution, the repeal of a statute does not affect proceedings begun by virtue of such repealed statute, where the rights to which the proceedings relate remain unchanged, although such proceedings are in a matter involving legislative as well as judicial questions and in the main are of legislative character.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 16, 17; Dec. Dig. ⟸25; Statutes, Cent. Dig. § 371; Dec. Dig. ⟸276(1).]

3. DRAINS ⟸82(1)—ASSESSMENTS—REVIEW.

Under L. 1907–08, p. 304, as amended by L. 1909, p. 220, as amended by L. 1910, p. 162 (section 2979, Rev. L. 1910), there is an adequate remedy at law, by appeal, from an assessment of real property that is not benefited by a proposed drainage improvement.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 87; Dec. Dig. ⟸82(1).]

Error from District Court, Lincoln County; Chas. B. Wilson, Judge.

Action by Mary A. Mullen against John J. Gayman, county treasurer, and others. Judgment for plaintiff, and defendants bring error. Reversed, with directions to dismiss petition.

John J. Davis, of Chandler, and Grant Stanley, of Oklahoma City, for plaintiffs in error. Erwin & Erwin, of Wellston, for defendant in error.

THACKER, J. The plaintiffs in error will be designated as defendants, and the defendant in error as plaintiff, in accord with their respective titles in the trial court.

This is an action by plaintiff against defendants to vacate and set aside a special assessment of $2,280, based upon a finding of a drainage benefit, and to perpetually enjoin the collection of the same against her southwest quarter of section 15, in township 14 north, range 2 east, of the Indian meridian, in Lincoln county, as a part of Deep Fork drainage district No. 1, of said county, under L. 1907–08, pp. 295–315, as amended by L. 1909, pp. 217–236, as amended by L. 1910, pp. 156–163 (sections 2959–3023, Rev. L. 1910), upon showing as to the proceedings had and contending as to other facts and as to the effect of our statutes that on August 7, 1909, a sufficient petition to the board of county commissioners of said county for the organization of this district and the construction of a main and lateral ditch was duly filed; that on August 12, 1909, under L. 1907–08, p. 299 (section 2964, Rev. L. 1910), three viewers were duly appointed by said county commissioners and, with a designated surveyor, directed to proceed to the premises along and adjacent to the line of the proposed drains and to report whether the same were practicable and necessary, or of private or public utility and benefit, which service was duly performed and which report showed that the proposed improvement was practicable and

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necessary and a public utility and benefit, and was accompanied by a recommendation of route, etc.; that on September 14, 1909, after due notice by publication under L. 1907–08, p. 299 (section 2965, Rev. L. 1910), the county commissioners found in favor of said petition for the said drainage improvements, and ordered and directed said viewers and surveyor to go upon the lands in said drainage district and establish the precise location of the proposed drainage ditch and laterals, survey and level the established line thereof, set a stake at every 100 feet, numbering downstream, mark the intersections and boundaries of lands, township, range, and county lines, bench marks, and road and railroad crossings, determine the dimensions and form of said drainage improvements, what disposition should be made of excavated earth, establish the number of cubic yards of earth or other substance to be removed and the cost per cubic yard of each section of 100 feet, and for the whole work, and to make report, profile, and plat of the same, together with a schedule of all lots and lands, and of public and corporate roads or railroads, together with the names and residences of the owners that will be benefited, damaged, or condemned by or for the improvement, and the damage or benefit to each tract of 40 acres or less, and make separate estimate of the cost of location and construction and apportion the same to each tract in proportion to the benefit or damage that may result to each, apportion and allot the construction or expense of same—of the number of lineal feet and cubic yards of said work—to each lot or tract of land, road, or railroad in proportion to the estimate of benefits or damages, specify the manner and time in which such improvements are to be made and completed, the number of floodgates, waterways, farm crossings, bridges, and the dimensions thereof, and note the county and township lines and railroad crossings etc., as required by L. 1907–08, pp. 300, 301 (section 3050, Comp. L. 1909), which was changed by the amendatory act of March 24, 1910, the same being L. 1910, p. 159 (section 2968, Rev. L. 1910), by inserting next after the requirement that "if the commissioners shall find that the proposed drain or improvement is necessary for sanitary or agricultural purposes, or will be conducive to the public health or a public utility, they shall cause to be entered upon their record such finding," the following: "And they shall so certify to the judge of the district court of such county, and request that he appoint three disinterested freeholders from the regular jury list of names prepared for the district court, who shall not be interested in the construction of said work and not of kin to any person interested therein; and thereupon the judge of the district court shall immediately cause ten days' notice to be given in some newspaper printed and of general circulation in the county, of the said application for appointment of viewers, and at the time stated therein shall appoint three such disinterested freeholders from the regular jury list of names of his court, and shall cause the names of such viewers so appointed to be certified to the board of county commissioners, and the said county commissioners shall thereupon cause an order to be entered on their records" authorizing and directing the three viewers so appointed and the county surveyor, etc.; that on April 25, 1910, the said viewers and surveyor having neither completed their work nor reported thereon, the judge of the district court of said county, acting upon the certified request of the county commissioners, assuming that the said act of March 24, 1910, which contained a section declaring the same emergency measure to take effect and be in force from and after its passage and approval was in effect, appointed three viewers and caused them to be certified to the county commissioners in accord with the above-quoted provisions of said act of March 24, 1910; that the county commissioners thereupon, on the same day, ordered and directed these viewers, together with a surveyor, to do and perform the same services with which the former viewers and surveyor were charged by the order of September 14, 1909; that on June 22, 1910, the first set of appointed viewers, with a surveyor, acting under the order of September 14, 1909, and the second and last appointed set of viewers with a surveyor, acting under the order of April 25, 1910, each made a finding and reported the same to the board of county commissioners in identically the same form and in accordance with the requirements of these orders; that on November 11, 1910, after due notice of the hearing under L. 1907–08, p. 302 (section 2971, Rev. L. 1910), the county commissioners approved and confirmed the report of both sets of viewers and ordered said assessment of $2,280 as a lien upon plaintiff's lands hereinbefore described under L. 1907–08, pp. 308, 309, as amended by L. 1909, p. 225 (section 2988, Rev. L. 1910); that 70 per cent. of said assessment was thereafter extended on the tax rolls of the county under L. 1907–08, p. 309 (sections 2991, 2992, Rev. L. 1910), and at the time of the commencement of this action the plaintiff had made default in payment and the county treasurer of Lincoln county was advertising this tract of land for sale and threatened to sell the same to pay the interest on said assessment; that the petition for the organization of said drainage district No. 1 and the report of the said set of viewers requiring that such improvement be made included, but the reports of both sets of viewers on June 22, 1910, did not include and wholly omitted provisions for a certain lateral ditch described in the said petition and in the first said report as follows: "A lateral ditch shall be constructed beginning at a point where the Captain creek in-

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tersects the Deep Fork ditch in the S. E. quarter of section 10—4—2, thence southwesterly through the N. E. and S. E. quarters of section 15—14—12, thence southwesterly through the N. E., N. W., and S. W. quarters of section 22—14—2"; that the plaintiff's lands would not be benefited by the construction of said drainage ditch and laterals thereto without the aforesaid Captain creek lateral, which lateral was again ordered on December 16, 1912, and a plat and profile for the same was filed April 6, 1914; that the plaintiff, erroneously believing that the construction of said Captain creek lateral was provided for in said viewers reports of June 22, 1910, filed no exception to the confirmation of these reports and assessment against her said lands under L. 1907-08, p. 304, as amended by L. 1909, p. 220, as amended by L. 1910 p. 162 (section 2978, Rev. L. 1910); nor appealed therefrom as authorized by L. 1907-08, p. 304, as amended by L. 1909, p. 220, as amended by L. 1910, p. 162 (section 2979, Rev. L. 1910), and that said act of March 24, 1910, includes a provision for the purchase or sale of real estate and other provisions specifying conditions and procedure constituting a part of the general statutory law under which the lien or incumbrance provided for under the L. 1907-08, pp. 308, 309, as amended by L. 1909, p. 225 (section 2988, Rev. L. 1910), may be fixed against real property, so that the said act of March 24, 1910, by reason of the constitutional inhibition against allowing such measures to take effect until 90 days after the adjournment of the session of the Legislature at which they are passed (section 58, art. 5, Williams, § 147a, of the state Constitution), notwithstanding this act is therein declared to be an emergency measure and to be in effect from and after its passage and approval, did not take effect until June 18, 1910 (see Riley v. Carico, 27 Okl. 33, 110 Pac. 738; Norris et al. v. Cross, 25 Okl. 287, 105 Pac. 1000; In re Initiative State Question No. 10, 26 Okl. 554, 110 Pac. 647), and so that, this act having gone into effect on June 18, 1910, the viewer's reports, of June 22, 1910, were made after the first set of viewers had lost all authority to act by the change in the law under which viewers must be appointed, the second set of viewers being without authority because appointed under an act that had not at the time they were appointed gone into effect. The judgment below was for the plaintiff, and the defendants bring the case here for review.

There was and is no controversy except as to the law, unless in respect to whether said lands would be benefited without the Captain creek lateral. The judgment below rests upon the propositions: (1) That the report of each of the two sets of viewers on June 22, 1910, and the action of the county commissioners thereon, on November 11, 1910, confirming the same and assessing plaintiff's real property, was absolutely void for want of legal authority in either set of viewers to act as such at the time of their said reports; and (2) that a provision for the Captain creek lateral, upon which said real property was dependent for any benefit whatever, having been omitted from the report of each set of viewers, the county commissioners had no jurisdiction to assess plaintiff's lands, and such assessment is absolutely void. And, attacking the basis of the judgment at both of these points, the defendants seek a reversal upon the propositions: (1) That the act of March 24, 1910, containing no direct or specific provision for an incumbrance of real property and, being amendatory of the prior statutes only in respect to the procedure for organizing drainage districts in two or more counties and the bond for costs and expenses required in proceedings to organize drainage districts and the method and manner of selecting viewers, and authorizing appeals without bond in cases where the question of damages is involved, is not within the inhibition of section 58, art. 5 (Williams, § 147a), of the state Constitution, but is subject to its emergency clause and took effect on said date of its approval; (2) that, under section 54, art. 10 (Williams, § 144), of the state Constitution, the proceedings begun by the first set of viewers were not affected by the provision in the act of March 24, 1910, for a different mode and manner of selecting viewers; and (3) that, upon the authority of Davis v. Board of County Commissioners, 45 Okl. 284, 137 Pac. 114, the plaintiff had an adequate remedy at law; but the question as to whether he had an adequate remedy by mandamus to compel the provision for the Captain creek lateral is not presented in their argument.

[1] The act of March 24, 1910, is merely incidentally declaratory of all those portions of the prior statutes which are repeated without change in connection with the new and amendatory portions of this act, and is not a repeal and re-enactment of such repeated portions (1 Sutherland on Statutory Construction, 441; Ely v. Holton, 15 N. Y. 598; Small v. Lutz, 41 Or. 570, 67 Pac. 421, 69 Pac. 825; Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1068; Gordon v. People, 44 Mich. 485, 7 N. W. 69; People v. Supervisors, 67 N. Y. 109, 23 Am. Rep. 94; McLaughlin v. Newark, 57 N. J. Law, 298, 30 Atl. 543; State v. Andrews, 20 Tex. 230; Central Pacific R. R. Co. v. Shackelford, 63 Cal. 265; Swamp Land Drainage District v. Glide, 112 Cal. 85, 44 Pac. 451), and the new and amendatory portions of this act neither provide directly or specifically for a lien (Crow v. Lind, 167 Mo. 228, 66 S. W. 1062, 67 S. W. 572), nor otherwise provide for a lien upon any basic facts which would not authorize the same under the prior law, nor relate, except remotely as hereinbefore shown, to the crea-

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tion of a lien. But, although it appears that the act of March 24, 1910, does not provide for an incumbrance on real property so as to fall in this respect within the constitutional inhibition against allowing immediate effect to such acts of the Legislature upon a declaration of an emergency (section 58, art. 5, Williams, § 147a, of the state Constitution), this act at pages 160, 161, does contain the following provisions, which appear to bring it within the inhibition of that section of the Constitution in that it contains a provision for the purchase and sale of real estate:

"If the commissioners shall, upon petition of 50 per cent. of the resident landowners or the owners of 50 per cent. of the total acreage of the land embraced in such district, at any time before the completion of such drain or other improvement, find that the location or specification of any such drain or improvement should be changed, they may, by an order of record, change such location and dimensions, and may acquire the right of way for any such drain or improvement by gift, grant, purchase or condemnation proceedings."

It thus appears that the act of March 24, 1910, did not go into effect until June 18, 1910, 90 days after its passage and approval (Riley v. Carcio, 27 Okl. 33, 110 Pac. 738), and that the selection of viewers by the district judge, on April 25, 1910, and their report to the county commissioners, on June 22, 1910, was without authority of law and void. This brings us to the question as to whether the proceedings by the set of viewers appointed on August 12, 1909, and directed on September 14, 1909, by the county commissioners to perform the services and make the report performed and made by them on June 22, 1910, was affected and rendered void by the act of March 24, 1910, which, as stated, took effect on June 18th, of that year.

[2] Section 54, art. 10 (Williams, § 144), of the state Constitution reads:

"The repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute."

In the case of Gordon v. State of Kansas, 4 Kan. (489) 421, it was held that a statutory provision (Comp. L. Kan. 838) that "the repeal of a statute does not * * * affect any * * * proceeding commenced under or by virtue of the statute repealed" is, because of the technical meaning of the word "proceeding," confined to judicial matters; that is, to proceedings in the prosecution or defense of an action, so that proceedings commenced under an act of 1863, as amended by an act of 1865, were put to an end by the repeal of these statutes by an act of 1867, which provided a different procedure and contained no saving clause; but in Cincinnati et al. v. Davis et al., 58 Ohio St. 225, 50 N. E. 918, it was held:

"Where a resolution, declaring the necessity of the improvement of an alley, is made by the proper board of a city, at the time the resolution is adopted, the subsequent amendment of the law, whereby the making of such improvements as to alleys of a certain width is conferred on another board, does not work a discontinuance of the pending proceeding, though it be of such an alley; and the improvements should be prosecuted to completion by the board that adopted the resolution, unless otherwise expressly provided in the amendment."

The Ohio Statute (section 79, Ohio Rev. Stat.) that is construed and applied in that case is substantially the same as the aforesaid Kansas statute and as our constitutional provision in the respect under consideration, and reads as follows:

"Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed; nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

And in City of Toledo v. Marlow, 28 Ohio Cir. Ct. R. 298, it was held that the several statutory steps required for the improvement of a street by pavement or sewer constituted a "proceeding," within the meaning of the Ohio Rev. Stats. § 79, quoted above.

In Bowman v. Cockrill, 6 Kan. (311) 190, where it was contended by the plaintiff that a "tax deed was not prima facie evidence of anything prior to its own execution, because he claims that the laws under which the deed was executed have been repealed without any saving clause, and because none of the subsequent laws making tax deeds prima facie evidence of all proceedings antecedent to the execution of such deeds have any retrospective operation," the court said:

"Section 113 of this new act contains a saving clause which reads as follows: 'All proceedings, titles, etc., not completed at the time of the taking effect of this act, shall be carried to final determination and execution according to the laws in force under which they originated.' The case of Gordon v. State ex rel., 4 Kan. 489, referred to by the plaintiff below, has no application in this case. The word 'proceedings' in the statute referred to in that case (Comp. L. 838) may mean judicial proceedings; but the word 'proceedings' in said saving clause undoubtedly means tax proceedings, the same as it does in that clause of section 10 of chapter 198, Comp. L. 878, which reads as follows: 'Such deed duly witnessed and acknowledged shall be prima facie evidence of the regularity of such proceedings, from the valuation of the land by the assessor inclusive, up to the execution of the deed.'"

And in State v. City of Topeka, 68 Kan. 177, 74 Pac. 647, it was held that the word "proceeding" did not refer to judicial proceedings in Laws 1903, p. 243, c. 122, § 200, concerning cities of the first class, which reads as follows:

"The passage of this act shall in no way affect any bond heretofore issued, contract entered into for any public building, pavement, or sewer, tax or special assessment levied, action now pending, or proceeding of any kind commenced and not completed, by or on behalf of any city."

In that case it was said:

"It is urged that the word 'proceeding' has been judicially interpreted by this court to apply

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only to judicial proceedings. Gordon v. State ex rel., 4 Kan. 489. This interpretation was given to the expression as used in section 7342, General Statutes of 1901. It was not, however, determined that the term could not be used to apply to other proceedings. * * * The act does not treat of judicial proceedings, but of the organization, powers and duties of cities of the first class, and particularly of issuing bonds and the erection of public improvements, and it was to protect proceedings of this character commenced under previously existing laws that the saving clause was enacted."

In Prentis v. Atl. Coast Line Co., 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150, it was said:

"Proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Statutes, § 720, no matter what may be the general or dominant character of the body in which they may take place. * * * That question depends not upon the character of the body, but upon the character of the proceedings."

In Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, it was held that the word "proceedings" is not a technical one and is aptly used by the courts to designate an inquiry before a grand jury. These cases, excepting the first-cited case from Kansas and the Ohio cases, merely illustrate the variety of uses made of the term "proceeding" in nonjudicial as well as judicial matters, and indicate that it often has a less technical and less restricted meaning than might be thought from a reading of that Kansas case alone.

In Black's Law Dictionary the word "proceeding" is defined as follows:

"In a general sense, the form and manner of conducting judicial business before a court or judicial officer; *regular and orderly progress in form of law*," etc. The italicization is ours.

And, although the question does not appear to have been heretofore discussed by this court, in the case of Harlow v. Board of Commissioners of Payne County, 33 Okl. 356, 125 Pac. 449, this court held that a proceeding to construct a bridge nearer than six miles to another bridge in contravention of the act of March 11, 1903 (L. 1903, p. 246), as amended by the act of March 10, 1905 (L. 1905, p. 354, being section 7885, Comp. L. 1909), in respect to the distance between bridges, being without authority and subject to be enjoined, was not legalized nor affected by the act of February 17, 1911 (L. 1911, p. 41), repealing the provision of prior laws so contravened because of this provision of our Constitution. In that case a temporary injunction was granted to prevent the county commissioners from entering into and carrying out a contract of construction of a certain bridge over a river within six miles of another bridge upon the erroneous view that such bridges were farther apart; and from an order dissolving that injunction, before the act of February 17, 1911, this case was brought to this court for review, where it was reversed upon the grounds that the distance between the bridges was less than six miles and the proposed bridge was within the inhibition of the prior statute, with the statement in the body of the opinion that the proceeding was not affected by the act of February 17, 1911, repealing the inhibition because of the provision of the Constitution now under consideration.

However, we deem it unnecessary to decide and do not decide whether the term "proceeding," as used in this section of our Constitution, includes any purely legislative or purely executive, as well as judicial and quasi judicial proceedings as the proceedings to assess and fix a lien against real property on account of drainage benefits involve both legislative and judicial questions (9 R. C. L. 623), although the propriety, wisdom, and public necessity of drainage rests exclusively with the Legislature (9 R. C. L. 623, 624), and all the proceedings thereunder may have a legislative character (9 R. C. L. 641).

In 11 Mod. Am. L. 446, it is said:

"The hearing may be before the board which made the original assessment, or before another board which while acting judicially in this instance is not a court and is composed of executive officers."

See Hibben v. Smith, 191 U. S. 310, 24 Sup. Ct. 88, 48 L. Ed. 195.

We think this change in the method and manner of selecting viewers, being in a mere matter of procedure and not in any matter of rights, does not affect the proceedings begun by virtue of the repealed statute in this respect, and that the report of the viewers appointed and acting under the old statute on the fourth day after the new statute went into effect was as valid as if there had been no change in the former statute.

[3] As to the proposition that the proposed drainage improvement, without the Captain creek lateral at the time of the assessment, included no benefit to the plaintiff's lands, we think she had an adequate remedy at law by appeal, if not by mandamus, although the statute authorizing appeals (L. 1907-08, p. 304, as amended by L. 1909, p. 220, as amended by L. 1910, p. 162, the same being section 2979, Rev. L. 1910) seems to assume at least nominal benefits to the appellant's property and in terms authorize an appeal only for the purpose of determining "whether the property for which an appeal is prayed has been assessed more than it will be benefited, or more than its proportionate share of the cost of the improvements."

In North Canadian River Drainage Dis. No. 3 of Oklahoma County v. Fleenor, 158 Pac. 902, although the precise question as to whether this statute empowers the district court to relieve an appellant from all damages whatever is not discussed, a judgment of such court granting such complete relief was affirmed against an assessment made by the county commissioners with the statement that:

"As there is evidence reasonably tending to support the findings of the court that the ditch was of no benefit to plaintiff's land, we will not disturb the judgment."

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Aside from the questions as to whether the plaintiff had an adequate remedy by mandamus and as to whether the subsequent provision for the Captain creek lateral makes this a moot question, which we do not determine, it appears to us that the plaintiff was not entitled to the relief granted her in the trial court.

The judgment is reversed, and the cause remanded, with instructions to dismiss plaintiff's petition.

TURNER, SHARP, and HARDY, JJ., concur. KANE, C. J., not participating.

(58 Okl. 493)

GAYMAN, County Treasurer, et al. v. POWELL. (No. 7591.)

(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

SPECIAL ASSESSMENTS.

Same as syllabus in case of John J. Gayman, County Treasurer, R. P. Roope, County Clerk, and C. F. Buzzi, Sheriff, Plaintiffs in Error, v. Mary A. Mullen, Defendant in Error, No. 7590 in this court, and decided at this time.

Error from District Court, Lincoln County; Chas. B. Wilson, Jr., Judge.

Action by P. M. Powell against John J. Gayman, County Treasurer, and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded, with instructions to dismiss petition.

John J. Davis, of Chandler, and Grant Stanley, of Oklahoma City, for plaintiffs in error. Erwin & Erwin, of Wellston, for defendant in error.

THACKER, J. The plaintiffs in error will be designated as defendants, and the defendant in error as plaintiff, in accord with their respective titles in the trial court.

This is an action by plaintiff against defendants to vacate and set aside a special assessment of $800, based upon a finding of a drainage benefit, and to perpetually enjoin the collection of the same against his northwest quarter (¼) of the southwest quarter (¼) of section twenty-two (22), in township fourteen (14) north, of range two (2) east of the Indian meridian, in Lincoln county, as a part of drainage district No. 1, of said county. From a judgment in favor of the plaintiff, the defendants bring the case here for review.

Except as to the real property affected and the owner of the same this case is practically identical in the facts thereof and precisely identical in the questions presented for decision with the case of John J. Gayman, County Treasurer, R. P. Roope, County Clerk, and C. F. Buzzi, Sheriff, Plaintiffs in Error, v. Mary A. Mullen, Defendant in Error, 161 Pac. 1051, No. 7590 in this court and decided at this time. The opinion and syllabus in the last-mentioned case is adopted as the opinion and syllabus in this case.

The judgment is reversed, and the cause remanded, with instructions to dismiss plaintiff's petition.

TURNER, SHARP, and HARDY, JJ., concur. KANE, C. J., not participating.

(58 Okl. 496)

GAYMAN, County Treasurer, et al. v. THOMPSON. (No. 7592.)

(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

SPECIAL ASSESSMENTS.

Same as syllabus in case of John J. Gayman, County Treasurer, R. P. Roope, County Clerk, and C. F. Buzzi, Sheriff, Plaintiffs in Error, v. Mary A. Mullen, Defendant in Error, No. 7590 in this court, and decided at this time.

Error from District Court, Lincoln County; Chas. B. Wilson, Jr., Judge.

Action by G. L. Thompson against John J. Gayman, County Treasurer, and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded, with instructions to dismiss petition.

John J. Davis, of Chandler, and Grant Stanley, of Oklahoma City, for plaintiffs in error. Erwin & Erwin, of Wellston, for defendant in error.

THACKER, J. The plaintiffs in error will be designated as defendants, and the defendant in error as plaintiff, in accord with their respective titles in the trial court.

This is an action by plaintiff against defendants to vacate and set aside a special assessment of $400, based upon a finding of a drainage benefit, and to perpetually enjoin the collection of the same against his northeast quarter (¼) of the southeast quarter (¼) of section twenty-one (21), in township fourteen (14) north, of range two (2) east of the Indian meridian in Lincoln county, Okl., as a part of drainage district No. 1, of said county. From a judgment in favor of the plaintiff, the defendants bring the case here for review.

Except as to the real property affected and the owner of the same this case is practically identical in the facts thereof and precisely identical in the questions presented for decision with the case of John J. Gayman, County Treasurer, R. P. Roope, County Clerk, C. F. Buzzi, Sheriff, Plaintiffs in Error, v. Mary A. Mullen, Defendant in Error, 161 Pac. 1051, No. 7590 in this court and decided at this time. The opinion and syllabus in the last-mentioned case is adopted as the opinion and syllabus in this case.

The judgment is reversed and the cause remanded, with instructions to dismiss plaintiff's petition.

TURNER, SHARP, and HARDY, JJ., concur. KANE, C. J., not participating.

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(58 Okl. 494)

GAYMAN, County Treasurer, et al. v. WEATHERS et al. (No. 7593.)

(Supreme Court of Oklahoma. Oct. 10, 1916.)

(Syllabus by the Court.)

SPECIAL ASSESSMENTS.

Same as syllabus in case of John J. Gayman, County Treasurer, R. P. Roope, County Clerk, and C. F. Buzzi, Sheriff, Plaintiffs in Error, v. Mary A. Mullen, Defendant in Error, 161 Pac. 1051, No. 7590 in this court, and decided at this time.

Error from District Court, Lincoln County; Chas. B. Wilson, Jr., Judge.

Action by J. C. Weathers and another against John J. Gayman, County Treasurer, and others. Judgment for plaintiffs, and defendants bring error. Reversed and remanded, with instructions to dismiss petition.

John J. Davis, of Chandler, and Grant Stanley, of Oklahoma City, for plaintiffs in error. Erwin & Erwin, of Wellston, for defendants in error.

THACKER, J. The plaintiffs in error will be designated as defendants, and the defendants in error as plaintiffs, in accord with their respective titles in the trial court.

This is an action by plaintiffs against defendants to vacate and set aside a special assessment of $440, based upon a finding of a drainage benefit, and to perpetually enjoin the collection of the same against their northwest quarter (¼) of the northwest quarter (¼) of section twenty-three (23), in township fourteen (14) north, of range two (2) east of the Indian meridian, in Lincoln county, as a part of drainage district No. 1, of said county. From a judgment in favor of the plaintiffs, the defendants bring the case here for review.

Except as to the real property affected and the owner of the same this case is practically identical in the facts thereof and precisely identical in the questions presented for decision with the case of John J. Gayman, County Treasurer, R. P. Roope, County Clerk, and C. F. Buzzi, Sheriff, Plaintiffs in Error, v. Mary A. Mullen, Defendant in Error, 161 Pac. 1051, No. 7590 in this court and decided at this time. The opinion and syllabus in the last-mentioned case is adopted as the opinion and syllabus in this case.

The judgment is reversed, and the cause remanded, with instructions to dismiss plaintiff's petition.

TURNER, SHARP, and HARDY, JJ., concur. KANE, C. J., not participating.

(63 Okl. 47)

PECK v. HUGHEY et al. (No. 5896.)

(Supreme Court of Oklahoma. Dec. 19, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⊂⊃773(5)—BRIEFS—REVERSAL FOR FAILURE TO FILE.

Where plaintiff in error has served and filed his brief in compliance with the rules of this court, and defendant in error has neither filed a brief nor offered any excuse for his failure to do so, and where the brief filed appears reasonably to sustain the assignments of error, the Supreme Court may reverse the case in accordance with the prayer of the petition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3110; Dec. Dig. ⊂⊃773(5).]

Error from District Court, Alfalfa County; James B. Cullison, Judge.

Action between Willis H. Peck and D. A. Hughey and another. There was a judgment for the latter, and the former brings error. Reversed and remanded.

Titus & Carpenter, of Cherokee, for plaintiff in error. Beeman & Kirkendall, of Cherokee, for defendants in error.

HARDY, J. Plaintiff in error filed his brief herein February 11, 1916, and duly served same upon defendant in error, since which time defendant in error has neither filed a brief nor offered an excuse for such failure; and under the repeated decisions of this court, we are not required to search the record to find some theory upon which the judgment of the court below may be sustained, but may, where plaintiff in error's brief appears reasonably to sustain the assignments of error, reverse the case in accordance with the prayer of the petition.

It appearing that the assignments of error relied upon are reasonably sustained by the brief filed, the judgment is reversed, and the cause remanded. All the Justices concur.

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(62 Okl. 17)

MISSOURI, K. & T. RY. CO. v. LYNN.
(No. 7682.)

(Supreme Court of Oklahoma. Dec. 5, 1916.)

(Syllabus by the Court.)

1. CARRIERS ⟸313 — CARRIAGE OF PASSENGERS—ACTIONS—PARTIES.
W. made an interstate shipment of live stock by defendant's line of railway, as a common carrier, with L. as caretaker of said stock, under a written contract by the provisions of which W. agreed to indemnify and hold harmless the said carrier for any damages it might be required to pay to any person accompanying said live stock. L., while acting as caretaker, sustained injury, and sued the carrier for damages. *Held*, that W. is not a necessary party to the action, and that it was not error for the court to deny the motion of defendant to make W. a party.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. ⟸313.]

2. CARRIERS ⟸242—CARRIAGE OF "PASSENGERS"—WHO ARE.
A person riding in the caboose of a freight train as a caretaker of live stock carried in such train is a "passenger," and it is the duty of the defendant railroad company to exercise toward him the highest reasonable and practicable skill, care, and diligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 980; Dec. Dig. ⟸242.

For other definitions, see Words and Phrases, First and Second Series, Passenger.]

3. CARRIERS ⟸298(2)—CARRIAGE OF PASSENGERS—RISK ASSUMED.
A passenger on a freight train assumes the ordinary risks of injury from jerks, jars, and jolts incident to the movement of such trains, and, in order to warrant a recovery for an injury sustained from a jolt or jar, must show that such jolt or jar was unusual, extraordinary, or unnecessary.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1192, 1205, 1206; Dec. Dig. ⟸298(2).]

4. CARRIERS ⟸307(4, 6)—CARRIAGE OF PASSENGERS—NOTICE OF INJURY.
Where an action is brought to recover damages for personal injury sustained by a caretaker of an interstate shipment of live stock under a written contract containing the provision that as a condition precedent to recovery of damages for personal injuries sustained by such caretaker, notice in writing of the claim for damages on account of such injury must be given the carrier within 30 days of the date of the injury; such provision being reasonable and valid, the failure to give such notice is a complete bar to such action.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1255, 1257–1259, 1491; Dec. Dig. ⟸307(4, 6).]

5. CARRIERS ⟸32(2)—CARRIAGE OF PASSENGERS—WAIVER OF CONDITIONS.
The provision of said contract requiring notice is a condition precedent to the maintenance of such action, and must be substantially complied with by such caretaker before he can maintain a cause of action against the carrier, and the carrier cannot waive nor ignore such terms of the contract, since to do so would violate the federal act regulating interstate commerce, and permit discrimination by the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 84; Dec. Dig. ⟸32(2).]

Commissioners' Opinion, Division No. 4. Error from District Court, Osage County; R. H. Hudson, Judge.

Action by Patrick Lynn against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Clifford L. Jackson, W. R. Allen, and M. D. Green, all of Muskogee, for plaintiff in error. Leahy & MacDonald, of Pawhuska, for defendant in error.

EDWARDS, C. For convenience and brevity the parties will be referred to as plaintiff and defendant, according to their position in the lower court. The plaintiff, Patrick Lynn, instituted this suit in the district court of Osage county against the defendant, Missouri, Kansas & Texas Railway Company, to recover damages for personal injuries sustained by plaintiff while a passenger on defendant's freight train as caretaker in charge of eight cars of cattle shipped by C. T. and J. E. White, from a point in Oklahoma to the National Stockyards at East St. Louis, Ill. The injuries complained of are alleged to have been caused by a sudden stop of said train in the defendant's yards at Ellis, Mo., by which plaintiff was thrown against the side and floor of the caboose, thereby breaking two of his ribs and injuring his back, from which injury it is alleged he suffered great physical pain and mental anguish, and will continue to so suffer, and whereby his earning capacity has been permanently impaired and he has been rendered unable to perform manual labor. The defendant by way of answer, among other things, alleges that the shipment of cattle was under a special contract, which is attached to the answer as Exhibit A. Which contract provides for two rates applicable to such shipments, the lesser of which applied to the shipment under which the live stock moved, and that under said rate defendant's liability is limited as provided in said contract; that the plaintiff is bound by all the terms and conditions of said contract and is barred from maintaining this action; that by the terms of said contract it is provided that the party in charge of said shipment would be carried only on the train drawing said cars, in accordance with the rules on back of said contract, a failure to observe which would be an absolute bar to any right to recover damages for any injuries resulting from failure to observe the same, and every one who should receive any injuries by reason of the negligence of the carrier should have no right of action therefor unless notice in writing of the claim for damages on account of such injury be given to some local agent of the carrier or the general manager at St. Louis within 30 days of the date of the injury, such notice to contain a statement of certain facts set out in the contract. The

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defendant further specifically pleads section 5 of said contract, requiring notice in writing of any injury sustained by any person in charge of said live stock within 30 days, and alleges that no notice was ever given as required in said paragraph 5. Further answering, the defendant alleges that the shippers, C. T. and J. E. White, by the terms of said contract agreed to hold the carrier harmless from all claims of injuries to persons accompanying said live stock. Defendant prays that said shippers be made parties defendant, and that if any judgment be rendered in favor of the plaintiff, it have judgment over against the said shippers for the amount thereof, with costs and expenses. The plaintiff, among other things, by way of reply, alleges that plaintiff upon his arrival at St. Louis presented his drovers' contract to the validating agent to have issued to him a ticket for his return transportation; that said agent at the time informed plaintiff that the general claim agent of defendant company desired to see him at the general office at St. Louis and arrange a settlement for plaintiff's injuries; that plaintiff went to the office of the general claim agent at St. Louis, and said claim agent offered to settle with plaintiff for the damages sustained, and plaintiff informed the agent at the time the full facts concerning his injuries, and stated to said agent that he did not know the extent of his injuries nor the character of the same, and that it was impossible for him to tell the company whether the injuries were permanent, and informed the company at the time that if the injuries were permanent, it would have to stand responsible for damages to him; that said officer did not demand that he make out or reduce to writing said statement and made no objection to the form of the claim made by plaintiff; that on his return to Oklahoma about 2 days thereafter the son of plaintiff saw one of the claim agents of the defendant and spoke to him of the injury of plaintiff, and the agent at the time agreed to call upon plaintiff and take a statement, but did not do so. That plaintiff thereafter wrote to said claim agent at Oklahoma City, and was by him directed to see a physician at Big Heart, Okl., and thereafter plaintiff wrote to the general claim agent at St. Louis and made a claim for damages, but received no reply thereto; that since the day of the injury the defendant had full notice and actual knowledge of all the facts and circumstances connected with and concerning such injury of plaintiff, and at all times assented to the verbal statement instead of the written statement, and by reason thereof waived the terms of the contract. Plaintiff further alleges that said contract is unreasonable, in that it was impossible for the plaintiff, within 30 days after said injury, to ascertain or discover the full extent thereof and whether or not it was permanent. The case was tried to a jury, and judgment rendered in favor of plaintiff in the sum of $2,000, from which judgment the defendant in due time appealed to this court. The defendant argues several propositions as grounds for reversal of the judgment rendered, which will be considered in the order presented.

[1] The first assignment is based upon the following clause in the live stock contract:

"* * * The shipper * * * will hold the carrier harmless from any and all claims for injuries to persons accompanying said live stock, as aforesaid, resulting from carrier's or employé's negligence, or otherwise, and will indemnify it, for any damages it may be required to pay by reason thereof. * * *"

And it is contended that under sections 4690 and 4691, Revised Laws of 1910, the shippers should have been made parties to the action. Those sections provide that any one having an interest in the subject of an action may be made a party, and that any person may be made a defendant who has or claims any interest in the controversy adverse to the plaintiff, or who is a necessary party to the complete determination of the question involved. It is also insisted that under the law of indemnity (article 10, c. 12, Revised Laws of 1910), the plaintiff was entitled to have the shippers made parties defendant. There is authority which would seem to have warranted the trial court in making the shippers parties to the action. Boyer v. Lucas & St. L., etc., Ry. Co. (Tex. Civ. App.) 72 S. W. 1038; Houston, etc., Ry. Co. v. Douglas (Tex. Civ. App.) 120 S. W. 1048. It, however, can hardly be said that one who indemnifies another against claims for injury and damages has such an interest in a suit for damages in actions for tort as will require the indemnifier to be made a party to the action. Under the second subdivision of section 1080, Revised Laws of 1910, there could be no recovery by the indemnified without payment by him. The general rule is stated as follows:

"The right to sue for indemnity for damages resulting from the neglect, misfeasance, or malfeasance of defendant does not accrue until payment has been made by plaintiff." 22 Cyc. 98 (D).

This court, in the case of Armstrong v. Poland, 156 Pac. 220, says:

"The first assignment, that 'the court erred in refusing to make additional parties defendant,' cannot be sustained. The cases relied upon by counsel are not in point, for the reason that in those cases the parties sought to be brought into the case were interested in the subject-matter of the action. Not so in this case. It would have been entirely proper, and perhaps the better practice, to have brought the parties in, and certainly for the best interests of the defendant, but there is no statute requiring the court to comply with the motion. The statute (section 4696, Rev. Laws 1910) is only mandatory where 'a determination of the controversy cannot be had without the presence of the other parties.' No such state of facts exists here. It was discretionary with the trial court, and we cannot say that there was an abuse of discretion."

We, therefore, held that the shippers were not necessary parties, and the denial of the motion is not reversible error.

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[2, 3] Upon the second assignment it is contended that the stopping of the train at the time plaintiff alleges he was injured was made in the usual and customary manner for a train of the length and character of the one in question; that a short stop was necessary, owing to difficulty in opening a switch; that such stop was one that might be expected to occur in the handling of this class of traffic, and was not a thing that could be avoided; and that there was no negligence on the part of the defendant in so handling its train, and no liability arose in favor of the plaintiff. The courts recognize that persons traveling upon freight trains must bear the inconveniences and risks arising from the ordinary operation of such trains; that bumping, jolting, lurching, and jerking is necessary and usual in the handling of freight trains, and it is only where the injury is caused by an extraordinary or unusual jar, jolt, or lurch, due to negligence in the handling of the train, that a carrier is liable. Hedrick v. Mo. Pac. Ry. Co., 195 Mo. 104, 93 S. W. 268, 6 Ann. Cas. 793; St. L., etc., Ry. Co. v. Gosnell, 23 Okl. 588, 101 Pac. 1126, 22 L. R. A. (N. S.) 892; St. L., etc., Ry. Co. v. Kerns, 41 Okl. 167, 136 Pac. 169. If there is evidence of an unusual or extraordinary jar, jerk, or lurch causing the injury of plaintiff, an inference of a breach of duty arises which places the burden upon the defendant to show that the injury was the result of an accident or some unforeseen condition, which the exercise of due skill, foresight, or diligence could not have prevented. 4 R. C. L. § 634, p. 1213; 5 R. C. L. § 715, p. 80; Dorr v. Lehigh Valley Ry. Co., 211 N. Y. 369, 105 N. E. 652, L. R. A. 1915D, 368, Ann. Cas. 1915C, 763; McGregor v. Great Northern Ry. Co., 31 N. D. 471, 154 N. W. 261; St. L. & S. F. Ry. Co. v. Fitts, 40 Okl. 685, 140 Pac. 144, L. R. A. 1916C, 348; Ramsey v. McKay, 44 Okl. 744, 146 Pac. 210.

Without setting out the evidence and the circumstances under which plaintiff sustained the injury complained of, we hold that the evidence clearly establishes that an unusual and extraordinary jar or jolt was given the caboose in which plaintiff was riding, caused by the sudden stop of the engine, brought about by the inability of the brakeman to promptly unlock the switch. The jury was properly instructed on this point.

[4] The third assignment argued by the plaintiff is in these words:

"The provisisons of the shipping contract were valid and reasonable; defendant did not, and could not, waive the provision for written notice, and plaintiff, having failed to give such notice, cannot recover."

And the clause of the contract here under consideration, section 7, is as follows:

"7. The shipper or party or parties in charge of said cars will only be carried on the train drawing said cars, in accordance with the rules on the back hereof, and the failure to observe such regulations shall be an absolute bar to any right to recover damage for any injuries or deaths resulting from such failure to observe the same. And he and they and each and every of them, who shall receive any injuries by reason of the negligence of the carrier, or otherwise, shall have no right of action therefor, unless notice in writing of the claims for damages on account of such injury be given the nearest, or any other convenient local agent of the carrier or the general manager of said railway company at St. Louis, Mo., within 30 days of the date of the injury. Such notice must state the time, place and particulars of the injury and the nature and the extent of the damages, and no other or further damages can be recovered than those set forth in this notice."

This contract being for an interstate shipment, the question involved is governed exclusively by the federal law. C., R. I. & P. Ry. Co. v. Hardwick, etc., 226 U. S. 426, 33 Sup. Ct. 174, 57 L. Ed. 284, 46 L. R. A. (N. S.) 203; Gulf, Colo. & Santa Fé v. Hefley & Lewis, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910; Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257.

In the Hardwick Case, supra, Mr. Justice White said:

"As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the state has a right to exert its authority in the absence of legislation by Congress, it must follow, in consequence of the action of Congress to which we have referred, that the power of the state over the subject-matter ceased to exist from the moment that Congress exercises its paramount and all-embracing authority over the subject. We say this because the elementary and long-settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme."

In the Hefley & Lewis Case, supra, it is said:

"It is unnecessary to pursue this discussion further. The state statute and the national law operate upon the same subject-matter, and prescribe different rules concerning it. The national law is unquestionably one within the competency of Congress to enact under the power given to regulate commerce between the states. The state statute must therefore give way."

And in the Croninger Case, supra, it is held:

"To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable, and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment. The duty to issue a bill of lading and the liability thereby assumed are covered in full; and, though there is no reference to the effect upon state regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject."

This court, in the case of St. Louis & S. F. Ry. Co. v. Wynn, 153 Pac. 1156, held:

"This action, being based upon a contract of interstate shipment, section 9, art. 23, of the Constitution, which provides: 'Any provision of

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any contract or agreement, express or implied, stipulating for notice or demand other than such as may be provided by law, as a condition precedent to establish any claim, demand, or liability, shall be null and void'—is without force, being abrogated under the Carmack Amendment of June 29, 1906 (34 Stat. 593, c. 3591, § 7; pars. 11, 12, U. S. Comp. Stat. 1913, § 8592)."

See, also, C., R. I. & P. Ry. Co. v. Gray et al., No. 7826, 165 Pac. 157, not yet officially reported.

[5] The stipulation in the contract requiring a notice in writing of the injury to be given within 30 days is reasonable, and the burden is upon the plaintiff to show a compliance with the contract in this regard. Failing to do so, his right of action is barred. St. L. & S. R. Ry. Co. v. Zickafoose, 39 Okl. 302, 135 Pac. 406; C., R. I. & P. Ry. Co. v. Conway, 34 Okl. 356, 125 Pac. 1110; C., R. I. & P. Ry. Co. v. Craig, 157 Pac. 87, not yet officially reported; St. L. & S. F. Ry. Co. v. Ladd, 33 Okl. 160, 124 Pac. 461; M., K. & T. Ry. Co. v. Harriman, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690; K. C. South. Ry. Co. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683.

It has frequently been held, and is now settled law that the common-law liability of a carrier in cases similar to the case at bar may be limited by contract entered into in consideration of a reduced rate of freight. Chicago, etc., R. Co. v. Miller, 226 U. S. 513, 33 Sup. Ct. 155, 57 L. Ed. 323; Chicago, etc., R. Co. v. Latta, 226 U. S. 519, 33 Sup. Ct. 155, 57 L. Ed. 328; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683; Missouri, K. & T. R. Co. v. Harriman Bros., 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690; Chicago, etc., R. Co. v. Cramer, 232 U. S. 490, 34 Sup. Ct. 383, 58 L. Ed. 697; Great Northern R. Co. v. O'Connor, 232 U. S. 508, 34 Sup. Ct. 380, 58 L. Ed. 703; Atchison, etc., R. Co. v. Robinson, 233 U. S. 173, 34 Sup. Ct. 556, 58 L. Ed. 901; Pierce Co. v. Wells Fargo & Co., 236 U. S. 278, 35 Sup. Ct. 351, 59 L. Ed. 576. See, also, the decisions of this court in St. Louis, etc., R. Co. v. Zickafoose, supra; Chicago, etc., R. Co. v. Bruce, not yet officially reported, 150 Pac. 880; St. Louis, etc., R. Co. v. Pickens, not yet officially reported, 151 Pac. 1055; St. Louis, etc., R. Co. v. Wynn, not yet officially reported, 153 Pac. 1156.

This shipment is governed by the Carmack Amendment to the Hepburn Act, and one of the principal purposes of this act is to require uniformity in the application of interstate commerce laws; and, if it should be held that the carrier may waive or ignore this condition of the contract or not as it may elect, the way for discrimination is open and legally sanctioned. In the case of Phillips Co. v. Grand Trunk W. R. Co., 236 U. S. 662, 35 Sup. Ct. 444, 59 L. Ed. 774, the court says:

"The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law, and to treat all shippers alike would have made it illegal for the carriers, either by silence or by express waiver, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission and the varying periods of limitation of the different states, where a suit was brought in a court of competent jurisdiction, or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others, would be to prefer some and discriminate against others, in violation of the terms of the commerce act, which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate, not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier. The railroad company, therefore, was bound to claim the benefit of the statute here, and could do so here by general demurrer. For when it appeared that the complaint had not been filed within the time required by the statute, it was evident, as matter of law, that the plaintiff had no cause of action. The carrier not being liable to the plaintiff for overcharges collected more than four years prior to the bringing of this suit, it was proper to dismiss the action."

See, also, Sullivan v. Mercantile Town Mutual Ins. Co., 20 Okl. 460, 94 Pac. 676, 129 Am. St. Rep. 761; G. F. & A. Ry. Co. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948.

We, therefore, conclude that the carrier may not waive the condition of the contract, requiring the giving of notice as contained in paragraph 7, and, since the notice required by the contract in question was not given, such provision being reasonable and valid, the failure to give same is a complete bar to the action of the plaintiff.

The judgment of the lower court is therefore reversed.

PER CURIAM. Adopted in whole.

(62 Okl. 81)

KOMALTY v. CASSIDY-SOUTHWEST COMMISSION CO. et al. (No. 7046.)

(Supreme Court of Oklahoma. June 27, 1916. On Motion for Rehearing, Jan. 2, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⟸327(2) — "NECESSARY PARTIES."

One whose rights may be affected by a reversal or modification of a judgment appealed from is a "necessary party" in the appellate court.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1795, 1814, 1831, 1834; Dec. Dig. ⟸327(2).]

For other definitions, see Words and Phrases, First and Second Series, Necessary Parties.]

On Motion for Rehearing.

2. APPEAL AND ERROR ⟸336(1)—PARTIES—NECESSARY PARTIES.

If a party in the trial court can, by a reversal or modification of the judgment appealed from, be, in any way, affected, he is a necessary party to the appeal; and, in case such person

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is not made a party in the appellate court, the appeal should be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1868–1874; Dec. Dig. ⊂⊃ 336(1).]

Commissioners' Opinion, Division No. 6. Error from District Court, Caddo County; Frank Matthews, Judge.

Action by Harry Komalty against the Cassidy-Southwest Commission Company and others. There was a judgment for defendants, and plaintiff brings error. Writ dismissed.

A. J. Morris, of Anadarko, for plaintiff in error. C. H. Carswell, of Anadarko, Blake & Boys, of Oklahoma City, and A. P. Johnson and F. A. Lane, both of Carnegie, for defendants in error.

CLARK, C. This is an action in ejectment, brought by Harry Komalty against several hundred defendants, to recover an undivided one-third interest in and to the southwest quarter of section 6, township 7, range 13 west, in Caddo county (being the land upon which the town of Carnegie is now situate).

The plaintiff claims that he and two other Indians, named Adle-gam-ah and Duke-Poor-Buffalo, were the true and only heirs at law of one Pau-tautle-ty, a deceased Kiowa Indian to whom an allotment of the land was made, and on August 25, 1901, a patent issued. Further allegations of the petition are that on March 2, 1903, Pau-tautle-ty died, and Adle-gam-ah and Duke-Poor-Buffalo, claiming to be the only heirs at law of the deceased, executed a deed by which they attempted to convey the land to the defendant Elmer E. Grinstead, who, with the other defendants, are in the open and exclusive possession under claim of title to the entire quarter section, by virtue of said deed; and plaintiff prays judgment against all of the defendants for the recovery of his undivided one-third interest therein, and that his title thereto be quieted. The defendant Elmer E. Grinstead answered by general denial, and disclaimed any interest in the real estate. Each of the other answering defendants alleges that Grinstead, after entering into possession on March 2, 1903, caused the same to be surveyed and platted into streets, alleys, parks, blocks, and parcels of land, and sold and conveyed separate lots to respective purchasers, who entered into possession, and that at the time of bringing this action there were a large number of persons severally claiming separate and specified lots, blocks, or parcels of said land, and all of which were in the open and exclusive possession, under claim of title, of the several record owners thereof, and that he was the sole and exclusive owner of only a specified portion of said quarter section, designated in accordance with the plat of said town, and that he does not claim to be the owner or purchaser of any other part or portion of said land, and that he claims said real estate under and by virtue of said allotment, patent, deed to Grinstead, plat, and by deed from Grinstead under mesne conveyances. To these several answers the plaintiff filed a general denial. Upon the return of a general verdict in favor of the defendants, judgment was duly entered—

"adjudging and decreeing that the plaintiff has no estate, right, title, claim, or interest in or to the southwest quarter of section 6, township 7, range 13, west, in Caddo county, or any part of parcel thereof, and that the title of the defendants in and to said lands and premises, and each and every part and parcel thereof, be and is hereby quieted against the said plaintiff and all and every person or persons claiming by, through, or under him, and the defendants have and recover against said plaintiff herein their costs laid out and expended."

[1] A number of the defendants in error have moved a dismissal of the appeal herein, assigning various reasons therefor, such as the failure to make certain defendants below parties to this appeal; to serve case-made upon them, or to give notice of settlement thereof; to serve or obtain waiver of service of summons in error upon other defendants; and to have the action revived in the name and against the heirs of certain defendants below, who died after the rendition of the judgment complained of, and more than one year prior to the date of filing of such motion, such heirs not having been made parties to these proceedings in error. The facts upon which these motions are founded are not seriously contested by plaintiff in error, but he resists a dismissal upon the ground that, as each defendant made claim to certain specific subdivisions of the land, and asserted no right to or interest in any portion thereof which was claimed by any other defendant, a reversal of the judgment would be binding upon the defendants in error, even though invalid as to other defendants not parties to these proceedings in error. This presents the only question necessary to be considered in passing upon these motions. We do not understand this to be a proper test by which to determine the necessity of making such persons parties to an appeal.

The case of Adams v. Higgins, 147 Pac. 1011, was quite similar in some respects to the one at bar. The plaintiff set up an equitable estate and claim of ownership to a quarter section of land upon which a portion of the city of Oklahoma City is now situated. The defendants were the patentee from the government and numerous other persons who were grantees of the patentee, and their mortgagees, and others who were alleged to have some claim of title to some portion of the land. The prayer was that the plaintiff "be adjudged and decreed to be the equitable owner of said real estate, and that he be restored to and recover the possession of said land from each and all of the defendants."

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The trial court sustained demurrers filed by a large number of the defendants. The plaintiff elected to stand upon his pleadings, and judgment was rendered, dismissing his case as to those demurring defendants. Here, upon issue joined by the pleadings a trial was had, a verdict returned, and a judgment was rendered thereon. In the Adams Case, supra, as in the one at bar, all the defendants claimed title through mesne conveyances under the patentee. The Adams petition did not state a cause of action against the defendants, and the allegations of the Komalty petition were not sustained by the proof. In each case judgment was rendered, denying the plaintiff the relief he sought. In the Adams Case the court held that as the suit was against defendants as grantees, or parties holding under such grantees, and of the original patentee, each defendant would be affected by a reversal of the judgment, and was a necessary party to the appeal. Here a joint judgment was rendered in favor of all the defendants below. A reversal of that judgment would vacate the decree which quieted the title of the defendants below to the entire quarter section of land as against the plaintiff. Under the repeated decisions of this court all of the defendants below are necessary parties here. Adams v. Higgins, supra; Chickasha Light, Heat & Power Co. v. Bezdicheck, 33 Okl. 688, 126 Pac. 821; Grounds et al. v. Dingman et al., 160 Pac. 883; Keet & Roundtree D. G. Co. v. Rogers, 156 Pac. 179.

The several motions to dismiss the appeal are sustained.

PER CURIAM. Adopted in whole.

On Motion for Rehearing.

ROBBERTS, C. The plaintiff below alleges, in substance: That the tract of land involved, to wit, the southeast quarter of section 6, township 7, range 13, W. I. M., was patented or deeded to an Indian, Pau-tautle-ty, on August 25, 1901. He died and left a widow, Adle-gam-ah, and a daughter, Adle-to-hoo-lah, who was the mother of the plaintiff. She afterwards died and left the plaintiff, Harry Komalty, her only heir. Pau-tautle-ty also had a son, Duke-Poor-Buffalo. That the widow of Pau-tautle-ty, viz. Adle-gam-ah, the son, Duke-Poor-Buffalo, and this plaintiff, are the only heirs of Pau-tautle-ty. On the 2d day of March, 1903, Adle-gam-ah and Duke-Poor-Buffalo deeded the entire tract to one Elmer Grinstead, and Grinstead, after the tract had been surveyed, platted, and divided into lots, blocks, and alleys, directly and indirectly, deeded to the several numerous defendants herein. Thereafter the plaintiff deeded his interests in the premises to the plaintiff in error, Boone D. Hite, and he is now the owner of whatever interest the plaintiff, Harry Komalty, may have had in the premises.

[2] To the plaintiff's petition, the defendants for answer (1) made general denial; and (2) specially denied that Harry Komalty is the grandson or heir of Pau-tautle-ty. Trial was had, and at the conclusion the court directed the jury to return a verdict for the defendants. Plaintiff appeals. Some of the defendants below were made parties to the appeal, but a large majority were not. No notice or service of any kind was served on those parties who were not made parties to the appeal. This court dismissed the appeal on that ground.

We are clearly of the opinion that all parties interested were not made parties of the appeal, and that the appeal was properly dismissed. For that reason, the motion for rehearing should be denied.

We may add here, however, that we have examined the evidence in reference to the issue, as to whether Harry Komalty was the grandson and heir of Pau-tautle-ty, and agree with the trial court that the evidence failed entirely to sustain that fact, and the court did not err in directing a verdict. A rehearing should be denied.

PER CURIAM. Adopted in whole.

(62 Okl. 30)

FIRST NAT. BANK OF TALOGA et al. v. FARMERS' STATE GUARANTY BANK OF THOMAS et al. (No. 7735.)

(Supreme Court of Oklahoma. Dec. 12, 1916.)

(Syllabus by the Court.)

1. NEW TRIAL ⟸1, 130—GROUNDS—ENUMERATION.

The statutory enumeration of grounds for a new trial is in this jurisdiction exclusive; and any matter for which a new trial may be granted is waived if not embraced in the motion therefor.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 1-3, 257-262; Dec. Dig. ⟸1, 130.]

2. NEW TRIAL ⟸99 — NEWLY DISCOVERED EVIDENCE—RIGHT TO.

The rule regarding the granting of new trials on the ground of newly discovered evidence requires that the evidence comply with the following conditions: (1) It must be such as will probably change the result; (2) it must have been discovered since the trial; (3) it must be such as could not have been discovered before the trial by the exercise of due diligence; (4) it must be material to the issue; (5) it must not be merely cumulative to the former evidence; (6) it must not be to merely impeach the former evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 201, 207; Dec. Dig. ⟸99.]

3. NEW TRIAL ⟸102(8)—MOTION FOR CONTINUANCE—DENIAL.

Where the application for a new trial on the grounds of newly discovered evidence discloses that at the time of the trial the name of the witness and the purport and significance of the testimony which would have been given had he been present was known to the movant, and no application for a continuance asked, the same

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is insufficient to justify the court to sustain the same.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 207; Dec. Dig. ⊂=102(8).]

Commissioners' Opinion, Division No. 3. Error from District Court, Custer County; Thomas A. Edwards, Judge.

Action between the First National Bank of Taloga, Okl., and others and the Farmers' State Guaranty Bank of Thomas, Okl., and another. The latter were granted a new trial, and the former bring error. Reversed, with directions.

Adams & Smith, of Taloga, and I. H. Lookabaugh, of Watonga, for plaintiffs in error. Geo. T. Webster and Phillips & Mills, all of Clinton, for defendants in error.

HOOKER, C. One of the material questions presented here is whether the trial court is authorized to grant a new trial on account of newly discovered evidence when the name of the witness and the purport of his testimony were known to the moving party before the trial, and the trial was had without any application for a continuance being made on account of the absent witness, or, in other words, may a party cognizant, of the importance of the testimony that would be given by the absent witness, the name of whom is known to him, proceed to trial and take his chance of success, and then, when he loses, procure a new trial on account of newly discovered testimony?

The facts here disclose that the defendants in error proceeded to trial in the lower court fully cognizant of the name and the purport of the testimony that would be given by the witness Curtis, and did not file any affidavit for a continuance on account of the absence of said witness, but proceeded to trial and were unsuccessful, for the reason that they were unable to identify the mules alleged to have been converted by the plaintiffs in error upon which it claims to have had a valid chattel mortgage. On account of the absence of this evidence the trial court sustained a demurrer to the evidence of the defendants in error. No motion for a new trial was filed, but after expiration of 30 days an application was had for a new trial based upon the ground of newly discovered evidence supported by a motion and affidavit which in itself shows that the name of the witness and the purport of the testimony was known to the defendants in error at the time it entered upon the trial of said cause. The lower court granted this new trial, from which order the plaintiffs in error have appealed, and contend: First, that the proposed evidence is not newly discovered after the trial, as provided by statute; second, that the proposed new evidence will not change the result; third, that the degree of diligence required by the statute is not shown in the application.

[1] The grounds for a new trial in this state are enumerated by the statute. This court, in St. L. Ry. Co. v. Lewis, 39 Okl. 677, 136 Pac. 396, said:

"The statutory enumeration of grounds for a new trial is in this jurisdiction exclusive; and any matter for which a new trial may be granted is waived if not embraced in the motion therefor."

In the application here there was but one ground attempted to be stated; therefore the court could not consider any other. That ground was the discovery of new evidence; hence we must consider this case upon the sole proposition of whether the evidence set forth in the motion is sufficient to come within the statute. If so, the trial court was right; if not, the trial court committed error upon a simple and unmixed question of law.

[2] We are fully aware that appellate courts are slow to interfere or disturb the ruling of the trial court in granting or refusing applications for new trials, inasmuch as the same is largely a discretionary matter.

This court, in the case of Vickers v. Carey Company, 151 Pac. 1023, L. R. A. 1916C, 1155, said:

"A rule of wide recognition regarding the granting of new trials on the ground of 'newly discovered evidence' exacts that the evidence fulfill the following requirements: (1) It must be such as will probably change the result if a new trial be granted; (2) it must have been discovered since the trial; (3) it must be such as could not have been discovered before the trial by the exercise of due diligence; (4) it must be material to the issue; (5) it must not be merely cumulative to the former evidence; (6) it must not be to merely impeach or contradict the former evidence."

And in the body of the opinion the court says:

"While 'newly discovered evidence,' material to the party applying, which he could not with reasonable diligence have discovered and produced at the trial, is ground for a new trial, applications therefor founded on such evidence are not favored in law. * * *"

[3] The application here does not allege that the evidence is newly discovered, but is a request for a new trial on the sole ground of the testimony of an absent witness whose name and the purport of whose testimony was known before the trial proceeded. As we view it, the existence of the evidence itself, as distinguished from the whereabouts of the witness, must have been discovered since the trial in order to authorize a new trial.

In 29 Cyc. 881, it is said:

"Newly discovered evidence material for the party applying which he could not with reasonable diligence have discovered and produced at the trial is ground for a new trial. * * *

"A new trial on the ground of newly discovered evidence will not be granted for evidence that was known to the unsuccessful party at the time of the trial. * * *

"Facts known to the movant at the time of the trial are not newly discovered because he did not then know the whereabouts of a witness who can testify thereto. * * * Where the movant was unable to procure the attendance at the trial of material witnesses whose testimony was then known to him, he must have asked for a continuance or delay to enable him to produce such witnesses or evidence.

"Evidence discovered during the progress of

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the trial must have been offered, if possible, although out of the regular order of proof, and even during or after argument, or, it seems, after the submission of the case to the jury. Where necessary, a delay must have been asked for by the movant to enable him to procure such evidence, and, where possible, subpœnas must have been issued and served upon the necessary witnesses. Where it was discovered by the movant during the trial that an absent witness had knowledge of a transaction in controversy, any necessary delay must have been requested to procure his testimony, although the movant did not then know to what such absent person could testify."

And at page 956 it is said:

"It must allege that such evidence was not known to the movant before the verdict, and show that he could not with reasonable diligence have discovered and produced it at the trial."

The Supreme Court of the territory, in Watkins v. United States, 5 Okl. 729, 50 Pac. 88, said:

"He does not pretend a lack of knowledge as to what the witness would testify had he been present at the trial, but only shows that the whereabouts of the witness could not be found or ascertained at the time of the trial, although he had made diligent search, for a long time prior thereto, to ascertain his whereabouts. To be ground for a new trial, the knowledge of what the witness would be expected to testify must have come to the defendant after it was too late to be procured and used upon the trial. The defendant, with full knowledge of what Ansel might have sworn to had he been present at the trial, knowing of his absence, and that his whereabouts was unknown, without making application for a continuance, announced himself ready for trial, and went to trial. His application for a new trial, on the ground of newly discovered evidence, was [therefore] properly overruled."

Likewise the Supreme Court of California, in Scanlan v. Ry. Co., 128 Cal. 586, 61 Pac. 271, said:

"A new trial was sought, and Donaldson's testimony was urged as the newly discovered evidence, but it appears from the affidavits that this evidence was in no sense newly discovered. Defendant's engineers had knowledge through their attorney of the materiality of Donaldson's testimony before the trial, and took certain steps to find him and procure his attendance. At the time of the trial they had not discovered him. Knowing of the importance of his testimony, defendants should have moved for a continuance, and, failing to do so, it must be held that it entered upon the trial at its peril."

This court, in McCants v. Thompson, 27 Okl. 708, 115 Pac. 600, said:

"The first duty of a party, surprised at the trial * * * is to take proper legal steps to continue or delay the cause. He cannot neglect this duty in the hope of securing a verdict in spite of such surprise and then obtain a new trial. * * * The defendant, having failed to comply with this rule, is not entitled to a new trial on such ground.

" 'To entitle the party to a new trial on the ground of newly discovered evidence, the motion should set forth the names of the witnesses [etc.], and that the evidence by reasonable diligence could not have been discovered before the trial.' * * *

"The facts set out in the affidavits in support of the motion for a new trial appear to have been known to the defendant at the time of the trial. * * * We cannot say that the trial court erred in refusing to grant a new trial on account of surprise or newly discovered evidence."

The following authorities—Killebrue v. Railway Co., 137 Ga. 681, 74 S. E. 270; Adamson, Adm'r, v. Traction Co., 111 Va. 556, 69 S. E. 1055; Carlton v. Monroe, 135 Mo. App. 172, 115 S. W. 1057; Bertram v. Dredge Co., 32 Ind. App. 199, 69 N. E. 479; Nehring v. Ricker, 126 Ill. App. 262; State v. Gregory, 31 S. D. 425, 141 N. W. 365; State v. Lamothe, 37 La. Ann. 43; Johnson v. Brown (Tex. Civ. App.) 65 S. W. 485; Merc. Co. v. Gillespie, 14 Okl. 143, 77 Pac. 183—all support the rule that a new trial for newly discovered evidence should be refused where the existence of such evidence was known, but not the whereabouts of the witness, and no continuance was asked.

We are therefore of the opinion that the motion filed here by the defendants in error for a new trial on account of newly discovered evidence did not bring the same within the statute so as to authorize the trial court to grant the same.

There are other grounds assigned as error here, but under the view we have taken it is unnecessary to consider the same.

The judgment of the lower court is therefore reversed, with directions to the trial court to set aside the order granting a new trial herein.

PER CURIAM. Adopted in whole.

(62 Okl. 67)

ECHOLS et al. v. REEBURGH. (No. 7472.)

(Supreme Court of Oklahoma. Dec. 19, 1916.)

(Syllabus by the Court.)

1. MORTGAGES ⇐383—FORECLOSURE BY ACTION—DEMAND FOR DEFICIENCY JUDGMENT.
Suit to foreclose a real estate mortgage may be maintained without seeking personal judgment for the mortgage indebtedness.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1148; Dec. Dig. ⇐383.]

2. JURY ⇐14(4)—RIGHT TO TRIAL BY JURY—NATURE OF ISSUE.
In an action for foreclosure, where a defendant against whom no money judgment is sought by cross-petition sets up lack of understanding and incompetency in the maker of the note and mortgage, and upon that ground seeks the affirmative relief of cancellation of the note and mortgage, under the authority of the decision of this court in Maas et al. v. Dunmyer, 21 Okl. 434, 96 Pac. 591, and of Hartsog v. Berry, 45 Okl. 277, 145 Pac. 328, such defendant is not entitled to a jury trial upon the issue of the lack of understanding of such maker.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 69; Dec. Dig. ⇐14(4).]

3. APPEAL AND ERROR ⇐1009(4) — MORTGAGES ⇐463 — FORECLOSURE — EVIDENCE—REVIEW.
In an equity case, where the judgment of the trial court is not against the weight of the evidence, it will be sustained. Record examined, and *held*, that the judgment of the lower court

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is sustained by the weight of the evidence, except as indicated.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3974; Dec. Dig. ⊂⊃ 1009(4); Mortgages, Cent. Dig. §§ 1361, 1363–1368; Dec. Dig. ⊂⊃463.]

4. INFANTS ⊂⊃89, 90—JUDGMENT ⊂⊃237(2)—PROCESS—EFFECT OF DEFECTS ON CODEFENDANTS.

Service of summons upon an infant cannot be waived; no one can appear for him in defense of an action prior to such service of summons; the defense of an infant must be made by guardian ad litem, who cannot be appointed until after such service of summons; and a judgment rendered against a minor defendant without service of summons and appointment of guardian ad litem is void; but, where minor defendants are not necessary parties, and the judgment is properly rendered as to all necessary parties, it will be sustained as to such parties against whom it is so properly rendered.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 255–272, 273, 276; Dec. Dig. ⊂⊃89, 90; Judgment, Cent. Dig. § 418; Dec. Dig. ⊂⊃ 237(2).]

5. APPEAL AND ERROR ⊂⊃1176(1) — DISPOSITION OF CAUSE — REVERSAL WITH DIRECTIONS.

Record examined, and *held*, that the judgment was improperly rendered as to certain minor defendants and in so far as money liability was adjudicated against adult defendants in foreclosure, but, the judgment being properly entered as against such adult defendants for foreclosure of mortgage, the judgment is reversed, and the cause remanded, with directions to the trial court to enter judgment in accordance with this opinion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4588, 4592; Dec. Dig. ⊂⊃ 1176(1).]

Commissioners' Opinion, Division No. 3. Error from District Court, Greer County; Will Linn, Judge.

Action by S. P. Reeburgh against R. C. Echols, Jr., and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded, with directions.

W. W. Noffsinger and Y. P. Broome, both of Muskogee, and Frank O. Eagin, of Mangum, for plaintiffs in error. H. D. Henry, of Mangum, for defendant in error.

JOHNSON, C. Upon March 19, 1909, to secure the payment of his promissory note of the same date in the sum of $1,116, one R. C. Echols executed to one G. C. Keeling his two mortgages covering the following described property, to wit: Lot 7 in block 19 of the original town of Mangum, Okl., and lots 39, 40, 41, and 42 in block 7, Irvington addition to the city of Oklahoma City, Okl. Such note was given in payment of another note upon which the said R. C. Echols was surety. The note and mortgages of March 19, 1909, were assigned by Keeling to S. P. Reeburgh.

This action was brought by Reeburgh against R. C. Echols, Jr., Ima Echols, Ora May Echols, and Sallie S. Echols, heirs of R. C. Echols, deceased, and Sallie S. Echols, G. C. Keeling, and J. A. Springer, and Sallie S. Echols, as natural guardian of R. C. Echols, Jr., Ima Echols and Ora May Echols, minor heirs of R. C. Echols, deceased, for foreclosure of the said real estate mortgages, and to recover a money judgment as against the said G. C. Keeling, indorser of the said note. Service of summons does not appear to have been had upon the said Keeling, nor upon either of said minors, R. C. Echols, Jr., Ima Echols, and Ora May Echols; and no guardian ad litem was appointed for the said minors. Keeling did not appear in the action; but the other defendants, including the minors, purported to enter a general appearance and defend the action.

The appearing defendants generally denied the allegations of the petition, including the execution of the note and mortgages, and set up that at the time of the purported execution of such instruments the maker, R. C. Echols, was ill in a hospital in Oklahoma City as a result of a serious surgical operation, from the effects of which illness he later died, and that at the time of the purported execution of such instruments, as a result of such illness, the said R. C. Echols was in a semiconscious condition, suffering with intense pain, was unable to and did not understand the nature and effect of the instruments, and was incapable of transacting or understanding any business transaction, and that the said note and mortgages were knowingly and fraudulently obtained from the said R. C. Echols while he was in such condition, and were without any consideration; and, based upon these allegations, the answer of said appearing defendants asked for the cancellation of the said note and mortgages, the latter as a cloud upon the real estate, and for such other and further relief as might have seemed equitable and just in the premises. While this pleading was denominated as an answer, it asked for affirmative relief, and in fact was an answer and cross-petition. Such answer and cross-petition alleged that the party obtaining the execution of the note and mortgage on behalf of the payee and mortgagee was the agent of plaintiff in this cause, and in fact acting for plaintiff and with his full knowledge.

The answer and cross-petition was not verified, and there was no evidence tending to controvert the execution of the note and mortgages; therefore that question does not enter into the appeal. The reply was an unverified general denial, thus not controverting the allegation that the taker of the instruments was the agent of plaintiff, and there was no evidence upon that point; and therefore the question of innocent third party is not in the appeal. Also these questions are not presented by the briefs of the parties.

At the trial plaintiff rested after the introduction of the note and mortgages, where-

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upon the defendants introduced their evidence tending to sustain the allegations of the answer and cross-petition as to the incompetency of R. C. Echols at the time of the execution of the instruments in question. There was no evidence of fraud or lack of consideration, but it appeared that the note and mortgages in question were executed in payment of the surety note hereinabove mentioned. At the conclusion of the evidence of defendants, on motion of the plaintiff, the court directed the jury to render a verdict in favor of plaintiff.

Upon the directed verdict the court rendered judgment for plaintiff against "R. C. Echols et al." for the sum of $1,943.70, being principal of the note, interest and attorney's fees, and "that the real estate above described be sold as upon execution to satisfy and pay the same, after a period of six months after the date of this judgment, 'appraiser of said mortgage having been made.'" From this judgment, and order denying motion for new trial, said appearing defendants have appealed.

The pivotal propositions here submitted are: (1) That the lower court erred in not submitting the case to the jury and in directing a verdict for plaintiff; and (2) that the court erred in rendering judgment for the plaintiff upon the evidence introduced in the case.

[2] If the issues involved were such that the parties were entitled to a jury trial, there was error in the direction of a verdict, for there was sufficient evidence upon the part of defendants, as to the main fact in issue, viz. the incompetency of mortgagor to take the case to the jury if the issue was triable to a jury. However, under the rules heretofore announced by this court, the issues were triable in equity to the court, and not to a jury as a matter of right.

In the case of Maas v. Dunmyer, 21 Okl. 434, 96 Pac. 591, Maas alleged that at the time of the execution of a deed in controversy there he was insane and without understanding, and upon this allegation asked for the affirmative relief of the cancellation of the deed. The suit was one for foreclosure of a mortgage executed by a grantee of Maas, and did not seek a money judgment against Maas. This court held that this issue involved the application of equitable doctrines, and was the predicate for relief that only a court of equity could give, and said:

"In an action for foreclosure, where a defendant against whom no money judgment is sought by cross-petition in his answer sets up a defense and alleges a cause of action involving the application of equitable doctrines, and seeks relief that only a court of equity can give, such defendant is not entitled to a jury trial on the issues raised by his cross-petition."

As applicable to other classes of actions and conditions of fact, a similar result was reached by this court in the case of Hartsog et al. v. Berry et al., 45 Okl. 277, 145 Pac. 328, and in a number of cases cited in the opinion in this last-named case, where it was held that, in an equitable action to quiet title to land, a cross-petition in ejectment would not entitle a defendant to a jury trial, as a court of equity, having already obtained jurisdiction of a purely equitable action, would retain such jurisdiction until the equitable issues were settled.

[1] In the present case plaintiff, as against appellants, sought foreclosure only, and not a personal judgment. The provisions of section 5128 of the Revised Laws of 1910, as amended by chapter 175 of the Session Laws of 1915, for personal judgments in actions to foreclose mortgages, are for the benefit of the lien creditor, and may be waived by him. This is the evident intention of the language used, and any other construction of that section would produce such a destructive effect upon the rights of lienors in a great many cases as could hardly have been intended by the legislative power. In a number of cases this court has held that suits in foreclosure may be maintained without seeking a personal judgment. Tracey v. Crepin, 40 Okl. 297, 138 Pac. 142; Brocker v. Stallard, 34 Okl. 612, 126 Pac. 781; McClung v. Cullison, 15 Okl. 402, 82 Pac. 499.

In this case the same defense which in Maas v. Dunmyer, supra, was held to be equitable was interposed by way of cross-petition. While a personal judgment was rendered against appellants, it was improper, and not justified by the issues, the evidence, or the law, and cannot influence the question as to whether the defendants were entitled to a jury trial.

[3] As to the issue of lack of understanding, the pleadings and circumstances of this case are identical with those in the case of Maas v. Dunmyer, supra; and, following the authority of that case, supported by Hartsog v. Berry, supra, and cases therein referred to, we must hold that in this case defendants were not entitled as of right to a jury trial. The direction of the verdict, under this holding, amounted to a decision of the case by the court, and was not error, if not against the weight of the evidence; for in the case of Hartsog v. Berry, supra, and kindred cases therein cited, it was held that in an equitable action the court is not bound by the verdict of a jury, and error in instructing a jury in such cases is harmless.

As to the assignment that the court erred in rendering judgment for plaintiff and against the appearing defendants, the finding of the lower court, necessarily involved in the judgment that defendants had not sustained the burden of proving the lack of contractual capacity in R. C. Echols at the time of the execution of the note and mortgages, and that the plaintiff was entitled to foreclosure of the mortgages, is reasonably supported by the evidence, and not against the weight of the evidence.

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The evidence of defendants showed that R. C. Echols was operated upon on March 14th for an abscess in the upper jaw, and remained in the hospital 10 or 15 days before going to his home at Mangum, Okl.; that he remained under an anesthetic about 24 hours. The attending physicians for defendants testified that thereafter for several days when he had fever he was semiconscious, but that when not under the influence of the fever he seemed perfectly sane if anything important came up. There was no evidence that at the time of the execution of the instruments he was under the influence of fever; but this occurred some 5 days after the operation, when, as indicated by the expert testimony, he was rallying from the effects of the operation. He attended to the arrangement of the expenses of his illness, and later, while still in about the same condition, executed to his wife deeds to the property in question, under which the defendants Sallie S. Echols, the widow, and J. A. Springer, grantee of the widow as to a half interest in such lands, are claiming such property in this action. One of the physicians testified that it was his recollection that he had told the party who took the note and mortgages that he could see Echols if he went to Oklahoma City. Echols was doubtless in such a physical and mental condition that a court of equity would very carefully scrutinize any evidence of fraud in a transaction with him at the time, and instantly set aside any instrument as to which the least degree of fraud existed; but there was no satisfactory evidence showing that his mind could not meet another upon the ground of fair dealing. There is no evidence of fraud, but the note was given in settlement of a then existing liability as to the validity of which not the least question is made. In addition to this, the old note was surrendered to Echols at the time, and later came into the hands of Sallie S. Echols. The adult defendants promised from time to time to settle the new note and mortgage, and made no question of the incapacity of Echols for more than 4 years, and until the old note seems to have been barred by the statute of limitations.

The finding of the lower court against the issue of lack of understanding, and in favor of the foreclosure, is not against the weight of the testimony; and the rule of this court on appeals in equity cases is that, unless the finding and judgment of the trial court is clearly against the weight of the evidence, they are conclusive upon this court. Board of Com'rs of Woodward Co. v. Thyfault, 43 Okl. 82, 141 Pac. 409.

[4, 5] However, there was no pleading or evidence to sustain a money judgment against any of the defendants who were parties to the judgment of the lower court; and the lower court was without jurisdiction to render any judgment whatsoever, for money or for foreclosure, as against the minor defendants, R. C. Echols, Jr., Ima Echols, and Ora May Echols, for the reason that no service of summons was had on any of such minors and no guardian ad litem was appointed for them.

This court has held that service of summons upon an infant cannot be waived; that no one can appear for him in defense of an action prior to such service; that his defense must be made by a guardian for the suit, who cannot be appointed till after service; and that a judgment rendered against a minor defendant without service of summons and appointment of a guardian ad litem is void. Condit v. Condit, Cause No. 7806, 168 Pac. 456, not yet officially reported; Bolling v. Campbell, 36 Okl. 671, 128 Pac. 1091; Scott v. Brown, 40 Okl. 184, 137 Pac. 113.

The judgment of the lower court as to the minor defendants must therefore be reversed. However, the evidence at the trial disclosed that the said minor defendants have no interest in the real property involved, and that prior to his death the mortgagor had conveyed the property to the defendant Sallie S. Echols, who later conveyed an undivided one-half interest in the property to the defendant J. A. Springer. This being true, the minor defendants were not necessary parties to the action, and judgment of foreclosure would be properly rendered as against Sallie S. Echols and J. A. Springer, adult defendants and owners of the equity of the mortgagor in the property; for this court has held that, where the minor heirs of a mortgagor are not necessary parties to an action and judgment of foreclosure of a real estate mortgage, such minor heirs would not be necessary parties on appeal, and the omission of such heirs as parties to the appeal will not deprive this court of jurisdiction to sustain the judgment of foreclosure as to the necessary parties who are parties to the appeal. Jameson v. Goodwin, 43 Okl. 154, 141 Pac. 767.

The petition did not seek a money judgment against Sallie S. Echols or J. A. Springer, and the evidence did not show that they had assumed the mortgage indebtedness. The money judgment therefore against these defendants was improperly rendered. However, regardless of these defects, this being an equity action, and the judgment of foreclosure being proper as against Sallie S. Echols and J. A. Springer, this court will render or direct the rendition of the judgment which should have been rendered in the trial court. Consolidated Steel & Wire Co. v. Burnham, 8 Okl. 514, 58 Pac. 654; Shenners v. Adams, 148 Pac. 1023, not yet officially reported; Wimberly v. Winstock, 149 Pac. 238, not yet officially reported.

The judgment of the lower court should be reversed, and the cause remanded, with directions to the lower court to permit plaintiff to dismiss the said action without prejudice as to the said minor defendants, R. C. Echols,

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Jr., Ima Echols, and Ora May Echols, and to enter judgment in favor of plaintiff and against the defendants Sallie S. Echols and J. A. Springer, adjudging the amount due from and unpaid by the estate of the mortgagor to the plaintiff, and for foreclosure of said mortgages and the sale of the mortgaged property in satisfaction of such indebtedness so found to be due and unpaid, with costs, and for such other relief as may be incident to such foreclosure and sale and to which plaintiff may be entitled in the premises, the costs of this appeal to be divided equally between plaintiff and the defendants Sallie S. Echols and J. A. Springer, half to plaintiff and the other half to the said last-named defendants.

PER CURIAM. Adopted in whole.

(63 Okl. 46)

THRAVES v. TUCKER et al. (No. 8397.)

(Supreme Court of Oklahoma. Dec. 19, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⟸343, 356—TIME FOR TAKING PROCEEDINGS—STATUTORY PROVISIONS.

Under section 4452, St. 1893 (section 5255, Rev. Laws 1910), as amended by Act Feb. 14, 1911 (Sess. Laws 1910–11, c. 18, p. 35), a proceeding to review an order denying a motion to vacate a prior judgment must be commenced within 6 months from the date of such order.

(a) Within the meaning of this section of our statutes, following the statutory rule in the trial courts (section 3892, St. 1893, the same being section 4659, Rev. Laws 1910), such a proceeding for a review is commenced, as to each defendant in error, at the date of the summons which is served on him, or on a codefendant who is a joint contractor or otherwise united in interest with him, provided such service of summons is actually made within 60 days from said date, and provided further that, where an attempt to commence such a proceeding, as, for instance, by filing a præcipe for summons, is made before the date of such summons, followed by a faithful, proper, and diligent endeavor to procure service and, within 60 days, by actual service of such summons, such proceeding shall be deemed to have been commenced at such earlier date, and provided still further, where service by publication is proper and is actually made, such proceeding shall be deemed commenced at the date of the first publication, or, if a faithful, proper, and diligent endeavor be made at an earlier date to procure such service, as, for instance, by præcipe and other prerequisite steps, and, within 60 days thereafter, such first publication is actually made, such proceeding shall be deemed commenced at the date of such attempt.

(b) Where such proceeding is not so commenced within said limited period of 6 months, a motion to dismiss the same will be sustained and such proceeding dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1889–1904, 1926, 1927; Dec. Dig. ⟸343, 356.]

Error from District Court, Nowata County; A. C. Hough, Special Judge.

Motion by W. V. Thraves against W. B. Tucker and another to vacate a prior judgment. Order overruling motion, and Thraves brings error. Dismissed.

Tillotson & Elliott, of Nowata, for plaintiff in error. A. B. Campbell, of Nowata, and J. H. Keith, of Coffeyville, Kan., for defendants in error.

THACKER, J. On December 20, 1915, the motion of the plaintiff in error to vacate a prior judgment against him in the trial court was overruled; and on June 17, 1916, he filed his petition in error in this court to obtain a review of the order overruling that motion, but has not procured the service nor issuance of summons, nor filed a præcipe therefor, and the defendants in error have not entered a general appearance here, nor otherwise waived the necessity for summons.

The defendants in error now move for a dismissal of this appeal upon the ground that no "proceeding" for a review in this court has been commenced within 6 months from the date of that order.

Under section 4452, Statutes 1893 (section 5255, Rev. Laws 1910), as amended by Act Feb. 14, 1911 (Session Laws 1910–11, c. 18, p. 35), a proceeding to review an order denying a motion to vacate a prior judgment must be commenced within 6 months from the date of such order. Within the meaning of the above-cited section of our statutes, following the statutory rule in the trial courts (section 3892, Statutes 1893, the same being section 4659, Rev. Laws 1910), such a proceeding for a review is commenced, as to each defendant in error, at the date of the summons which is served on him, or on a codefendant who is a joint contractor or otherwise united in interest with him, provided such service of summons is actually made within 60 days from said date, and provided further that, where an attempt to commence such a proceeding, as, for instance, by filing a præcipe for summons, is made before the date of such summons, followed by a faithful, proper, and diligent endeavor to procure service, and within 60 days by actual service of such summons, such proceeding shall be deemed to have been commenced at such earlier date, and provided still further, where service by publication is proper and is actually made, such proceeding shall be deemed commenced at the date of the first publication, or, if a faithful, proper, and diligent endeavor be made at an earlier date to procure such service, as, for instance, by præcipe and other prerequisite steps, and within 60 days thereafter such first publication is actually made, such proceeding shall be deemed commenced at the date of such attempt. Barber Asphalt Paving Co. et al. v. Botsford et al., 50 Kan. 331, 31 Pac. 1106. Where such proceeding is not so commenced within said limited period of 6 months, a motion to dismiss the same will be sustained and such proceeding dismissed. Watkins et al. v. Barnwell, 35 Okl. 205, 128 Pac. 511, and cases therein cited.

As it appears that no proceeding has been

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commenced in this court to review the order mentioned within 6 months from the rendition of the same, as required by the sections of the statutes cited, the motion to dismiss this appeal is sustained, and this appeal is dismissed. All the Justices concur.

(62 Okl. 134)

CHICAGO, R. I. & P. RY. CO. v. WRIGHT.

(No. 8054.)

(Supreme Court of Oklahoma. Dec. 5, 1916. Rehearing Denied Jan. 9, 1917.)

(Syllabus by the Court.)

1. NEGLIGENCE ⇐136(19)—ATTRACTIVE NUISANCE—JURY QUESTION.

A child 9 years of age was injured by hot water, steam, and hot mud emitted from a metal pipe, said pipe being 3½ or 4 inches in diameter, attached to a stationary engine and extending out of the building in which it is located, and the end of the pipe was unguarded and unprotected. Whether the premises whereon the same is located was sufficiently attractive to allure children to the danger, and whether the pipe, in the position and manner in which it was left, was dangerous, and whether left in a dangerous condition in an attractive place known to be frequented by children, and whether the situation was such as to suggest to the railway company the probability of accident, and whether the defendant was negligent, presented a question of fact for the consideration of the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 313, 322; Dec. Dig. ⇐136(19).]

2. NEGLIGENCE ⇐141(10) — CONTRIBUTORY NEGLIGENCE—CHILDREN—INSTRUCTIONS.

It is not error to submit to the jury the question of contributory negligence permitting the jury to take into consideration the age, experience, and maturity of the child, or that a child under 7 years of age is not guilty of contributory negligence, or that a child between 7 and 14 years of age is not presumed to be guilty of more than technical trespass as affecting the question of duty of the defendant in respect to the dangerous condition of the premises.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 393; Dec. Dig. ⇐141(10).]

Commissioners' Opinion, Division No. 2. Error from District Court, Jefferson County; Cham Jones, Judge.

Action by Ella Wright, next friend of Herbert George, a minor, against the Chicago, Rock Island & Pacific Railway Company, for damages. There was judgment for plaintiff, and defendant brings error. Affirmed.

C. O. Blake, W. H. Moore, and R. J. Roberts, all of El Reno, K. W. Shartel, of Oklahoma City, and Guy Green, of Waurika, for plaintiff in error. Bridges & Vertrees, of Waurika, for defendant in error.

BRUNSON, C. This suit was instituted on the 1st day of July, 1915. It was tried on the 20th day of October, 1915, there was judgment for the plaintiff, the defendant filed a motion for a new trial, which was overruled and exceptions saved, and the case is now before us on appeal. Before the suit was tried, the defendant in error, upon first obtaining permission of the court, amended his petition to make it read "Herbert George, by next friend, Ella Wright, plaintiff."

It is alleged substantially that Ella Wright is the mother of Herbert George, a minor, of the age of 9 years; that they reside in Jefferson county, Okl.; that the defendant is a duly organized and chartered corporation engaged in the business of common carrier of freight and passengers for hire, and that it operates one of its lines through Jefferson county, Okl.; that the company, for the purpose of carrying on its business at the town of Waurika, maintains and operates a roundhouse, and in connection with said roundhouse maintains and operates a stationary engine, and has connected therewith an iron pipe about 3½ inches in diameter, and 30 or 40 feet long, which extends out of the roundhouse on the north side thereof, and passes out of the same at an elevation of about 2 feet from the surface of the earth, and said engine is used for cleaning out engines or boilers, and when in such use there is emitted from said pipe boiling water, steam, and hot mud, and that said water, steam, and hot mud are emitted from said pipe without any protection or hood over the same, and that said hot water, steam, and hot mud are thrown upon the ground for a distance of 30 or 40 feet, at which place there has been formed, by reason thereof, a small pond; that said roundhouse, engine, and pipe so used for cleaning out said engines or boilers have been operated by the railroad company for the past 7 years, and cinders piled around said pipe and the pond or lake so formed at the end of said pipe was attractive to children as a playground, and was so used by them. All of which fact was well known to the agents, servants, and employés of the railway company, and that said company has never taken any steps to hood said pipe, or in any wise protect the public from the danger thereof, or to prevent children from playing thereat, and upon its premises.

It is further alleged that on the 4th day of March, 1915, said Herbert George, together with two other boys of about the same age, were playing at and near the roundhouse and near the end of said pipe, and when immediately in front of the pipe, an agent, servant, or employé of said company, without notice or warning, turned boiling water, steam, and hot mud upon said Herbert George, by reason whereof he was severely scalded and burned, and that by reason of said injuries he was confined to his bed and room for over three weeks; that he suffered intense and excruciating pain, both in body and mind, and that as a result of said burns, it has left deep and lasting scars upon the body and limbs of said Herbert George, and

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that by reason of said injuries, he is permanently injured, to his great humiliation, mental suffering, and disgrace; that just immediately prior to the time said boiling water, steam, and hot mud were thrown upon him, the agent, servant, or employé of said railway company saw and noticed said Herbert George and his playmates playing at and near the end of said pipe, and that he did not notify or warn them that he was going to clean out a boiler, and that there was danger, or that they were liable to be injured. And it is charged that by reason of these facts, acts, and conditions, the railway company was guilty of gross negligence, willfulness, and wantonness, and he has been greatly damaged in the sum of $3,000.

[1] The answer was one of general denial, except that it admitted that it is a corporation engaged in operating a railroad, and that it maintains and operates said roundhouse; denied that if said Herbert George was injured, such injuries were occasioned by any negligence or carelessness on the part of the railway company, or of its servants, agents, or employés, but alleged that the said injuries, if so received, were directly occasioned by and were the proximate results of the plaintiff's own negligence. To this answer a reply was filed, denying each and all of the allegations set up as a defense in said answer.

It is contended that the court erred in giving to the jury instructions Nos. 2, 7, and 8. Instruction No. 2 reads as follows:

"(2) In this case, you are instructed that if you find from a preponderance of the evidence that said Herbert George was injured as alleged, and that such injuries, if any, were occasioned and the result of the emission of steam, water, and hot mud from the pipe as alleged in the plaintiff's petition, and you further find that the steam, hot water, and hot mud were discharged from said pipe while the employés of the company in a negligent and careless manner, and with a knowledge of the presence of the said Herbert George on the said premises, at or near the said pipe in question as alleged in his petition, and you further find that the said Herbert George was free from any negligent and careless conduct on his part which contributed to his injury, then you should find for the plaintiff, and assess his recovery at such sum as you find from all the facts and circumstances in the evidence and under the instructions hereinafter given you that you think he is justly entitled to, in no event to exceed the sum sued for, to wit, $3,000."

It is contended that the giving of this instruction was error; that it violated the rule laid down in case of Midland Valley Ry. Co. v. Littlejohn, 44 Okl. 7, 143 Pac. 1. In that case it was held that it is error to instruct the jury so as to permit a trespasser or licensee who had suffered personal injuries from contact with dangerous things on the premises of a landowner to recover damages therefor without proof of either willfulness or wantonness on the part of such landowner. It is also contended that this instruction is contrary to the doctrine laid down in the case of the City of Shawnee v. Cheek, 41 Okl. 227, 137 Pac. 724, 51 L. R. A. (N. S.) 672, where it was held that the duty owing by a landowner to a trespassing child of 10 years of age, "in respect to safety from dangerous artificial conditions of the premises" is that such landowner will not "injure him intentionally or wantonly." In both of these cases it is held that wantonness may be inferred in proper cases from an omission to correct the condition, as well as from acts of commission, where such omission "involves a reckless disregard for the safety of merely technical and reasonably anticipated trespassers."

It is contended that the court committed error in permitting the jury to return a verdict for the plaintiff if it found that:

"Hot water and hot mud was discharged from said pipe by the employés of the company in a negligent and careless manner, and with a knowledge of the presence of said Herbert George on the premises at or near the steam pipe in question as alleged in his petition."

The evidence discloses that on the 4th day of March, 1915, the day of the accident, the plaintiff in error was maintaining, and for 6 or 7 years prior thereto had maintained, a roundhouse at Waurika, in which was located a stationary engine, a metal blowpipe 3 or 4 inches in diameter extending from it and out of the building some 40 or 50 feet; that the pipe was used for the purpose of blowing out engines; that when it blew off it blew a stream of hot water, steam, and hot mud a distance of 60 or 70 feet beyond the end of the pipe, except when a wind was blowing strong, and that beyond the end of the pipe was formed a considerable pool of water; that from the place where the blowpipe was turned on and off it was only about 4 or 5 feet to the door in the west side of the building; and that from this door the end of the pipe could be seen, and when the accident happened said door was open.

On the day of the accident, Harve Lowe was operating said engine, and he had operated it for something over a year prior to that time. Immediately after he turned the blowpipe on, he looked out of said door, and saw two small boys running away from the building; they were 40 or 50 feet away; he then turned the blowpipe off and went to the door, but at that time he did not see Herbert George, the boy injured, but soon thereafter he saw him going up the railroad limping. Immediately after the accident, and just after the blowpipe had been turned off, the two small boys looked and saw three men standing in the door of the roundhouse, laughing. Said Harve Lowe said he did not see the boys at the time he turned the blowpipe on, and he did not go to the door to look to see if any one was near the pipe and liable to be injured by it; that he had never, at any time, before, turned the blowpipe on, gone to the door, and looked to see if any one was near the end of the pipe and liable to be injured, and that he had never had instructions so to do; that several times he had seen small boys playing around the

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roundhouse, and knew that they occasionally visited the place. The end of the pipe was uncovered and unguarded, exposed, and not in any manner inclosed.

It was shown by H. G. Fuller that he operated the stationary engine for several years, but had not operated it during the past 2 or 3 years, and that he never, at any time, turned the blowpipe on without first going to the door to see if any one was near enough to the end of the pipe to be injured from the hot water, steam, and mud which emitted therefrom. There was a path that ran parallel with the pipe, but none that crossed in front of it. It was shown by the undisputed evidence that the danger from this pipe could have been eliminated at a cost of about $8.50.

On the day of the accident Herbert George, a lad of 9 years of age, and two of his companions about the same age had gone from the town of Waurika down to the vicinity of the roundhouse for the purpose of picking up small pieces of lead which were found in the waste about the roundhouse; they had been about the roundhouse for a short time, and had picked up a number of pieces of lead, when one of the boys announced his intention of going for a drink of water, the other two boys started to go home, and Herbert George started home, stepped in front of the blowpipe, and just as he did so, there was emitted therefrom hot water, steam, and hot mud, which struck him on the leg and burned him with such severity that the attention of a physician was required. The physician was called to see him several times each day for a period of about two weeks. The boy was disabled, and was confined to his bed for about three weeks, during which time he suffered severe pains. Herbert George had been to the roundhouse several times before that day, but he had never seen the pipe in use, and did not know for what purpose it was used.

Upon request of the plaintiff in error the jury was permitted to go to the roundhouse and view it, inspect the pipe and place where the boy was injured.

We gather from the argument of the plaintiff in error, the error in this instruction consists in the court charging the jury that if the injury was occasioned by the company in a negligent and careless manner, and with a knowledge of the presence of Herbert George on the premises at or near the steam pipe in question, then the plaintiff could recover, and without requiring the jury to find that the company was guilty of wantonness. It may be that the instruction would be objectionable if that was the only instruction upon the right of the defendant in error to recover, but, in another paragraph of the instruction the jury was told that, before plaintiff would be entitled to recover, he would be required to prove that he was injured through wanton and willful negligence in the manner charged in the petition.

In instruction No. 5 the jury was told that defendant in error was a trespasser, and plaintiff in error owed him no duty except that of not injuring him wantonly and willfully, and in instruction No. 6 it was explained what was necessary to constitute wanton and willful injury.

The instruction following the one complained of here was given for the purpose of explaining to the jury what defendant in error would have to establish by a preponderance of the evidence in order to recover—that they would have to show wantonness and willfulness on behalf of the company before it would be liable for the emission of the steam, hot water, and hot mud from the pipe in a careless and negligent manner.

We do not deem it necessary to enter into an extended discussion of the attractive nuisance doctrine, as that doctrine has been fully explained in the cases above referred to, and in other cases by this court. In the case of Littlejohn v. Midland Valley Ry. Co., 148 Pac. 120, it is said:

"In the jurisdictions where the attractive nuisance doctrine is recognized, whether or not the particular premises are sufficiently attractive to entice children into danger, and whether a certain machine is dangerous and known to be such, or where it be left in a dangerous position in an attractive place known to be frequented by children, and whether the situation was such as to suggest to the proprietor the probability of accident and to involve the question of negligence in leaving it uncovered or unguarded, are questions for the jury."

The evidence in this case is practically undisputed. The jury was permitted to inspect the place where the boy was injured and from its verdict found that the premises were sufficiently attractive to entice children into danger; that the blowpipe was a dangerous instrument, known to be such to the company; that it was left in a dangerous position in an attractive place known to be frequented by children, and that it was such as to suggest to the company the probability of accident; and that it was negligent in leaving it uncovered and unguarded. It was not error to give the instruction complained of in view of the fact that it was fully explained by the main charge.

It is contended that the court erred in giving instruction No. 7 because the same is so worded that it is "unintelligible as given." We have examined this instruction, and we think it is so worded that its meaning is reasonably clear and that the jury understood it, and besides construing this instruction, together with the whole instructions given, we cannot say that it misled the jury, or that they did not understand it.

[2] It is next contended that the court erred in giving instruction No. 8, which reads as follows:

"You are instructed, gentlemen of the jury, that said defendant alleges in its answer that said injuries, if so received by said Herbert George, were directly occasioned and were the

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proximate result of the plaintiff's own negligence and want of care, and if you find from the evidence said Herbert George, through carelessness or negligence upon his part, contributed to the injuries received by him, or that said injuries were a result of his own negligence and want of care, then your verdict should be for the defendant, but in this connection you are instructed that a child under 7 years of age will, and in the absence of evidence of capacity between 7 and 14 years of age is presumed to, be incapable of guilt of more than technical trespass, as affecting question of duty of owner in respect to dangerous condition of premises, and the character of the trespass may be circumstance to be considered by the jury in ascertaining whether there is contributory negligence."

It is admitted that this instruction is good, if it had not embodied a question laid down in the third paragraph of the syllabus in the case of City of Shawnee v. Cheek, supra, but that this spoiled an otherwise good instruction. Said paragraph reads as follows:

"A child under 7 years of age, or in the absence of evidence of capacity, between 7 and 14 years of age, is presumed to be incapable of guilt of more than technical trespass as affecting question of duty of owner in respect to dangerous condition of premises, and the character of the trespass may be circumstance to be considered by the jury in ascertaining whether there is contributory negligence."

We fail to see how it could be error to give this instruction on the defense of contributory negligence. The Cheek Case was decided upon the same theory as this case; it being an attractive nuisance case. In the answer of the plaintiff in error, it pleaded contributory negligence as a defense, and under the evidence and pleadings in this case, it was the duty of the court to instruct the jury on contributory negligence and to tell it who were capable of being guilty of contributory negligence. It was not error for the court to give this instruction.

Finding no error in the record, the judgment of the lower court is affirmed.

PER CURIAM. Adopted in whole.

(63 Okl. 45)

SPRIGGS v. McCARTY. (No. 7929.)

(Supreme Court of Oklahoma. Dec. 19, 1916.)

(Syllabus by the Court.)

MASTER AND SERVANT ⟸80(14)—NEW TRIAL ⟸108(1)—ACTION FOR SERVICES—INSTRUCTIONS — NEWLY DISCOVERED EVIDENCE — RIGHT TO NEW TRIAL.

Record examined, and *held:* (1) That the instructions given to the jury by the trial court fully and fairly state the law applicable to the issues joined by the pleadings and the evidence; (2) that the trial court did not err in overruling defendant's motion for a new trial, based upon newly discovered evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 123; Dec. Dig. ⟸80 (14); New Trial, Cent. Dig. § 226; Dec. Dig. ⟸108(1).]

Error from County Court, Oklahoma County; William H. Zwick, Judge.

Action by Dan McCarty against A. R. Spriggs. There was a judgment for plaintiff, and defendant brings error. Affirmed.

J. Q. A. Harrod and W. A. Staley, both of Oklahoma City, for plaintiff in error. Chas. H. Ruth, of Oklahoma City, for defendant in error.

KANE, C. J. This was an action, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, to recover an amount alleged to be due him for services as manager of a rooming house in Oklahoma City, covering the period of time from the 3d or 4th day of June to the 27th day of November, 1911. The cause was originally tried before a justice of the peace, where judgment was rendered in favor of the plaintiff for the amount prayed for. Hereafter the parties will be designated as "plaintiff" and "defendant," respectively, as in the court below. Thereafter the defendant appealed to the county court, where a trial de novo was had before a jury, which also resulted in a verdict in favor of the plaintiff for the amount prayed for in his bill of particulars upon which judgment was duly rendered, whereupon the defendant filed his proceeding in error to review the action of the county court.

The grounds for reversal which counsel for defendant rely upon for reversal in their brief are stated as follows: (1) The court erred in the instruction given as shown by this assignment and in refusing to instruct the jury on defendant's theory of the case; (2) the court erred in overruling the defendant's motion for new trial on the ground of newly discovered evidence.

Plaintiff and defendant were the only witnesses who testified in the case. The testimony of the plaintiff was to the effect that the defendant employed him to manage a rooming house at No. 116 West Reno street, Oklahoma City, and agreed to pay $1 per day for his services, allow him 50 cents per day for meals, and furnish him lodging. Under this oral agreement plaintiff worked for defendant for 26 weeks; that during this time he drew 50 cents per day for his meals, and lodged at the rooming house; that he made a written itemized statement of receipts and disbursements, and delivered the same to the defendant, deducting the amount allowed for meals and all actual expenses; that the defendant was to pay the $1 per day as soon as he sold the property; that defendant, prior to the commencement of the action, had sold the property and failed to pay the plaintiff the $1 a day, as agreed upon. The defendant testified, in effect, that he employed plaintiff on June 4, 1911, to run a rooming house at No. 116 West Reno street, Oklahoma City; that he told him he wanted to keep the place open as he wanted to sell the same; that subsequently he sold his real

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property, as well as the personal property in the rooming house; that the plaintiff worked until November 27, 1911, a period of 26 weeks; that the plaintiff furnished the defendant with an itemized statement each week for 26 weeks, with all expenditures in one column and all receipts in another column; the balance of the receipts he always turned over to the defendant; that the defendant never preserved any of these statements; that the plaintiff always deducted his $1 per day, and the receipts showed the same; and that he therefore does not owe the plaintiff anything. This testimony was submitted first to the justice of the peace, and subsequently to a jury in the county court, with the result hereinbefore stated, and it is scarcely possible to conceive how prejudicial error could be committed in the judicial settlement of the very simple issues involved.

As we have seen, all the grounds for reversal relied upon belong to the class described in section 6005, Rev. Laws 1910, for the commission of which no judgment shall be set aside or new trial granted by any appellate court of this state, unless, in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right. It is sufficient to say of the errors presented that, after an examination of the entire record, it does not appear that the errors complained of—if errors at all—have probably resulted in a miscarriage of justice, or that they constitute a substantial violation of any constitutional or statutory right of the defendant. On the contrary, we are entirely satisfied that complete justice has been done between the parties in the two trials had below, and that the county court did not abuse its discretion in denying the defendant a new trial on the ground of newly discovered evidence.

For the reasons stated, the judgment of the court below is affirmed. All the Justices concur.

(62 Okl. 73)

SHARPLESS SEPARATOR CO. et al. v. GRAY. (No. 8210.)

(Supreme Court of Oklahoma. Dec. 19, 1916.)

(Syllabus by the Court.)

1. PLEADING ⊂⊃428(1)—PETITION—DEFECTS.
Where a petition is attacked for the first time by objection at the trial to the introduction of any evidence thereunder, and there is not a total failure to allege some essential matter, and the allegations are simply incomplete and indefinite or conclusions of law, such objection to the introduction of evidence will be overruled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1433; Dec. Dig. ⊂⊃428(1).]

2. MASTER AND SERVANT ⊂⊃39(1)—CONTRACT OF EMPLOYMENT—BREACH.
In an action to recover damages for the breach of a contract for employment, necessary averments in the petition are: (1) An allegation of the execution of the contract; (2) an allegation of its breach; (3) an allegation of performance or readiness to perform on the part of plaintiff; and, (4) an allegation of the damages sustained by the plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 12, 45; Dec. Dig. ⊂⊃39(1).]

3. MASTER AND SERVANT ⊂⊃39(1)—BREACH OF CONTRACT OF EMPLOYMENT—PETITION.
Where a petition to recover damages for the breach of a contract for employment contains the necessary allegations to constitute a cause of action for damages for breach of contract, the fact that the damages claimed are denominated salary instead of damages does not render it fatally defective.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 12, 45; Dec. Dig. ⊂⊃39(1).]

4. MASTER AND SERVANT ⊂⊃41(1, 6)—BREACH OF CONTRACT OF EMPLOYMENT—DAMAGES.
The measure of damages for the breach of a contract of employment by the employer is prima facie the sum stipulated to be paid for the services; and the burden of reducing the damages by proof that the servant has, or might with reasonable diligence have, obtained other remunerative employment of a like character after his discharge, rests on the employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 12, 50, 52, 53; Dec. Dig. ⊂⊃41(1, 6).]

5. MASTER AND SERVANT ⊂⊃44—BREACH OF CONTRACT—DAMAGES—INSTRUCTIONS.
The defendant having neither pleaded nor proved that plaintiff had, or might with reasonable diligence have, secured other remunerative employment after his discharge, an instruction directing the jury that, if they found for the plaintiff, it would be their duty to award him the balance due under the terms of the contract, is not erroneous.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 59; Dec. Dig. ⊂⊃44.]

6. TRIAL ⊂⊃251(9) — INSTRUCTIONS — SUFFICIENCY.
Instructions examined, and *held* free from reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 595; Dec. Dig. ⊂⊃251(9).]

Commissioners' Opinion; Division No. 1. Error from District Court, Oklahoma County; John W. Hayson, Judge.

Action by C. H. Gray against the Sharpless Separator Company, a corporation, and another. There was a judgment for plaintiff, and defendants bring error. Affirmed.

Everest & Campbell, of Oklahoma City, for plaintiffs in error. Ledbetter, Stuart & Bell, of Oklahoma City, for defendant in error.

RUMMONS, C. This action was commenced in the district court of Oklahoma county on June 18, 1915, by the defendant in error, hereinafter called the plaintiff, against the plaintiffs in error, hereinafter called defendants, to recover the sum of $890, with interest, for the breach of a contract of employ-

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ment for the year 1914. The petition of plaintiff, omitting the caption, signature, and exhibits, is as follows:

"Now comes the plaintiff and represents to the court that on or about the 11th day of October, 1913, the defendants entered into a written contract with the plaintiff, whereby they employed him to work for them at a salary of $125 per month from the 1st day of January, 1914, until the 1st day of January, 1915, said salary of $125 payable monthly; that on the 1st day of January, 1914, the plaintiff entered upon said contract and worked for the said defendants under said contract until the 1st day of June, 1914, a copy of said contract, which is a proposition accepted by this plaintiff is hereto attached, marked Exhibit A and made a part hereof; that during the month of May, 1914, the defendants, without any excuse or cause, discharged this plaintiff from their services, and have failed and refused since the 1st day of June, 1914, to pay him said salary, according to contract, although this plaintiff has been ready and willing to comply with his part of said contract during all of said time, and has tendered to the defendants his services.

"That the said defendants, the Sharpless Separator Company and the Sharpless Separator Company of Texas, are one and the same institution, and the Sharpless Separator Company of Texas is merely the name under which the Sharpless Separator Company manages its branch office at Dallas, Tex., and the said Sharpless Separator Company owns all the assets and has assumed all the liabilities of the said Sharpless Separator Company of Texas, both of said corporations being foreign corporations and nonresidents of the state of Oklahoma.

"That by reason of the execution of said contract and the discharge of this plaintiff, and by reason of the failure of the defendants to pay this plaintiff his salary from the 1st day of June, 1914, the defendants have become liable to this plaintiff in the sum of $875, with interest on each month's salary from the end of said month until this date at the rate of 6 per cent. per annum, or in the total sum of $890, for all of which the defendants have become liable to this plaintiff.

"And this plaintiff here states that his claim is a civil action for the recovery of money, the same being for salary contracted for and now past due; that said claim of plaintiff against defendants is just, and the plaintiff ought to recover said sum of $890, with interest thereon from this date at the rate of 6 per cent. per annum. And this plaintiff here states and alleges that the defendants are foreign corporations and nonresidents of the state of Oklahoma.

"Wherefore plaintiff prays that he have judgment against said defendants and each of them for said sum of $890, with interest thereon from this date at the rate of 6 per cent. per annum, and that an attachment issue requiring the sheriff to attach the lands, tenements, goods, chattels, stocks, rights, credits, moneys, and effects of the defendants and each of them in said county, not exempt by law from being applied to the payment of plaintiff's claim, or so much thereof as will satisfy the plaintiff's claim. Plaintiff prays for such other and further relief as he may be entitled to in law and in equity."

Defendants answered, denying the execution of the written contract alleged in the petition, and alleging that the plaintiff entered the employ of the defendants in the year 1914, under an oral contract between the plaintiff and defendants by the terms of which defendants reserved the right to discharge plaintiff at any time by giving 30 days' notice, and alleging that such notice was given by defendants, and that all the terms of said contract was complied with by defendants prior to plaintiff's discharge by defendants. Plaintiff replied, denying the allegations of the answer. The cause was tried to a jury, resulting in a verdict in favor of the plaintiff in the sum of $875. The defendants, having unsuccessfully moved for a new trial, prosecute this proceeding in error to reverse the judgment of the court below.

Under a number of assignments in error, the defendants present four questions for review: (1) That the court erred in overruling the objection of defendants to the introduction of any evidence, for the reason that the petition failed to state a cause of action; (2) that the evidence of the plaintiff did not justify a verdict in his behalf; (3) that the court erred in giving to the jury instruction No. 13; and (4) that the court erred in giving to the jury instruction No. 15.

The principal contention in the brief of counsel for defendants is that the petition fails to state a cause of action, for the reason that it sets out a cause of action for the recovery of salary due the plaintiff for "constructive service" after his discharge, and that, as the doctrine of "constructive service" by a discharged employé during the remainder of the term for which he was employed does not obtain in this state, and as the only recovery that can be had for a breach of a contract of employment is in an action for damages for such breach, the petition fails to state a cause of action.

[1] Defendants did not demur to the petition of plaintiff, but saved their objection to its sufficiency by an objection to the introduction of evidence. It has been repeatedly held by this court that an objection to the introduction of evidence as a means of attacking the sufficiency of a pleading is not looked upon with favor, but, where the pleading wholly fails to state a cause of action or defense, such objection shall be sustained, but, where the only objection made to a petition is by objection at the trial to the introduction of any evidence thereunder, and there is not a total failure of averment as to some essential matter, but the allegations are simply incomplete and indefinite or conclusions of law, objection to the introduction of evidence will be overruled. First National Bank v. Cochran, 17 Okl. 538, 87 Pac. 855.

[2] Under these rules of law, is the petition fatally defective? It is contended by defendants, and borne out by the weight of authority, that an action will not lie for "constructive services" for the discharge of an employé employed for a definite term before the end of the term, but that the employe's remedy is by action for damages for breach of contract of employment.

In Ditzler Dry Goods Co. v. Sanders, 44 Okl. 678, 146 Pac. 17, it is said by Commis-

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sioner Brewer, delivering the opinion of the court:

"It was for a long time held in the English courts that, if a servant was wrongfully discharged, he might treat the contract as still existing, and sue for his wages as they became due. This gave rise to the doctrine of 'constructive services,' and in such cases the servant sued on the contract for wages for the time he was not allowed to serve. This rule was followed in the earlier cases in this country, as is said in 26 Cyc. 999, and is still followed in some of the states; but the doctrine has since been repudiated by the courts of England and the majority of the courts in this country. These later authorities hold that, if a servant be wrongfully discharged, he has no action for wages, except for services past rendered. As far as any other claim on the contract is concerned, he must sue for the injury he has sustained by his discharge in not being allowed to serve and earn the wages agreed on. As has been said, we think the petition in this case, when properly considered, asserts a claim for the injury he has received on account of the breach of the contract. It is said in 26 Cyc. at page 1002: 'Generally it may be said that the petition * * * in an action for wrongful discharge is sufficient if it contains all that it is necessary for plaintiff to prove under a plea of the general issue; and, where a complaint alleges facts sufficient to constitute a cause of action for damages for breach of contract, the fact that the prayer is for judgment for wages instead of for damages does not render it fatally defective.'"

The necessary allegations in a petition to recover damages for the breach of a contract of employment are: (1) An allegation of the execution of the contract; (2) an allegation of its breach; (3) an allegation of the performance or readiness to perform on the part of the plaintiff; and (4) an allegation of the damages sustained by the plaintiff.

[3] The petition in the instant case contains the necessary averments as to the execution of the contract, as to its breach, and as to performance or readiness to perform on the part of the plaintiff. The petition then alleges that "by reason of the failure of the defendants to pay this plaintiff his salary from the 1st day of June, 1914, the defendants have become liable to this plaintiff." The petition then alleges that plaintiff's claim is a civil action for the payment of money, the same being for salary contracted for and now past due, and prays for an attachment. This latter allegation, and the prayer for attachment, form no part of the petition and had no place in it, and may be treated as surplusage.

In a subject note to the case of Howay v. Going-Northrup Co., 6 L. R. A. (N. S.) 49, at page 67, the authorities, are collated to the effect that in a petition containing the necessary allegations as to the execution of the contract and its breach by the defendant the damages are sufficiently alleged, even though they be denominated wages for the unexpired term of employment.

In the case of Ditzler Dry Goods Co. v. Sanders, supra, Commissioner Brewer quotes with approval from 26 Cyc. 1002, to the same effect. We therefore conclude that the petition in this case was not vulnerable to attack by objection to the introduction of evidence.

As to the objection of defendants that the evidence of plaintiff was not sufficient to justify a verdict in his behalf, no argument is presented in the brief of defendants other than the proposition before stated, that the plaintiff was not entitled to recover for "constructive services." From the view we take of the petition this action was an action for damages for a breach of contract of employment, and it follows there is no merit in this contention of the defendants.

Defendants next complain of the giving of instruction No. 13, which is as follows:

"If after a fair and impartial consideration of all of the testimony in this case, and in compliance with the instructions herein given you, you believe that the plaintiff has established by a preponderance of the testimony that he had a contract in writing with the defendant, by the terms of which he was employed for one year, beginning January 1, 1914, and terminating January 1, 1915, by the terms of which he was to be paid the sum of $125 per month, and that the defendants, without any fault on plaintiff's part, discharged the plaintiff and has since failed to pay him from the 1st day of June, 1914, it would be your duty to find for the plaintiff for the balance due under the terms of the contract, not to exceed in all the sum of $890, with interest at the rate of 6 per cent. from January 18, 1915."

They also complain of the giving of instruction No. 15, which is as follows:

"You are instructed that under a contract of employment entered into between the parties, where the time of employment is not definitely stated, the employer may discharge an employé at any time he sees fit, but where the time is definitely fixed for which the employé has been employed, then the employer cannot discharge the employé unless for good cause, without becoming liable for the balance due under the contract."

These instructions are considered together by counsel for defendants in their brief, and they may be so considered in this opinion. These instructions are not open to the objection that they do not clearly state the measure of damages applicable to this case.

[4-6] The measure of plaintiff's recovery in an action for breach of a contract for employment is prima facie the sum stipulated to be paid by the employer for the services, but it is subject to reduction in such sums as the plaintiff has earned or might with reasonable diligence have earned during the period by securing other employment of a similar character, but the plaintiff is neither required to allege nor prove that he has been unable to secure other employment. The burden is upon the defendant to plead and prove in mitigation of damages that the plaintiff has, or might with reasonable diligence have, obtained profitable employment during the remainder of the term. Ditzler Dry Goods Co. v. Sanders, supra; Howay v. Going-Northrup Co., 6 L. R. A. (N. S.), note page 99.

As the defendants neither pleaded nor offered evidence to show that the plaintiff had, or might with reasonable diligence have,

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secured other remunerative employment after his discharge, no issue was raised by the pleadings or the proof as to the amount of the recovery. As the instructions complained of clearly state the rule as to the prima facie measure of plaintiff's damages, the defendants were not prejudiced by the court's failure to instruct upon the mitigation of damages because of the securing other remunerative employment by the plaintiff, because no such issue was presented by the pleadings.

Finding no error in the record, the judgment of the court below should be affirmed.

PER CURIAM. Adopted in whole.

(62 Okl. 144)

GERMANIA NAT. BANK v. DUNCAN et al.
(No. 7519.)

(Supreme Court of Oklahoma. Oct. 31, 1916. Rehearing Denied Jan. 9, 1917.)

(Syllabus by the Court.)

1. DIVORCE ⊂⊃256 — ALIMONY — LIEN OF JUDGMENT—PRIORITY.

Where the wife files a suit for divorce and alimony, and in her petition describes specifically certain real estate, the property of her husband, and seeks to prevent its alienation, and asks that the same be subjected to her claim for alimony, and service of process is had upon the husband in due time and in manner and form provided by statute, and the cause is afterwards reduced to judgment awarding her said property as alimony, her claim and right is superior to the lien of an attaching creditor of the husband, who sues and attaches after the institution of the action by the wife for divorce and alimony.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 725, 726; Dec. Dig. ⊂⊃256.]

2. DIVORCE ⊂⊃273—ALIMONY—INTERVENTION BY WIFE.

The wife properly intervened in the suit of the creditor and asserted her prior claim to said property, and the judgment of the court in her favor is sustained by the law.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 747; Dec. Dig. ⊂⊃273.]

Commissioners' Opinion, Division No. 3. Error from District Court, Kay County; W. M. Bowles, Judge.

Action by the Germania National Bank, a corporation, against F. M. Duncan, Jr., and another, in which Grace Duncan intervened, seeking the discharge of an attachment. There was a judgment for intervener, and plaintiff brings error. Affirmed.

J. F. King, of Newkirk, for plaintiff in error. W. K. Moore, of Ponca City, for defendants in error.

HOOKER, C. The bank sued F. M. Duncan and another to recover a judgment upon a promissory note. The suit was filed in the district court of Kay county on March 24, 1915, and summons was issued on the same day, and at the same time attachment was issued in said action against the property of the defendant F. M. Duncan, and levied upon the farm in controversy here, on March 24, 1915.

On June 4, 1915, one Grace Duncan filed her motion to discharge said attachment and to release said farm therefrom, alleging that on January 22, 1915, she was the wife of F. M. Duncan, and that on said date she instituted a suit against him in the district court of said county for divorce and alimony, and that in her petition she had specially mentioned and described the farm levied upon here and had asked that the same be held subject to her claim for alimony. That she obtained service by publication, and that on April 7, 1915, she procured a judgment for divorce, and was in that decree awarded this farm as permanent alimony. The motion to release the farm and to discharge the attachment was heard and sustained by the court on June 15, 1915.

[1] There are two questions to be determined by this record: (1) Did Grace Duncan by virtue of her petition and publication service acquire a lis pendens lien upon said farm? If so, is her lien which was subsequently reduced to a judgment superior to the attachment claim or lien of the bank here?

This court in the case of McWhorter v. Brady et al., 41 Okl. 387, 140 Pac. 784, said:

"The doctrine of lis pendens, under the common law, was based on the theory of public policy, while, under our statute, it appears to be treated as an element of the law of notice. It has been said (25 Cyc. 1451) 'that it is essential to the existence of a valid and effective lis pendens that three elements be present: (1) The property must be of a character to be subject to the rule; (2) the court must have jurisdiction both of the person and the res; (3) and the property of res involved must be sufficiently described in the pleadings.'

"There is no question concerning the first and second elements above named. Let us examine as to the third. In 25 Cyc. 1462, it is said: 'A purchaser or mortgagee or other person who would otherwise be affected by the rule of lis pendens is not affected by the pendency of an action, unless the pleadings therein, at the date of the purchase or the acquisition of rights, describe the property as to which the rule is sought to be applied so as to enable the purchaser or other third person to ascertain its identity. The property is sufficiently described, it would seem, although not described by metes and bounds, if described with reasonable certainty, that is, if enough is alleged to enable a person upon reasonable inquiry, to identify the property and ascertain the object of the suit.'

"It is earnestly contended by plaintiff in error in his brief that the statute is no broader than the common-law rule, and that the averments of the petition must be so definite that any one on reading it can learn what property was intended to be made subject of recovery. With this contention we cannot fully agree, for that the statutory rule governing lis pendens is broader and more comprehensive than the common-law rule, in that the statutory lis pendens partaking, as it does, of the nature and doctrine of notice, makes notice the channel or means through, or by which, the real object and purpose of lis pendens is attained. * * * The statute makes a pending suit constructive notice and requires intending purchasers to exercise a reasonable care and diligence in ascertaining the

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nature of a pending suit; this requirement is everywhere recognized and abstractors are required to examine the records in the district clerk's office in order to ascertain whether the land, for which they are making an abstract of title, is involved. * * *"

Our statute (section 4732) provides:

"When the petition has been filed, the action is pending, so as to charge third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title; but such notice shall be of no avail unless the summons be served or the first publication made within sixty days after the filing of the petition."

The record here shows that the statutory requirement as to publication was complied with.

This court also in Shufeldt v. Jefcoat et al., 151 Pac. 595, said:

"A purchaser pendente lite of property actually in litigation, for value and without actual notice in fact, takes with notice of the action. * * *"

1 Story, Eq. Jurisprudence, § 405, provides:

"A purchase made of property actually in litigation pendente lite, for a valuable consideration and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree in the suit."

Also in Baker v. Leavitt, 153 Pac. 1099, this court said:

"A final judgment of a court of competent jurisdiction is conclusive between the parties and their privies in a subsequent action involving the same subject-matter, not only as to all matters actually litigated and determined in the former action, but as to all matters germane to issues which could or might have been litigated and determined therein."

"One who purchases real property from a party to an action involving the title thereto, after the institution and during the pendency of such action, is bound by the judgment rendered therein against his grantor, and acquires no greater rights than his grantor."

For further authority see Holland v. Cofield, 27 Okl. 469, 112 Pac. 1032.

In the case of Garver v. Graham, 6 Kan. App. 344, 51 Pac. 812, it is held:

"Where the defendant in an action for a divorce brought by her husband filed an answer and cross-petition denying the grounds alleged by the plaintiff, setting up grounds for a divorce in her favor, that she was the owner of certain lands, describing them, and that her husband was the owner of certain other real estate and personal property, describing it, and praying that a divorce be granted her, that the real estate then in the name of her husband, described in her answer, might be decreed to her, that alimony be granted, and that all the property both personal and real be appropriated to satisfy the decree, held, that such answer and cross-petition brought the property described within the jurisdiction of the court, and that a person subsequently taking a mortgage thereon from the husband only, is bound by the judgment and decree thereinafter rendered."

In the case of Wilkinson v. Elliott, 43 Kan. 590, 23 Pac. 614, 19 Am. St. Rep. 158, it is said:

"Where the wife files a petition asking for a divorce and for alimony, in which she definitely describes certain real estate of the husband, and prays that it may be set apart and decreed to her as permanent alimony, the doctrine of lis pendens will apply; and any one who purchases such property during the pendency of the action will be bound by the judgment subsequently rendered therein."

In Tolerton v. Willard, 30 Ohio St. 579, it is said:

"If a petition for divorce and alimony by the wife specially describes certain real estate of the husband, charging it with equities of the wife, and asking an injunction to prevent alienation pendente lite, and also equitable relief, and the decree therein is such as that from it, it may be found that the court acted on those equities and favorably thereto, the proceedings operate as a lis pendens, and the decree for alimony and settling equities will be a lien on the lands, preferable to that of a mortgagee who had actual notice of the proceedings for divorce and alimony, and whose mortgage was executed and recorded, pending those proceedings."

In the case of Thomas v. Hillhouse, 17 Iowa, 67, it is held:

"No attaching creditor can acquire through his attachment a higher or better right to the property or assets attached than the defendant had when the attachment was levied, unless he can show some fraud or collusion by which his rights have been impaired."

See, also, Drake on Attachment, § 223.

In Harshberger v. Harshberger, 26 Iowa, 503, it is said:

"The district court of the county where the plaintiff resides, having jurisdiction of the cause in an action for divorce and alimony, may rightfully declare and enforce a lien for alimony granted in the action against real estate of the defendant situated in another county. And such lien will have priority over an attachment issued in an action commenced in the county where the land lies, and which was not levied thereon until after the rendition of the decree granting alimony, though before a transcript thereof was filed in the latter county."

See, also, Vanzant v. Vanzant, 23 Ill. 536; Daniel v. Hodges, 87 N. C. 95.

By reference to volume 6, Corpus Juris, p. 286, under the title "Attachment," § 547, we find the following rule:

"The rights of an attaching creditor with respect to the property attached must be determined by the state of the title at the time when the attachment was made. He is not in the position of a bona fide purchaser for value, but obtains only the rights which the debtor had in the property at that time, and is postponed to liens or claims of other persons upon or to the property, which became effective before the attachment, except in so far as he may avail himself of fraud in a transaction affecting the property. * * *"

Section 548:

"The rule which has just been stated that an attaching creditor acquires only the rights which the debtor himself had in the attached property applies where the debtor holds title to the property subject to a valid outstanding charge or lien, whether such lien is based upon a contract or agreement between the debtor and the lienor as in the case of a mortgage, or pledge, or arises by operation of law, as in the case of a lien for rent, wages, taxes, customs duties, or labor or materials furnished for the construction of a building or vessel, a carrier's lien, or the lien created by the filing of a lis pendens."

In the case of Bank v. McDermott, 99 Ala. 79, 10 South. 154, it is said:

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"When process, in an action by creditors to set aside as fraudulent a sale of a stock of goods, is served prior to the levy of defendant's attachment, the attachment lien is subordinate to the lien of the process."

Also in the case of Cotton v. Dacey (C. C.) 61 Fed. 481, it is there held:

"One who attaches land after a bill to establish an equitable interest in the land has been filed, but before service of process in such suit has been made on him, and who does not obtain judgment in his action until such service has been made, does not acquire, by his action, any rights in the land superior to the equities set up in the bill."

In the case of Keither v. Losier et al., 88 Iowa, 649, 55 N. W. 952, the Supreme Court of Iowa said:

"Section 2628 of the Code provides that, during the pendency of an action affecting real estate, no interest can be acquired by third persons in the subject-matter, as against plaintiff's title. Held, that the filing of a bill in equity to subject certain land to the payment of a claim pending for judgment gives a lien on the land so affected, superior to that created by an attachment levied after the filing of the equity bill."

Also in the case of Puckett v. Benjamin, 21 Or. 370, 28 Pac. 65, it is held:

"(1) Plaintiff purchased a one-half interest in defendant's stock and ranches in Colorado, and took charge of the business. Defendant came to Oregon, and afterwards it was agreed to exchange the property in Colorado for that in controversy. While plaintiff was yet in Colorado the exchange was made, and without his consent the Oregon property was conveyed to defendant alone, and was operated in his name. Held, that an undivided one-half interest in the property was held by defendant in trust for plaintiff.

"(2) This suit having been commenced, and lis pendens filed before taking judgment in a suit in attachment which was levied on the property in controversy by a creditor against defendant, plaintiff's equities were not affected by such judgment."

In the case of Hines v. Duncan, 79 Ala. 112, 58 Am. Rep. 584, it is said:

"But it may be asserted as a general proposition, settled by our former decisions, that a bill in equity brought to subject her separate property to the satisfaction of her contracts, followed by service of process, creates a lien upon the specific property sought to be subjected. Such bill and service of process thereon are in the nature of an equitable levy, and give the court control of the property, which it will not permit to be withdrawn by any subsequent act or title, so as to render the suit ineffectual. In the absence of such bill she may dispose of her property, and a purchaser would acquire title, though he had notice of her debts; but after such suit is instituted, she is not authorized to make a disposition of it by sale or otherwise, or to materially change its status. The lien thereby acquired may be defeated or lost by a failure to prosecute the suit to a final decree of condemnation and sale; but it becomes specific when the suit is prosecuted to a final decree. Miller v. Sherry, 2 Wall. 237 [17 L. Ed. 827].

"It may be said that the lien, being inchoate, will not prevail over a right of homestead exemption acquired by subsequent occupancy, and before the lien is consummated and made specific by a final decree in the suit. The lien acquired by the levy of a writ of attachment is only inchoate, dependent upon the rendition of judgment. If no judgment is rendered, the lien is lost; but if judgment is obtained, it overrides and defeats any conveyance of the property, subsequent to the levy and prior to the judgment. Reed v. Perkins, 14 Ala. 231. * * * When a final decree is made, it relates to and takes effect from the date of the service of process. By the final decree the lien is made specific from this date and overrides and defeats all intervening rights and titles. By no subsequent act of the debtor can the lien be defeated."

[2] It appears that when the wife instituted her suit for divorce, she prayed for alimony and specifically described this farm in her petition as the property of the defendant F. M. Duncan, and also asked that he be enjoined from alienating it, and that the same be subjected to her claim and right of alimony. She sought to impress this land with a lis pendens lien for alimony, and in our judgment did so.

The court had jurisdiction of the parties and the property; the petition accurately described the property, and summons was had in due time as required by law, and the property was of that character to be subject to the rule. She thereby acquired an inchoate right or lien upon this property which by the judgment of the court subsequently ripened into and became absolute, and the plaintiff in error as an attaching creditor pendente lite has no right in or to said property by virtue of its attachment lien, superior to the claim of the defendant in error Grace Duncan.

The judgment of the lower court is therefore affirmed.

PER CURIAM. Adopted in whole.

(63 Okl. 1)

FT. SMITH & W. R. CO. v. HARMAN.

(No. 7182.)

(Supreme Court of Oklahoma. Dec. 19, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⊂=1068(4) — REVIEW — HARMLESS ERROR.

Where, in an action for damages for burning the grass upon a hay meadow and for damage to the grass roots, the plaintiff was entitled under the evidence to recover a sum equal to that awarded, under any theory of the law the judgment in his favor will not be reversed for an alleged error in defining the measure of damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4228; Dec. Dig. ⊂=1068(4); Trial, Cent. Dig. § 558.]

Error from District Court, Okfuskee County; John Caruthers, Judge.

Action by B. F. Harman against the Ft Smith & Western Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Warner & Warner, of Ft. Smith, Ark., for plaintiff in error. R. A. Hockensmith, of Okemah, for defendant in error.

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HARDY, J. The question involved herein is the measure of damages in an action for destruction of a hay meadow by fire communicated thereto by one of defendant's engines. The testimony shows that 45 acres of meadow was burned over and the standing hay thereon burned off. From the remainder of the meadow there was harvested 1½ tons per acre, and some of the witnesses estimated that the 45 acres from which the standing hay was burned would have yielded 60 tons. The value of the hay at plaintiff's farm was shown to be from $7 to $8 per ton, while at the town of Okemah, about three miles distant, it had a market value of from $8 to $9 per ton. The cost of cutting and harvesting was $3 per ton and the expense of hauling to Okemah was from 75 cents to $1.25 per ton. The verdict of the jury found the damages by reason of the burning of the standing hay to be $160.25. The court instructed the jury as follows:

"In case you find for the plaintiff, then you should proceed to fix his damages at such sum as you may believe by a fair preponderance of the evidence he has shown himself entitled to. The measure of damages for the growing or standing hay being the value of it at the time and place of its destruction by the fire, less whatever expense was incident to its cutting and harvesting. In addition to alleging damages to 45 acres of grass, the plaintiff alleges that the grass roots on 45 acres of said meadow and field were destroyed or greatly damaged, and you are instructed that if you so find, you may allow the plaintiff such damages as he may have shown by a fair preponderance of the evidence he sustained by reason of the destruction or injury to the grass roots, the measure in the latter case being the difference in the value of the land before and after the fire, without regard to the standing crop."

From the foregoing instruction it is apparent that the court intended to submit to the jury, as a separate item of damage, the value of the standing hay; and the evidence of the witnesses indicates that in placing a value upon the hay it was considered by them as severable from the land, and the value which they placed thereon evidently did not include damage to the grass roots. In the latter part of the instruction, where the court submitted to the jury for their determination the amount of damages suffered by reason of the destruction or damage to the grass roots, the value of the standing crop was expressly excluded from consideration. Upon this latter item the verdict of the jury was for $119.75. There is sufficient evidence in the record upon which to support the verdict as to each of the separate items.

Inasmuch as the plaintiff claims damages for the destruction of or injury to the grass roots, it is insisted that the correct rule by which to measure his damages is the market value of the land before and after the fire, because the kind and character of crop destroyed was perennial, and that the court should have so instructed the jury. In a number of decisions this court has held that in a suit to recover damages for the destruction of a growing crop, such damages are to be estimated as of the date of the injury, and the measure to be applied is compensation for the value of the crop in the condition in which it was at the time of its destruction. C., R. I. & P. Ry. Co. v. Johnson, 25 Okl. 760, 107 Pac. 662, 27 L. R. A. (N. S.) 879; St. L. & S. F. Ry. Co. v. Dale, 36 Okl. 114, 128 Pac. 137; St. L. & S. F. Ry. Co. v. Ramsey, 37 Okl. 448, 132 Pac. 478; M., O. & G. Ry. Co. v. Brown, 41 Okl. 70, 136 Pac. 1117, 50 L. R. A. (N. S.) 1124; De Arman v. Oglesby et al., 152 Pac. 356. None of these cases, however, involved a claim for damages to perennial crops. By section 2872, Rev. Laws, 1910, it is provided that:

"For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not"

—thereby providing that a party injured shall have full compensation for any detriment suffered by reason of the wrongful acts of another. In the present case the loss of the hay was certainly an injury, as was the destruction of or damage to the grass roots, and in determining the total amount of injury suffered by plaintiff, it was proper to take into consideration both of these items. The instructions submitted the items separately, each excluding the other from consideration in determining the amount thereof, and the two taken together, constituted the total amount of damage suffered by plaintiff which he was entitled to recover. In a note to Thompson v. C., B. & Q. Ry. Co., 23 L. R. A. (N. S.) 310, many authorities on the measure of damages in this class of cases are collected, and the conclusion of the author is stated in the following language:

"The question as to the measure of damages for the destruction of a perennial crop is one presenting so many * * * phases and conditions which may affect the result one way or another that, even aside from the conflict of opinion among the decisions, it is practically impossible to formulate a general rule by which all cases may be governed."

A number of cases collected in the note hold that injury to perennial crops is a damage to the inheritance, and that the true measure of damages in such cases is the difference in the market value of the land before and after the destruction of the crops, while a number of other cases hold that the value of such crops can be measured and ascertained without reference to the value of the soil on which they stand, and in these cases the measure of damages is held to be the value of the grass or crop at the time of its destruction. A note to the later case of U. S. Smelting Co. v. Sisam, 37 L. R. A. (N. S.) 976, and also the case of International Agricultural Corporation Co. v. Abercrombie, 184 Ala. 244, 63 South. 549, 49 L. R. A. (N. S.) 415, collects the more recent decisions upon this subject. Under the rule that the measure of damages is the difference in the market value of the land before and after the

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destruction of the crops, the jury would be authorized to take into consideration the standing crop of hay and the injury to the grass roots, if any, but the first part of the instruction in this case was qualified so the jury were limited to the value of the standing hay, and in determining its value were not permitted to consider the injury to the grass roots, while in the latter portion of the instruction they were permitted to assess the damages to the grass roots, excluding from consideration in determining this amount any damages to the standing crop. While the instruction is not to be commended in thus dividing the elements of damage which plaintiff was entitled to recover, yet, taking the two, they amount to that which in law is the correct measure of his recovery. A similar situation was presented in St. Louis, Iron Mountain & Southern Ry. Co. v. Marlin, 33 Okl. 510, 128 Pac. 108, which was an action for damages for the destruction of hay and trees. In the opinion it was said:

"On the issue of the measure of damages, the amount prayed for by plaintiff was $608. The verdict of the jury was $224.20. Our statute (Comp. L. 1909, § 2907) provides that the measure of damages for tort is such as will compensate fully for the detriment approximately caused thereby. There is some difference in the holdings of the courts as to the proper manner of establishing such damages as were inflicted in this case; but plaintiff's witnesses testified to facts showing damages far in excess of the amount allowed by the jury. They testified to the value of the hay and trees destroyed, and also the difference in the value of the land before and after the fire, either of which showed damages larger in amount than the verdict. Under these circumstances, even though one of the methods followed was erroneous, defendant was not injured thereby, as the verdict * * * was much less than the proof would sustain under either."

In this case plaintiff was entitled to recover an amount that would fully compensate him for all the damage proximately caused by the fire communicated to his premises by the engine of defendant, and if the instructions did not authorize a recovery by him of a larger amount then no prejudice has resulted. In arriving at the value of the standing hay, the damage to the grass roots was not considered, and in determining the damage to the grass roots the standing hay was excluded, and the amount of the two items thus formed, when added, give the actual amount of detriment or damage resulting from the fire, and thus it is seen that no prejudice to defendant resulted from giving the instruction.

It is said that the second paragraph of instruction No. 2 is erroneous, in that the jury were not instructed that the damages to the grass roots must be measured as of the time and place of the destruction of the property, because this instruction did not include the place where the value of the land should be reckoned, but left it wholly a matter of conjecture with the jury as to what place they would select in determining its market value. This objection is without merit. The damage to the grass roots could only be determined by finding the difference in the value of the land before and after the fire, and it is hard to understand how the jury could determine the market value of a specific piece of land, unless that value was determined with reference to the place where the land was located. Land is not movable like personal property, and if it has a value, that value must be determined by taking its location into consideration.

No complaint is made that the verdict is excessive or not supported by the evidence.

The judgment is affirmed. All the Justices concur.

(63 Okl. 47)

BANK OF TUTTLE v. GORDON. (No. 5967.)

(Supreme Court of Oklahoma. Dec. 19, 1916.)

(Syllabus by the Court.)

1. USURY ⟸102(3) — RECOVERY—PAYMENT—WHAT CONSTITUTES—CONSTITUTION.
The giving of a new note in renewal of a previous one is not a payment thereof as contemplated by section 3 of article 14 of the Constitution. This section contemplates an actual payment, and not a promise to pay in the future.
[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 197, 251; Dec. Dig. ⟸102(3).]

2. USURY ⟸102(1)—"DEMAND"—ESSENTIALS.
The "demand" required by second proviso to section 1005, Rev. Laws 1910, as a condition precedent to an action for the recovery of usurious interest paid should be for the entire amount which the party is entitled to recover, and not for the amount of interest in excess of the legal rate. Demand in this case *held* to be sufficient.
[Ed. Note.—For other cases, see Usury, Cent. Dig. § 254; Dec. Dig. ⟸102(1).
For other definitions, see Words and Phrases, First and Second Series, Demand.]

Error from District Court, Grady County; Frank M. Bailey, Judge.

Action by M. V. Gordon against the Bank of Tuttle, a corporation. There was a judgment for plaintiff, and defendant brings error. Affirmed.

S. C. Durbin, of Chickasha, for plaintiff in error. Maurice Smith, of Chickasha, and J. W. Bartholomew, of Oklahoma City, for defendant in error.

HARDY, J. Defendant in error brought suit in the district court of Grady county against the plaintiff in error to recover certain usury alleged to have been paid by him. The parties will be referred to as they appeared in the trial court. Judgment was rendered in favor of the plaintiff for the sum of $228, being double the amount of interest paid and $35 as an attorney's fee, and defendant prosecutes error.

[2] The first and main contention of defendant is that there was no legal demand for the return of the usury paid, and that without such demand plaintiff could not maintain this action. The notice is said to

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be insufficient because it is a specific demand for the sum of $114, being the entire amount of interest claimed to have been paid by plaintiff, and is not for the amount of interest paid by him in excess of the legal rate. This question was determined adversely to the contention of defendant in Miller v. Oklahoma State Bank, 157 Pac. 767, where this court said:

"We also hold that under the second subdivision of said section 1005, where the borrower of money pays therefor a greater rate of interest than 10 per cent. per annum, he, or his legal representatives, may, within two years after maturity of such usurious contract, recover from the person, firm, or corporation taking or receiving such interest twice the amount of the interest so paid, provided that before bringing such suit the party bringing the same must make written demand of the party to be sued for the payment of the sum so authorized by the statute to be recovered."

The demand is for the sum of $114, which is claimed to be due M. V. Gordon, was signed by G. L. Hamrick, and was deposited in the post office at Tuttle on March 13, 1913, and received by defendant on the same day. Suit was filed March 15th.

The statute does not prescribe any form of demand, but requires as a condition precedent to the right to maintain an action to recover the penalty prescribed thereby that the party must "make written demand for return of such usury." The demand apprised the defendant of the amount due and to whom, and it is apparent that Hamrick merely signed as the agent of plaintiff, and that defendant could not have been misled thereby, and by reference to its records could readily ascertain the justness of the claim and determine whether it would pay the amount or resist the claim.

No particular time is required to intervene between making demand and commencing suit, and no question appears to have been made in the trial court upon this point, and cannot be urged here for the first time.

In summing up its argument upon the insufficiency of the demand, defendant in its brief says:

"The case was tried on the allegations of the plaintiff that he had made demand for a return of the entire interest which he claimed to have paid, and defended throughout upon the ground that no demand for usury had been made. Upon that theory we believe the case is in this Supreme Court for review, and we confidently believe that it will be heard and decided upon the issues presented in the trial court."

From which it appears that the real issue submitted to the trial court was that the statute contemplated as a condition precedent to plaintiff's right of action that he make demand for the return of the interest paid in excess of the rate allowed by law, and that a demand for a different amount was not a compliance with the statute, and therefore such a demand would not entitle plaintiff to maintain this suit. But this question, as already stated, since the trial of this case in the lower court, was determined against defendant's contention in Miller v. State Bank, supra.

It is further urged that the court erred in treating the dealings between plaintiff and defendant as one transaction, and defendant claims there were in fact three separate and distinct transactions. The facts are that on January 10, 1911, plaintiff borrowed $400 from defendant for which he executed his note in the sum of $430, which was not paid at maturity, and thereafter executed two renewals, each of which were an extension of the previous indebtedness. It is claimed that no usury was charged in the last note, and that the first two notes were paid by the respective renewals, and that plaintiff's recovery should be reduced in the sum of $46, twice the amount of interest paid on the third note.

The court instructed the jury that, if they believed from the evidence that a note was given for which a usurious rate of interest was charged, and that such interest was not at the time of such charge paid, but was added into the note, and if such note was renewed, and if such usurious interest charged was carried into such usurious note, the renewal note would be equally tainted with usury as the original note. The giving of this instruction is assigned as error. The assignment cannot be sustained.

[1] In Anderson v. Tatro, 44 Okl. 219, 144 Pac. 360, it was held that the giving of a new note in renewal of a previous one was not payment of the earlier note as contemplated by section 3 of article 14 of the Constitution. In the opinion it was said:

"The evidence in this action shows that the plaintiff did not pay to the defendant the $690 as alleged in the first cause of action, but gave a renewal note for $762.45, which included seven months' interest. This note is the basis for recovery in the second cause of action. The giving of a new note in renewal of a previous one is not a payment of the earlier note as contemplated by section 3 of article 14 of the Constitution, as this section contemplates an actual payment, and not a promise to pay in the future. First Nat. Bank v. Lasater, 196 U. S. 115, 25 Sup. Ct. 206, 49 L. Ed. 408; Brown v. Marion Nat. Bank, 169 U. S. 416, 18 Sup. Ct. 390, 42 L. Ed. 801; Driesbach v. Nat. Bank, 104 U. S. 52, 26 L. Ed. 658; Rushing v. Bivens, 132 N. C. 273, 43 S. E. 798."

It is shown that the first two notes were usurious and were not paid when due, and that the original indebtedness entered into and became the consideration upon which the last note was based, and these facts bring this case within the rule declared in the case just cited.

No question is made as to the right of plaintiff to recover double the amount of usurious interest paid where demand is only made for the amount actually paid.

Finding no error in the record, the judgment is affirmed. All the Justices concur.

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(62 Okl. 76)

SMITH et al. v. GARNETT. (No. 8244.)

(Supreme Court of Oklahoma. Dec. 19, 1916.)

(Syllabus by the Court.)

1. GUARDIAN AND WARD ⟸175—LIABILITIES ON BONDS—BOND FOR SALE OF REALTY.

The sureties upon a guardian's special bond, given as a prerequisite to the sale of real estate, are not liable for a misappropriation by the guardian of funds not arising from the sale of the real estate, in relation to which their bond was given.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 600-606; Dec. Dig. ⟸175.]

2. GUARDIAN AND WARD ⟸92—BONDS—SPECIAL BOND.

Bond examined, and *held* to be a special and not a general bond.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 358-362; Dec. Dig. ⟸92.]

3. GUARDIAN AND WARD ⟸163, 180—SALE OF REALTY—ORDER OF COURT—CONCLUSIVENESS.

A valid final order of the county court, finding only the amount due from a guardian to his ward, is binding upon both the guardian and his bondsmen liable therefor as to such amount due, but it is not binding as to whether the obligation of a particular surety covers liability for a defalcation of such amount by the guardian.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 407, 474, 540-544, 621; Dec. Dig. ⟸163, 180.]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Muskogee County; Geo. C. Crump, Judge.

Action by Philip H. Garnett, administrator, against Thomas P. Smith and another. Judgment for plaintiff, and defendants appeal. Reversed as to plaintiffs in error for further proceedings.

Franklin & Carey, of Muskogee, for plaintiffs in error. Dan M. Meredith, and W. P. Z. German, both of Muskogee, for defendant in error.

BURFORD, C. Philip H. Garnett, as administrator of the estate of Rosa Smith, deceased, sued J. E. Johnson, A. W. Marshall, Thomas P. Smith, and V. R. Coss as sureties, upon certain guardianship bonds, given by Elias Dean as guardian of said Rosa Smith, a minor. It appears that Johnson and Marshall signed the guardian's general bond, did not dispute their liability, and all questions as to them are eliminated here. Smith and Coss were sureties upon a bond executed after the guardianship proceeding was commenced, the condition and obligation of which was as follows:

"The condition of the above obligation is such that whereas, on the 21st day of October, 1911, an order was entered by the county court of Muskogee county, Oklahoma, authorizing the above-named principal, as guardian of the estate of Rosa Smith and Helen Smith, to sell certain real estate belonging to said estate and providing therein that said guardian should give an additional bond in the above-named sum before making such sale: Now, therefore, if the said Elias Dean, as such guardian, shall faithfully execute the duties of such trust according to law, then this obligation to be void, otherwise to remain in full force and effect."

It seems that the guardian died, and thereupon Johnson and Marshall, sureties upon his general bond, filed a final report in the county court. This report was regularly set for hearing, at the hearing was corrected by the county judge, and, as corrected, approved. As this order is the subject of the principal contention here, we set it out in full:

"Now, on this 6th day of April, 1914, there comes on for hearing the final reports, filed on the 24th day of January, 1914, by the bondsmen of Elias Dean of the acts and doings of the said Elias Dean as guardian of Helen Smith and Rosa Smith, minors. And due notice of said hearing having been given, and the court, having heard and examined said reports, and being well and sufficiently advised in the premises, doth approve the same as changed. At this time there is due to Helen Smith the sum of $20 and to Rosa Smith the sum of $196.16."

Thereafter the ward Rosa Smith died, and the administrator of her estate brought the instant action.

Defendants Smith and Coss set up in their answer, to which no reply was filed, and offered to prove on the trial that the bond signed by them was given as a prerequisite to an order of sale for certain of the real property of the minor, that the supposed interest of the minor was sold, but, the nature of the minor's interest being in litigation, the amount of the bid was held in the county court, and upon it being finally determined, in effect, by this court, that said minor had no interest in the land so sold, the sum bid was returned to the prospective purchasers. This proof was refused by the trial judge, but the allegations thereof in the answer were never stricken nor denied by reply. It seems that the trial court proceeded upon the theory that the order of the county court was conclusive of the liability of the defendants in the absence of proof of fraud in obtaining it. In this he was clearly in error. We do not deem it necessary to decide the question raised in the brief as to the right of the bondsmen to make the final report or the validity of the order of the county court approving the report. Assuming that order to be entirely valid, it could not have the effect given it by the trial court.

[3] It is true that this court has held that a valid adjudication by the county court of the amount due from the guardian to his ward, being unappealed from, is binding, not only upon the guardian but upon his bondsmen (Greer v. McNeal, 11 Okl. 519, 69 Pac. 891; Southern Surety Co. v. Burney, 34 Okl. 552, 126 Pac. 748, 43 L. R. A. (N. S.) 308; Title Guaranty & Surety Co. v. Slinker, 35 Okl. 128, 128 Pac. 696; Henry v. Melton, 148 Pac. 730, and cases cited), and if the judgment be valid upon its face and the face of the record, and without fraud, it cannot be collaterally attacked. Hathaway v. Hoffman,

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153 Pac. 184, and Scott v. Abraham, 159 Pac. 270, are among the latest cases from this court upon that subject, and in them the earlier decisions are set out and reviewed. But here the order of the county court did not attempt to find what sureties were liable for the loss, if any had occurred. Nor do any of our cases go so far as to hold that the order would be binding on the sureties if it did so attempt to bind them. Determining the amount due from a guardian to his ward, the thing directly before the county court, and determining what persons are liable for a defalcation of that amount, a thing not at all before the county court, are entirely different propositions. Inasmuch as the county court did not attempt to determine the parties, other than the guardian, liable for the amount found due, it is not necessary for us to go further than to say that the order approving the final report, if valid at all, was binding as to the amount due from the guardian, but not as to the liability of these defendants to pay that amount if the guardian defaulted. See Lyman v. Conkey, 1 Metc. 317, cited and discussed in Mattoon v. Cowing, 13 Gray, 387–389. Such is the effect of the conclusion reached by this court in Dunleavy v. Mayfield, 155 Pac. 1145, where it was said:

"Generally an order of the county court, approving a final report and settlement of a guardian, is conclusive on both the guardian and ward, and is impervious to collateral attack, as to all matters properly included in such report; yet such an order is not to be extended by mere intendment to matters not actually or necessarily embraced in the report and determined by such order."

Turning now to the bond. Upon its face it is apparently the bond provided for in section 6564, Rev. Laws 1910, to be given prior to a sale of real estate. That section provides:

"Every guardian authorized to sell real estate must, before the sale, give bond to the county judge, with sufficient surety, to be approved by him, with condition to sell the same in the manner and to account for the proceeds of the sale as provided for in this article."

[2] The bond, heretofore quoted, sets out the contemplated sale, and then provides that if the guardian shall faithfully execute the duties of "such trust," the bond should be void. What trust? Obviously the only one referred to in the bond, to wit, the sale of real estate. Under no fair construction can this bond be said to be a general one covering any devastavit of the estate.

[1] If the defendants could prove, as they should have been allowed to do, if indeed the fact is not admitted in the pleadings, that no funds ever came into the guardian's hands from the sale of real estate, then the bondsmen on the special bond ought to be here excused, as they are not liable for loss of general funds of the estate arising from sources independent of the sale for which the bond was given. This is clear from the statute and the terms of the bond. It has been so held in similar cases, in Swisher v. McWhinney, 64 Ohio St. 343, 60 N. E. 565; Barker v. Boyd (Ky.) 71 S. W. 528, and Fay v. Taylor, 52 Mass. (11 Metc.) 529. See Woerner on Guardianship, p. 133.

Southern Surety Co. v. Burney, supra, is cited in support of the contention that the sureties upon the special bond are generally liable. That case held that a guardian's general bond covered a loss, also covered by a special bond to sell real estate, but to say that the greater includes the smaller is far from saying that the smaller includes the greater. Such must be the analogy which we are asked to draw from that case.

For the reasons given, the cause should be reversed as to plaintiffs in error for further proceedings.

PER CURIAM. Adopted in whole.

(62 Okl. 54)

ABERCROMBIE et al. v. EDWARDS et al.

(No. 8119.)

(Supreme Court of Oklahoma. Dec. 19, 1916.)

(Syllabus by the Court.)

1. INNKEEPERS ⇐11(3) — LIABILITIES—LOSS OF GOODS.

Under the common law, where property is brought to a hotel for the purpose of sale or show, such as the goods of commercial travelers, the law does not hold the innkeeper to his strict liability, but only to the exercise of ordinary care, and makes him answerable only for his negligence.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. § 22; Dec. Dig. ⇐11(3).]

2. INNKEEPERS ⇐11(11)—LIABILITIES—LOSS OF GOODS.

Under section 1113, Rev. Laws 1910, an innkeeper is liable for all losses of, or injuries to, personal property placed by his guests or boarders under his care, unless occasioned by an irresistible, superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one whom he brought into the inn or boarding house.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. §§ 33, 34; Dec. Dig. ⇐11(11).]

3. INNKEEPERS ⇐11(6)—LIABILITIES—"PERSONAL PROPERTY."

The words "personal property," as used in this act, embrace the samples of traveling salesmen.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. §§ 3, 25–27; Dec. Dig. ⇐11(6).

For other definitions, see Words and Phrases, First and Second Series, Personal Property.]

4. INNKEEPERS ⇐11(11)—LIABILITIES—LOSS OF GOODS—"PLACED UNDER HIS CARE."

The provision of this statute that the innkeeper is liable for goods of his guests, "placed under his care," is declaratory of the common law, not restrictive thereof. Under such provision it is not necessary, in order to render the innkeeper liable for their loss, that the goods be placed under his special care, or that notice be given of their arrival. It is sufficient if they are brought into the inn in the usual and ordinary way and are not retained under the exclu-

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sive control of the guest, but are under the general and implied control of the innkeeper.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. §§ 33, 34; Dec. Dig. ⟸11(11).]

5. INNKEEPERS ⟸11(12)—LIABILITIES—LOSS OF GOODS—QUESTION FOR JURY.
Whether the liability thus imposed is excused by the negligence of the guest, contributing to the loss is in this state a question for the jury.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. §§ 35–40; Dec. Dig. ⟸11(12).]

6. INNKEEPERS ⟸11(12) — LIABILITIES—ACTIONS—QUESTIONS FOR JURY.
Evidence examined, and *held* sufficient as against a demurrer thereto.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. §§ 35–40; Dec. Dig. ⟸11(12).]

Commissioners' Opinion, Division No. 2. Error from District Court, Custer County; T. A. Edwards, Judge.

Action by W. A. Abercrombie and another against Sarah Edwards and another. From a judgment sustaining a demurrer to the evidence, plaintiffs bring error. Reversed, and new trial ordered.

Phillips & Mills, of Clinton, for plaintiffs in error. Geo. T. Webster, of Clinton, for defendants in error.

BURFORD, C. This suit was instituted by the plaintiffs in error against the defendants in error to recover the value of a certain sample trunk and its contents. The plaintiff's evidence showed that he was a traveling salesman, and that the goods lost were samples which he carried for the purpose of show and display. His trunk was placed in the sample room of the hotel by a baggageman employed by him, and after it had remained there for a considerable period of time finally was found to be missing, and it was presumed that the same had been stolen.

There was evidence tending to show that it was customary for commercial travelers to have their sample trunks placed in the sample room, and that the plaintiff had followed this custom during five or six years previous to the loss of his trunk, and that he knew of no other place provided for sample trunks. There was also evidence that the proprietress of the hotel had a room in the third story where property placed specially in her care was locked up and stored. There was evidence that the proprietor of one of the bus and baggage lines in Clinton, where the hotel was located, was paid a weekly stipend to solicit guests for the hotel, and that he commonly placed their baggage, without special instruction, as he knew what to do with it. There was no proof, however, that this particular baggageman handled the trunk for plaintiff when last placed in the sample room, plaintiff's testimony only going so far as to establish that he usually employed such baggageman. The proprietress, introduced as a witness by plaintiff, testified positively that she did not know that the trunk was placed in the sample room. The only evidence tending to show knowledge was testimony that on one occasion some months previous to the loss one of the hotel clerks saw the trunk in the sample room and examined a part of its contents, and that it had been the custom of plaintiff and other traveling men for years to place their trunks in this sample room. The last time it was placed there it remained some sixty days; the plaintiff Abercrombie being in and out of the hotel visiting his customers in the surrounding country. On December 12th he saw and opened the trunk in the sample room. From that time until December 14th he was registered at the hotel, but was away for several meals. On December 14th he looked for his trunk and found it gone. When he visited the sample room on December 12th he found the room unlocked and left it so. Proof was that the custom of the hotel was to leave this room unlocked, except when it was being used by some particular salesman, in which case the key was delivered to the salesman during his occupancy of the sample room. To this evidence the trial court sustained a demurrer, and the correctness of his ruling is before us for review.

[1] The liability of an innkeeper under the common law is fully determined in the decision of Williams v. Norvell-Shapleigh Hardware Co., 29 Okl. 331, 116 Pac. 786, 35 L. R. A. (N. S.) 350, Ann. Cas. 1913A, 448, a case almost identical upon the facts. It was there said:

"Where property is brought to a hotel for the purpose of sale or show, such as the goods of commercial travelers, the law does not hold an innkeeper to his strict liability, but only to the exercise of ordinary care and answerable for negligence."

[2] That case, however, arose in the Indian Territory, and liability was governed by the rules of the common law only. Our statute (section 1113, Rev. Laws 1910) provides in part:

"An innkeeper or keeper of a boarding house is liable for all losses of, or injuries to, personal property placed by his guests or boarders under his care, unless occasioned by an irresistible superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one whom he brought into the inn or boarding house."

As was said in Huckins Hotel Co. v. Hooper, 44 Okl. 307, 144 Pac. 177:

"This statute practically makes the innkeeper an insurer of the property of his guest placed under his care," unless excused by the terms of this or the other sections of the statute relating to keeping a safe, etc.

[3] The statute extends the liability to all "personal property," thus doing away with the distinction drawn at common law between goods for personal use and goods carried as samples or for sale.

[4] The only question remaining, then, is whether the plaintiff's proof showed that his

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trunk was placed under the care of the innkeeper or the contributory negligence of the plaintiff was under our Constitution a question for the jury. We may eliminate any question as to whether a delivery to a baggageman hired to solicit for the hotel was a delivery to the innkeeper, as there is no definite proof that the trunk was upon the occasion of its being last placed in the hotel delivered to the particular baggageman shown to have been so employed or to any of his agents. It then remains to determine whether placing the trunk in the sample room under the circumstances indicated above amounts to placing under the innkeeper's care. We regard the expression in the statute "placed under his care" as not intended to modify the rules of the common law in regard to the time at which, and the circumstances under which, the liability of the innkeeper attaches to the goods of his guest. We think section 1113 must be construed as extending rather than restricting the common-law doctrine. The liability of the innkeeper is extended to all personal property of the guest, whereas at common law it did not extend to goods carried for purposes of sale, nor, as held by many courts, to large sums of money or articles of great value not necessary for the traveler's convenience and comfort. So, too, the liability of an innkeeper is extended to the property of regular boarders, and a boarding house keeper is brought under the same rules as an innkeeper. Where, therefore, every other provision of the section amplifies and extends rather than restricts the common law, we feel justified in inferring that the intention of the Legislature in the particular clause in question was likewise not restrictive. On the other hand, section 1114 clearly limits the harsh liability imposed by the preceding section. It provides for exemption from liability for articles of great value and small compass not required for present use, if a safe be provided, notice given, and the guest fail to deposit such articles especially with the landlord, but this section also, by strong implication at least, recognizes the existence of liability unless there be a compliance with the statute. Huckins Hotel Co. v. Hooper, supra.

California prior to 1895 had a statute which is an exact duplicate of our own. In Mary T. Fay v. Pacific Improvement Co., 93 Cal. 252, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198, the Supreme Court of that state, construing this statute, said:

"Nor is it necessary, in order to render the innkeeper liable, that the property should have been delivered into his exclusive personal possession. 'The guest may retain personal custody of his goods within the inn, as of his trunk and its contents, his wearing apparel, and other articles in his room, and any jewelry or valuables carried or worn about his person, without discharging the innkeeper from liability.' Jalie v. Cardinal, 35 Wis. 126."

And in Churchill v. Pacific Improvement Company, 96 Cal. 490, 31 Pac. 560, speaking of this statute, the California court said that:

The statute "was simply declaratory of the common law," and, "if, therefore, there was no such statutory provision as we find in section 1859, the liability of the innkeeper would be the same as it is under that section."

Though we are not prepared to now approve the broad language of this case in all respects, yet it is illustrative of the views of that court in regard to the effect of the statute.

Viewing the statute as we do, as not restrictive of the common law, we turn to the principle of that law to determine the innkeeper's liability here. At common law notice to the innkeeper that the goods of the guest were brought within the inn was not necessary before the innkeeper's liability attached, nor was it necessary that complete domination over the goods be given the innkeeper. If they were under his general control, though retained in his room by the guest, it was sufficient. So, too, if the goods of the guest were deposited in the usual and ordinary place for receiving them, and especially if that place were within the inn or appurtenant to it, the liability at once attached. Thus it has been held:

"It is not necessary that goods should be placed in the special keeping of an innkeeper in order to make him liable in case of loss. If the owner is a guest, and his goods are within the inn, that is sufficient to charge the innkeeper." McDonald v. Edgerton, 5 Barb. (N. Y.) 560.

"A delivery of the goods into the custody of the innkeeper is not necessary to charge him with them; for, although the guest doth not deliver them or acquaint the innkeeper with them, still the latter is bound to pay for them if they are stolen or carried away; even though the person who stole them or carried them away is unknown." Story on Bailments, § 479; 2 Kent's Commentaries, 593; Burrows v. Trieber, 21 Md. 320, 83 Am. Dec. 590.

"Although the guest doth not deliver his goods to the innholder to keep, nor acquaint him with them, yet, if they be carried away or stolen, the innkeeper shall be charged." Calye's Case, 8 Co. 32.

"It is clear that the goods need not be in the special keeping of the innkeeper in order to make him liable; if they be in the inn, that is sufficient to charge him." Burnett v. Millar, 5 T. R. 274, 4 M. & S. 306.

"It is not necessary that the baggage should be in the innkeeper's special keeping; but it is generally sufficient that it is in the inn under his implied care. The innkeeper may be exonerated by showing that the guest has taken upon himself exclusively the custody of his own goods; but even a request by him that they shall remain in some particular place in the inn, the place so designated not being in his exclusive possession, but under the control and supervision of the innkeeper, will not discharge the latter from his liability" if the goods be lost. "Unless the innkeeper has given his guest notice that he will not be responsible for the goods if they are left in the public room, his liability still continues. The mere exercise of the choice of a room or other place by the guest which is not objected to will not discharge the innkeeper from his general responsibility if the guest does not thereby acquire an exclusive possession of the room or place." Packard v. Northcraft's Adm'r, 59 Ky. (2 Metc.) 439.

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The "innkeeper's responsibility for property of his guests extends to every part of his house into which it is usual for such property to be taken, and this responsibility can only be limited by his showing that there was a different understanding between him and his guest." Epps v. Hinds, 27 Miss. 657, 61 Am. Dec. 528.

"Where a traveler went to an inn and desired to have his luggage taken into the commercial room, to which he resorted, from which it was stolen, *held*, that the innkeeper was responsible, although he proved that, according to the usual practice of his house, the luggage would have been deposited in the guest's bedroom, and not in the commercial room, if no order had been given respecting it." Richmond v. Smith, 8 Barn. & Cress. 9, 15 E. C. L. 14.

In Maloney v. Bacon, 33 Mo. App. 501, a trunk was placed upon the platform outside the hotel—the usual place for delivery of such baggage. The court held the innkeeper liable for its theft, saying:

"Applying the principle to be deduced from the foregoing, we hold that, if defendant had customarily received the baggage of his guests at the platform in the immediate front of his hotel, and that plaintiff's trunk was delivered on this platform in the usual and customary way, as practiced between the defendant and transfermen, that defendant should answer for its loss."

Innkeepers are chargeable for the goods of their guests lost or stolen out of their inn, and to render them liable it is not necessary that the goods should be delivered into the special keeping, nor to prove negligence, as where a sleigh loaded with wheat was put by a guest into an outhouse appurtenant to the inn, where loads of that description were usually received, and the grain stolen during the night, the innkeeper was held responsible for the loss. Clute v. Wiggins, 14 Johns. (N. Y.) 175, 7 Am. Dec. 448; Norcross v. Norcross, 53 Me. 163; Bradner v. Mullen, 27 Misc. Rep. 479, 59 N. Y. Supp. 178; Read v. Amidon, 41 Vt. 15, 98 Am. Dec. 560.

[6] Applying the principles to be deduced from these cases to so much of the testimony in the case at bar as is favorable to plaintiff, and omitting consideration of all other, as we must upon demurrer to the evidence, it seems that a case was proven. Plaintiff was a guest; he caused his trunk to be deposited within the hotel, in the only place that he, from an experience of five or six years in stopping there, knew to be provided for such trunks. It was shown that this was the room ordinarily used by traveling men for their sample trunks. Although there was no proof that the landlady knew his trunk was in the room upon the particular occasion involved, inasmuch as the testimony showed it had previously been placed there, as many as 20 times, it is fairly inferable that she knew that it was customary to do so. In fact, this was the only "sample" room provided, and she herself testified that she permitted and authorized its use by traveling men. The room is shown not to have been in the exclusive possession of the plaintiff, Abercrombie.

[5] If he was guilty of negligence which would preclude his recovery, that was a question for the jury. Upon the whole we are of opinion that the testimony was sufficient, as against a demurrer to the evidence, to authorize the submission of the cause to the jury, and that the trial court was in error in refusing so to do.

The cause should be reversed, and a new trial ordered.

PER CURIAM. Adopted in whole.

(62 Okl. 57)

ATOKA COUNTY v. OKLAHOMA STATE BANK. (No. 7893.)

(Supreme Court of Oklahoma. Dec. 19, 1916.)

(Syllabus by the Court.)

1. TAXATION ⟸543(1) — ASSESSMENTS — CORRECTION.

At the time this cause arose, the sole method by which erroneous assessments of taxes might be corrected or values equalized was by proceeding before the board of equalization and appeal to the courts, the application to the county board of equalization to be made prior to the payment of taxes so assessed. Proceedings under section 14, c. 152, Session Laws of 1910–11, for refund of taxes erroneously assessed and paid, *held* void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1006; Dec. Dig. ⟸543(1).]

2. TAXATION ⟸472—TAX ASSESSOR—DUTIES OF.

It is the duty of the tax assessor to correctly revise the assessment roll as per order of the county board of equalization before transmitting his abstract to the state board of equalization. *Held*, in the instant case, that if he failed so to do, relief cannot be had from the board of county commissioners.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 843; Dec. Dig. ⟸472.]

3. TAXATION ⟸464—ASSESSMENTS — COUNTY COMMISSIONERS.

The board of county commissioners, as such, is not a board of equalization. While the county board of equalization has the same personnel as the board of county commissioners, yet the boards are differently organized, perform separate functions, and are independent of each other.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 828; Dec. Dig. ⟸464.]

4. TAXATION ⟸493(1) — ASSESSMENTS — APPEALS.

Section 15, c. 152, Session Laws of 1910–11, prescribing the method of appeal from county boards of equalization, does not apply to appeals from boards of county commissioners.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 876; Dec. Dig. ⟸493(1).]

5. TAXATION ⟸493(1)—COUNTY COMMISSIONERS—APPEALS FROM ACTION OF.

Sections 1640 and 1641, Revised Laws 1910, prescribe the method of appeal from actions of the board of county commissioners at the time of the appeal herein.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 876; Dec. Dig. ⟸493(1).]

6. TAXATION ⟸493(1)—APPEALS—SUFFICIENCY OF APPEAL.

An appeal taken from an action of the board of county commissioners, on behalf of the

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county, by the county attorney, under sections 1640 and 1641 of Revised Laws of 1910, upon the written demand of seven or more taxpayers of the county, said action relating to the interests or affairs of the county at large, or any portion thereof, *held* proper in this case.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 876; Dec. Dig. ⟸493(1).]

7. TAXATION ⟸493(6, 7) — PROCEEDINGS — APPEALS.

If such appeal is taken by the county attorney, the matter is tried de novo in the district court, and it is not necessary, in the notice of appeal, to set forth specifically the grounds therefor.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 880, 881; Dec.Dig. ⟸493(6, 7).]

8. TAXATION ⟸493(4) — ASSESSMENTS — APPEALS.

The action of the board of county commissioners in assuming jurisdiction under the latter part of section 14, c. 152, Session Laws of 1910–11, and in determining that an erroneous assessment has been made, and ordering return or refund of portion of taxes collected is of a judicial nature and, though void, may be appealed from to the district court.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 879; Dec. Dig. ⟸493(4).]

9 TAXATION ⟸493(1) — ASSESSMENTS — APPEALS.

Action of the district court in dismissing appeal of county attorney taken on behalf of the county upon the written demand of seven taxpayers from action of the board of county commissioners attempting to remit and refund portion of taxes paid by reason of alleged erroneous assessment, *held* to be error in this case.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 876; Dec. Dig. ⟸493(1).]

Commissioners' Opinion, Division No. 1. Error from District Court, Atoka County; J. H. Linebaugh, Judge.

Proceedings by the Oklahoma State Bank, a corporation, against Atoka County, to recover taxes. An appeal to the district court from the action of the board of county commissioners being dismissed, Atoka County brings error. Reversed and remanded.

J. W. Clark, Co. Atty., and M. C. Haile, Asst. Co. Atty., both of Atoka, for plaintiff in error. R. M. Rainey, of Atoka, for defendant in error.

STEWART, C. On the 28th day of January, 1915, the defendant in error, the Oklahoma State Bank, filed an affidavit before the board of county commissioners of Atoka county, Okl., claiming a refund of taxes alleged to be erroneously assessed for the year 1914, in the sum of $786.80. Said affidavit was filed under section 14, c. 152, Session Laws of Oklahoma, 1910–11, and contains the following allegations:

"Personally appeared before the undersigned authority in and for said county, Jas. Hudspeth, cashier of the Oklahoma State Bank of Atoka, Okl., who being by me first duly sworn, deposes and says: That in the year 1914 his bank rendered their taxes to the county assessor as follows:

Capital, surplus and undivided profits	$65,000 00
Less real estate	18,260 00
Less Oklahoma bonds and warrants	28,000 00
	$46,260 00
Leaving a balance of	$18,740 00

"That he was summoned to appear before the county commissioners and show why same should not be raised, that said cashier did appear, and it was agreed and placed on the books of the assessor as outlined above, and is still on the books of the assessor in the above amounts, but for some reason the assessment was raised to the county treasurer in the sum of $28,000. Therefore making an erroneous assessment against me of $28,000, amounting to $786.80, and ask that the same be remitted, refunded, as the law provides."

On the 2d day of February, 1915, the board of county commissioners of Atoka county, acting on such affidavit, ordered the county treasurer to remit and refund the sum of $786.80 to the Oklahoma State Bank as being erroneously assessed against said bank for the year 1914. The county attorney, acting under the provisions of sections 1640 and 1641, Revised Laws of Oklahoma of 1910, and upon the written demand of seven taxpayers of the county, appealed on behalf of Atoka county to the district court of said county, from such action of the board. On February 19, 1915, notice of appeal was served on a member of the board of county commissioners, and also on the president of the bank. The appeal was filed in the district court of Atoka county on February 20, 1915. The defendant in error, Oklahoma State Bank, on March 6, 1915, filed a motion in the district court to dismiss the appeal, setting up the following grounds, to wit: First, that the order attempted to be appealed from is not an appealable order; second, that the purported appeal was not taken in the manner or in the form provided by the laws of Oklahoma. Thereafter, and on the 9th day of June, 1915, the district court made an order dismissing the appeal, to which action of the court the county attorney excepted, and on the part of Atoka county has appealed to this court from the order of the court below dismissing the appeal.

[1] At the time the proceedings were had in the court below, section 14, c. 152, Session Laws 1910–11, had not been construed by this court. The latter part of said section provides:

"If any such taxes, so erroneously assessed shall have been paid, the same shall be a valid charge against the county and shall be refunded by the board of county commissioners and the amount of such refunded taxes, which have been paid over to any municipality, or to the state, shall be deducted from the tax money due the state or such municipality at the next settlement."

In Johnson v. Grady County, 150 Pac. 497, the clause quoted is held to be unconstitutional.

At the time the claim of defendant in error was presented to the board of county commis-

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sioners, chapter 19, Session Laws 1916, had not been enacted, and it was the law of this state that the sole method by which erroneous assessments of taxes may be corrected or values equalized was by proceeding before the boards of equalization, and appeal therefrom to the courts, such proceedings to be instituted before the payment of the tax complained of. Section 7370, Revised Laws 1910; chapter 87, § 3, Session Laws 1910; Johnson v. Grady County, supra; Board of County Commissioners, Canadian County et al. v. Tinklepaugh et al., 152 Pac. 1119; Lusk et al. v. Porter, Co. Treas., 156 Pac. 224. Chapter 19, Session Laws 1916, purports to lodge certain authority concerning these matters in the board of county commissioners. Said act is not material to this case.

The claim of defendant in error arose over an alleged erroneous assessment for the year 1914. The same was not filed until the 28th day of January, 1915, long after the expiration of the time for making up the tax rolls. It is provided by our statutes that the county board of equalization shall sit on the first Monday in June of each year, and that the assessor shall correctly revise the assessment roll as per order of the county board of equalization; that not later than Saturday before the third Monday in June of each year he shall make an abstract of the assessment as revised by the county board of equalization and transmit the same to the state board of equalization, and that immediately after the receipt of the report from the state board of equalization the assessor shall proceed to revise his assessment rolls accordingly. Section 12, c. 152, Session Laws 1910–11.

It is further provided by section 7374, Revised Laws 1910, that the state board of equalization shall hold its annual meeting on the third Monday in June of each year, or as soon thereafter as the total valuation of all the property in the state subject to taxation shall have been ascertained, and that the state board of equalization shall—

"compute the amount appropriated to pay the expenses of the state government for the period aforesaid with twenty per cent. added thereto as an allowance for delinquent taxes. From the actual amount thus computed shall be deducted the estimated income of the state from all sources other than from the levy hereby made. The amount so ascertained shall be certified by the state auditor to the clerks of the several counties in this state, and shall be entered upon the tax rolls thereof."

From the record in this case it appears that the complaint was filed before the board of county commissioners by the defendant in error on January 28, 1915, after the completion of the tax rolls for year 1914, and after defendant in error had paid its taxes for the year 1914. It is held by Justice Sharp, of this court, in Lusk et al. v. Porter, County Treasurer, supra, that:

"Where the county commissioners, acting as a county board of equalization, as provided in section 12, c. 152, Session Laws 1910–11, complete their labors, and the county assessor, in the manner and within the time fixed by statute, makes and transmits an abstract of the assessment as revised by said county board of equalization, to the state board of equalization, and where the county assessor thereafter receives from the state board of equalization his report, the board of county commissioners acting as a county board of equalization is without authority to alter, change, or in any manner revise the action of the state board; and any attempt to do so on the part of said board is a nullity."

In view of the statutes and the holdings of this court to the effect that the only remedy for erroneous assessments or corrections as to taxes is by proceeding before the board of equalization prior to collection of taxes, and appeal therefrom, we conclude that the action of the board of county commissioners of Atoka county, in attempting to remit or refund to the defendant in error a portion of the taxes paid, is without authority and void. We are further fortified by the decision of this court in Johnson v. Grady County, supra, holding that the clause in section 14, c. 152, Session Laws 1910–11, declaring taxes erroneously assessed and paid to be a valid charge against the county, is unconstitutional and void.

[2, 3] It appears from the affidavit filed before the board of county commissioners that the defendant in error by its cashier appeared before the county commissioners, and that by agreement the assessment in question was corrected in accordance with the claim of the defendant in error, and so placed on the books of the assessor. We assume that the affiant meant to say he appeared before the county board of equalization. If such was done, it was the duty of the assessor to make such corrections as may have been ordered by the county board of equalization, and show same in his abstract transmitted to the state board of equalization, and the tax rolls should have been prepared accordingly. If the assessor failed in his duty, the defendant in error suffered a wrong. The policy of our law is that there is a remedy for every wrong. We can conceive of a remedy that the defendant in error had, and perhaps yet has, if a wrong has been done. It does not follow, however, that because the defendant in error was injured by the failure to show the correction on the rolls furnished the treasurer, the board of county commissioners had authority to give relief. The law does not vest such authority in the board of county commissioners. The authority of the board of county commissioners, however, is only incidentally involved in the case at bar; the matter to be determined by us is whether or not the district court of Atoka county erred in dismissing the appeal taken by the county attorney from the action of the board of county commissioners. The defendant in error contends in its brief that if the action of the board of county commissioners is void, no appeal would lie from such void action, and that for this reason the action of the district court in dismissing the appeal should not be disturbed. It is also urged that the

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action of the board of county commissioners was neither a judicial nor a quasi judicial act, and therefore, no appeal will lie. It is further contended that the appeal was not taken in the manner and form provided by the statutes of Oklahoma. The defendant in error makes specific reference to section 15, c. 152, Session Laws 1910–11, which section provides:

"Appeals may be taken from all county boards of equalization to the district or superior court of the county wherein the assessment is made, within thirty days after the adjournment thereof, and to the Supreme Court, if from the state board within sixty (60) days after the adjournment of such board, but not afterwards. Provided that no matter will be reviewed on appeal which was not presented to the board appealed from; and, provided, further, that every appeal shall state specifically the objections to the assessment and the relief sought. Provided, further, that appeals may be taken from the district or superior courts to the Supreme Court as provided by the Code of Civil Procedure."

Counsel for defendant in error insists that the notice of appeal does not state specifically the objections to the motion of the board of county commissioners, that the board of county commissioners is a board of equalization, and that section 15, c. 152, Session Laws 1910–11, with reference to appeals from boards of equalization, applies to the taking of an appeal in such a case as the one at bar. Our statute provides for the organization and session of the county board of equalization, and by law the tax assessor is made secretary of such board. It is well understood that the recording officer or clerk of the board of county commissioners is the county clerk of the county. While the board of equalization has the same personnel as the board of county commissioners, yet it is organized differently, performing a separate function, and it does not follow that such boards are one and the same, or that the board of county commissioners, as such, constitute a board of equalization. In Johnson v. Grady County, supra, Judge Mathews, speaking for the court, says:

"And it is true that the board of equalization is composed of the board of county commissioners, but the board of equalization is clearly a separate and distinct body from the board of county commissioners. The board of equalization exists at only one time in the year. Section 11 provides that the board of equalization shall meet the first Monday in June, and when it completes its work at that time, it loses its identity as a board of equalization. It is as completely and clearly a separate and distinct board or body as if it were composed of different men from those constituting the board of county commissioners."

[4] It must therefore follow that section 15, c. 152, Session Laws 1910–11, does not apply to appeals from the board of county commissioners.

We have read with interest the instructive brief of the learned counsel for defendant in error, and have not overlooked any of the authorities cited, nor the legal propositions advanced. We are convinced that as a general proposition ministerial or administrative acts cannot be reviewed on appeal to the courts. Such a course would lead to a conversion of the functions of the courts, and would not accord with the American policy of preserving intact, separate, and distinct the three co-ordinate branches of the government. In the case at bar, however, it is not necessary for us to pass on the question of whether or not only judicial or quasi judicial acts of the board of county commissioners are proper subjects to be reviewed on appeal. Assuming, however, for the purposes of this case, that only such acts may be thus reviewed, the questions left for us to answer may be reduced to the following: First, did the action of the board of county commissioners of Atoka county, in assuming jurisdiction, finding upon the question presented, and ordering the taxes collected by virtue of the alleged erroneous assessment to be returned, partake of a judicial nature? Second, the action of the board of county commissioners in this case being void, can the county attorney, on the written demand of seven taxpayers, appeal to the district court? Third, has the county attorney appealed in the manner provided by law?

[5] We are of the opinion that the board of county commissioners in assuming authority and asserting jurisdiction under section 14, c. 152, Session Laws 1910–11, which purports to give the board such authority, performed an act judicial in its nature, and, further, that in determining whether or not an erroneous assessment had been made, the amount thereof, and whether or not the county was liable, the board also acted judicially.

[6, 7] The county attorney, under the circumstances, had the right to appeal on behalf of the county: (1) In order to have the district court pass on the authority and jurisdiction of the board of county commissioners; (2) if the board had jurisdiction to have a determination by the district court as to whether or not under the facts in the case, the money should have been refunded.

The first part of section 1640, Revised Laws 1910, provides for an appeal from all decisions of the board of county commissioners on matters properly before them to the district court by any person aggrieved, including the county, by its county attorney, upon filing of a bond to be approved by the county clerk, the conditions of the bond being prescribed in said section. The latter part, only, of said section is applicable to this case, and reads as follows:

"Provided, that the county attorney upon the written demand of at least seven taxpayers of the county, shall take an appeal from any action of the board of county commissioners when said action relates to the interests or affairs of the county at large or any portion thereof, in the name of the county, when he deems it to the interest of the county so to do; and in such case no bond shall be required or given and upon serving the notice provided for in the next section the county clerk shall proceed the same as if a bond had been filed."

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Section 1640, by act of the Legislature of March 11, 1915, c. 117, Session Laws of 1915, has been amended so as to require written demand of at least 15 freeholders, but such amendment does not affect the case at bar. Section 1641, Revised Laws 1910, provides:

"Said appeal shall be taken within twenty days after the decision of said board, by serving a written notice on one of the board of county commissioners, and the clerk shall, upon the filing of the bond as hereinbefore provided, make out a complete transcript of the proceedings of said board relating to the matter of their decision thereon, and shall deliver the same to the clerk of the district court."

Section 1640, supra, has come down to us from territorial days; it became the law of the territory of Oklahoma in 1890, and has remained the law of the territory and state of Oklahoma since its enactment, with the exception of the amendment mentioned. The section was construed by the Supreme Court of the territory of Oklahoma in Hadlock v. Board of County Commissioners of County G, 5 Okl. 570, 49 Pac. 1012. From such opinion, we will quote later.

Judge Brewer, speaking for the Supreme Court of this state, partially construes said section, in Parker et al. v. Board of Commissioners, Tillman County, 41 Okl. 723, 139 Pac. 981. Judge Brewer holds that the overruling by the board of county commissioners of a protest made by citizens and taxpayers against the location by the county commissioners of a bridge at a certain named point cannot be made the subject of review by appeal to the district court, for the reason that the board in such case was performing an administrative or governmental function, and that the protest did not extend to any claim of irregularity in the preliminary notices or challenge the right of the commissioners. We agree in the conclusions reached by Judge Brewer, but, in our opinion, the decision does not apply to the facts in this case.

It is evident that under section 1640, supra, any action of the board of county commissioners, "when said action relates to the interests or affairs of the county at large or any portion thereof," could be appealed from in the name of the county by the county attorney, upon the written demand of seven taxpayers of the county, at the time the county attorney appealed to the district court. The language is broad enough to cover any act of the board of county commissioners, whether administrative or judicial. It is doubtful, however, whether by statute the courts can be clothed with power to review administrative acts of boards created by law unless in the performance of such acts judicial or quasi judicial power is exercised. It is not necessary, however, to pass on this question in the case at bar, and we are not passing on the same.

[8, 9] It is not contended that the county attorney did not serve and file the notice of appeal as required by sections 1640 and 1641, supra, nor that the county attorney did not act upon the written demand of seven taxpayers of the county, and the record supports the course of the county attorney. The notice as served, both on one of the county commissioners and on the defendant in error, reads:

"To the Oklahoma State Bank, a corporation, and the Board of County Commissioners of Atoka County, Oklahoma. Notice is hereby given that Atoka county, by its county attorney J. W. Clark, will appeal to the district court, in and for said Atoka county, from a decision of the board of county commissioners of said Atoka county, Oklahoma, heretofore rendered on the second day of February, 1915, refunding to the said the Oklahoma State Bank, the sum of seven hundred eighty-six and 80/100 ($786.80) dollars, as an erroneous assessment of taxes, upon an erroneous assessment affidavit No. 36, filed by the Oklahoma State Bank with the board of county commissioners on the 28th day of January, 1915. This appeal is taken upon the written demand of not less than seven taxpayers as provided by law. [Signed] J. W. Clark, County Attorney for Atoka County."

Without question, the record in this case shows that the action of the board of county commissioners "relates to the interests or affairs of the county at large," and we are of the opinion that such notice is sufficiently specific under section 1640 and 1641, Revised Laws of Oklahoma, and that the county attorney has appealed in the manner provided by law.

Referring again to the contention of defendant in error that if the action of the board of county commissioners was void, the appeal should be dismissed, we will say that we can see no advantage that would come to the defendant in error by this court sustaining the dismissal of the appeal on such grounds, except as to the matter of costs.

We suggest that as a fair proposition, if costs have been incurred because the defendant in error caused the board of county commissioners to do a void act, then the defendant in error, and not the county, should bear the costs. While the action of the board of county commissioners in attempting to remit or refund the taxes paid is void, and in our opinion could be attacked collaterally, yet we hold that the county, by its county attorney, under the record in this case, would have a right to appeal from such void act of the board, especially in view of the fact that the void order made by the board might injuriously affect the interests or the affairs of the county. We are forced to this conclusion, not only by the general principle involved, but because of the verbiage of the statute itself which provides that the county attorney—

"shall take an appeal from any action of the board of county commissioners when said action relates to the interests or affairs of the county at large or any portion thereof."

We agree with the attorney for defendant in error that appeals do not lie as a matter of right. They are creatures of either statutory or organic enactment, but there is ample statutory authority for an appeal of this

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character. It was the duty of the county attorney, after written demand was made by seven taxpayers, to make the appeal, though the action of the board was void and of no effect. In support of this view we quote from the opinion of Justice Gillette of the Supreme Court of Oklahoma Territory in Hadlock v. Board, supra. On page 573 of the opinion (49 Pac. 1013) the court says:

"The statute giving the right of appeal from all decisions of the board of commissioners does not contemplate that a person aggrieved shall only have the right of appeal in those matters of which the board has jurisdiction, but whenever the board does act upon any matter which is before it for action, appeal lies, and it is for the purpose of determining whether or not the board properly acted upon the matter before it that the appeal is taken."

In the same opinion the court further says:

"And even if it be held that the judgment of the board of commissioners is a void judgment, still appeal will lie" (citing Shoemaker v. Grant County, 36 Ind. 175; Stonington v. States, 31 Conn. 213; Petty v. Durall, 4 Greene [Iowa] 120).

As sustaining the view that where the board of county commissioners act without authority, remedy in equity does not necessarily preclude remedy at law by appeal, the case of Harlow v. Board of County Commissioners of Payne County et al., 33 Okl. 353, 125 Pac. 449, and authorities cited are instructive.

The judgment of the district court of Atoka county in dismissing the appeal should be reversed, and this cause remanded, with instructions to reinstate the appeal and determine the matters involved in accordance with the views herein expressed.

PER CURIAM. Adopted in whole.

(62 Okl. 139)

CITY OF ENID et al. v. WARNER-QUINLAN ASPHALT CO. (No. 7310.)

(Supreme Court of Oklahoma. Dec. 5, 1916. Rehearing Denied Jan. 9, 1917.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS ⟸374(1)—PUBLIC CONTRACTS—DUTY OF CONTRACTOR.

A contractor is charged with knowledge of the law under which a contract for paving streets of a city may be entered into, and one who contracts to pave the streets of a city, in consideration of receiving assessments against abutting property of the streets paved, in payment of such paving, should, prior to entering into such contract, ascertain whether or not such assessments are enforceable, and upon failure to do so acts at his peril.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 905, 910; Dec. Dig. ⟸374(1).]

2. MUNICIPAL CORPORATIONS ⟸247—PUBLIC CONTRACTS—DUTY OF CONTRACTOR.

He who deals with a municipality does so with the knowledge of its and its agents' powers, and if in contracting with a municipality one goes beyond the limitations imposed, he does so at his peril.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 651–656, 682; Dec. Dig. ⟸247.]

3. MUNICIPAL CORPORATIONS ⟸374(1)—PUBLIC CONTRACTS—LIABILITY OF MUNICIPALITY.

Where a contract is entered into by a city for paving its streets, providing for the payment of such paving by assessments against the abutting property of the streets paved, and said contract also provides that the city shall be exempt from any direct liability on account of such paving, and upon completion and acceptance of such paving, the city delivers to the contractor the legally authorized and legally issued assessments and tax warrants for all of the paving done against the abutting property of the streets paved, and a part of said assessments and tax warrants are against abutting property belonging to the United States, which assessments cannot be enforced, and which assessments are not paid, an action will not lie against said city to recover for a breach of said contract, the amount of such assessments as are against said property of the United States, alone upon the ground that such assessments against the property of the United States are not enforceable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 905, 910; Dec. Dig. ⟸374(1).]

4. MUNICIPAL CORPORATIONS ⟸374(3)—PUBLIC CONTRACTS—PETITION.

The petition in this case carefully considered, and *held* not to state a cause of action against the city of Enid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 905, 910; Dec. Dig. ⟸374(3).]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Garfield County; James W. Steen, Judge.

Action by the Warner-Quinlan Asphalt Company, a corporation, against the City of Enid and others. There was a judgment for plaintiff, and defendants bring error. Reversed and remanded, with directions to dismiss.

Guy S. Manatt and Parker & Simons, all of Enid, for plaintiffs in error. McKeever & Church, of Enid, for defendant in error.

COLLIER, C. This is an action brought by the defendant in error, hereinafter styled plaintiff, against plaintiffs in error, hereinafter styled defendant, to recover the sum of $6,467.68, with interest thereon from the 4th day of March, 1908, for a breach of contract entered into by said parties for the grading, curbing, guttering, draining, and paving certain streets of the city of Enid.

The petition in this cause, omitting caption and signature, is as follows:

"Comes now the plaintiff herein and for its cause of action against the defendant states to the court as follows: That it is a corporation organized under and by virtue of the laws of the state of Maine and engaged in the business of grading, paving, curbing, guttering and draining streets and other public places. That the city of Enid is a municipal corporation of the state of Oklahoma, that C. F. Randolph is the mayor thereof, and that J. H. Shaw, W. D. Hitchcock and W. T. Overton are the commissioners

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thereof. That on the 24th day of August, 1906, the plaintiff herein made and entered into a contract with the defendant for the construction of certain public improvements, to wit, the grading, curbing, guttering, draining and paving of certain parts of the city of Enid, to wit: That portion of Market street, beginning at the Rock Island tracks and continuing thence to Grand avenue and from Grand avenue through the public square, around the public square on both sides thereof, and from Independence avenue to the Frisco tracks north of the public square. That thereafter, in due course of time, said contract was completed and the city of Enid accepted said improvements as completed in compliance with the contract above mentioned, and thereupon it became and was the duty of the city of Enid to pay therefor in the manner provided by law and under the contract above mentioned. That said contract contained the following provisions, to wit: 'The city agrees that she will pay for said improvements in the manner provided by law by special assessments made upon the property in the districts affected, for which the city shall in no wise be liable, and that after any block of said work shall be tendered to the city as complete, within ten days thereafter the city will by its city engineer either accept or reject the same; it is understood and agreed by the parties hereto that in no event is the city to be liable in any way, whatsoever, or any circumstances whatsoever for any costs in connection with the construction of said work, except the city be liable as an owner of any lot or lots of grounds in the districts affected and then only to the extent that other lot owners so situated are liable and to the extent of her property alone.' That upon the 4th day of March, 1908, the city of Enid turned over to the plaintiff herein all of the warrants of special assessment good, valid and enforceable in law as called for in the contract, except warrants for the sum of $6,467.86, representing the assessments due, chargeable to and payable by two portions of the following described quarter blocks: The south 136,125 feet of the S. E. ¼ of block 10, city of Enid, to the amount of $3,177.29, and the south 136,125 of the S. W. ¼ of block 10, city of Enid, to the amount of $3,289.55, the same being that part of the public square in the city of Enid owned by the United States government. That it became and was the duty of the city of Enid, after the completion of said work and the acceptance thereof by the said city, to turn over to the plaintiff herein good valid tax warrants and assessments enforceable in law covering the amount chargeable to the above-described piece of the public square, the property of the United States government, and the city of Enid should have turned over to the plaintiff herein good, valid and enforceable tax warrants for the sum of $6,467.86 as ——— out upon the 4th day of March, 1908, but the city of Enid has failed, neglected and refused so to do, though often requested thereto by the plaintiff herein, and the said city now fails and refuses to turn over to the plaintiff good, valid and sufficient tax warrants enforceable in law of the date hereinbefore mentioned for the amount hereinbefore mentioned. Wherefore the plaintiff prays judgment against the city of Enid for the sum of $6,467.86, with interest thereon from the 4th day of March, 1908, until paid at 7 per cent., and the costs of this action."

To the petition the defendants interposed a demurrer on the ground that the petition fails to state a cause of action against the defendants, which was overruled and excepted to, and answer filed by the defendants. From the view we take of the case we deem it unnecessary to set out the answer or to recite the evidence given on the trial of the case.

The case was tried to the court and a judgment rendered against the city of Enid for $6,306.30, with interest from the 4th day of March, 1908, at 6 per cent. per annum. Motion for a new trial was duly made, overruled, and excepted to. To review the judgment rendered, defendants bring error.

It thus appears that this action seeks to recover directly from the city part of the expense of the paving provided for by said contract, on the ground that part of the tax assessments contracted to be delivered in payment of said work was against property of the United States and nonenforceable. This presents for our consideration the power of a municipality to enter into a contract for the paving of its streets and the manner of providing for the payment thereof.

[1-3] We are of the opinion that the city was without authority of law to contract for the work to be done under said contract and to pay for the same other than in the manner provided by the contract sued upon. As averred in the petition, the city did not agree to pay directly for the work contracted under said contract to be done. On the contrary the city, as stated in the contract, agreed to pay for the same—

"in the manner provided by law, by special assessments made on the property of the districts affected, for which the city shall in no wise be liable, and that after any block of said work shall be tendered to the city as complete, within ten days thereafter, the city will by its city engineer accept or reject the same; it is understood and agreed by the parties hereto that in no event is the city to be liable in any way whatsoever, or any circumstances whatsoever for any costs in connection with the construction of said work, except the city be liable as an owner of any lot or lots of ground in the districts affected, and then only to the extent that other lot owners so situated are liable and to the extent of her property alone."

Section 3, art. 2, c. 8, of the Session Laws of Oklahoma 1901 (page 68), the law in force when said contract was made, provides:

"The abutting lots, pieces, or parcels of ground shall be charged with the cost of making any improvements herein specified, to the center of the block, where the abutting way is on the exterior of the block, and to the exterior of the block where the improvement is made on an alley or other public way in the interior of such block, each quarter block shall be charged with its due proportion of paving both the front and side streets on such block, together with the area formed by intersections and alley crossings, which cost shall be apportioned among the lots and subdivisions of such quarter block according to the benefits * * * to each lot or parcel."

Section 7 of article 2, chapter 8, in part reads:

"* * * Upon completion of the contract through any block by any contractor and the approval and acceptance of his work, the mayor and council shall cause certificates to be issued against all lots, tracts or parcels of ground for all assessments unpaid by the owner, which certificates shall recite the date of the passage of the ordinance making the assessments, the name of the street upon which the improvement was made, the amount of the assessment, the description of the property against which the same is levied, and that the same will be levied against said property in ten

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equal installments with interest thereon at the rate of seven per cent. per annum, levied each year, to pay the maturing installment and interest on all unpaid installments, and shall be signed by the mayor, and countersigned by the city clerk."

Even without the stipulation in the contract as to nonliability on the part of the city for the paving contracted to be done, we are of the opinion that under the law which existed at the time the contract was entered into (article 2, c. 8, of the Session Laws of the Territory of Oklahoma 1901, supra) the city could not be held liable, by reason of the fact that the assessment against the property belonging to the United States government could not be enforced. In our opinion both contracting parties, when making the contract, had in view the want of authority on the part of the city to contract for payment otherwise than as provided in the contract, by an assessment against the abutting property, and this is emphasized by the stipulation in the contract that the city is not, under any conditions, to be directly liable on the contract.

"If an assessment proves invalid the city is liable to the contractor for the cost of the improvement, or the amount of the void assessment certificates, unless it is expressly exempt from such liability by charter or contract." 28 Cyc. p. 1059, "d," and authorities therein cited.

In the instant case it is expressly provided by law, and by the contract sued upon, that the city is not to be liable, by reason that the assessments against the property of the United States are not enforceable against said property.

In the case of German-American Savings Bank v. City of Spokane, 17 Wash. 315, 49 Pac. 542, 38 L. R. A. 259, the syllabus is as follows:

"Where a city has no power to contract for certain improvements to be paid for out of the general fund, it cannot be made liable for failure to provide a special fund out of which payment was to be made."

"From our investigation of the cases and text books we are of the opinion that the decided weight of authority is against allowing a recovery of the city upon such matters at all, in the absence of an express lawful contract to that effect, or in cases where the money has been collected on the assessments, and is in the city treasury."

"One who deals with a municipality does so with knowledge of the legal limitations on its or its agents' powers; and, if in contracting with a municipality one goes beyond the limitations imposed, he does so at his peril." Town of New Butler v. Tucker, 153 Pac. 628; Gardner v. School District, 34 Okl. 716, 126 Pac. 1018; Fairbanks-Morse Co. v. City of Geary, 157 Pac. 720.

The only grounds for recovery on the part of the plaintiff stated in the petition is that the assessments against the property owned by the United States are not enforceable. There is an averment in the petition that the assessments were properly made and the same delivered to the plaintiff, and this exonerates the city from liability upon the contract sued upon; it not being averred that the said assessments had been paid to the city.

With knowledge of the law and stipulation in the contract as to nonliability of the city, the plaintiff should have ascertained, prior to entering into the contract for paving, whether or not the abutting property proposed to be assessed was subject to the payment of such assessment, and if it failed to do so it acted at its peril, assumed the risk of being paid other than by the city, and if not paid is without legal remedy against the city for the collection of the value of the paving assessed against such property as the assessment cannot be enforced against it, without averring and proving other grounds of breach of said contract than that part of the assessments for the payment of such paving was against property of the United States and was not enforceable.

[4] To hold that the petition in this case states a good cause of action and that a recovery may be had by the plaintiff against the city would be to hold that that which cannot be directly done can be indirectly done—payment of the cost of paving by the city. Certainly the law that prohibits an act from being directly done prohibits it from being indirectly done.

With the contention of plaintiff that it is not equitable to permit the city to have and enjoy the benefits derived from the completion of the contract on the part of the plaintiff, without the plaintiff is paid therefor, we have nothing to do. This possible hardship upon the plaintiff can in no wise change the law, and in reviewing the case we can only apply the cold steel of the law—that recovery cannot be had against a municipality in this state on a contract for paving because some part of the abutting property against which proper assessments have been levied cannot be collected by reason of the fact that it belongs to the United States.

We have carefully read and re-read the very able brief of attorneys for the plaintiff, and considered the authorities therein cited, and are not unmindful that the courts of last resort of several of the states are in conflict with the views we herein express, but we are unable to follow said adverse holdings for the reason that the same are in direct conflict with the law of this state existing at the time the contract sued upon was made, as to the payment for paving—"that the expense of paving is to be borne by the abutting owners who are benefited thereby."

If the contention of the plaintiff be upheld as to the sufficiency of the petition, it will in effect subject the property of nonabutting owners to be charged with part of the costs of paving, other than paving of streets upon which their property abuts, by reason that the property of nonabutting as well as that of abutting owners would be taxed to create the fund to pay the judgment awarded; in our opinion, a result directly in conflict with

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the law of the contract under review. Town of New Butler v. Tucker, supra.

The prayer of the petition prays judgment only against the city, and, in our opinion, the petition in this case fails to state a cause of action against the city, and the court committed prejudicial error in overruling the demurrer to the said petition.

From the view expressed by us, it is unnecessary to consider the several other errors assigned by the defendants.

This cause is reversed and remanded with instructions to dismiss the same with prejudice.

PER CURIAM. Adopted in whole.

FIRST NAT. BANK OF CLEVELAND v. COATES. (No. 5826.)*

(Supreme Court of Oklahoma. Dec. 19, 1916. Rehearing Denied Jan. 9, 1917.)

(Syllabus by the Court.)

1. HOMESTEAD ⟸26, 161—PERSONS ENTITLED TO EXEMPTION—"NONRESIDENT."

Nonresident, as employed in the statute of this state (Rev. Laws 1910, § 3344), as to who may claim exemptions, must be construed to be one who has ceased to be domiciled in the state or who never resided in the state, or who, having been domiciled in the state, thereafter acquired a permanent residence in another state.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 34, 312–314; Dec. Dig. ⟸26, 161.

For other definitions, see Words and Phrases, First and Second Series, Nonresident.]

2. HOMESTEAD ⟸162(1) — ABANDONMENT — INTENT TO RETURN.

One who has a homestead in this state does not forfeit his right to claim such homestead as exempt from levy and sale for payment of unsecured debts, by his temporary absence from the state with intention of returning to the state and his homestead.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 315, 318, 319; Dec. Dig. ⟸162(1).]

3. FRAUDULENT CONVEYANCES ⟸52(1)—CONVEYANCE OF HOMESTEAD.

One who has acquired a homestead in this state can, while temporarily absent from the state, convey—being joined in such conveyance by his wife—his homestead to his daughter without a valuable consideration being paid therefor, and such conveyance will vest in the daughter, as a gift, the interest in such homestead, free from the claims of his general creditors, and such conveyance cannot be successfully attacked as being in fraud of creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 118, 122–124; Dec. Dig. ⟸52(1).]

4. ATTACHMENT ⟸238 — DISCHARGE — GROUNDS—OWNERSHIP OF PROPERTY.

That the property attached is not the property of the defendant in attachment is not a ground for the discharge of the attachment on defendant's motion.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 816–818, 823, 824; Dec. Dig. ⟸238.]

5. ATTACHMENT ⟸291 — PERSONS LIABLE — INTERVENTION.

Where property is attached in which defendant in attachment has no interest, the proper procedure to have such attachment discharged is for the owner of the property to intervene in said attachment proceeding, as provided by section 4701, Rev. Laws 1910.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1023–1033; Dec. Dig. ⟸291.]

Commissioners' Opinion, Division No. 1. Error from District Court, Pawnee County; L. M. Poe, Judge.

Action by the First National Bank of Cleveland against J. B. Coates. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Goodwin & Smith, of Cleveland, and S. A. Horton, of Oklahoma City, for plaintiff in error. McNeill & McNeill, of Pawnee, for defendant in error.

COLLIER, C. This action was commenced by the plaintiff in error, hereinafter styled the plaintiff, against the defendant in error, hereinafter styled the defendant, to recover upon certain promissory notes. An order of attachment was issued in said cause, and levied on February 24, 1913, upon certain lands in Pawnee county as the property of the defendant. Proceedings were taken by the plaintiff to procure service on the defendant by publication, and thereafter the defendant appeared and moved to dissolve the attachment. This motion was heard by the court upon affidavits and oral testimony. The court ordered a dissolution of the attachment, to which plaintiff excepted and appeals to this court to reverse such order. It is in evidence that for some years defendant and his family had been residing upon the lands attached and occupying them as their homestead; that some time prior to the commencement of this action the defendant sold at public auction a part of his personal property and shipped the rest of his chattels, except some household goods which were left upon the lands attached, to Iowa, the defendant accompanying them; that later he went from Iowa, with such chattels, to Ft. Saskatchewan, Canada, and there rented a farm; the wife of defendant remained upon the lands attached some time after her husband left, and then rented such lands for a year, and with the family joined the defendant in Canada. Both the defendant and his wife testified that the going to Canada and the renting of the lands attached was only temporarily, and that they never intended to permanently remove from their homestead, but intended to return thereto, and that the occasion for the defendant leaving the homestead and going to Canada was the fact that crop conditions in Pawnee county had been very poor; that the defendant was heavily indebted, and that he hoped to sell his stock to better advantage in Canada than he could

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⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Opinion withdrawn and new opinion substituted. See 163 Pac. 714.

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in Oklahoma, and hoped to be able to earn more money during his absence than he could in Oklahoma. This testimony was rebutted by plaintiff by evidence of statements made by the defendant showing an intention to permanently leave Oklahoma, and to permanently establish himself in Canada.

On February 8, 1913, before the levying of the attachment in this cause, the defendant, joined by his wife, conveyed the lands in controversy to Clarrie Maxine Coates, who was the youngest child of the defendant, and at the time of such conveyance was four years old; that such deed was not filed for record until after the commencement of this action and the levying of said attachment. Some months afterwards an attempt was made by the defendant to have Clarrie Maxine reconvey this land to him, the evidence disclosing that, upon the advice of a barrister in Canada, Clarrie Maxine's name was signed to a deed by an older sister. This deed is so palpably a nullity that it is not considered by counsel for plaintiff, nor need we consider it.

The first important question presented by the record and the briefs of plaintiff and defendant in this case is whether or not the defendant in going to Canada with his family and renting a farm became a nonresident within the meaning of our homestead exemption laws. It was admitted by plaintiff that defendant did not abandon his homestead by going to Canada, if when going to Canada he did so with the intention of subsequently returning and occupying his homestead; but it is contended that "he thereby became a nonresident," and is precluded from asserting his homestead exemption by virtue of the terms of section 3344, Revised Laws of Oklahoma 1910.

The evidence being in conflict as to whether or not the defendant when he went to Canada intended to permanently remove from this state and his homestead, and there being evidence tending to reasonably support the finding of the court that he did not remove with the intention of permanently removing from the state and abandoning his homestead, which finding is necessarily included in the finding of the court that the attached property was exempt, had the title to the land been in defendant at the time of the levying of the attachment, the finding of the court that the said property was exempt and discharging the attachment thereon would have been free from error, under the well-established holdings of this court that it will not disturb a finding when reasonably supported by the evidence notwithstanding the evidence was in conflict.

[2] In construing the law of exemption, it is held that:

"One who has a domicile in this state cannot be a nonresident while temporarily absent from the state." Chariton County v. Moberly, 59 Mo. 238.

"The exemption laws should be liberally construed." Hoyt v. Pullman, 152 Pac. 886, L. R. A. 1916B, 1288.

"A homestead cannot be abandoned without a going away from it with the definite intention never to return." McCammon v. Jenkins et al., 44 Okl. 612, 145 Pac. 1163.

"Abandonment of a homestead must be established by the most clear, conclusive, and undeniable evidence." McCammon v. Jenkins et al., supra.

See Shepherd v. Cassiday, 20 Tex. 29, 70 Am. Dec. 372; Gouhenant v. Cockrell, 20 Tex. 96; Cross v. Everts, 28 Tex. 523; Mills v. Von Boskirk, 32 Tex. 360.

Applying to the evidence in this case the rules of law hereinbefore cited, we are of the opinion that the defendant did not lose his right to claim his homestead exemption by his temporary removal to Canada with intention of returning to Oklahoma. So long as he remained domiciled in the state, the defendant did not lose his right to claim his exemption by reason of his temporary removal to and sojourn in Canada with intention of returning to Oklahoma and his homestead. Rand Lbr. Co. v. Atkins et al., 116 Iowa, 242, 89 N. W. 1104; Minnesota Stoneware Co. v. McCrossen et al., 110 Wis. 316, 85 N. W. 1019, 84 Am. St. Rep. 927; Farmer v. Hale, 14 Tex. Civ. App. 73, 37 S. W. 164; Allen v. Campbell, 53 Tex. Civ. App. 76, 115 S. W. 360; In re Presnall (D. C.) 167 Fed. 406; Sanders et ux. v. Sheran, 66 Tex. 655, 2 S. W. 804; 21 Cyc. 597.

[1] In construing the homestead laws of the state, a nonresident of the state must be defined to be one who ceases to be domiciled in the state, or who never was a resident of the state, or who having been domiciled in the state, thereafter has acquired a permanent residence in another state.

[3] The property attached having been impressed as the homestead of the defendant, it remained the homestead of defendant during his temporary sojourn in Canada, and until he and his wife conveyed it to his daughter; and, by having his wife join in the conveyance as shown by the evidence, he was free to dispose of his homestead in this state, while temporarily in Canada, as he wished, and his creditors cannot complain of his action in conveying the homestead to his daughter, whatever the consideration for such conveyance, or whatever his motives may have been in conveying the same. Carter v. Pickett, 39 Okl. 144, 134 Pac. 440; McCammon v. Jenkins, 44 Okl. 612, 145 Pac. 1163; Kershaw v. Willey, 22 Okl. 677, 98 Pac. 908; J. I. Case T. M. Co. v. Walton Trust Co., 39 Okl. 748, 136 Pac. 769; Scott-Baldwin Co. v. McAdams, 43 Okl. 161, 141 Pac. 770.

[4] The conveyance of the homestead, though executed without a valuable consideration, and though induced by an improper motive, was a legal gift by the defendant to his four year old daughter, and divested all the right and interest that the said defendant had in his said homestead, and consequently, at the time of the levy of the at-

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tachment, he had no homestead or other interest in the property attached; the attempted reconveyance of his four year old daughter, acting through her minor sister, to the defendant, being absolutely void. The court committed reversible error in dissolving the attachment on the ground that the property attached was exempt. That at the time of the trial the defendant had no interest whatever, either as a homestead or otherwise, in the property attached, did not authorize the discharge of the attachment.

[5] If the property attached belongs to another, the proper procedure to discharge the property from the attachment would be by the intervention of the owner of said property—in this case, by the intervention of the four year old child to whom the property had been conveyed. Section 4701, Revised Laws of Oklahoma 1910.

"Any person claiming property attached may interplead in the cause, and issues made by such interpleader shall be tried as like issues between plaintiff and defendant." Miller et al. v. Campbell Com. Co., 13 Okl. 75, 74 Pac. 507.

This case is reversed and remanded.

PER CURIAM. Adopted in whole.

(13 Okl. Cr. 30)

Ex parte JOHNSON. (No. A-2782.)

(Criminal Court of Appeals of Oklahoma. Jan. 4, 1917.)

(Syllabus by the Court.)

1. JURY ⟸35(2)—JURY TRIAL—RIGHT TO.

The Bill of Rights of the Constitution of Oklahoma declares that: "The right of trial by jury shall be and remain inviolate, and a jury for the trial of civil and criminal cases in courts of record, other than county courts, shall consist of twelve men; but, in county courts and courts not of record, the jury shall consist of six men." Const. art. 2, § 19. And that: "In all criminal prosecutions the accused shall have the right of a speedy and public trial by an impartial jury of the county in which the crime shall have been committed." Const. art. 2, § 20. *Held*, that a person prosecuted under a city ordinance for an offense which is also made a misdemeanor by statute, or an ordinance, the punishment for a violation of which is or may be imprisonment, is entitled to a jury trial in the court of original jurisdiction, and to accord to the accused the right to be tried by a jury in the county court on appeal after conviction in the municipal court, does not satisfy the requirements of the Constitution. In such cases a judgment of conviction in the municipal court, not based upon a verdict of guilty by a jury, is void.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 237-241; Dec. Dig. ⟸35(2).]

2. JURY ⟸23(1)—RIGHT TO—MISDEMEANORS —"MUNICIPAL COURTS"—"OFFENSE."

Section 1, c. 147, Laws 1915, define municipal courts "to mean and include all the courts of the state of Oklahoma, organized and existing in the various towns and cities thereof which shall have and possess, under the laws of the state, original jurisdiction to hear and determine offenses against the ordinances of municipalities," and defines an "offense" "to mean the doing of some act or the failure to perform some duty, commanded by some municipal ordinance, or by law, for the violation of which a penalty or punishment is provided thereby," and declares such proceedings to be "criminal in their nature; and except as otherwise specifically provided, shall be governed by, and subject to, general laws relating to criminal procedure." *Held*, that in respect to "offenses" under city ordinances, the punishment for which is or may be imprisonment, conviction of the accused without a jury trial would be in contravention of section 7 of the Bill of Rights, providing that "No person shall be deprived of life, liberty, or property, without due process of law," because under the constitutional provisions a jury is an essential part of every tribunal for the trial of criminal cases, and such constitutional provisions places the right to trial by jury beyond the power of the Legislature to abrogate or abridge it, and it is beyond the power of the Legislature to confer jurisdiction on any tribunal to try criminal cases without providing for jury trials.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 152; Dec. Dig. ⟸23(1).

For other definitions, see Words and Phrases, First and Second Series, Municipal Courts; Offense.]

3. JURY ⟸31(1)—CONSTITUTIONAL GUARANTIES—EVASION.

The constitutional guaranties intended to secure the liberty of the citizen and the right to a trial by jury cannot be evaded by the nature of the powers vested in the municipality under its charter, or the nature of the jurisdiction conferred upon the municipal court.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 204, 214; Dec. Dig. ⟸31(1).]

Application by Tom J. Johnson for writ of habeas corpus. Writ allowed, and petitioner discharged.

On behalf of Tom J. Johnson, a duly verified petition for writ of habeas corpus was presented to the presiding judge of this court representing that he is illegally restrained of his liberty by the officers of the city of Oklahoma City, and is now compelled to work on the highways near the city of Edmond in Oklahoma county by some contract arrangement existing between the officers of the city of Oklahoma City and the officers of the county of Oklahoma.

It is further averred in said petition:

"That the cause of said restraint, according to the best of the knowledge and belief of the petitioner is, that the said Tom J. Johnson, petitioner herein, was convicted of the crime of vagrancy on the 8th day of July, 1916, in the municipal court of the city of Oklahoma City, Oklahoma, and was, by said court on said 8th day of July, 1916, fined in the sum of ninety-nine dollars ($99.00) and imprisonment in the city jail of Oklahoma City for a period of ninety (90) days. Your petitioner alleges and states that said restraint is illegal and void in this: That the municipal court of Oklahoma City, state of Oklahoma, had no jurisdiction to fine your petitioner in the sum of ninety-nine dollars and imprison him for a period of ninety days in the city jail of Oklahoma City, Oklahoma. That said judgment is illegal and void and in violation of the Constitution of the state of Oklahoma, the general laws of said state and the charter of said city of Oklahoma City. Your petitioner further says that he is illegally restrained of his liberty and illegally and unlawfully compelled to work with convicts upon the highways of Oklahoma county, state of Oklahoma, under and by virtue of some contract or arrangement between the said Oklahoma City

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and the authorities of Oklahoma county, Oklahoma, and that said contract or arrangement whereby he is compelled to work upon the public highways of Oklahoma county, Oklahoma, is in violation of section 2, article 23, of the Constitution of the state of Oklahoma, and is unlawful, unconstitutional and void. Wherefore your petitioner prays the honorable court to grant a writ of habeas corpus, and that he be discharged, without delay, from such unlawful imprisonment."

A writ of habeas corpus was issued, and in response thereto the officers to whom it was directed produced the petitioner in court, and at the same time filed their answer and return duly verified, which, omitting formal parts, is as follows:

"Return of Chief of Police and Sheriff.

"Comes now W. B. Nichols, chief of police of Oklahoma City, and M. C. Binion, sheriff of Oklahoma county, Oklahoma, and for return of the writ of habeas corpus issued herein on the 12th day of July, A. D. 1916, shows to the court that said Tom J. Johnson is in custody by reason of the following facts: That heretofore, to wit, on July 8th, 1916, a complaint was filed in the municipal court of the city of Oklahoma City charging the said Tom J. Johnson with vagrancy, as is shown by the copy of the complaint hereto attached, marked Exhibit A, and made a part hereof. That thereafter on the 8th day of July, A. D. 1916, the said Tom J. Johnson was duly arraigned in the municipal court of the city of Oklahoma City, entered a plea of not guilty, and after trial duly had before said court the said Tom J. Johnson was found guilty of being a vagrant as defined by section 702 of the Revised Ordinance of the city of Oklahoma City, and was duly adjudged to pay a fine of ninety-nine ($99) dollars and costs in said case, and to be confined in the city jail of the city of Oklahoma City for a period of ninety (90) days. That at the time said judgment and sentence was imposed upon the said Tom J. Johnson, he was notified of his right of appeal, and that no appeal from said judgment and sentence has been taken, and that thereafter on the 8th day of July, 1916, the said Tom J. Johnson was duly committed to the city jail of Oklahoma City by virtue of a mittimus duly issued and by said municipal judge, a copy of which is hereto attached, marked Exhibit B and made a part hereof. That thereafter on the ——— day of July, 1916, by virtue of an agreement existing between the board of county commissioners and the board of city commissioners of the said city of Oklahoma City, and said Tom J. Johnson was turned over to and was received by said board of county commissioners for the purpose of working the said Tom J. Johnson upon the public highways of Oklahoma county. That prior to the turning of the said Tom J. Johnson over to the board of county commissioners, the said Tom J. Johnson had been sentenced to the city jail for the offense of vagrancy and had not paid the fine and costs assessed against him. That said county commissioners have not and will not pay for the services of the said Tom J. Johnson, except the cost of his maintenance. Wherefore, respondent having duly answered said writ prays that said writ of habeas corpus be denied and that the said Tom J. Johnson be returned to the custody of your respondents. W. B. Nichols, M. C. Binion, Respondents."

On July 15, 1916, petitioner being present in court in person and by his counsel it was agreed that the case should be submitted to the court on the facts stated in the petition and the answer thereto. Upon the conclusion of the arguments and after a consideration of the same the decision and opinion of the court was delivered by the presiding judge, holding that the petitioner is unlawfully restrained of his liberty as averred, and it was ordered that he be discharged from further custody and go hence without day.

O. A. Cargill and Hainer, Burns & Toney, all of Oklahoma City, for petitioner. B. D. Shear, Municipal Counselor, Frank Watson, and John Embry, Co. Atty., all of Oklahoma City, for respondents.

DOYLE, P. J. (after stating the facts as above). From the petition upon which the writ issued and the answer thereto, it appears that the petitioner was convicted in the municipal court of Oklahoma City on a charge of vagrancy as defined by the city ordinance, and was sentenced to imprisonment for 90 days and to pay a fine of $99, and failing to pay said fine that he be further imprisoned until the same is satisfied. That he was then transferred to the custody of the overseer of the Oklahoma county convict road gang, who put him at hard labor on the public roads of the county.

Counsel for the petitioner contend that his conviction was illegal and void in that the municipal court was without jurisdiction to render a judgment imposing a jail sentence and fine, because he was denied his constitutional right to a jury trial.

The argument of counsel for respondent is that the general authority given under certain sections of the charter of Oklahoma City to pass all necessary ordinances is sufficient, although there is no specific grant of authority in the charter giving the municipal authority the power to impose a fine or an imprisonment for a violation of any ordinance; that in addition to the general grant of powers in the city charter, all specific grants of authority given to a city council of a city of the first class under the Constitution and laws of the state in force at the time of the adoption of the charter would by reference and by adoption under those sections of the charter be conferred upon the board of commissioners of the city of Oklahoma City, including among others section 601, Rev. Laws, which is the only section in the statute that specifically grants power to a city to impose a fine not to exceed $100 and imprisonment not to exceed three months or both such fine and imprisonment for a violation of an ordinance. That compelling a city prisoner to work on the county roads is no part of the judgment and sentence pronounced upon him by the municipal court; as this authority depends upon the agreement between the board of city commissioners and the board of county commissioners, which agreement is not within the inhibition of the Constitution providing that: "The contracting of convict labor is hereby prohibited." Const. art. 23, § 2. And it is argued that the statute providing for appeals from judgments of conviction in mu-

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nicipal courts to county courts sufficiently recognizes and satisfies the constitutional right to a trial by jury. The same being section 2, c. 147, Laws 1915, entitled "An act to regulate appeals from judgments of municipal courts prescribing the procedure thereof, and repealing all laws in conflict herewith."

This presents the principal question for decision in the case.

The pertinent sections of said act are as follows:

"Section 1. *Definitions.* The term 'municipal courts' as herein used is hereby defined to mean and include all the courts of the state of Oklahoma, organized and existing in the various towns and cities thereof which shall have and possess, under the laws of the state, original jurisdiction to hear and determine offenses against the ordinances of municipalities, and an 'offense' is hereby defined to mean the doing of some act, or the failure to perform some duty, commanded by some municipal ordinance or by law, and for the violation of which a penalty or punishment is provided thereby. Such proceedings are hereby declared to be criminal in their nature; and except as otherwise specifically provided, shall be governed by, and subject to, general laws relating to criminal procedure.

"Sec. 2. In all cases before a municipal court, except a judgment rendered on confession, an appeal may be taken by the defendant to the county court, and to such court only, where the trial thereof shall be had de novo on questions of both law and fact.

"Sec. 3. No such appeal shall be allowed, however, unless the defendant shall, within ten days after the rendition of such judgment, enter into a recognizance payable to said municipality, to be approved as to amount, form, and sureties, by the trial judge, in the penal sum of not less than fifty dollars nor more than five hundred dollars, and in no case less than double the amount of the fine and cost."

"Sec. 8. In the trial of said cause in the county court it shall be the duty of the court to try the case in the same manner that it should have been tried before the municipal court, except that upon demand of either party a jury shall be called to try the issues joined in said cause."

[1, 2] The constitutional provisions securing the right of trial by jury are the following declarations of the Bill of Rights:

"Sec. 19. The right of trial by jury shall be and remain inviolate, and a jury for the trial of civil and criminal cases in courts of record, other than county courts, shall consist of twelve men; but, in county courts and courts not of record, a jury shall consist of six men.

"Sec. 20. In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed."

The right of "trial by jury" secured by the first clause in section 19 of the Bill of Rights includes the elements of trial by jury as they were known and understood by the framers of the Constitution and the people when they adopted it. By both provisions the right of trial by jury is preserved in all cases with such modifications as are specified, as it existed at the time of the adoption of the Constitution. And both secure the right of one acused of crime to demand a trial by jury, without regard to the name or grade of the offense charged against him. Ordinarily the right of trial by jury will be presumed in all cases where it existed at the time of the adoption of the Constitution.

The framers of our Constitution in which this right is so sedulously guarded well knew that a trial by jury afforded the best protection for innocence, and the surest mode of punishing guilt yet discovered among men. They knew very well that no people could be free under a government which had the power to punish without restraint. Hamilton expressed in the Federalist the universal sentiment of his time, when he said that:

"The arbitrary power of conviction and punishment for pretended offenses had been the great engine of despotism in all ages and all countries."

The declarations of the Bill of Rights securing the right of trial by jury are prohibitions operating upon the legislative as well as positive commands to the judicial department, and the doctrine is elementary that while the Legislature may extend this right, it is beyond the power of the Legislature to abridge, impair, or materially change the right in any of its essential features. Article 6 of the Amendments to the federal Constitution is almost identical in its terms with section 20 of our Bill of Rights.

The principles which underlie the question here presented have received careful consideration in several cases before the Supreme Court of the United States. The following cases define the right as it existed when our Constitution was adopted: Reynolds v. United States, 98 U. S. 148, 25 L. Ed. 244; Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223; American Pub. Co. v. Fisher, 166 U. S. 467, 17 Sup. Ct. 618, 41 L. Ed. 1079; Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061; Capital Traction Co. v. Hof, 174 U. S. 5, 19 Sup. Ct. 580, 43 L. Ed. 873; Black v. Jackson, 177 U. S. 349, 20 Sup. Ct. 648, 44 L. Ed. 801; Rassmussen v. United States, 197 U. S. 516, 25 Sup. Ct. 514, 49 L. Ed. 862.

In the case of Callan v. Wilson, supra, the Supreme Court of the United States, passing upon the precise question raised here, held that:

"To accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried, otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned, * * * does not satisfy the requirements of the Constitution."

In that case it appears that by an information filed by the United States in the police court in the district of Columbia, the petitioner Callan with others was charged with the crime of conspiracy, and having been found guilty by the court, he was sentenced to pay a fine of $25, and upon default in its payment to suffer imprisonment in jail for the period of 30 days.

Mr. Justice Harlan, delivering the opinion of the court in part, said:

"The third article of the Constitution provides that 'the trial of all crimes, except in cases of impeachment, shall be by jury and such trial shall be held in the state where the said crime shall have been committed; but when not committed within any state, the trial shall be

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at such place or places as the Congress may by law have directed.' The Fifth Amendment provides that no person shall 'be deprived of life, liberty, or property, without due process of law.' By the Sixth Amendment it is declared that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.' The contention of the appellant is, that the offense with which he is charged is a 'crime' within the meaning of the third article of the Constitution, and that he was entitled to be tried by a jury; that his trial by the police court, without a jury, was not 'due process of law' within the meaning of the Fifth Amendment; and that, in any event, the prosecution against him was a 'criminal prosecution,' in which he was entitled, by the Sixth Amendment, to a speedy and public trial by an impartial jury. * * * It would be a narrow construction of the Constitution to hold that no prosecution for a misdemeanor is a prosecution for a 'crime' within the meaning of the third article, or a 'criminal prosecution' within the meaning of the Sixth Amendment. And we do not think that the amendment was intended to supplant that part of the third article which relates to trial by jury. There is no necessary conflict between them. Mr. Justice Story says that the amendment, 'in declaring that the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state or district wherein the crime shall have been committed (which district shall be previously ascertained by law), and to be informed of the nature and cause of the accusation, and to be confronted with the witnesses against him, does but follow out the established course of the common law in all trials for crimes.' Story, Const. par. 1791. And as the guarantee of a trial by jury, in the third article, implied a trial in the mode and according to the settled rules of the common law, the enumeration, in the Sixth Amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the states to have in the supreme law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property. This recognition was demanded and secured for the benefit of all the people of the United States, as well those permanently or temporarily residing in the District of Columbia, as those residing or being in the several states. There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this district may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property—especially of the privilege of trial by jury in criminal cases."

In answering the argument that the provisions of the act of Congress which gave a party convicted in the police court a right of appeal and the right of trial by jury in a higher court, the learned justice said:

"These provisions, undoubtedly, secure the right of appeal from the police court to the Supreme Court of the district, and a trial by jury in the latter court. But the fact remains that the accused may, under the statute, be tried in the court of original jurisdiction, upon the issue of guilt or innocence; and by its judgment, unless he gives security for his appearance in another court, he may be deprived of his liberty. The police court is not, in such cases, an examining court merely, but a trial court, in the fullest sense of those words."

And after reviewing the authorities upon this subject, the learned justice concludes:

"We cannot assent to that interpretation of the Constitution. Except in that class or grade of offenses called petty offenses, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged. In such cases a judgment of conviction, not based upon a verdict of guilty by a jury, is void."

In the case of Bettge v. Territory, 17 Okl. 85, 87 Pac. 897, by the unanimous decision of the Supreme Court of Oklahoma Territory, it was held that:

"Under the provisions of the federal Constitution, the guarantee of an impartial jury in a criminal prosecution, secures to the accused the right of a jury trial from the first moment, and in whatever court he is put on trial for the same offense charged."

And see Miller et al. v. State, 3 Okl. Cr. 457, 106 Pac. 810.

In the case of Miller v. Commonwealth, 88 Va. 618, 14 S. E. 161, 342, 979, 15 L. R. A. 441, the Virginia Supreme Court of Appeals held:

"A jury trial in the first instance is guaranteed by a constitutional provision for trial by jury and the right to a jury trial on appeal will not satisfy such constitutional provision where a jury is not allowed on the original trial."

To the same effect is Taylor v. Reynolds, 92 Cal. 573, 28 Pac. 688.

By the provisions of the statute above quoted the right of appeal is made to depend upon the recognizance. If this is not entered into by the prisoner with approved sureties, which he may or may not be able to procure, then the party prosecuted has no appeal and is denied his right to a trial by jury.

It is a matter of common knowledge that in many cases before the police court the prisoner by reason of his poverty is unable to give a good and sufficient bond, and to deny the right of trial by jury in the court having original jurisdiction of the cause would be in many instances an absolute denial of one of the most sacred rights inherent in the people; and in effect would be a denial of the equal protection of the law.

It has been well said that under our Constitution "there is none so great or powerful as to be exempt from the just penalties of the law, and none so poor and humble or so low as to be unworthy of its protection," and we should not forget that the worst as well as the best of men is entitled to the protection of the Constitution, and that a strained interpretation of the law which deprives a bad man of his right of personal liberty today may to-morrow deprive a good man of his equally—and in the eyes of some people perhaps more—sacred rights to property.

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It will be observed that section 1 of the act already quoted defines a violation of an ordinance for which a penalty or punishment is prescribed as an "offense," and that proceedings for such violations are declared to be criminal in their nature, "to be governed by, and subject to, general laws relating to criminal procedure." It follows from the view we take that in respect to "offenses" under city ordinances the punishment for which is or may be imprisonment, conviction of the accused would be in contravention of section 7 of the Bill of Rights, providing that "no person shall be deprived of life, liberty, or property, without due process of law," because under the constitutional provisions a jury is an essential part of every tribunal for the trial of criminal cases. Both provisions are intended to place the right beyond the power of the Legislature to abrogate or abridge it, therefore it is beyond the power of the Legislature to confer jurisdiction on any tribunal to try criminal cases without providing for jury trials.

The ordinance in question defines the offense of vagrancy in the identical language of the Penal Code. Section 2515, Rev. Laws. The maximum punishment prescribed by the ordinance is 90 days' imprisonment, and a fine of $100; that prescribed by the statute is 30 days' imprisonment, and a fine of $100. It would be an insult to the commonest understanding to say that by virtue of the powers conferred on municipal courts the accused could be submitted to the greater punishment for the same act without a trial by jury, because the prosecution was instituted in the municipal court.

If we needed evidence of the value of the right of trial by jury, we would find abundance of it in the record before us. A citizen is arrested without warrant, is brought before the municipal court, is summarily convicted on hearsay testimony, and is given the maximum sentence, which in effect amounts to 6 months' penal servitude. He is poor, and by reason of his poverty he is unable to give an appeal bond; on the mittimus he is then by virtue of a contract between the city and the county placed in the custody of the overseer of the county chain gang to serve out the sentence imposed. The punishment imposed in its nature and character is the same as that imposed for crimes against the state. It cannot be that such punishment can be imposed in Oklahoma by the ipse dixit of a police judge. If the sentence can be for 6 months, it may be for 12 months if the Legislature should permit it. Truly it is said that "summary judgment is but judicial despotism." The state and the public have an interest in the preservation of the liberties of the people and will not allow the citizen to be deprived of his liberty without due process of law.

Process which tries a man without formality for some petty municipal offense and punishes him in the same manner as, and along with, criminals violating the laws of the state, with no right to a jury trial, is not due process of law. The conclusion necessarily follows that the constitutional provisions guaranteeing to the accused the right of trial by jury secures the right of such a trial in the court having original jurisdiction. In so far as the opinions in the case of In re Simmons, 4 Okl. Cr. 667, 112 Pac. 951, 5 Okl. Cr. 399, 115 Pac. 380, and Meloy v. City of Woodward, 7 Okl. Cr. 16, 120 Pac. 1119, conflict with this opinion, they are overruled.

[3] The right of a trial by jury is only one among the several rights enumerated in the Bill of Rights. They are all necessary to a complete enjoyment of that personal liberty which is our birthright, and which it is the duty, not only of the courts, but of every citizen to jealously guard. They are all designed to safeguard the accused in all criminal prosecutions, so that no person may "be deprived of his liberty except by the law of the land, or the judgment of his peers."

For the reasons stated we are of the opinion that the right to a trial by jury cannot be evaded by the nature of the powers vested in the municipal corporation, or the nature of the jurisdiction conferred upon municipal courts. It follows that the proceedings had upon the trial and conviction of the petitioner were illegal and void, and said court was without jurisdiction to render the judgment and sentence.

The petitioner must therefore be discharged from custody.

ARMSTRONG and BRETT, JJ., concurred.

Ex parte BURLESON. (No. A-2788.)

(Criminal Court of Appeals of Oklahoma. Jan. 6, 1917.)

(Syllabus by Editorial Staff.)

HABEAS CORPUS ⊜29—TRIAL—SENTENCE—VALIDITY.

Where accused on a charge of vagrancy was sentenced by a municipal judge to fine and imprisonment, though no evidence was introduced in support of the charge, and before the time for appeal had elapsed was taken to a road gang and compelled to work on the public highway, he is unlawfully imprisoned and entitled to discharge.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 24; Dec. Dig. ⊜29.]

Petition by Bert Burleson for a writ of habeas corpus to secure his release from imprisonment by the Chief of Police of Oklahoma City and the Sheriff of Oklahoma County. Writ issued, and petitioner discharged.

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J. T. Michael, of Oklahoma City, for petitioner. B. D. Shear, A. T. Boys, and Frank Watson, all of Oklahoma City, for respondent.

PER CURIAM. This is a habeas corpus proceeding instituted in this court by Bert Burleson, who alleges that he is restrained of his liberty by the chief of police of Oklahoma City and the sheriff of Oklahoma county, under the following state of facts: That on the 10th day of July, 1916, he was arrested on a charge of vagrancy and brought before the municipal judge of said city and a pretended trial was had, wherein no evidence was introduced tending to prove that said petitioner was guilty as charged, and he "was illegally sentenced to pay a fine of $99 and $1 costs and serve 90 days in the city jail; that thereafter on the 13th day of July, 1916, and before the time had elapsed within which said petitioner could take an appeal he was transferred to the county jail and immediately taken to a road gang and placed in chains and compelled to work upon the public highways in Oklahoma county."

In response to the writ issued the officers to whom it was directed produced the petitioner in court on July 16th, and the same time filed their answer and return. Upon the hearing, the opinion of the court was delivered by the presiding judge, holding that petitioner is unlawfully restrained of his liberty as averred, and it was ordered that he be discharged.

The facts and issues in the case are substantially the same as in the case of In re Tom J. Johnson, 161 Pac. 1097, opinion filed December 30, 1916. For the reasons given in the opinion in that case it was held that the petitioner was entitled to his discharge.

(13 Okl. Cr. 51)

Ex parte KING. (No. A-2892.)

(Criminal Court of Appeals of Oklahoma. Jan. 10, 1917.)

Application by Joe King for writ of habeas corpus. Writ allowed, and petitioner discharged.

C. H. Ruth, of Oklahoma City, for petitioner. B. D. Shear, Municipal Counselor, and Frank Watson, both of Oklahoma City, for respondent.

PER CURIAM. This is an application for writ of habeas corpus by Joe King who alleges that he is illegally restrained of his liberty by the officers of the city of Oklahoma City and is now compelled to work on the highways near the city of Luther in Oklahoma county under some contract arraignment existing between the officers of Oklahoma City and the officers of Oklahoma county, by virtue of a commitment issued on a judgment and sentence of the municipal court of Oklahoma City, wherein he was sentenced to pay a fine of $25 and costs and serve a sentence of ten days in the city jail. On the 18th day of December, 1916, the writ issued, returnable the next day, at which time on the hearing of the case before the court and upon the authority of In re Johnson, 12 Okl. Cr. —, 161 Pac. 1097, the writ was allowed, and the petitioner was discharged from custody.

(13 Okl. Cr. 51)

Ex parte SPENCER. (No. A-2822.)

(Criminal Court of Appeals of Oklahoma. Jan. 11, 1917.)

(Syllabus by Editorial Staff.)

HABEAS CORPUS ⊂=29—UNLAWFUL IMPRISONMENT.

Where petitioner was arrested and sentenced to imprisonment by the judge of a municipal court without jury trial and notwithstanding a total lack of evidence, and was denied admission to bail, though offering sufficient sureties, petitioner was entitled to discharge from imprisonment, being unlawfully restrained of his liberty.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 24; Dec. Dig. ⊂=29.]

In the matter of the application of Charles Spencer for a writ of habeas corpus. Writ issued, and applicant discharged.

J. T. Michael, of Oklahoma City, for petitioner. B. D. Shear and A. T. Boys, municipal counselors, and Frank Watson, all of Oklahoma City, for respondent.

PER CURIAM. The petition in this case omitting title, verification, and exhibits thereto attached is as follows:

"Your petitioner, Charles Spencer, respectfully shows to this court:

"First. That he is illegally restrained of his liberty by the chief of police, W. B. Nichols, of the city of Oklahoma City, and unlawfully confined in the city jail of said Oklahoma City, Okl.

"Second. Your petitioner further represents that he was arrested without a complaint having been first procured as is provided by law, and that after said arrest a purported complaint was signed, but never sworn to; therefore your petitioner has been arrested without due process of law, confined by order of the court.

"Third. That upon a pretended hearing of said cause on the 7th day of August, 1916, before the municipal court of said Oklahoma City upon the charge of transporting, there was no evidence introduced tending in any manner to show that said defendant was guilty of any of the acts constituting the charge of transporting; that at the time of the hearing of said charge of transporting against the said defendant, five other persons charged with other various crimes were tried and convicted upon the evidence of John Heep and —— Sanders, two plain clothes officers of the city of Oklahoma City. That there was no evidence whatever from any witness, direct or indirect, tending to show that the said petitioner had committed any crime against the ordinances of said Oklahoma City or the laws of the state of Oklahoma, but notwithstanding the total lack of evidence presented, at said hearing at the municipal court, M. L. Spittler, without any regard for the constitutional rights of said petitioner, assessed the fine of $50 and costs, and sentenced said petitioner to serve 30 days in the city jail. That a copy of the complaint heretofore referred to is hereto attached, and marked 'Petitioner's Exhibit A.'

"Fourth. That upon the hearing as aforesaid, the petitioner served notice upon the city that an appeal had been taken to the county court of said county. That thereafter, to wit,

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on the same day, the said petitioner was unlawfully remanded to the city jail, and was and is now confined within said jail; that on the said 7th day of August, 1916, a good and sufficient appeal bond in the sum of $1,400 was presented to the said M. L. Spittler, with good and sufficient sureties thereon, and said bond was refused by the said M. L. Spittler for the reason that the bondsmen thereon had signed a number of other appeal bonds for persons seeking appeal from his court. That thereafter, on the 9th day of August, 1916, the petitioner presented another appeal bond with good and sufficient sureties thereon in the sum of $11,000 and listed thereon real estate and farm land in Oklahoma county in every manner exempt and for all reasons good and sufficient surety. That the said municipal judge refused said bond, stating: 'These bondsmen are not good in any court. I don't care if they are worth $100,000. You may be able to make me accept their bond and I may be wrong, but I will not accept them until I am made'—showing the said M. L. Spittler is holding said petitioner in said court in said confinement without admission to bail and for the malicious purpose of punishing said petitioner merely to suit his own capricious will. That the bonds heretofore referred to are hereto attached, and marked Plaintiff's Exhibits 'B' and 'C.'

"Fifth. Petitioner further alleges and says that the ordinance under which said petitioner is confined is void and unconstitutional for the reason that the same is in contradiction to the statutory laws of the state of Oklahoma.

"Sixth. Petitioner further alleges and says that he is innocent of any crime whatsoever against the laws of the city of Oklahoma City and the state of Oklahoma, and asks that he be discharged upon this hearing.

"Seventh. It is further alleged by the said petitioner that on the 11th day of August, 1916, at 5 o'clock p. m., he presented his petition for writ of habeas corpus to Hon. Geo. W. Clark of the district court of Oklahoma county, Okl., a copy of which petition is hereto attached and made a part of this petition; that upon said presentment a writ commanding said W. B. Nichols to appear in said court on the 12th day of August, 1916, at 11 o'clock was served; that the sheriff of said county, M. C. Binion, by M. L. Sanders, deputy, made a return of the writ; that the said writ was served upon the said W. B. Nichols by copy and not by original, and that because of said fact said George W. Clark refused to further hear said plaintiff's petition, and refused to issue a new writ against the said W. B. Nichols, stating that he did not have time to take the matter up; that there is no other district judge in the said county of Oklahoma county at this time to whom to make application for said writ to be made. For a further reason petitioner states that the time for appeal is rapidly passing, and that his rights are being prejudiced through no fault of his."

August 12, 1916, the petition was presented to the court, and the writ issued. In response thereto the officer to whom it was directed produced the petitioner in court, and at the same time filed answer and return thereto. Upon consideration of the case and for the reasons stated in the opinion in the case of In re Johnson, infra, we are of the opinion that the municipal court was without jurisdiction to render the judgment and sentence.

It follows that the petitioner is unlawfully restrained of his liberty, and is entitled to a discharge from the imprisonment of which he complains. He is therefore by the judgment of this court discharged therefrom.

(22 N. M. 325)

STATE ex rel. CUNNINGHAM et al. v. ROMERO, County Treasurer. (No. 1913.)

(Supreme Court of New Mexico. Sept. 22, 1916. On Motion for Rehearing, Dec. 30, 1916.)

(Syllabus by the Court.)

1. TAXATION ⟸709(1)—TAX SALE—REDEMPTION.

Chapter 78, Laws 1915, construed, and *held*, that the owner of property may redeem the same from a tax sale within three years from the date of the certificate by paying the amount paid at such sale, with interest at the rate of 1 per cent. per month, together with any taxes which may have been paid upon the property by the purchaser of the tax certificate, with interest at the same rate.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1430–1433; Dec. Dig. ⟸709(1).]

On Motion for Rehearing.

2. TAXATION ⟸514—TAX SALE — REDEMPTION.

The provision of section 1, chapter 78, Laws 1915, which reads as follows, "Such sale of said certificates or duplicate certificates, or such redemption by the owner, shall release said property from the lien of all delinquent taxes, penalties, interest and costs standing against the same at the date of such sale or redemption," operates to release the property from the lien of all such taxes, penalties, interest, and costs upon the sale of the certificate.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 956–961; Dec. Dig. ⟸514.]

Appeal from District Court, San Miguel County; Leahy, Judge.

Action by the State, on the relation of J. M. Cunningham and another, administrators of the estate of F. H. Pierce, for mandamus to Eugenio Romero, treasurer and ex officio collector of taxes of San Miguel County. From a judgment for relators, defendant appeals. Affirmed.

This is an action for mandamus against the county treasurer of San Miguel county to compel him to receive a certain sum of money tendered and claimed by relators to be sufficient to redeem certain lands from a tax sale previously made for delinquent taxes, and to issue a certificate of redemption therefor.

The petition shows that the properties involved were sold October 8, 1913, pursuant to law, to the county of San Miguel for delinquent taxes for the years 1912 and 1913, penalties, interest, and costs aggregating to the sum of $654.13. The petition further shows that on July 7, 1915, at a regular session of the board of county commissioners of said county of San Miguel, and pursuant to the provisions of chapter 78, Laws 1915, the board adopted a resolution authorizing the county treasurer to sell all tracts, lots, and parcels of land—

"which have been bid in by the county * * * for two or more years to the highest bidder for cash, the minimum amount to be accepted in cash by the said treasurer to be the actual amount of taxes due for all years for which

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taxes appear upon the tax rolls to be delinquent, including the year 1913, less all costs, penalties and interest."

The petition further recites that on September 20, 1915, two certificates of tax sale, being the ones here involved, were recorded in the office of the county clerk of San Miguel county, and on September 22, 1915, the respondent, the county treasurer of San Miguel county, assigned and conveyed to the Glen Investment Company the said certificates of tax sale in consideration of the payment by said company of the sum of $585.06 therefor, which sum was the minimum amount under the conditions of the resolution of the board of county commissioners heretofore referred to.

It further appears from the petition that the said Glen Investment Company, on October 1, 1915, paid the sum of $144.03 delinquent taxes for the year 1911, on the property described in the said certificates. On January 10, 1916, the relators, on behalf of the estate of F. H. Pierce, deceased, and for and on behalf of the heirs of said F. H. Pierce, deceased, tendered to Eugenio Romero the sum of $148.83, for taxes for the year 1911, on said property, including interest thereon, and the sum of $267.97, for the use of Glen Investment Company or its assigns, to redeem the property described in said certificates from the sale for the year 1912, being the amount of the purchase money which was paid for the tax sale certificate No. 608, which was one of the certificates acquired by said Glen Investment Company by purchase from the county treasurer on September 22, 1915; the amount thus tendered being the amount paid by the purchaser, the Glen Investment Company, with interest at 1 per cent. per month from the date of purchase to the date of the tender. And at the same time and place the relators also tendered on behalf of the estate and heirs of F. H. Pierce, deceased, the sum of $338.75, for the use of the Glen Investment Company, to redeem the property from the sale for the year 1913; the amount of this tender being the amount for which the second certificate was sold by the county treasurer on September 22, 1915, with interest thereon at the rate of 1 per cent. per month from the date of sale to the date of the tender.

By the petition it further appears that the respective tenders referred to were refused by the county treasurer, who also refused to give to relators a certificate of redemption from the tax sales, wherefore relators tendered into the court the sum of $755.55 for a certificate of redemption from the sales in question, and for the payment of the taxes for the year 1911.

A demurrer to the petition for the writ was interposed upon the ground that the petition did not state facts sufficient to constitute a cause of action in that it showed upon its face that no proper and legal tender was made to the respondent, the county treasurer, which demurrer was overruled; and, the respondent declining to plead further, it was ordered and adjudged that the alternative writ be made mandatory, from which judgment of the trial court this appeal is prayed.

Chas. W. G. Ward and C. A. Hunker, both of Las Vegas, and Thomas H. Gibson and Edwin Park, both of Denver, Colo., for appellant. Charles A. Spiess and Herbert W. Clark, both of East Las Vegas, for appellees.

HANNA, J. (after stating the facts as above). The only question for our determination is whether an owner of real estate which has been sold to the county for delinquent taxes for two or more years prior to April 1, 1915, may redeem the same by the payment of the amount for which the certificate of sale has been sold and assigned by the county to a third party, or whether such owner must pay the original amount for which the property was sold to the county.

[1] It is the contention of appellant that the Glen Investment Company, the purchaser of the tax certificate in question, is entitled to receive not only the amount paid for the certificates, but also the penalties, interest, and costs which had accrued thereon, although such penalties, interest, and costs had not, in fact, been paid to the county by the purchaser of the certificates. The question is purely one of construction of our statutes, and there is no controversy over the fact that the sale of the property described in the certificates for delinquent taxes was made pursuant to the provisions of section 5498 of the Codification of 1915, which section provides:

"Each parcel of real estate offered for sale shall be struck off to the highest bidder for cash, but if such real estate cannot be sold for the full amount of the taxes, penalty and interest due thereon or if there should be no bidder for the same, the whole amount of the property on which the taxes have been levied shall be struck off to the county for such total amount, and the collector shall make an entry on the assessment book of the fact, opposite to the name of the person assessed, and shall be credited with the amount of tax thereon in his usual settlement. In no case shall such interest be released, abated, rebated or reduced, but it shall have all the force and effect of the original tax and become part thereof, and any failure on the part of the county treasurer to add such interest to the tax at the time of collection thereof shall subject him to a penalty of double the amount thereof for which he and his bondsmen shall be liable, to be recovered by suit brought in the name of the state. One half of the interest or penalty collected upon taxes shall be paid to the state treasurer for the credit of the state interest fund, and the other half shall be credited to the county interest fund: Provided, the county shall not by the sale aforesaid acquire title to such real estate, but shall sell and assign the duplicate tax certificate, as provided in section 5500."

By section 5500 it is provided that:

"When any property shall be struck off to the county as provided in section 5498, it shall be the duty of the county treasurer to sell and assign the duplicate certificate of such sale to any person who will at any time pay the full

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face value thereof with accrued interest, and if the same cannot be sold at private sale before the regular sale of property for delinquent taxes in the next succeeding year, such certificate shall be sold at public auction at the time of such delinquent tax sale to the highest bidder for cash by the county treasurer then in office, but in no case shall such certificate of sale be sold for less than the full amount of the taxes and interest due after notice stating the time and place of sale, a brief description of the property, the amount due and the name of the person against whom the tax was assessed, or that it was assessed against unknown owners, if such be the case, shall have been published for four consecutive weeks, as provided in section 5495.

"It shall be the duty of the treasurer, immediately after the sale of any such duplicate tax sale certificate, if the post office address of the owner or agent of the owner is known, to mail a notice to such owner or agent informing him of the sale of such duplicate certificate of taxes upon his property, and giving the name of the purchaser and the amount paid therefor, and the surplus, if any, over and above the taxes, penalty and accrued interest, and that unless he shall redeem the same within three years from the date of recording of said duplicate certificate, which, with the assignment thereof by the treasurer, must be recorded in the office of the county clerk, a deed therefor will be executed and delivered to the purchaser, or his assigns. The owner of any such real estate may, at any time prior to the sale of such duplicate certificate, redeem the same by paying to the treasurer the amount of such taxes, penalty, interest and costs."

It is to be noted from the foregoing section that it was made the duty of the treasurer after the sale of any such duplicate tax certificates to mail a notice to the owner or agent of the property, informing him of the sale of such certificate, and giving him the name of the purchaser and the amount paid therefor, and advising him that unless he shall redeem within three years from the date of recording of said duplicate certificate, a deed will be executed and delivered to the purchaser or his assigns.

By section 5502, Code 1915, subsequently repealed, it was further provided that the treasurer should give the purchaser a certificate of sale containing a description of the property sold, stating the name of person or persons to whom the same was assessed, and the amount paid therefor, and that the property was sold for taxes subject to the right of the owner to redeem the property within three years by paying the amount paid at such sale, with interest thereon at the rate of 1 per cent. per month.

This latter section of the Codification of 1915 was amended by chapter 78 of the Laws of 1915; the amending act being an entire substitution for said section 5502, and reads as follows:

"Upon payment of the amount for which any real estate is sold, the collector shall give to the purchaser a certificate of sale, containing a description of the property sold, stating the name of the person or persons to whom the same was assessed or that it was assessed to unknown owners, as the case may be, the amount paid therefor, and that it was sold for taxes, with the date of sale, and that the sale is subject to the right of the owner to redeem the property within three years by paying the amount paid at such sale with interest thereon at the rate of one per cent. per month, which certificate must be recorded in the office of the county clerk in a book kept for the purpose of recording such certificates. Such former owner may at any time, within three years from the date of such certificate, provided for in section 36 hereof, redeem the property by paying to the county treasurer for the use of the purchaser, or his assigns, the amount of the purchase money with interest thereon at the rate of one per cent. per month, together with any taxes which may have been paid upon the property by the purchaser or his assigns, with interest at the same rate, and such former owner may retain possession of the property until the time of redemption has expired. In all cases where any property shall have been bid in by any county subsequent to March 16th, 1905, and prior to March 18th, 1913, in accordance with chapter 22 of the Laws of 1899, and the duplicate certificate of such sale shall not have been sold by the county treasurer in conformity with the provisions of chapter 134 of the Laws of 1905, or some amendment thereof, the person or persons, their heirs, executors or assigns, who owned said property at the time the same was bid in by such county are hereby declared to have the right of paying the amount of taxes for which said county bid in said property unto the county treasurer of said county at any time prior to January 1st, 1916, and it shall be the duty of said county treasurer upon receipt of the amount of such taxes to issue unto such person or persons, their heirs, executors or assigns, as the case may be, a certificate of redemption of said property, which certificate shall be conclusive proof of such redemption in any case hereafter commenced. Real estate sold for taxes, whether struck off to the county or to others, shall continue to be assessed in the name of the original owner, or to unknown owners, as the case may be, until the redemption period shall have expired, and taxes thereon for the time during which said certificate or duplicate certificate shall be held by the county or a purchaser shall be a lien upon said property until paid. Any final judgment for the sale of real estate for delinquent taxes, rendered according to law, shall estop all parties from raising any objection thereto which existed at or before the rendition of such judgment and could have been presented as a defense in such action in the court wherein the same was rendered, and as to all such questions the judgment shall be conclusive evidence of its regularity and validity in all subsequent proceedings, whether collateral or direct, and no bill of review or other action attacking the said judgment shall be entertained by any court except in cases where the taxes had been paid or the real estate was not liable for tax or assessment.

"Whenever any lot, parcel or tract of land, or any interest therein, or any improvement thereon, shall have been bid in prior to April first, 1915, by or for any county at tax sales made pursuant to law for two or more years, and the treasurer of such county has been unable to sell the certificates or duplicate certificater therefor so as to realize the total amount of the taxes, interest, penalty and costs due upon such property, said treasurer may sell the same at public auction to the highest bidder for cash, who shall bid not less than the minimum sum therefor which the county commissioners of said county, by order duly entered upon their records at any regular meeting, may have decided to accept. And at any time prior to the date fixed for such sale in the notice given by the treasurer the owner of such property may redeem the same from such tax sales by paying to the treasurer the minimum amount so fixed by the county commissioners, such sale of said

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certificates or duplicate certificates, or such redemption by the owner, shall release said property from the lien of all delinquent taxes, penalties, interest and costs standing against the same at the date of such sale or redemption."

By the second paragraph of the amendatory act of 1915, it is quite clear that at any time prior to the date fixed for the sale by the treasurer of the tax certificate, the owner of the property may redeem the same from tax sale by paying to the treasurer the minimum amount fixed by the county commissioners, but the question is whether or not he can tender this minimum amount after the treasurer has sold the certificates and assigned the same to a third party for the minimum amount fixed by the board of county commissioners. It is clear that no attempt to redeem was made prior to the sale of the certificates.

Appellant makes an able argument to the effect that a county necessarily becomes the purchaser of the property under the provisions of section 5498, paying therefor the total amount of the taxes, interest, penalties, and costs against the property, and that, therefore, this amount is the amount which must be paid in order to redeem the property from the tax sale, even though the certificate has been assigned to a third person, and that any other construction would defeat the statute. In other words, the argument is that unless the county is a purchaser, and the taxes, interest, penalties, and costs the purchase money, there never has been and there never can be a sale for delinquent taxes to counties under the law, and that the plain purpose of the statute would be defeated by taking from counties the remedy given by the statutes for the enforcement of delinquent taxes upon real estate; and, further, that certificates of tax sales could never be issued to the county under the statute for the lack of any method whereby to pay the amount for which real estate is sold for delinquent taxes. It is therefore forcibly argued that the only right of redemption that the relators can claim under the facts alleged in their petition is to be found in section 5502, as amended, which is by paying to the county treasurer for the use of the purchaser, or his assigns, the amount of the purchase money (paid by the county), with interest thereon at the rate of 1 per cent. per month, together with any taxes which may have been paid upon the property, together with interest at the same rate.

The fallacy of this argument, however, lies in the fact that the purchaser referred to in the act of 1915 is the purchaser of the tax certificate, who is authorized to acquire the certificate at a minimum amount to be fixed by the county commissioners under the terms of the act. It is our conclusion that the terms "purchaser and amount paid therefor" refer to the sale of the certificate by the county. The act does not provide that the taxes, with interest, costs, and penalties, shall be the amount specified in the certificate to be issued by the county treasurer, but does provide that the amount paid for the certificate shall be set out in the tax certificate, which, taken together with the other provisions of the act as to the sale of the property for taxes and the right of the owner to redeem within three years, would clearly indicate that the owner is only required to tender the amount paid by the purchaser of the certificate, together with the interest of 1 per cent. per month as provided by the act in question. We therefore conclude that the owner of property may redeem the same from a tax sale within three years from the date of the certificate by paying the amount paid at such sale, with interest at the rate of 1 per cent. per month, together with any taxes which may have been paid upon the property by the purchaser of the tax certificate, with interest at the same rate.

All doubt as to the correctness of our conclusion is disposed of by an examination of the concluding sentence of the second paragraph of chapter 78 of the Laws of 1915, which reads as follows:

"And at any time prior to the date fixed for such sale in the notice given by the treasurer the owner of such property may redeem the same from such tax sales by paying to the treasurer the minimum amount so fixed by the county commissioners, such sale of said certificates or duplicate certificates, or such redemption by the owner, shall release said property from the lien of all delinquent taxes, penalties, interest and costs standing against the same at the date of such sale or redemption."

From the foregoing quotation it is quite apparent that the Legislature intended not only that the owner might redeem from a tax sale upon the payment of the minimum amount so fixed by the board of county commissioners prior to the date fixed for a sale in the notice given by the treasurer, but also that the sale of the certificates or duplicate certificates, as well as the redemption by the owner, should release the property from the lien of all delinquent taxes, penalties, interest, and costs standing against the same at the date of such sale or redemption. Not only was the sale of the tax certificate for a minimum amount to be fixed by the board of county commissioners clearly contemplated, but it was evidently intended that the penalties, interest, and costs should no longer constitute a lien against the property, and that this was true in the case of redemption by the owner before a sale of the tax certificate by the treasurer, and was also true, even though the tax certificate was sold before redemption for the minimum amount, in which later event the penalties, interest, and costs should also cease to be a lien.

Finding no error in the record, the judgment of the district court is affirmed, and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

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On Motion for Rehearing.

HANNA, J. Appellant has filed a motion for rehearing, in which he sets forth several reasons for his contention that the former opinion in this case is erroneous.

[2] First, he argues that the construction placed by this court upon the closing words of section 1, chapter 78, Laws 1915, which read as follows, "Such sale of said certificates or duplicate certificates, or such redemption by the owner, shall release said property from the lien of all delinquent taxes, penalties, interest and costs standing against the same at the date of such sale or redemption," operates to release the property from the lien of all such taxes, penalties, interest, and costs upon the sale of the certificate, and the purchaser of the same simply holds a piece of paper without security of any kind or character.

That the statute does operate to release the property from the lien of the delinquent taxes, penalties, interest, and costs cannot be doubted from the language used; but appellant is mistaken in his further contention that the purchaser of the certificate has no security whatever, for under the statute he is entitled to retain the certificate until the property is redeemed by payment by the owner to the treasurer of the amount paid by the purchaser for the certificate, plus the interest authorized by the statute, and if such owner does not redeem within three years the holder of the certificate is entitled to a deed for the property. The reason for the provision releasing the property from the lien of delinquent taxes, etc., upon the sale of the certificate, is apparent. The board of county commissioners is authorized to fix a minimum price at which the certificate may be sold at public auction, which may be, and presumably is, less than the amount of taxes, penalties, interest, and costs. If the sale of the certificate under such circumstances did not operate to release the property from the lien of the delinquent taxes, penalties, interest and costs, or if such property is redeemed by the owner on payment of the price so fixed, the delinquent taxes, etc., or the difference at least between the minimum price so fixed and the amount of such delinquent taxes, etc., appearing upon the books of the treasurer, would continue as a lien upon the property which the county could enforce and the purchaser of the certificate would be required to eventually pay this amount, even though he might have purchased the certificate for much less. Hence we are satisfied that the construction placed upon this clause in the former opinion is correct.

In his motion for rehearing appellant further contends, first, that a sale to the county constitutes a sale for taxes, the same as though it were to a private individual; second, that the county becomes invested with the same title that is acquired by the individual; and, third, that a certificate issued to a county constitutes a contract or obligation, which, in the hands of the county, cannot be violated by any subsequent act of the Legislature.

For the sake of argument, all of these contentions may be assumed to be correct, and yet the act in question, as construed in the former opinion, does not violate any of the principles contended for. In the first place, it does not require the county to sell the certificates for less than their face value, but merely gives legislative sanction to such a proceeding in case the board of county commissioners so elect to proceed. This being true, no discussion of the power of the Legislature to constitutionally so legislate, had the law in question arbitrarily directed a sale of these certificates for less than the full amount of the taxes, etc., is necessary.

But, if we should assume that the Legislature had no authority to authorize the counties to sell the certificates for less than the full amount of the taxes, etc., or to permit a redemption from such sale without the payment to the county of such amount, we fail to see how appellant would be benefited. His contention is that the owner of the property must pay to the county treasurer the full amount of the delinquent taxes, penalties, interest, and costs, up to the time of sale, plus the interest provided by statute, which accrues after a sale, and that this money so paid to the county goes to the purchaser of the certificate and not to the county, so that in either event the county would receive only the amount for which the certificate had been sold. The reason for the provision giving the owner the right to redeem by paying to the county treasurer the amount for which the certificate is sold, plus the interest provided by statute, is readily apparent, when we consider the fact that the certificate may have been sold for many times the amount of the original taxes, penalties, interest, and costs. The minimum amount for which the certificate may be sold is fixed, whereupon such certificate is offered for sale to the highest bidder for cash. Suppose, for example, that the amount of delinquent taxes, etc., due on a parcel of real estate, was $100, and the board should fix $50 as the minimum amount for which the certificate might be sold, and at the auction several bidders should be present, and the purchaser of the certificate should pay $150 for the same. If appellant's argument be sound, the owner of the real estate could redeem the property by paying to the county treasurer, for the use and benefit of the owner of such certificate, $100, and the purchaser of the certificate would be minus $50, as there is no provision in the statutes by which he could recover the overplus so paid by him.

We are satisfied that the construction placed upon this statute in our former opinion is correct, and the motion for rehearing

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will therefore be denied; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

(22 N. M. 319)

STATE v. CHESHER. (No. 1912.)

(Supreme Court of New Mexico. Dec. 21, 1916.)

(Syllabus by the Court.)

1. HOMICIDE ⇐116(4)—DEFENSES—CARE.
The standard by which the jury must determine the reasonableness of belief of accused that danger is so apparently imminent that he must act in self-defense is that of an ordinary person of firmness, reason, and prudence, not that such question should be determined from the standpoint of the accused; and instruction given by the court *held* proper.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 161; Dec. Dig. ⇐116(4).]

2. HOMICIDE ⇐169(2)—EVIDENCE—ADMISSIBILITY.
Evidence of transaction occurring between appellant and deceased a few minutes previous to the act of homicide and closely connected therewith *held* improperly excluded.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 342; Dec. Dig. ⇐169(2).]

3. HOMICIDE ⇐339—APPEAL—HARMLESS ERROR.
Doctrine of "harmless error" *held* inapplicable.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 714; Dec. Dig. ⇐339.]

Appeal from District Court, Curry County; McClure, Judge.

Lem Chesher was convicted of voluntary manslaughter, and he appeals. Reversed and remanded.

O. O. Askren, of Roswell, and Patton & Bratton and W. A. Gillenwater, all of Clovis, for appellant. F. W. Clancy, Atty. Gen., and H. S. Bowman, Asst. Atty. Gen., for the State.

ROBERTS, C. J. The appellant, Lem Chesher, was convicted of voluntary manslaughter in the district court of Curry county. From the judgment of the court sentencing him to serve a term in the state penitentiary, he appeals.

We deem that an extended statement of the facts of this case is unnecessary in view of the disposition we have determined to make it. In brief, the evidence tends to show that appellant and Sam Byers, the deceased, prior to the day of the homicide, were not on friendly terms; that the two parties met on the streets of Texico on the day of the homicide, and after some conversation had passed between them they agreed to be friends, and in token of that agreement and fact repaired to a nearby saloon; that the parties became involved in a discussion or argument there, and that appellant fired three shots at and toward the deceased, one of which, at least, resulted in the death of deceased; that, according to the evidence of the state, deceased was unarmed at the time and made no hostile demonstration at or toward the appellant, but that, according to the evidence introduced in behalf of appellant, the deceased declared that if any one present did not like him or wanted to fight that was the time and place in which they could be accommodated, at which time deceased attempted to extract a pistol from his hip pocket, whereupon appellant fired the shots referred to; and that deceased actually did extract from his pocket a gun which dropped to the floor during the time the appellant was firing at him. This evidence is untrue according to the evidence introduced by the state and apparently believed by the jury. As this case must be reversed on one ground, we deem it advisable to consider only such other questions as we apprehend may occur upon the retrial of this case.

[1] 1. The foremost of such questions is whether to warrant action in self-defense, the situation and surrounding circumstances, as they appeared to the person asserting the right to act thereon, must have been such as would have excited the fear of death or great bodily harm of a reasonably cautious and courageous man, or a person of ordinary firmness, reason, and prudence; or is the question to be solved from the standpoint of the jury or from that of the defendant himself? The appellant contends that the standard of determining the reasonableness of the belief of the accused that the danger is so apparently imminent that he must act in self-defense is from the standpoint of the person himself, rather than from that of a "reasonable man" or that of the jury who views the matter in the light of past events, whereas the state contends that the instruction, as given, is correct. It would serve no useful purpose, we believe, to discuss the merit or demerit of the three different rules applied by the courts except to say that the courts which follow the "reasonable person" view, so far as we have ascertained, do not mention the fact, which we judge to be of some importance, that ordinarily, we believe, the accused person at the trial would be deemed to be a reasonable man under the presumption of law, hence an instruction based upon the "reasonable man" view would consequently be correct as applied to any defendant, unless perchance the facts and circumstances surrounding the act of homicide would be such as to necessarily characterize the accused as other than such a person. We realize that there is much merit in the view that the standard is that of a reasonable man as well as the view that the standard is that of the person who asserted the right of self-defense. But after careful consideration we have deemed that the "reasonable man" view is the correct one and the prevailing one in this country. A full and complete discussion of the rule, together with cases supporting it, as well as the other

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two rules mentioned, will be found in 13 R. C. L. "Homicide," § 122; note to State v. Beckner, 3 L. R. A. (N. S.) 535; Wharton's Cr. L. (11th Ed.) § 610 et seq.; State v. Gordon, 191 Mo. 114, 89 S. W. 1025, 109 Am. St. Rep. 790, note 804 et seq. See, also, State v. Summer, 55 S. C. 32, 32 S. E. 771, 74 Am. St. Rep. 707, note 717 et seq. Having arrived at such conclusion, it follows that the instruction referred to is not erroneous on the ground of attack made by appellant thereto.

[2] 2. The case of the state began with a narration of the actual difficulty which occurred in the saloon after all the parties had repaired thereto for the purpose of indulging in liquor in token of the renewed friendship of the appellant and the deceased. The evidence of the state, however, tended to show that appellant and deceased had previous to that time been enemies, and that they had repaired to the saloon to drink in token of their reconciliation. The appellant, by way of defense, sought to show that he and deceased had a conversation on the streets of the town of Texico immediately preceding the time that he and deceased entered the saloon. Appellant offered to prove by three witnesses the following:

"We expect the testimony of this witness to be to the effect that at the time Sam Byers and Lem Chesher, Jr., were talking in the vacant lot south of the Deats saloon in the town of Texico, within five minutes of the time of the killing that this witness was standing on the sidewalk talking with the defendant, and that while they were talking the deceased motioned to the defendant to come out, and that the defendant requested this witness to go with him; that this witness did go with the defendant to the place where the deceased was standing, and that upon approaching the deceased the defendant said, 'Sam I understand that you are up here to kill me,' and he said, 'Who in hell told you?' and the deceased says, 'I have word to that effect and have had a letter,' and that the defendant then said, 'Sam, you know you stood in with those fellows down there and had me indicted on a charge that wasn't true,' and the deceased said, 'I don't know a damn thing about it,' and the defendant then said, 'Sam, do you look me in the eye and tell me that you didn't have anything to do with that down there?' and he said, 'I do,' and the defendant then said, 'Sam, let's shake hands and be friends and go and have a drink,' and that they did shake hands, and that this witness then said, 'I am glad that you men can settle your troubles this way,' and that the deceased and the defendant then turned and walked into the Deats saloon just before the killing, within perhaps five minutes before the homicide."

The trial court rejected this offer, although it permitted the appellant himself to narrate facts of substantially the same character, and also permitted the state, in rebuttal, to prove the conversation had between appellant and deceased just previous to their entrance to the saloon. The appellant contends that this evidence was relevant and material as a part of the whole transaction, and that the rejection of this offer was error, notwithstanding that the court permitted the appellant himself to testify with regard thereto. The Attorney General contends that this evidence was not a part of the res gestæ, but that if it was and was improperly rejected, that it constitutes harmless error in that the facts contained in the offer were placed before the jury by the testimony of the appellant. We regard the position of the appellant on this question as correct. It will be remembered that appellant and deceased, previous to the day of the homicide, had been very unfriendly—in fact had been enemies. They met in Texico, and after a conversation had between them repaired to the saloon, where the homicide occurred.

They went to the saloon as a direct result of the conversation they had just previous thereto on the outside of the saloon. The trial court apparently regarded the substance of this conversation as relevant in two instances, but rejected proof thereof when offered by witnesses other than the appellant and one for the state. The doctrine of res gestæ is one difficult of application we admit, and one which may be differently applied by the most learned of courts. In the case of Wood v. State, 92 Ind. 269, 272, the court, among other things, has this to say:

"Where, however, the declarations are part of the quarrel which continues as one transaction until it culminates in a homicide, then the declaration made at any time during its progress and connected with it become part of the thing done, and as such competent evidence."

That the conversation of deceased and appellant had just immediately preceding their entrance into the saloon constituted a quarrel we have no doubt. The fact that the parties agreed to be friends and pledge their friendship by indulging in liquor becomes immaterial in deciding this question. The quarrel between the parties commenced with their meeting in front of the saloon and ended with the death of the deceased, and this notwithstanding that there was an interval of time therein when they appeared to be friends. In 1 Wharton's Cr. Ev. (10th Ed.) § 262, it is said:

"Res gestæ are events speaking for themselves, through the instinctive words and acts of participants, but are not the words and acts of participants when narrating the events. What is said or done by participants under the immediate spur of a transaction becomes thus a part of the transaction, because it is then the transaction that thus speaks."

In Kernan v. State, 65 Md. 253, 259, 4 Atl. 124, 125, the facts, with reference to this particular point were somewhat similar to those in the case at bar. There the trial court admitted proof of what occurred at another saloon a short distance from where the homicide took place, and only a few minutes previous thereto. The court said:

"What was said and done by others, at the same time and in company with him, was only a part of what he was directly connected with, and was inseparably connected with the history of his conduct at the time, and necessary to an intelligent appreciation of his doings."

In State v. Elvins, 101 Mo. 243, 246, 13 S. W. 937, 938, the court held that evidence of a previous quarrel and all that was said and

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done with reference thereto was admissible as part of the res gestæ, saying:

"And the testimony was perfectly competent to show how the quarrel began, and all that was said and done about it by defendant up to the time when a few minutes thereafter he fired the shot which caused the present accusation. Such testimony was a part of the res gestæ, and besides it went to show the state of feelings defendant had towards Flynn."

For other authorities on this point see Wood v. State, 128 Ala. 27, 31; 1 Starkie on Ev. 54.

In State v. Kennade, 121 Mo. 405, 413, 26 S. W. 347, 349, the court said:

"The occurrences in the saloon just a few minutes before the homicide, as related by Bass, elucidating as they did the subsequent * * * transactions and giving to them their proper complexion and expression, constituted part of the res gestæ, and were therefore competent evidence."

In Territory v. Price, 14 N. M. 262, 269, 91 Pac. 733, the court in effect, held that all the circumstances leading up to and preceding the homicide elucidated the criminal transaction which subsequently occurred and were admissible therefor.

[3] In conclusion we add that we are of the opinion that the trial court should have permitted appellant to prove by the several witnesses offered by him all that occurred in the conversation and meeting of the parties just prior to the act of homicide. The doctrine of harmless error in criminal cases is a dangerous one, and will not be applied in this case, for we are wholly unable to state as a fact that this evidence would have had no material bearing on the conclusion reached by the jury. The appellant was entitled to show the previous transaction which illuminated the subsequent homicidal act, and the refusal of the court to permit him to show such facts by witnesses other than himself constitutes reversible error, for which reason this case will be reversed and remanded for a new trial; and it is so ordered.

HANNA, J., concurs.

PARKER, J. I concur in the result, but disapprove of the instruction which is sustained by the court.

(22 N. M. 367)

KNIGHT v. FAIRLESS et al. (No. 1942.)

(Supreme Court of New Mexico. Dec. 29, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⇐639(1)—DISMISSAL—ABSTRACTS OF RECORD.

Where there has been a bona fide attempt to comply with the provisions of section 6, c. 77, Laws 1915, in regard to abstracts of record, an appeal will not be dismissed, although the parts of the record referred to in the assignments of error are imperfectly presented in the abstract.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2829; Dec. Dig. ⇐639(1).]

Appeal from District Court, Otero County; Leahy, Judge.

Action between Eli Knight and Irby L. Fairless and another. From judgment for the latter, former appeals. On motion to dismiss appeal. Motion denied.

J. L. Lawson, of Alamogordo, and Holt & Sutherland, of Las Cruces, for appellant. Renehan & Wright, of Santa Fé, for appellees.

PARKER, J. Appellee has moved to dismiss the appeal upon the ground that the abstract of record fails to present parts of the record to which reference is made in the assignments of error. He relies upon section 6 of chapter 77, Laws 1915, which provides that in such cases the appeal may be dismissed. This section is designed for the convenience of this court in examining the cases as they come before us, and gives the appellee or defendant in error no absolute right to a dismissal. In the case the abstract does present the parts of the record referred to in the assignments of error, but, perhaps, the same are so imperfectly presented as to require reference to the transcript in order to understand the facts. The pages of the transcript are referred to so that the facts may be readily obtained. There has been a bona fide attempt to comply with this statute, and, under all the circumstances, we do not deem it necessary to dismiss the appeal.

The motion to dismiss the appeal will be denied, and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

(22 N. M. 307)

POPLE v. OREKAR. (No. 1883.)

(Supreme Court of New Mexico. Oct. 7, 1916. On Motion for Rehearing, Dec. 30, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐655(2) — EXCEPTIONS, BILL OF ⇐40(4)—EXTENSION—APPLICATION FOR.

An application for extension of time to settle and sign a bill of exceptions made within ten days of the return day violates the provision of section 4505, Code 1915, and where an extension of time has been allowed within said ten-day period, and a bill of exceptions settled pursuant to such order of extension of time, it must be stricken on proper motion therefor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2823–2825; Dec. Dig. ⇐655(2); Exceptions, Bill of, Cent. Dig. § 60; Dec. Dig. ⇐40(4).]

2. PLEADING ⇐418(1)—DEMURRER—WAIVER OF RIGHTS.

A demurrant waives his right to object to an adverse ruling on his demurrer by proceeding to trial on the merits or by subsequently pleading over to the merits.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1399, 1403; Dec. Dig. ⇐418(1).]

3. PLEADING ⇐241, 278—AMENDED PLEADING—SCOPE OF AMENDED PLEADING.

In every amendatory or supplemental pleading filed by a party, it is necessary for him to

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therein restate his entire cause of action, defense, or reply, and all matters set forth in his original pleading and not carried forward into his amendatory or supplemental pleading are abandoned.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 642; Dec. Dig. ⊂⊃241, 278.]

4. APPEAL AND ERROR ⊂⊃219(2)—OBJECTIONS IN LOWER COURT—FINDINGS OF FACT.

Where the appellant complains of the fact that the court omitted to make findings of fact, but did not call this omission so to do to the attention of the trial court, the point is not available in this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1322, 1323; Dec. Dig. ⊂⊃219(2).]

On Motion for Rehearing.

5. APPEAL AND ERROR ⊂⊃1001(1)—REVIEW—VERDICT.

Where there is substantial evidence to support the verdict or judgment, or the findings of the court, further inquiry in this court will not be had.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928-3933; Dec. Dig. ⊂⊃1001(1).]

6. EVIDENCE ⊂⊃384—PAROL EVIDENCE—ADMISSIBILITY.

The general rule is that parol evidence cannot be received to contradict, vary, add to, or subtract from the valid written terms of a contract.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. ⊂⊃384.]

7. EVIDENCE ⊂⊃419(1)—PAROL EVIDENCE—CONSIDERATION.

If a written instrument fails to state the entire consideration, the same may be shown, and if the consideration stated is in ambiguous terms, or if it is clear that the whole consideration is not stated, the true consideration may be proved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1916; Dec. Dig. ⊂⊃419(1).]

8. EVIDENCE ⊂⊃434(1)—PAROL EVIDENCE RULE—ADMISSIBILITY.

Oral evidence is admissible for the purpose of impeaching a written instrument for false or fraudulent representations, upon the faith of which the contract was entered into.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2006, 2015, 2020; Dec. Dig. ⊂⊃434(1).]

9. PLEADING ⊂⊃67—DEFENSES—ANTICIPATING DEFENSES.

The pleader is not required to anticipate defenses.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 139; Dec. Dig. ⊂⊃67.]

Appeal from District Court, Colfax County; T. D. Lieb, Judge.

Action by George W. Pople against John Orekar. From judgment for plaintiff, defendant appeals. Affirmed.

This is an action in equity to foreclose a mechanic's lien, arising in connection with the erection of a two-story brick building in the city of Raton. Appellant demurred to the complaint, subsequently answering and setting up a counterclaim and alleged waiver of the lien, to which appellee replied, asserting an absence of consideration for the waiver and fraud in its procurement. To the reply appellant demurred, but did not in this demurrer or the demurrer to the complaint raise a jurisdictional question. The demurrers were overruled by the trial court, and the parties proceeded to trial before the court, which resulted in a judgment for appellee for the sum of $341.81 and attorney's fee in the sum of $50, from which judgment and decree the defendant, appellant here, appeals.

J. Leahy, of Raton, for appellant. L. S. Wilson, of Raton, for appellee.

HANNA, J. (after stating the facts as above). [1] The appellee moves to strike the bill of exceptions because an order of the trial court filed upon the 4th day of December, 1915, extending the time for signing and settling the bill of exceptions to the 6th day of December, 1915, and further order of the court granting the defendant an extension of time within which to file the transcript of record in the Supreme Court until the 17th day of December, 1915, were improvidently entered, and not within the statutory requirements governing such extensions of time, the return day having been previously extended to the 7th day of December. The further point is made that the notice served upon appellee of the intention of appellant to apply to the trial judge for the signing, sealing, and settling of the bill of exceptions was not served in conformity with the statute, in that the day fixed for settling, signing, and sealing the bill of exceptions was only three days prior to the return day, which was December 7, 1915, and further because the notice was dated November 27, 1915, and received by the attorney for appellee on the 29th day of November, 1915, but that no transcript of record was filed in the cause with the clerk of the court prior to the 30th day of November, 1915, or four days prior to the date fixed for the hearing upon the application to have the bill of exceptions signed, sealed, and settled.

It appears that the several objections were raised and exceptions taken to the action of the trial court in making the orders referred to. The statutes governing the question under consideration were fully considered by this court in the case of Costilla Land & Development Co. et al. v. Robert Allen et al., 17 N. M. 343, 128 Pac. 79, and it was there pointed out that section 2 of chapter 120, Laws 1909, appearing as section 4490, Code 1915, only authorizes an extension of time within which to file a complete transcript, and under this section no authority exists for extending the time for settling and signing the bills of exceptions. By section 4 of chapter 120, S. L. 1909, appearing as section 4505, Code 1915, authority was granted the trial judge, or, in his absence from the state, any other district judge, to extend the time for settling and signing the bills of exceptions, application for which extension of time, how-

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ever, must be made at least ten days prior to the return day.

There is no question in the case under consideration but that the extension of time to settle and sign the bill of exceptions was made within the ten-day period immediately preceding the return day, and the order was therefore violative of the provisions of section 4505 of the Code, for which reason the motion to strike the bill of exceptions must be granted. See Price et al. v. Toti et al., 16 N. M. 1, 113 Pac. 624.

[2] There are numerous assignments of error, most of which depend upon the bill of exceptions, and therefore cannot be considered. Appellant, however, urges that the trial court committed error in overruling demurrers to the complaint and the reply. It is axiomatic, however, that a demurrant waives his right to object to an adverse ruling on his demurrer by proceeding to trial on the merits or by subsequently pleading over to the merits. 31 Cyc. 746; B. S. Green Co. v. Blodgett, 159 Ill. 169, 42 N. E. 176, 50 Am. St. Rep. 146.

[3] Appellant next argues that plaintiff was estopped from alleging in his reply a different time of payment of the money alleged to be due him than he alleged in the complaint, and further discusses several other grounds of alleged estoppel. We fail, however, to find any assignment of error raising the question of estoppel, and therefore will not consider these alleged grounds of error.

The next proposition argued by appellant predicates error on the action of the trial court in overruling the motion of defendant to strike an amendment to plaintiff's reply, for reasons stated in said motion. The only grounds of the said motion necessary to consider have to do with the alleged failure of said pleading to set forth all the matters relied upon by way of replication to the answer. In other words, the so-called amended reply sought to supplement the original reply, and did not restate all the matter contained in the first pleading filed as a reply. In Albright v. Albright et al., 21 N. M. 606, 157 Pac. 662, this court held that in every amendatory or supplemental pleading filed by a party it is necessary for him to therein restate his entire cause of action, defense, or reply, and all matters set forth in his original pleading and not carried forward into his amendatory or supplemental pleading are abandoned. Therefore there could not be error, so far as this appellant is concerned. A failure to comply with the statute would, as stated, simply operate as an abandonment of the original pleading; therefore we find no error in the matter complained of.

[4] It is next assigned as error that the court refused to make specific findings of fact and conclusions of law requested by defendant. That the court did so refuse is apparent from the record, but we cannot, in the absence of a bill of exceptions, pass upon the alleged erroneous action of the trial court in this respect, because we have none of the evidence before us, and are not able to judge whether the findings of fact tendered and requested were improperly refused or not. This being true, the conclusions of law which necessarily were based upon the findings of fact cannot be passed upon by this court, and we therefore cannot sustain either contention of appellant.

In the same connection it is argued that it was the duty of the trial court to find the facts and give its conclusions of law pertinent to the case, which the trial court failed and refused to do. We find no evidence of the failure of the trial court in this respect, except so far as it appears that the trial court refused to give the findings of fact and conclusions of law tendered by the defendant. In the case of Enderstein v. A., T. & S. F. Ry. Co., 21 N. M. 548, 157 Pac. 670, this court recently held that, where the appellant complains of the fact that the court omitted to make findings of fact, but did not call this omission so to do to the attention of the trial court, the point is not available in this court. In other words, the appellant cannot be heard to claim the benefit of an alleged error in an omission by the trial court where he did not direct the attention of the court to such omission by the necessary request that the court make the findings and conclusions called for by the statute. It is true in this case the appellant did tender certain findings of fact and conclusions of law. But these were not deemed proper to be given and were refused. No further request was made by appellant for additional findings by the trial court, and no other findings were tendered or called for. We therefore find no error in the record in this respect.

The judgment of the lower court is affirmed; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

On Motion for Rehearing.

HANNA, J. Appellant urges a number of grounds in support of his motion for rehearing, the first 11 grounds stated covering substantially the same question, which, briefly stated, is predicated upon the following facts, viz.: That this court overlooked the fact that at the time of the oral argument the motion to strike the bill of exceptions and to dismiss the appeal had been denied, for which reason this court was precluded from again entering upon a consideration of the question, and by reason of the further fact that appellee, having filed a brief upon the merits, had waived his right to again urge the alleged defect in the appeal, giving rise to the motion to strike and dismiss, and that therefore this court could not enter upon a reconsideration of the question as called upon to do by a supplemental brief of appellee filed July 20, 1916, again raising the alleged defects in the record.

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In our opinion we held that the application for an extension of time within which to settle and sign the bill of exceptions must not be made within ten days of the return day, and that the bill of exceptions in this case must be stricken because such application had been made within the period of ten days, and therefore violated the provisions of section 4505, Code of 1915.

We assume that December 7, 1915, was the return day in this case. It had been fixed as the return day by stipulation, and by the order of the district court made and entered on the 4th day of October, 1915, at Tucumcari, N. M. It is now contended that this date was the time fixed for signing and settling the bill of exceptions only, and this contention finds some support in a later order of the trial court, entered on the 6th day of December, 1915, in which order the trial court granted "the defendant an extension of time within which to file the transcript of record or certified copies thereof in the Supreme Court of New Mexico," fixing said extension of time "as December 17, 1915."

This court assumed that the trial court and counsel understood the term "return day" to mean just what the statute intended it should mean, and what is commonly understood by this court and counsel generally to be the meaning of the term. The several orders and motion, upon careful examination, would possibly indicate that the counsel in the court below did not have the meaning of the term "return day" clearly in mind. It was evidently assumed that the extension of time to December 7, 1915, was for the purpose, and the purpose only, of settling and signing the bill of exceptions. The last order of the trial court evidently sought to correct the inadvertence of counsel and extended the return day to the 17th of December, without designating the later date as the return day. In view of the confusion which has existed in the treatment of this particular matter by both trial court and counsel, it is deemed advisable to reconsider our action in striking the bill of exceptions and to give consideration to such assignments of error as we have heretofore declined to consider upon the ground that the bill of exceptions was not before us, and we will therefore take up a consideration of these in their order.

[6] The first point relied upon by appellant in his brief, which has not been given consideration in our former opinion, is that the trial court erred in overruling the objections of defendant to testimony of the witnesses Jaramillo and Romero, because such testimony was offered for the purpose of proving a verbal agreement between the litigants, entered into prior to the making of the written agreement. While appellant's contention in this respect is not clear, it must be based upon the ground that the alleged verbal agreement became merged in the written contract.

The conversation testified to dealt with an understanding between the parties to the litigation, had before a written contract between them was entered into, and, over the objection of the defendant on the ground that the former understanding was immaterial, the court permitted the testimony to be given upon the theory that the alleged written contract related back to the previous verbal understanding. The record, however, further discloses the fact that the alleged written contract, which was set out in the answer of defendant, had been abrogated by agreement of the parties, and a subsequent verbal contract entered into, which was the contract referred to in the complaint, and which was substantially the same as the first parol agreement. By reason of this issue between the parties as to what contract had been entered into by the parties, it would become evident that the conversation before employment, as testified to by the witness Jaramillo, would be important in throwing light upon the undertaking or agreement which was finally entered into, and therefore this evidence became material. The same conclusion applies to the testimony of the witness Romero.

The next error assigned is the refusal of the trial court to admit certain evidence of defendant, offered to prove a bar account of the plaintiff; it being contended that defendant laid a proper foundation for the introduction of this evidence by showing that certain charge slips were made by a bartender, Ely Markovich, who could not be produced. It appears from the record that Markovich made charges on slips of paper which the defendant had totaled and entered in a book in his possession at the time he was seeking to testify, and from which he attempted to give evidence. The statement of counsel for defendant was as follows:

"Defendant excepts to the ruling of the court, and now offers the testimony of the witness as to the entries made by Mr. Markovich and transferred by this witness to the books attempted to be offered in evidence and offers the books, and further offers to have the witness refresh his recollection of the charges made against plaintiff as made by this witness and copied from the original entries, and then testify from memory."

The court ruled that the books could not go in evidence unless the original entries upon which they were based should go in with them. The statute under which the defendant was evidently attempting to proceed was section 2187, Code 1915, which reads as follows:

"In the trial of civil causes in the courts of this state, the books of account of any merchant, shopkeeper, physician, blacksmith or other person doing a regular business and keeping daily entries thereof, may be admitted in evidence as proof of such accounts upon the following conditions:

"First. That he kept no clerk, or else the clerk is dead or inaccessible.

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"Second. Upon proof, the party's oath being sufficient, that the book tendered is the book of original entries.

"Third. Upon proof, by his customers, that he usually kept correct books.

"Fourth. Upon inspection by the court to see if the books are free from any suspicion of fraud."

It is clearly evident that there was no real attempt to comply with the terms and conditions of this statute; for which reason we find no error in this ruling of the trial court. There was no evidence tending to explain why the clerk who had made the original entries could not be produced, nor why the original book of entries could not be produced, nor that the account as produced was correct, and in other respects the testimony failed to show any real compliance with the statute upon this subject.

The next point assigned as error by appellant is that the evidence of the witness Herbert Finkle was improperly admitted over the objection of the defendant, because the written contract could not be abrogated by this evidence. This contention loses sight of the fact that plaintiff claimed a verbal contract for personal employment to supervise the construction of the building, which, plaintiff contends, had been abrogated. The testimony of the witness tended to prove plaintiff's contention, and was therefore clearly admissible. It indicated that defendant had assumed charge of the work, and was employing labor and fixing wages, and thereby demonstrating that the written contract had been abrogated.

The next point argued is that the trial court was in error in rendering the decree because the court had no jurisdiction so to do, since the only ground for equity jurisdiction was the allegation of the alleged lien, and the defendant's waiver of the same was presented to the court prior to the time the court attempted to take jurisdiction, and try the cause without the aid of a jury, thereby depriving defendant of his right to have said facts tried by jury. It does not appear that this point was presented by the assignments of error of appellant, and we have searched the record in vain to find where the point was called to the attention of the trial court. The brief of appellee is silent upon this point, but our examination leads us to conclude that there is absolutely no merit or basis for this contention.

The next error assigned is that the decree is erroneous because it is apparent from the amount thereof, and which is practically all that plaintiff sued for, that no allowance was made the defendant as an offset for the damages sustained for plaintiff's failure to fulfill his part of the conditions in said written contract, and that said decree failed to allow the defendant any offset whatever as set forth in the counterclaim of his answer. It appears from the record that the amount sued for was $492, and interest, while the amount recovered was $341, so that the essential ground of plaintiff's complaint in connection with this alleged error is not well taken; as it is evident that something was allowed in the way of an offset. It is not for this court to weigh the evidence, but, as has been so frequently said as to require no citation of authority, where there is substantial evidence to support the verdict or judgment, or the findings of the court, further inquiry in this court will not be had. Wade's New Mexico Appellate Procedure, § 499.

The next four assignments of error deal with an alleged waiver of the mechanic's lien, which is the basis of the suit. It is first contended that evidence was improperly admitted tending to show fraud by misrepresentation in procuring the waiver; that plaintiff made no request to have the waiver set aside; that the waiver was not sufficiently pleaded; that the alleged misrepresentation did not constitute fraud; and that the pleadings should have been amended in order to give the court jurisdiction to pass upon the alleged waiver. It appears from the evidence that the plaintiff below, appellee here, before the completion of his work upon the building, executed a waiver of his lien, his testimony disclosing that he did this upon representations by the defendant, appellant here, that it was necessary to borrow money and place a mortgage upon the property in order to secure funds to complete the work, and that after he secured the funds he would pay the money due the plaintiff. His agreement so to pay the amount due is relied upon as the misrepresentation constituting fraud. It is also urged by appellee that there was no consideration for the waiver, and that the expressed consideration of $1 was not paid. The alleged waiver of the lien was signed after the employment of the plaintiff, and the employment was in no way conditioned upon the execution of the waiver of the lien. There is no controversy between the parties that the mechanic's lien could be waived. It is simply contended that there is no consideration for the alleged waiver in question, or, if consideration existed, it has failed by reason of the alleged bad faith or fraud of the defendant.

[7] The statement of the several assignments of error, though somewhat confusing and apparently presenting difficulties, is, in our opinion, resolvable into the one question of whether or not parol testimony can be introduced to show the real consideration for the written contract or waiver of the lien. The general rule is that parol evidence cannot be received to contradict, vary, add to, or subtract from the valid written terms of a contract. This rule, however, is subject to the exceptions that, if a written instrument fails to state the entire consideration, the same may be shown, and if the consideration stated is in ambiguous terms or if it is clear that the whole consideration is not stated, the true consideration may be proved. Jones

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on Evidence, § 468. The same author also states the rule to be that the real consideration may be proved, although different from that expressed in the writing, unless the parol testimony tends to change the contract itself, in which event parol evidence is not admissible. To the same effect, see, also, Wigmore on Evidence, § 2433; volume 3, Ency. of Evid. pp. 401, 402; 9 Cyc. 368; 6 A. & E. Ency. of Law, 767.

[8] If the evidence objected to does not go to the matter of proving the true consideration, but is solely to be considered as evidence of misrepresentation amounting to fraud, we find that the evidence would nevertheless be admissible, upon the ground that oral evidence is admissible for the purpose of impeaching a written instrument for false or fraudulent representations, upon the faith of which the contract was entered into. That this is an exception to the general rule as to the admissibility of oral evidence affecting the terms of the written instrument finds support in Abbott's Proof of Facts, p. 562, and in the authorities there cited.

[9] We deem it unnecessary to further consider the question raised by the several assignments of error referred to, further than to say that the objection that the waiver was not sufficiently pleaded is not well taken. It is a well-established principle of pleading that the pleader is not required to anticipate defenses. 31 Cyc. 109.

[5] The next assignment of error is that a judgment or decree in any amount for plaintiff would be erroneous because of insufficient evidence to support the same. An examination of the record, however, clearly shows substantial evidence to support the judgment of the lower court, and it will therefore not be disturbed by this court.

Finding no error in the record, or the bill of exceptions, we adhere to our former judgment, which is that the judgment of the lower court be affirmed; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

(22 N. M. 302)

LOFTUS et al. v. JOHNSON. (No. 1824.)

(Supreme Court of New Mexico. Dec. 30, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⟸516 — RECORD — SCOPE AND CONTENTS—NECESSITY FOR BILL OF EXCEPTIONS.

In all actions tried without a jury the testimony taken before a court or that taken by a referee, the transcribed notes of the stenographer in such cases, properly certified by the court or referee, and all motions, orders, or decisions made or entered in the progress of the trial of any such action shall become and be a part of the record for the purpose of having the cause reviewed by the Supreme Court upon appeal or writ of error, without any bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2332–2340; Dec. Dig. ⟸516.]

2. APPEAL AND ERROR ⟸597(1)—RECORD—MATTERS TO BE SHOWN.

Section 31, c. 57, Sess. Laws 1907 (section 4500, Code 1915), provides a method by which less than the entire record may be incorporated into the transcript, but, under this section, all that portion of the record essential to a review in the Supreme Court of the questions presented must be incorporated into the transcript of the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2627–2631, 2635–2638; Dec. Dig. ⟸597(1).]

3. APPEAL AND ERROR ⟸907(1)—REVIEW—PRESUMPTIONS.

Upon a doubtful or deficient record every presumption is indulged in favor of the correctness and regularity of the decision of the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3673, 3678; Dec. Dig. ⟸907(1).]

4. APPEAL AND ERROR ⟸596—RECORD—DUTY TO PREPARE.

The duty of having a transcript properly prepared and filed rests upon the appellant or plaintiff in error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2624–2626; Dec. Dig. ⟸596.]

5. APPEAL AND ERROR ⟸660(2)—RECORD—DEFECTS—CORRECTION.

Section 4502, Code 1915, provides that a suggestion or motion for a certiorari to supply a diminution of the record shall be made on the first day of the term to which the appeal or writ of error is returnable, and shall be accompanied by an affidavit setting forth reasons, satisfactory to the court, for the omission of the same from the transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2845; Dec. Dig. ⟸660(2).]

Error to District Court, San Juan County; Abbott, Judge.

Action by J. Allen Johnson against T. L. Loftus and others. Judgment for plaintiff, and defendants Loftus and others bring error. Motion to dismiss denied.

Frank A. Burdick, of Farmington, for plaintiffs in error.

HANNA, J. This is a suit brought by the defendant in error, J. Allen Johnson, against the town of Farmington, and Messrs. Loftus, Hall, and Tucker, plaintiffs in error, seeking damages for the alleged negligent performance of a contract for the construction of a waterworks system to supply the town of Farmington.

At this time the case is not before us on its merits, but upon a motion by the defendant in error to dismiss the appeal, the grounds of which motion are: First, where only a portion of the record and proceedings of the trial court is deemed necessary to a review of the case, and such portion is called for by the præcipe filed in the office of the clerk of the district court, under the provisions of section 4500, Code 1915, it is neces-

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sary that the court stenographer transcribe the whole of his stenographic notes and file the same in the office of the clerk of the court in which the action in which they were taken was tried. Section 4500 does not clearly provide for the filing in the office of the clerk of the transcribed notes of the evidence or proceedings had at the trial, though inferentially such would seem to be called for. The præcipe is directed to the clerk of the court and calls for a portion or portions of the proceedings, which, it would seem, the clerk would be unable to incorporate in the transcript to be prepared by him unless all of the proceedings were on file in his office.

In the case of bills of exceptions, under the provisions of section 4495, it was evidently the intention of the Legislature to authorize any party to an action to require the court stenographer to transcribe the whole or any part of his notes, which are then to be filed in the office of the clerk of the court and thereafter embodied in the bill of exceptions. This section and section 4500 were both included in the appellate procedure act of 1907, and the fact that the filing of the transcribed notes in the office of the clerk of the court is not required under section 4495 would perhaps cast some doubt upon the construction of section 4500.

We have not been favored with a brief by defendants in error in support of the motion to dismiss, and by reason of the fact that our determination upon the second point raised makes the decision upon this, the first point raised, a moot question, we are disposed to pass the question without deciding, until such time as the court has the question before it properly briefed.

The second and only other point raised by the motion to dismiss is that where a portion only of the record or proceedings of the trial court is sought to be brought to this court for review, under sections 4493 and 4500, Code 1915, it is necessary that the portion of the proceedings so brought up for review shall be properly certified by the court or referee, which certificate must also show that the portion of the testimony or proceedings so brought up for review contains all the evidence in the court below upon the question or questions sought to be reviewed.

[1] The provisions of section 4493 are plain, and it is there clearly provided that:

"In all actions tried without a jury the testimony taken before a court or that taken by a referee, the transcribed notes of the stenographer in such cases, properly certified by the court or referee, and all motions, orders or decisions made or entered in the progress of the trial of any such action shall become and be a part of the record for the purpose of having the cause reviewed by the Supreme court upon appeal or writ of error, without any bill of exceptions."

[2] In the recent case of Rogers v. Crawford, 161 Pac. 1184, not yet officially reported, this court held that the certificate of the court stenographer, in itself, is insufficient to make the transcript of the proceedings of the trial court an element in the review of the case, in that the transcript was not properly certified to. It is plain that the transcript must be certified to by the court or referee before whom the testimony was taken. In the present case only a portion of the testimony is attempted to be brought before this court for review, and an attempt was made to comply with the statute in the matter of the certificate, which was made by the trial judge in the following language:

"The foregoing transcript of the testimony of the therein named witnesses at the trial of the said cause of action is approved by me as being a correct record of a portion of the testimony had and taken at and during said trial. Edmund C. Abbott, Judge."

It is apparent that the foregoing certificate does not recite that the portion of the testimony certified to as being a correct record of the testimony taken at the trial constitutes all the testimony upon the question or questions sought to be raised by the præcipe filed in the office of the district clerk under the provisions of section 4500. This section of the Code was before this court for construction in the case of Baca et al. v. Unknown Heirs, 20 N. M. 1, 146 Pac. 945, where the court said in an opinion of Chief Justice Roberts:

"Section 31, c. 57, S. L. 1907 (section 4500, Code 1915), provides a method by which less than the entire record may be incorporated into the transcript, but under this section all that portion of the record essential to a review in the Supreme Court of the questions presented must be incorporated into the transcript of the record."

To the same effect see, also, New Mexico Coal & Mining Co. v. Baker, 21 N. M. 531, at 542, 157 Pac. 167.

[3] The territorial Supreme Court, in the case of Street v. Smith, 15 N. M. 95, 103 Pac. 644, disregarded a transcript containing what purported to be the testimony in a case because it was not properly certified to, holding that upon a doubtful or deficient record every presumption is indulged in favor of the correctness and regularity of the decision of the court below. This principle has been differently stated in numerous decisions and is well established. It is admitted to be the law by the brief of plaintiffs in error.

[4] They seek to escape its application by a contention that because the abstract of the record contains a statement by counsel that the testimony submitted comprises all the testimony taken at the trial, bearing upon the points raised, a challenge to the appellee was thereby made to prove the statement to be untrue by the exhibition of other portions of the stenographic notes, inasmuch as section 4500 of the Code gives him the privilege of so doing. This contention is untenable because, as held by this court in the case of Baca et al. v. Unknown Heirs, 20 N. M. 1, 146 Pac. 945, the duty of having a tran-

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script properly prepared and filed rests upon the appellant or plaintiff in error.

[5] The result of our conclusion upon the second point raised by the motion is that the transcript of the testimony not having been properly certified to by the trial court, cannot be considered by this court in passing upon the case upon its merits. In anticipation of the possibility of this result, counsel for plaintiffs in error, in the concluding portion of his brief, suggests a diminution of the record, and that his suggestion be considered a motion asking for certiorari to supply such diminution, upon the ground that special cause exists as set out in sections 4501 and 4502 of the Code of 1915. While it is doubtful whether the relief sought by certiorari is available under the circumstances, a point not necessary to be decided, yet plaintiffs in error have not put themselves within the terms of section 4502, which provides that a suggestion or motion for certiorari to supply a diminution of the record shall be made on the first day of the term to which the appeal or writ of error is returnable, and shall be accompanied by an affidavit setting forth reasons, satisfactory to the court, for the omission of the same from the transcript. There is nothing omitted from the transcript in this case, and, from the facts, it would clearly appear that the record below, so far as the defective certificate is concerned, would disclose the same facts as the transcript before us now disclosed, for which reasons a certiorari would serve no useful purpose, if available, as a remedy for the condition.

Inasmuch as one of the questions raised upon the merits may be solved by resort to the record proper, the motion to dismiss must be denied; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

(22 N. M. 293)

CRAIG et al. v. PARSONS et al.
(No. 1887.)

(Supreme Court of New Mexico. Dec. 11, 1916.)

(Syllabus by the Court.)

1. BROKERS ⟸7—CREATION OF RELATION.
A contract, providing that one party agrees to sell land of another party for a certain sum, for which first party shall receive a certain stipulated commission, *held* to create the relation of principal and agent between the parties.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 5–8; Dec. Dig. ⟸7.]

2. BROKERS ⟸14 — CONTRACTS — CONSTRUCTION—"TO SELL."
The expression "to sell," used in contract of brokerage, defined.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 13; Dec. Dig. ⟸14.
For other definitions, see Words and Phrases, First and Second Series, Sell.]

3. BROKERS ⟸35, 65(2) — COMPENSATION — RIGHT TO.
Where an agent sells land of his principal at a price in excess of the price stipulated and agreed upon between the principal and the agent, and fraudulently appropriates the difference to himself, or permits others to appropriate it, he becomes liable to the principal for such difference, together with the value of the commission received by him.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 27, 48; Dec. Dig. ⟸35, 65(2).]

4. BROKERS ⟸102—RIGHTS OF PRINCIPAL—FRAUD.
Where a person, with full knowledge of the facts, aids and abets a broker in the commission of an act of fraud upon the principal, he is liable to the latter for loss sustained thereby.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 146; Dec. Dig. ⟸102.]

Appeal from District Court, Chaves County; Richardson, Judge.

Action by Harry V. Craig and another against Ralph M. Parsons and another. From a judgment for plaintiffs, defendants appeal. Affirmed on condition.

Geo. S. Downer, of Albuquerque, and Reid & Hervey and Ed. S. Gibbany, all of Roswell, for appellants. R. C. Reid, of Roswell, for appellees.

HANNA, J. This is an appeal from the district court of Chaves county by Ralph M. Parsons and M. M. Baumgartner from a judgment against them in the sum of $3,600. The complaint in this case, in substance, alleged that the appellees, prior to April 6, 1912, were the owners of a certain tract of land in Chaves county, and on the date last mentioned entered into a contract in writing with Parsons, whereby the latter agreed to sell said premises for $6,100, for which he was to receive from the owners of the land a certain model Ford automobile; that a sale of said premises was made by parsons to C. L. Herrman for $9,000; that appellants concealed from appellees that they had received $9,000 for said land and fraudulently appropriated the difference between the contract price of said land and the price actually received therefor to their own uses, and that the commission specified in said contract was paid by the owners to Parsons in ignorance of the fraud of the appellants. The time of the discovery of the alleged fraud was also alleged. The separate answer of the appellants denied the fraud alleged in the complaint, and alleged that the appellant Parsons sold the said lands to Baumgartner for $6,100, for which sum Parsons accounted to the owners, and that Baumgartner thereupon sold the said land to Herrman for $9,000. Under those facts it was contended that Parsons had fulfilled his contractual obligations, and that Baumgartner owed no duty whatever in the premises to the appellees. The contract of April 6, 1912, is in the following words:

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"Parsons agrees to sell the place for $6,100 and to close the deal within 30 days from April 6 (unless time is extended by Craig): $4,000 of the purchase price to be paid in cash and the balance, $2,000 in one year at 10%; $100 having been already paid, the receipt of which is hereby acknowledged. $500 of the $4,000 has been deposited in the First National Bank of Roswell and if the deal is not consummated, by fault of present owners, then in that event, it is to be divided equally between Craig and Parsons. If the provisions of the above contract are carried out Parsons is to receive a new model T 4-door Ford car as his commission for effecting the sale. It is further understood that Parsons' customer may have the right, instead of making a note for the deferred payment of $2,000, to pay the same in cash."

[1, 2] 1, 2. One of the contentions made by the appellants is that this contract does not create Parsons the agent of the owners of the said land, but simply authorizes him to make a sale of the property. Upon that theory it is claimed that the evidence shows that Parsons sold the land to Baumgartner for the contract price, and even though he (Parsons) assisted in making the sale to Herrman for $9,000, he cannot be held liable to the appellees, because he owed them no duty in the premises. The contract hereinabove referred to clearly provides for the agency of Parsons in the matter of the sale for the owners of the property, unless the meaning to be ascribed to the words "to sell" changes the evident intention of the parties as elsewhere expressed in the instrument. Parsons, by the terms of the instrument, was to receive his specified commission from the owners for effecting a sale of the property to his "customer." The evident intention of the parties that Parsons was to act as the agent of the owners in effecting a sale of the property is not changed because of the use in the contract of the words "to sell." In Keim v. Lindley (N. J. Ch.) 30 Atl. 1063, 1073, a leading case, the court, speaking with reference to the meaning to be given to the words "to sell" and the like, said:

"It seems to me to amount to no more than this: That the mere employment of an ordinary real estate broker to effect a sale of a parcel of land, even though the price and terms be prescribed, does not amount to giving present authority to such broker to conclude a binding contract for the same. Moreover, such authority is not usually to be inferred from the use by the principal and broker in that connection of the terms 'for sale' or 'to sell,' and the like. Those words, in that connection, usually mean no more than to negotiate a sale by finding a purchaser upon satisfactory terms."

See, also, 4 R. C. L. "Brokers," § 14; Bacon v. Davis, 9 Cal. App. 83, 98 Pac. 71; Duffy v. Hobson, 40 Cal. 240, 6 Am. Rep. 617; Gault Lumber Co. v. Pyles, 19 Okl. 445, 92 Pac. 175, 176; Stemler v. Bass, 153 Cal. 791, 96 Pac. 809, 811, and note, 17 L. R. A. (N. S.) p. 211, where many cases are collected.

While the terms employed in such contracts control in the construction to be given them by the courts, cases of some similarity, holding that the relation of principal and agent was created by the act of the parties, are Chezum v. Kreighbaum, 4 Wash. 680, 30 Pac. 1098, 32 Pac. 109; and Tate v. Aitken, 5 Cal. App. 505, 90 Pac. 836, 839.

[3] 3. Holding, as we do, that at all times material hereto Parsons was the agent of the appellees, the question next presented is whether Parsons is liable under the facts disclosed by the evidence and the findings of the court. The appellants insist that their version of the transaction is the correct one, but there is substantial evidence to sustain the conclusions of the trial court, and therefore we must assume that those conclusions are correct. The trial court found that the record failed to disclose that Parsons appropriated to himself any of the excess of the purchase price. It also held that the sale of the premises was made to Herrman and not to Baumgartner. This finding is contained in the trial court's memorandum opinion, and conflicts with the judgment of the court, which found that all the allegations of the complaint were sustained by the evidence. The evident conclusion of the court, however, was that while Parsons did not appropriate to himself any of the excess purchase price, he was liable to the principal by virtue of his conduct in selling the property to Herrman for $9,000 and concealing from appellees the real price paid therefor. In Duncan v. Holder, 15 N. M. 323, 107 Pac. 685, the territorial Supreme Court said:

"The value in such cases [cases where principal sues agent for money had and received] is quite immaterial, for the reason that the agent is not employed with regard to the value of the property, but by the terms of his employment he is charged with the duty of selling it at a price fixed by his principal, irrespective of its value, and the law places upon the agent his duty to account to his principal for any advantage which he may secure in the line of his employment; that is, even if the property is placed in the agent's hands to sell at a certain price, and he receives a greater price, he is bound to account for it."

Appellants' argument that appellees had no cause for complaint, because they received for their land all that they asked for it, is clearly without merit under the foregoing authority. Where the doctrine in the foregoing cases is applied, the courts hold that the principal may recover from the agent, not only the difference in the price paid to the principal for the land and the price obtained by the agent and concealed from the principal, but also the value of the commission paid by the principal to the agent. Deter v. Jackson, 76 Kan. 568, 92 Pac. 546. The principle underlying this phase of the doctrine is that the agent's fraudulent conduct prevents him from receiving or retaining any benefit whatever from the transaction. In the case of Duncan v. Holder, supra, the agent had actually received and converted to himself the excess of the purchase price paid to his principal, whereas such excess was not actually converted by the agent in the case at bar. The question, then, is whether an agent is liable for his fraudulent conduct where he

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does not convert the excess of the purchase price, but permits another to convert it. The cases are numerous where a broker is held liable on the theory of breach of duty, even though he obtains no pecuniary benefit on account of his conduct, one of such cases being Brown v. Carpenter, 142 Ky. 676, 134 S. W. 1150. The following statement in Emmons v. Alvord, 177 Mass. 470, 59 N. E. 126, is authority for the conclusion that Parsons is liable to appellees, notwithstanding the finding of the court that he received no part of the excess purchase price paid by Herrman:

"For a broker employed to sell land to understate to his principal an offer which he has received, with intent to appropriate, or to help some one else to appropriate, the difference between the amount as he states it and the amount actually offered is an actionable wrong, if the fraud succeeds, for which substantial damages can be recovered in case they can be proved."

In Powers v. Black & Baird & Hartman, 159 Pa. 153, 157, 28 Atl. 133, Black and Baird, brokers, were held liable in damages for the loss suffered by appellee, although the said brokers were shown not to have received any of the proceeds of the sale of the real estate, except their commissions. These cases are ample authority for holding Parsons liable in this case, notwithstanding the fact that he received none of the proceeds of the sale to his own use.

In March, 1912, appellees verbally listed their land for sale with Parsons, who was a real estate broker. Parsons immediately corresponded with Baumgartner for the purpose of having the latter procure a purchaser for the land, in a sum in excess of the price at which the land was listed by the appellees. The listing price was $6,100, and the price at which Baumgartner was advised to attempt to sell the property was $6,500. In the following month Baumgartner accompanied Herrman to Chaves county from Illinois, where the latter was shown the lands of the appellees. Parsons quoted this land to Herrman at $9,200, but subsequently advised him that the owner would sell for $9,000. This offer Herrman accepted, executing an instrument which the parties understood would bind him to purchase on those terms. Baumgartner became a party to this instrument at the direction of Parsons. After this contract or instrument was executed Parsons and Harry V. Craig executed the instrument hereinabove set out. This contract specified $6,100 as the purchase price. It appears that Parsons subsequently orally agreed to change the contract selling price from $6,100 to $6,250. Parsons delivered the equivalent of $6,250 to appellees, and appellees delivered to Parsons the commission agreed upon. Under these facts and the authorities, the trial court was not in error in rendering judgment against Parsons. The question as to the amount of that judgment will be considered hereafter in this opinion.

[4] 4. After the land was listed with Parsons, Baumgartner was advised by him to obtain a purchaser for $6,500, in which event he (Parsons) would obtain a new automobile at cost. Parsons said that Baumgartner could unload this place for $7,500 spot cash easily, thus making a $1,000 offhand," and urged Baumgartner to exert himself and "line up a customer, * * * send or bring him down at once—this thing is going to sell right away as it is a snap, and you ought to get the commission, $1,000. See!" Baumgartner was advised to "get on the band wagon and come in for your share of the spoils." The correspondence clearly indicated that it was arranged between these two persons that Baumgartner should procure a person who would purchase the property at a much greater price than $6,500, and that Baumgartner would receive all that he could influence the purchaser to pay above that sum. Prior to the execution of the deed for said property by appellees to Herrman, but subsequent to the execution of the contract between appellees and Parsons, the latter wrote Baumgartner, saying in part:

"I have a copy of the contract with Herrman and can understand plain English. 'I get $4,000 cash and note for one year $2,500, 8% secured by mortgage'—you get everything else in sight."

If the statement of Parsons contained in the foregoing quotation be true, Parsons would get $250, or its equivalent, more than the price called for in his broker's contract, and Baumgartner would profit to the extent of $2,500, or its equivalent. The trial court, in effect, found that Baumgartner profited by this transaction to the same extent that appellees were damaged, namely, $3,600, and there is substantial evidence to sustain the finding that Baumgartner participated in the fraud and became liable. However, the question as to the amount of the judgment rendered against Baumgartner will be considered under another point.

The evidence fully establishes that Baumgartner had full knowledge of all the material facts, and that he participated in this arrangement, whereby appellees were defeated of a portion of the purchase price paid by Herrman for said land. The question of law which is presented is whether a third person, not in privity with the principal, is liable to the latter for his participation with the agent or broker in the commission of an act of fraud upon the principal. In Mechem on Agency (2d Ed.) § 1233, it is said:

"In practically every case wherein the principal has proximately suffered loss, the principal may maintain an action of tort against the agent based upon the latter's breach of duty. In such an action he may join, as codefendants, third persons who have colluded or conspired with the agent to defraud the principal."

The cases of Tibbs v. Zirkle, 55 W. Va. 49, 46 S. E. 701, 104 Am. St. Rep. 977, 981, 2 Ann. Cas. 421, Holmes v. Cathcart, 86 Minn. 213, 92 N. W. 956, 60 L. R. A. 734, 97 Am. St. Rep. 513, and Easterly v. Mills, 54 Wash. 356, 103 Pac. 475, 28 L. R. A. (N. S.) 952, 956, assume that participation by third persons

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in the fraud of the agent makes the former persons liable to the principal, but do not directly so decide. This question, however, was squarely passed upon in Boston v. Simmons, 150 Mass. 461, 23 N. E. 210, 6 L. R. A. 629, 15 Am. St. Rep. 230, 232. Simmons was an officer of a water board of the city of Boston, and Wilson assisted him in fraudulently selling to the board a reservoir site for a sum in excess of that which would have been sufficient to purchase the land in the absence of such fraud. The court said:

"The fact that he (Simmons) acted according to the averments in the declaration in connection with another party * * * does not diminish his own responsibility; while the other, who participated in the scheme, and who has knowingly aided and abetted in the transaction, and shared its profits in pursuance of their agreement so to do, becomes a wrongdoer with him. * * * Where an agent purchased property for his principal, and falsely represented that he had paid for it a larger sum than he had actually paid, it was held that he would be liable for such overplus. There is no reason why one who has intentionally co-operated with him, and has enabled him to commit the fraud, should not be equally liable."

See, also, Powers v. Black & Baird, cited supra; Emmons v. Alvord, supra; Perry v. Hayes, 215 Mass. 296, 102 N. E. 318; Hickman v. Sawyer, 216 Fed. 281, 284, 132 C. C. A. 425.

Baumgartner participated in the scheme whereby the appellees were defrauded with full knowledge of the material facts, and we see no good reason why he should not be held to be equally liable with Parsons for the damage done the appellees.

The court rendered judgment against appellants jointly in the sum of $3,600, apparently on the theory that appellants received $9,000 for the land and accounted for but $6,100. The appellants contest the right of the court to render judgment in that sum. The appellants proffered no requested findings, nor took any proper exception to any finding made by the court, but appellees do not insist that the appellants are in no position to raise a question with respect to the amount of the judgment; hence we will consider it. The evidence shows that appellees actually received the equivalent of $6,250 for the land, not $6,100, the basis used by the court in computing damages. The Ford car was delivered to Parsons, not to Baumgartner; hence its value is properly chargeable against only Parsons. It was found to be of the value of $700. Thus Parsons became liable to appellees in the total sum of $3,450, not $3,600, and Baumgartner in the total sum of $2,750, not $3,600.

The judgment of the trial court will be affirmed upon the filing of remittiturs by appellees in accordance herewith, within 20 days from date; otherwise the judgment of the trial court will be reversed, and remanded for a new trial; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

(49 Utah, 9)

SPRATT v. PAULSON. (No. 2864.)

(Supreme Court of Utah. Nov. 21, 1916. Motion to Modify Judgment Denied Dec. 29, 1916.)

1. APPEAL AND ERROR ⟸1051(1)—HARMLESS ERROR—ADMISSION OF EVIDENCE—TRIAL TO THE COURT.

When a cause is tried by the court without a jury, the judgment will not be reversed for the admission of incompetent evidence if there is sufficient competent evidence to sustain the finding.[1]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161, 4162, 4165, 4166; Dec. Dig. ⟸1051(1).]

2. CORPORATIONS ⟸121(5)—SALE OF CORPORATE STOCK—ACTION BY SELLER—EVIDENCE.

Evidence which merely shows that defendant acquired from plaintiff stock which he had given to plaintiff as an employé of the corporation, and that he promised to pay therefor, does not support a finding that defendant promised to pay plaintiff the amount which he paid for the stock of those who had paid par for it at his solicitation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 504; Dec. Dig. ⟸121(5).]

3. SALES ⟸52(1)—ACTION BY SELLER—EXPRESS PROMISE.

Where one relies upon an express promise of the buyer to pay a specific price in excess of the actual market value, he must prove that the minds of the parties met upon the particular price claimed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 118–123, 1045; Dec. Dig. ⟸52(1).]

4. WITNESSES ⟸331½ — IMPEACHING EVIDENCE—JUDGMENT.

In a suit to recover the price for corporate stock sold to defendant, defendant cannot be cross-examined as to a judgment rendered in another state against him and in favor of one who claimed a contract similar to plaintiff's, in order to test his credibility.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. ⟸331½.]

5. EVIDENCE ⟸123(3)—ADMISSIBILITY—DECLARATIONS OF AGENT—DECLARATIONS SUBSEQUENT TO TRANSACTION.

Statements by defendant's agent which were made after the transaction to which they related had been completed are not admissible in an action against defendant growing out of that transaction, as res gestæ.[2]

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 354; Dec. Dig. ⟸123(3).]

Appeal from District Court, Salt Lake County; Geo. G. Armstrong, Judge.

Action by G. C. Spratt against J. P. Paulson. Judgment for the plaintiff and defendant appeals. Reversed and remanded with directions to grant a new trial.

Hurd & Hurd, of Salt Lake City, for appellant. Gustin Gillette & Brayton, of Salt Lake City, for respondent.

FRICK, J. The plaintiff brought this action against the defendant to recover the sum of $1,060, which the plaintiff alleged the defendant had agreed to pay the plain-

[1] Victoria, etc., Co. v. Haws, 7 Utah, 515, 27 Pac. 695.

[2] Meyers v. Railroad, 36 Utah, 307, 104 Pac. 736, 21 Ann. Cas. 1229.

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tiff for ten shares of the capital stock of a certain corporation of which both were stockholders. The defendant filed a general denial to plaintiff's complaint.

The plaintiff, at the trial, produced evidence tending to prove: That the defendant, prior to and in November, 1907, was the sole owner of certain business in Salt Lake City. That the plaintiff, who was then a young man, was then, and for a number of years had been, employed by the defendant in said business and had been promoted from time to time. That defendant's brother was the general manager of said business. That, in the month of November aforesaid, defendant, being desirous of increasing the capital of said business, incorporated the same and induced some of the business men of Salt Lake City to subscribe for some of the stock of said corporation. That the defendant, as payment for the stock subscribed for by him, to wit, 850 shares out of a total number of 970 shares issued of the par value of $100 each, turned over all of the assets of said business to said corporation. That certain business men of Salt Lake City subscribed for 220 shares of said stock of said corporation, who, with one exception, paid $100 per share in cash therefor, while one of them paid only $500 on his subscription of 25 shares and remained indebted to the corporation for 20 shares at the rate of $100 per share. That defendant's brother requested and induced the plaintiff and one Bergman, another employé of the defendant, to subscribe for 10 shares each. The 10 shares of stock subscribed for by plaintiff, he claims, were given or donated to him, and that he was not required to pay therefor. That the defendant donated said stock to the plaintiff for the reason that he wanted plaintiff to have some substantial interest in the corporate business after it was incorporated. Plaintiff also produced evidence tending to show that, in addition to the 20 shares which were given to plaintiff and to Bergman as aforesaid, there were also 5 shares given to a Mr. Smith, another employé, who was not a subscriber, and in addition thereto he also received 5 shares for which he had to pay the par value, to wit, $500; that the 20 shares that were issued to plaintiff and to Bergman, and the 10 shares received by Smith, were all charged on the books of the corporation to the defendant, so that, while defendant had subscribed for only 850 shares, he was actually charged with 880 shares on the books of the corporation; that the assets of the business turned in by the defendant did not pay for said 880 shares of stock in full, and he was indebted to the corporation as a balance due on said shares charged to him the sum of $8,879.67, which was to be and was paid for by additional merchandise furnished by the defendant to the corporation; that in February, 1910, the defendant was desirous of selling the assets and business of the corporation to a certain corporation of Chicago, and he came to Salt Lake City to induce the local subscribers for stock as aforesaid to surrender their stock to him at par so that he might turn the same over to said corporation; that the stockholders who had paid for their stock demanded the sum of $100 plus 6 per cent. interest for one year, or $106 per share, for their stock; that the defendant finally agreed to and did pay to all of the Salt Lake subscribers who had paid the full par value for their stock the sum of $106 per share; and that he paid the subscriber who had paid in only $500 on his subscription of 25 shares the amount he had actually paid in, and all of the subscribers, including the plaintiff, then surrendered their stock to the defendant, and the same was canceled and turned over to the Chicago concern.

Up to this point there is not much conflict or dispute between the parties. In addition to the foregoing, however, the plaintiff also contends and testified that the defendant had also agreed to pay him the sum of $106 a share for the 10 shares that he subscribed for and were given to him as before stated. The plaintiff concedes that the defendant had never expressly promised to pay him $106 a share, or any other specified sum for said 10 shares, but he testified that the defendant, after selling out the corporate business, on his departure from Salt Lake City, "told me he would send me the money for my stock as soon as he got back to Denver." The plaintiff therefore insists the defendant had agreed to pay him $106 a share for said 10 shares of stock. Upon the other hand, both the defendant and his brother, who was the general manager of defendant's business, and, after the incorporation, the general manager and treasurer of the corporation, denied that the 10 shares subscribed for by the plaintiff were given or donated to him but they insist that he was expected to pay therefor, although they admitted that they had not demanded the subscription price from him at any time, and that he was paid a dividend of $60 on the stock. They also deny the authority of the defendant's brother to make a gift of the stock to plaintiff, and they both testified that, when the corporate business was turned over, the plaintiff, as well as the other employés, surrendered his shares of stock to the Salt Lake corporation without demanding pay therefor; that the same was turned over to the Chicago corporation; that the plaintiff, for more than two years thereafter, had never demanded pay for the stock or suggested that he was to receive anything therefor; that no subscriber received anything for his stock except what he had paid therefor with 6 per cent. added; and that the plaintiff had never paid anything for the stock, hence he was not entitled to anything under the arrangement made with the other subscribers. Defendant further proved that, after the business was incorporated, it lost

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money, and that when it was taken over by the Chicago corporation the stock was worth not to exceed $50 a share; that he paid the Salt Lake subscribers the full amount they had paid for the stock for the reason that he felt morally bound to do that, because he had induced them to subscribe for the stock. There was much other testimony, some of which was admitted over the objections of the defendant and to which we shall refer later.

The court found for the plaintiff and entered judgment for the full amount claimed, which, with legal interest, amounted to the sum of $1,481.65. The defendant appeals and has assigned numerous errors upon the admission and exclusion of evidence, and, further, that the evidence does not support the findings, etc.

[1] A careful reading of all the evidence produced at the trial, and of the proceedings had as the same appears from the bill of exceptions, discloses that the court was exceedingly liberal in the admission of evidence. Indeed, if the case had been tried by a jury instead of by the court, there would be no doubt respecting our duty to reverse the case upon the ground that improper evidence was admitted against the defendant over his objections and exceptions which was prejudicial to his substantial rights. In view, however, that the case was tried by the court, it is insisted by plaintiff that, although it were conceded the court erred in the particulars just stated, yet that there is at least some substantial evidence in support of the material findings, and hence we may not interfere. Counsel cite and rely upon the case of Victoria, etc., Co. v. Haws, 7 Utah, 515, 27 Pac. 695, where the court lays down the doctrine contended for in the following words:

"When the judge tries a case without a jury, it is not a reversible error to admit incompetent, irrelevant, or immaterial evidence; for he decides the case on the proper testimony only, and disregards entirely that which is incompetent, irrelevant, and immaterial. When the clear preponderance of competent, relevant, and material evidence supports the findings, this court will not reverse because of errors of the court below in admitting incompetent, irrelevant, or immaterial evidence, for the presumption in such case is that it was wholly disregarded."

In 46 Am. Dig. (Century Ed.), under the head of Trial, § 895, the doctrine, which is supported by a very large number of cases to which it is unnecessary to refer specially here, is stated thus:

"When a cause is tried by the court without a jury, the judgment will not be reversed on the ground of the admission of immaterial or incompetent evidence if sufficient proper evidence was admitted to sustain the finding."

If therefore the findings in this case are sustained by proper and competent evidence, we may not set them aside, although the court admitted improper evidence during the course of the trial. The question therefore is: Are the findings that are assailed by the defendant, and which are essential to the judgment, supported by sufficient proper evidence?

[2] The principal issues that the plaintiff was required to prove by proper evidence were: (1) That the 10 shares of stock were donated or given to him, that is, that the stock belonged to him; and (2) that the defendant had promised to pay him the sum of $106 per share therefor. Now, there is ample proper evidence in the record to support the findings that the 10 shares of stock were given to the plaintiff, and that it was not intended that he should pay therefor. We shall therefore not further discuss that branch of the case. The plaintiff, however, relies upon an express promise of the defendant not only to pay plaintiff for said 10 shares of stock, but he insists that the defendant expressly promised to pay him the sum of $106 per share therefor. Has the plaintiff established that express promise by competent evidence? What evidence has he produced to establish it? All the plaintiff testified to upon that subject was that "he (the defendant) told me he was paying $106 for the stock," meaning the stock that was obtained from the subscribers who had paid par value of $100 a share therefor. He was then asked:

"Q. Will you answer that question, did he (the defendant) say that he would pay you that? A. No, sir. Q. No, he never did, did he? A. No, sir."

The plaintiff conceded over and over again that the defendant had never in express terms promised to pay him any specific amount for his stock, and what he relies on to establish the express promise is that the defendant paid the subscribers who had paid par for their stock the sum of $106 per share, and that when the defendant left Salt Lake City for his home in Denver after settling with the other subscribers he told plaintiff that he would send him the money for his stock as soon as he reached Denver; and, further, that in May, 1913, after plaintiff had written a number of letters to the defendant addressed to Denver, he wrote in reply that:

"I am absolutely unable right now to help you out, but expect to arrange for some money next month and will then take the matter up with you further."

The defendant, however, explained this statement by saying that at that time he did not know what, if any, arrangements his brother had made with the plaintiff respecting his stock, and for that reason had made the statement as quoted above. There was also much more correspondence between the parties, but it goes no farther than to show that the 10 shares of stock were given to the plaintiff, and does not establish an express promise to pay a particular sum or price therefor. Now, if plaintiff had paid for his stock the same as the other subscribers had done, or if the defendant had paid the other subscribers par value for their stock plus 6 per cent. regardless of whether they had paid for it or not, the inference that plaintiff was to receive the same amount for his stock

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would be of considerable force or weight; but, as it is, and after the explanation why the Salt Lake subscribers who had paid the par value for their stock were paid back the par value plus 6 per cent., which is not denied, there is nothing left upon which to base an inference of an express promise to pay a specific amount for the plaintiff's stock, but the most that can be inferred from what the defendant had said and written would be an implied promise that he would pay plaintiff the market value of the stock or what it was actually worth.

[3] Plaintiff's counsel seem to overlook the fact that they rely upon an express agreement or contract to pay a specific price or sum of money for the 10 shares of stock. Such a contract is not established by merely showing that the defendant received the stock and agreed to pay therefor. Where one person obtains the property of another, and such other does no more than to agree to pay therefor, then, in order to prevent injustice, the law always implies a promise to pay the actual value or the market price of the property if it has a market price, and also implies that the payment was intended to be made within a reasonable time. The law, in furtherance of justice, therefore, supplies what was omitted or not expressed. Where, however, as here, one relies upon an express promise to pay a specific price which is in excess of the actual value of the property, he must prove that the minds of the parties met upon the particular price or amount claimed, and that must be done by showing that the defendant, in apt words or terms, promised or agreed to pay that particular price or amount. In such a case justice does not requfre an implied promise, and the law does not supply any material omission, but requires the promise to be established by proper evidence. While it may not be necessary to prove the precise words constituting the promise, yet it must be made to appear from what was said and done that an express promise or agreement to pay the particular price demanded was made, and that the minds met upon that proposition.

There is abundant evidence in the record to support a finding that the defendant is liable to the plaintiff for the actual value of his stock at the time it was surrendered by the plaintiff in February, 1910; but, in view of all the circumstances disclosed by the evidence, there is not sufficient evidence to support a finding of an express promise to pay the plaintiff any specific sum or price for his stock.

[4] Plaintiff's counsel, in recognition of the weakness of the evidence upon that point, undertook to prove that Mr. Bergman was precisely in the same situation respecting his stock that the plaintiff was; that Mr. Bergman, like plaintiff, had been promised pay for his stock; and that when the defendant failed or refused to pay Mr. Bergman he commenced an action in the courts of Colorado to recover the sum of $106 per share for the stock, and Bergman had recovered judgment against the defendant in the courts of Colorado for the full amount he claimed for his stock, to wit, $106 a share. When plaintiff's counsel first attempted to prove that Bergman had obtained such a judgment, defendant's counsel objected, and the objection was sustained. When the defendant took the stand, however, in his own behalf, on cross-examination, over the objection and exception of his counsel, he was by the court compelled to testify that Bergman had obtained a judgment against him for between $1,400 and $1,500 in the courts of Colorado for his stock. Defendant's counsel vigorously contend that the evidence was improper, and that its admission constitutes prejudicial error. To state that the judgment under the circumstances of this case was not proper evidence to establish any material or substantive fact or facts in issue between the plaintiff and the defendant is merely to state the obvious. Counsel for plaintiff, however, suggest that evidence regarding the judgment was merely offered and admitted as affecting the credibility of defendant's testimony. When plaintiff's counsel first offered to prove that Mr. Bergman had obtained a judgment, counsel said: "It would be interesting to know what a jury thought of a contract like the one sued on." Now, however, it is suggested that the judgment was offered and admitted to test the credibility of the defendant. But how was it proper for that purpose? Of course, it always is proper to show that a party has made statements, or admissions, or denials contrary to his present testimony; but how is a judgment that is entered against him without his consent and against his will to be construed an admission or a statement made by him? If the judgment had established the status of either party to the action and that status was material in this case, the judgment would be proper evidence to prove that. That judgment was, however, not proper as substantive evidence to prove any material fact in issue between the plaintiff and the defendant in this case. Nor, for the reasons stated, was it proper evidence to test the credibility of defendant's testimony. In either view, therefore, the court erred in admitting proof of the judgment.

[5] It is, however, also insisted by defendant's counsel that the court erred in admitting certain declarations or statements made by defendant's brother, who, it was claimed, was the agent of the defendant. In that regard it is contended that the declarations or statements were made by defendant's brother as the general manager of the corporation, and not as the agent of the defendant. Moreover, it is insisted that some of the declarations relied on and admitted over defendant's objections were made at a time after the

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transactions had been fully consummated, and hence were not part of the res gestæ, and for that reason were not proper evidence against the defendant. In answer to the first objection, it was made to appear by a witness who testified he knew that defendant's brother "was the authorized agent for his brother," the defendant, at the time of the transactions and when the statements referred to by counsel were made. With regard to the second proposition it is true that the court permitted plaintiff to testify to some statements attributed to defendant's brother which were made long after the transactions or business referred to had ended, and hence such statements were not part of the res gestæ, and were not made in the course of the business transacted, and for that reason were not proper under the rule laid down by this court in the case of Meyers v. Railroad, 36 Utah, 307, 104 Pac. 736, 21 Ann Cas. 1229. See, also, upon this point, 2 Jones, Comms. Ev. § 255, and 1 Elliott, Ev. § 252. The statements last referred to were, however, not of such character as to prejudice the defendant, and hence, although the court erred in admitting them, we should not reverse the judgment upon that ground alone. As we have already remarked, however, the court was extremely liberal in admitting evidence, and both parties were frequently permitted to go beyond the rules of evidence.

We desire to add that we do not wish to be understood by anything we have said as holding that the actual value of plaintiff's stock was $50 a share, or any other sum. We referred to that matter only because the defendant testified that the stock was worth not exceeding that amount when he settled with the stockholders, and his testimony as to that was not disputed. In view that the plaintiff has failed to prove an express agreement on the part of the defendant to pay $106 a share for the stock in question, but has proved that the defendant did agree to pay him for the stock, the question of the market or actual value thereof at the time it was surrendered by the plaintiff, or when he agreed to surrender it to the defendant, is an open question upon which both parties have a right to be heard. Moreover, we think that under the allegations of the complaint the plaintiff is entitled to recover the market or actual value of the stock; but for the reasons stated he cannot, as the evidence now stands, recover $106 a share upon an express agreement to that effect.

For the reasons stated, the judgment is reversed, and the cause is remanded to the district court of Salt Lake county, with directions to grant a new trial. Costs to appellant.

STRAUP, C. J., and McCARTY, J., concur.

(49 Utah, 71)

EPHRAIM MILLING & ELEVATOR CO. v. CITY OF EPHRAIM. (No. 2882.)

(Supreme Court of Utah. Dec. 7, 1916.)

1. WATERS AND WATER COURSES ⟸179(1) — OBSTRUCTION AND DIVERSION—PLEADING—SUFFICIENCY.

Complaint, alleging that defendant city had exclusive control of creek waters, that during periods of each year snow and storms caused unusually large quantities of water in the creek and caused overflow, carrying down large quantities of timber, mud, rock, and débris, and that the city willfully, carelessly, and negligently built, in the natural channel, strong abutments of timbers and stone, so as to obstruct the natural flow of the waters, and prevent water, timber, and earth from being carried down the creek, thus causing an overflow about plaintiff's mill which was thereby damaged, is sufficiently particular as to facts to support a judgment for plaintiff.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 244–247, 263; Dec. Dig. ⟸179(1).]

2. TRIAL ⟸140(1)—QUESTIONS FOR JURY—CREDIBILITY OF WITNESSES.

Whether testimony of certain witnesses is more creditable or reliable than that of other witnesses is solely for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 334; Dec. Dig. ⟸140(1).]

Appeal from District Court, Sanpete County; A. H. Christenson, Judge.

Action by the Ephraim Milling & Elevator Company against the City of Ephraim. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. Christensen and J. W. Cherry, both of Mt. Pleasant, for appellant. Lewis Larson, of Manti, for respondent.

STRAUP, C. J. This action was brought to recover damages to plaintiff's premises and flour mill alleged to have been caused by the defendant. In the complaint it is alleged that the defendant "took and had" the exclusive control, management, and distribution of the waters of Cottonwood creek, a natural stream of water having its source in the mountains and coursing by plaintiff's premises and through the town of Ephraim; that during portions of each year melting snows and storms caused "unusual quantities of water" to course in the stream, and sometimes to overflow its banks, and to carry down large quantities of timber, mud, rock, and débris; that the defendant "willfully, carelessly, and negligently built and constructed, and caused to be built and constructed in the said natural channel of the said creek, strong abutments of timbers and stone, so built and constructed in the natural channel of the said creek as to obstruct the natural flow of the waters through the said natural channel," and thereby prevented rock, timber, and earth from being carried down the stream, but to lodge and to obstruct the natural flow of the waters and to cause them to overflow the banks of the

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stream and upon the plaintiff's premises, into its mill and upon and over its grain and flour and machinery therein, to plaintiff's damage, etc. To the complaint a general demurrer for want of facts, and a special demurrer for uncertainty, were interposed and overruled. The defendant answered denying the charged obstruction and negligence, and averred that, to prevent rock and débris at high water from being carried into and through the town of Ephraim, the defendant constructed "a divider in the channel of said Cottonwood creek, and that in constructing the said divider the channel itself was not obstructed in any manner, but was left as wide and deep, free and clear, as it had always been"; and that "the object of constructing said divider in the channel of said creek was to divert and carry away from the natural channel of the said creek a portion of the waters whenever, by reason of unusual floods and cloudbursts, there should be more water than the said channel could carry"; and that the waters so diverted by it were carried upon lands owned by it, and the divider was so constructed as not to carry any waters, rock, gravel, sand, or débris, or other material, over the banks of the stream or upon plaintiff's property.

[1] The case was tried to a jury, which resulted in a verdict for the plaintiff in the sum of $500. The defendant appeals. The matters presented for review, putting them in the defendant's language, are: "The overruling of the demurrer, the court's refusal to grant a nonsuit and a new trial," and "present the same general propositions of law," want of facts to support plaintiff's cause. Other than that, nothing is urged in support of the demurrer. No attempt is made to point out wherein the complaint is wanting in facts, and no reason occurs to us why it is so far wanting in such particular as not to support a judgment. That is all that need be said on that point.

[2] The defendant's argument chiefly goes to the point that the evidence is insufficient to support the allegations of the complaint. In such respect it is contended that it is not sufficiently made to appear that the defendant, by placing the abutments, or divider, in the channel of the creek, interfered with the natural flow of the stream, or caused its waters to overflow the banks of the stream and to run on plaintiff's premises. Witnesses for the plaintiff testified that the defendant, in putting in the abutments, or divider, at that point, widened the channel and diverted a portion of the waters therefrom, which so reduced the force and rapidity of the flow of the waters that they would not carry gravel, rock, and débris farther down the stream, which, together with the abutments, timber, and stone put in, caused gravel, sand, rock, and other material to lodge, the bed of the channel to be raised or filled the waters dammed, the banks of the stream to overflow, and the waters to run upon plaintiff's property, injuring its mill, flour, grain, and machinery therein. Several witnesses for the plaintiff testified to that. It was disputed by testimony of the defendant's witnesses. Whether the testimony of the one or the other was the more creditable or reliable was solely for the jury.

The judgment, therefore, is affirmed, with costs.

FRICK and McCARTY, JJ., concur.

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(49 Utah, 177)

WITHEROW v. MYSTIC TOILERS.
(No. 2706.)

(Supreme Court of Utah. Nov. 16, 1916. Rehearing Denied Dec. 28, 1916.)

1. INSURANCE ⟸699 — REINSURANCE — ACCEPTANCE—SUFFICIENCY.
Where the secretary of the defendant fraternal society submitted a written proposal to another society, in which the deceased was insured, that defendant assume its obligations in consideration of a transfer of all the property of the insurer to defendant subject to the approval of the defendant's directors, a delivery and acceptance of the property in accordance with the contract and the subsequent correspondence between the defendant and the plaintiff, wherein the defendant in effect recognized the obligation as its own, by seeking to avoid it on the ground of breach of warranty, was sufficient evidence of approval of the contract to make a prima facie case.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. ⟸699.]

2. INSURANCE ⟸825(2) — FRATERNAL INSURANCE—ACTION ON POLICY—QUESTION FOR JURY.
In action on a policy of fraternal insurance, the question as to the physical condition and health of the deceased when the certificate was issued to him *held* for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. ⟸825(2).]

3. APPEAL AND ERROR ⟸1002 — REVIEW — FINDINGS.
A verdict on conflicting evidence is final.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. ⟸1002.]

4. INSURANCE ⟸723(5) — FRATERNAL INSURANCE—FALSE WARRANTIES.
Where the false statements of the deceased in his application for life insurance in a fraternal association related to slight injuries which did not affect his general health, they will not avoid the contract unless they are material to and increase the risk of loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1863; Dec. Dig. ⟸723(5).]

5. INSURANCE ⟸825(2) — FRATERNAL INSURANCE — BREACH OF WARRANTY — QUESTION FOR JURY.
In an action on a policy of fraternal insurance, whether the deceased's failure to state, seven months prior to obtaining the certificate, he was visited by a physician for a sprained knee or that some years prior thereto he had injured his nose which had caused nosebleed, substantially increased the chances of loss insured against or were material to the risk, *held* for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. ⟸825(2).]

Appeal from District Court, Summit County; F. C. Loofbourow, Judge.

Action by Mary Witherow against the Mystic Toilers, a fraternal and beneficiary society. Judgment for plaintiff, and defendant appeals. Affirmed.

E. A. Walton, of Salt Lake City, for appellant. L. B. Wight, of Salt Lake City, for respondent.

STRAUP, C. J. The deceased, Wm. J. Witherow, as is alleged, on the 23d day of September, 1910, became a member of a mutual benefit society known as the Fraternal Order of Mountaineers, and on the same day, in such order, had his life insured in favor of his mother; that he died on the 19th day of October, 1910; that on the 15th day of December, 1910, the defendant, the Mystic Toilers, also a fraternal and beneficial society and a corporation, in consideration of taking over the assets and property of the Fraternal Order of Mountaineers, agreed to pay the loss of the certificate, but failed to do so. The defendant denied liability on its part and pleaded a breach of warranty. The plaintiff had judgment, from which the defendant appeals.

[1] The first point made is that there is no evidence to show that the defendant at any time had agreed or assumed to pay the obligation. There is evidence to show that the secretary of the defendant, assuming to act for it, did so agree. That is, that he, as such secretary, submitted a written proposal to the Fraternal Order of Mountaineers that in consideration of the defendant's paying, among others, the claim in question, the defendant should receive all the property, furniture, assets, books, records, etc., of the Fraternal Order of Mountaineers, which proposition was accepted by the order and its property, assets, books, and records delivered to the defendant; but the proposal contained a provision that the "contract presented" by the defendant's secretary was subject to the approval of the insurance department of Iowa and of the supreme directors of the defendant. The contention made is that there is no evidence of such approval. There is no direct evidence, but we think there is indirect evidence. This because (1) of the delivery and acceptance of the property, etc., in accordance with the contract, and (2) the subsequent correspondence between the defendant and the plaintiff wherein the defendant in effect recognized the obligation as its obligation, but sought to avoid it on the sole ground of the deceased's breach of warranty in falsely and fraudulently misrepresenting his condition of health and making other misstatements of alleged material facts when he obtained the insurance. When proofs of death were furnished the defendant, it did not reject the claim upon the ground that it was not its obligation, but upon the sole ground "that the insurance was obtained fraudulently," by the deceased misrepresenting his state of health. At least we think a prima facie case in such respect was made to put the defendant upon its proof.

[2-5] Now, as to the alleged breach of warranties: The evidence is in direct conflict as to the physical condition and health

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of the deceased when the certificate was issued to him; the witnesses for the plaintiff testifying that it was good, those for the defendant that it was bad. That issue was properly submitted to the jury and because of the conflict in the evidence their verdict is final. He, in response to printed questions on the application signed by the deceased, "Have you ever had any disease, injury or surgical operation performed?" "When were you last treated by a physician?" "How long sick?" and, "Are there any remaining effects?" answered, "No," and, "None." In such respect it is claimed he did not answer truthfully. It was shown, substantially without dispute, that the deceased, about seven months prior to obtaining the insurance, in going through a mining tunnel where he was at work, hurt his knee on a trolley. It was bruised, sprained, and swollen, caused some lameness, and was more or less painful. A physician was called once to attend it who testified to its sprained and swollen condition, and that he prescribed liniment, but that the injuries had not affected "the general health." Deceased also, some time prior to the insurance, had received a cut on the back of the hand from a saw, leaving a scar. He also, three or four years prior thereto, fell from a swing and injured his nose, which thereafter, at six or seven intervals, caused a "nosebleed." Because of this evidence it is contended that the defendant, on the issue of the breach of warranty, was entitled to a directed verdict in its favor. It is not claimed that the injuries affected the deceased's general health, or that they contributed to the cause of his death, "congestion of the lungs." It, however, is claimed that the statements that he had received no injury and had not been attended by a physician constituted a breach of warranty, though such facts or statements were not material to the risk, and that such breach, though not causing the loss, nevertheless avoided the contract. Cases and authorities cited by appellant so hold. 3 Joyce, Ins. §§ 1970–1975; 3 Cooley, Briefs on Insurance, 1950–1952; Nelson v. Nederland Life Ins. Co., 110 Iowa, 600, 81 N. W. 807; Cobb v. Association, 153 Mass. 176, 26 N. E. 230, 10 L. R. A. 666, 25 Am. St. Rep. 619. But in a recent case we held otherwise. Bednarek v. Brotherhood of American Yeomen, 157 Pac. 884. Adhering to this decision, we are not prepared to say that the deceased's failure to state that he, seven months prior to obtaining the certificate, was visited by a physician for a sprained knee, or his failure to state such injury, or the other injuries, was, as matter of law, of such materiality as to avoid the contract, or that such injuries or withholding knowledge of them substantially increased the chances of loss insured against. Penn Mutual Life Ass'n Co. v. Trust Co., 73 Fed. 653, 19 C. C. A. 286, 38 L. R. A. 33, 70. We think such matters were of fact and not of law, to be, as they were, submitted to the jury. The judgment is therefore affirmed, with costs.

FRICK and McCARTY, JJ., concur.

(49 Utah, 243)

MORRIS v. BLUNT et al. (No. 2814.)

(Supreme Court of Utah. Dec. 5, 1916. Rehearing Denied Dec. 30, 1916.)

1. DEDICATION ⟸15—REQUISITES AND SUFFICIENCY.

Since a dedication rests primarily in the owner's intent, there must be a concession intentionally made by him, provable by declarations or acts, or inferred from circumstances, though no form or ceremony is necessary, but it must appear that he knew of the public use and intended to grant to the public the right to such use.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 13; Dec. Dig. ⟸15.]

2. DEDICATION ⟸44 — EVIDENCE — SUFFICIENCY.

Evidence *held* insufficient to show dedication of highway to public use.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 85–87; Dec. Dig. ⟸44.]

3. DEDICATION ⟸88—REVOCATION.

If a highway is established by dedication and acceptance by the public, it continues to be a highway as long as public use continues, regardless of attempted revocation by the dedicator.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 77, 78; Dec. Dig. ⟸38.]

4. DEDICATION ⟸37—USE—PUBLIC NATURE.

Where the users of an alleged dedicated highway were of three classes, one using by a grant in a deed, another by the right of entry collateral to a canal easement, and the third by a right or claim not disclosed by the evidence, but using merely for egress from their own private land, there was no public use of the highway.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 73, 74; Dec. Dig. ⟸37.]

5. HIGHWAYS ⟸5 — "PUBLIC THOROUGHFARE."

A "thoroughfare" is a place or way through which there is passing or travel, and becomes "public" when the public have a general right of passage.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 6, 7; Dec. Dig. ⟸5.

For other definitions, see Words and Phrases, Public Thoroughfare.]

6. DEDICATION ⟸37—USE OF WAY UNDER PRIVATE GRANT—EFFECT.

Under Comp. Laws 1907, § 1115, providing that a highway shall be deemed to have been dedicated to the use of the public when continuously used as a public thoroughfare for ten years, use under private right is insufficient to show dedication, and such use, however long, does not make the way public, and the mere fact that the public also use it without objection from the owner will not make the way public.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 73, 74; Dec. Dig. ⟸37.]

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7. EASEMENTS ⊂⊃7(2)—PRESCRIPTIVE RIGHT—HIGHWAYS.
A prescriptive easement does not arise in seven years by analogy to the statute barring action to recover realty when a plaintiff was not seised of the property within seven years, such statutes not applying to rights of way or easements, but prescriptive right can arise only by adverse use and enjoyment under claim of right uninterrupted and continuous for 20 years.
[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 17, 27, 33; Dec. Dig. ⊂⊃7(2).]

8. EASEMENTS ⊂⊃36(3)—PRESCRIPTION—EVIDENCE—SUFFICIENCY.
Evidence *held* insufficient to show acquisition of highway easement by prescription; the use having been interrupted at various times during the alleged prescriptive period.
[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77, 78, 88, 93; Dec. Dig. ⊂⊃36(3).]

9. EASEMENTS ⊂⊃12(1)—GRANT BY DEED—EFFECT.
While a deed of a part of a tract conveying it, "together with all the appurtenances," would convey an existing highway easement, it would not serve to create an easement.
[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 35–38; Dec. Dig. ⊂⊃12(1).]

10. EASEMENTS ⊂⊃16 — GRANT BY DEED — REQUISITES AND SUFFICIENCY.
Generally, when the owner of a tract of land has arranged and adapted various parts, so that one derives a benefit from the other of a continuous and obvious character, and he sells one part without mentioning the incidental advantage or burdens of one in respect to the other, there is implied an understanding that such advantages and burdens continue.
[Ed. Note.—For other cases, see Easements, Cent. Dig. § 43; Dec. Dig. ⊂⊃16.]

11. EASEMENTS ⊂⊃16 — SEVERANCE — REQUISITES AND SUFFICIENCY.
Elements essential to constitute easement by severance are unity of title followed by severance, an apparent, obvious, and visible servitude at the time of severance, reasonable necessity to the enjoyment of the dominant estate, and it must usually be continuous and self-acting.
[Ed. Note.—For other cases, see Easements, Cent. Dig. § 43; Dec. Dig. ⊂⊃16.]

12. EASEMENTS ⊂⊃18(1)—WAYS OF NECESSITY—REASONABLE NECESSITY OF USE.
An easement by severance in a right of way apparent at the time of severance does not exist except so far as is reasonably necessary to the use of the dominant estate, and the fact that a house on the severed tract faced toward an extended way not necessary to access did not give an easement thereon.
[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 50, 52, 55; Dec. Dig. ⊂⊃18(1).]

13. EASEMENTS ⊂⊃48(3)—GRANT BY DEED—LOCATION.
Generally on severance of title, if the deed conveys a right of way across land still held by the grantor, but does not fix its course or extent, and at the time of conveyance there was in use on the land reserved such a way plainly visible, and known to the parties, it will be deemed to have been intended by the grantor to be conveyed.
[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 103, 104; Dec. Dig. ⊂⊃48(3).]

14. EASEMENTS ⊂⊃48(1) — CONVEYANCE — INSTRUCTIONS.
In construing any grant of right of way, the use, in character and extent, is limited to such as is reasonably necessary and convenient to the dominant estate and as little burdensome to the servient estate as possible for the use contemplated.
[Ed. Note.—For other cases, see Easements, Cent. Dig. § 103; Dec. Dig. ⊂⊃48(1).]

Appeal from District Court, Salt Lake County; J. A. Howell, Presiding Judge.

Suit by Joseph N. Morris against Joseph Blunt, administrator of the estate of Jane Kersey, deceased, and others. Decree for complainant, and defendants appeal. Affirmed.

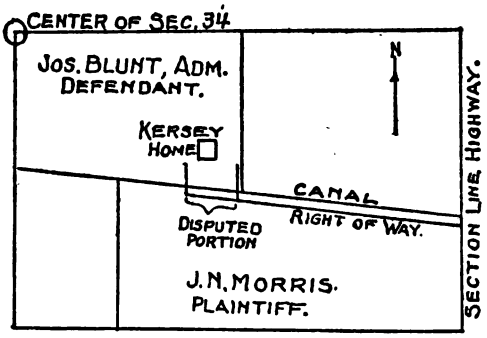
C. W. Collins, of Salt Lake City, for appellants. A. A. Duncan, of Salt Lake City, for respondent.

LOOFBOUROW, District Judge. This action was brought in equity to quiet title to certain lands and to restrain the defendants from interfering with the plaintiff's peaceable possession of the same. The plaintiff alleges title to the land and that the defendants wrongfully removed fence posts placed thereon by plaintiff, and threaten to remove them as often as plaintiff replaces them, and that defendants at divers times have crossed over said land with vehicles and on foot, and will continue to so interfere with the peaceable possession of plaintiff unless restrained, and plaintiff prays for a decree quieting title and enjoining the defendants from trespassing on said land.

The defendants admit that plaintiff owns the land in question, but they claim a right of way across a part of said land for themselves, and that the roadway so used by them is a public highway. They admit that one of the defendants removed from said roadway certain posts placed thereon by plaintiff, and that they travel said road, but deny that they are trespassers thereon. They allege that on October 8, 1887, the plaintiff conveyed by warranty deed to Jane Kersey, now deceased, and through whom the defendants claim, the land that the defendants now occupy and which lies directly to the north of plaintiff's land, the boundary line being the north side of a canal running east and west between the two tracts, with all appurtenances thereto, and a right of way for ingress and egress over and across the lands of plaintiff with vehicles and domestic animals, that for 15 years prior to the making of said deed, and at the time of said conveyance, the road in question existed and was and had been used by the public, and that it was a well-defined, clearly marked road, and allege that the plaintiff has, by various acts, attempted to interfere with the use of said highway; and the defendants ask that their right in said road be decreed to them, and that the plaintiff be enjoined from further interfering with the peaceable possession of said right by the defendants. The following sketch will explain the situation of the lands of the respective parties,

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the location of the canal, and the right of way in dispute:



The district court made findings of fact to the following effect to wit: That the deed in question was executed and delivered by the plaintiff, Joseph N. Morris, to Jane Kersey on October 8, 1887, and that, after describing the land by metes and bounds, it contained the following clause:

"Together with a right of way for ingress and egress to said land from east line of said section over a strip of land one rod wide along the south side of and following the course of said Utah & Salt Lake Canal, said right of way to include the right of ingress and egress to and from said land first above conveyed with vehicles and domestic animals of all kinds at any and all times."

That subsequent to said conveyance said Jane Kersey died, leaving the defendants, except Joseph Blunt, her heirs, and that Joseph Blunt is the administrator of the estate of the said Jane Kersey, deceased. That the road in question is not, and never was, a public highway. That the canal through the lands in question has a shoulder or bank about 18 inches above the general level of the land and extending from 1 to 1½ rods south from the water's edge and along the south side of said canal. That the meaning of the phrase "a strip of land one rod wide along the south side of and following the course of said Utah & Salt Lake Canal" is that the south side of said canal is the outer edge of said shoulder or bank, and that the right of way specifically mentioned in the deed extends along the south or outer edge of said shoulder and extends from the east section line westerly along the course above indicated parallel to and 1½ rods south of the high-water mark, following the meanderings thereof, more or less, to a point directly south of the southeast corner of defendants' land; thence westerly 2½ rods; thence north across the canal to the land of the plaintiff, thereby leaving a square 2½ rods each way for the purpose of turning and crossing the canal. That the defendants have no right or interest in the lands of the plaintiff other than as above indicated. The court issued an injunction restraining the defendants from in any manner interfering with the use by plaintiff of the lands owned by him, except as above indicated, thus closing to the defendants the road from about the southeast corner of defendants' land to the point where said road formerly crossed the canal a distance of about 20 rods.

The defendants at once perfected this appeal, assigning numerous errors which are specifically as follows: (1) That the court was wrong in its findings that the whole road was not a public highway; (2) wrong in its finding and conclusion that the strip of road about 20 rods in length from the east line of the defendants' land westerly to the point where formerly said road crossed the canal, did not pass to the defendants under the deed mentioned as an appurtenance to the land.

Upon examining the record and the evidence, we find that this suit was filed June 20, 1914. The evidence shows that on October 8, 1887, when Jane Kersey became the owner of the land now held by the defendants by a conveyance from the plaintiff, the road extended west of the east line of her property about 20 rods, and then turned north across the canal; that the road before that time had continued on west on the south side of the canal from that point through the section, and some of the people who lived to the west and those working on the canal traveled said road frequently; that it was unimproved, marked only by wheel tracks which were plainly visible; that it was open, without gates; that there were no signs to the effect that it was a private highway, and that there never have been such signs along the road; that the house bought by Jane Kersey, with the land, faced toward this road that extended west of the point where the district court found it turned north across the canal; that the Kersey place has been continuously occupied, and the occupants and the visitors traveled the road to and from the house; that there has been no change in the location of the road; that it is in substantially the same position on the ground now that it was 27 years ago; that in making and cleaning the canal the excavated material and débris were thrown out on the south side of the canal, making the surface of the ground rough and uneven for a distance of 1 to 1½ rods along the south side of the canal and through its entire length upon the land in question; that numerous boulders were thrown out of the canal; that no bridge existed at the point where defendants contend the road should cross the canal; that in about 1912 the plaintiff plowed the road to the canal bank, and that frequently, in plowing the lands adjoining the road, plaintiff deposited boulders from his land upon the road; that the defendants, with shovels, leveled the road and threw the rocks to the north toward the canal, and continued to travel the road as before; that in 1914 plaintiff set posts in the roadway where defendants crossed the canal, turning north, and that the defendants, or some of them, removed said posts and threw them

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aside and continued to cross at that point; that plaintiff closed the road on the south side of the canal running west from the defendants' present crossing in about 1910; that the road was plowed by plaintiff in about 1904; that in about 1907 plaintiff placed a wire gate at the public highway along the east line of the section; that defendants objected and cut it down; that the water in the canal is about 16 feet wide; that the company does not have title to the land covered by the canal, and claims only by usage; that there is no bridge across the canal to the Jane Kersey place.

It will be seen that the defendants' complaint in this court is as to that part of the decree that turns the road across the canal at about the southeast corner of the defendants' land, instead of permitting an extension of 20 rods to the west, and then turn north across the canal as it did formerly.

They rely upon three grounds to hold the road in question, to wit: (1) That by long continual use it has become a public highway; (2) that by their and Mrs. Kersey's use they have an easement by prescription; (3) that said road was granted by said deed, both by the description of a road one rod wide, specially described, and also by reason of said road being appurtenant to the land conveyed in the deed. We will examine these questions in order:

First, that by long continual use the 20 rods of road in question has become a public highway; that is, that there has been a dedication by the owner to the public use and an acceptance by the public.

[1] A dedication rests primarily in the intent of the owner. There must be a concession intentionally made by him, which may be proved by declarations or by acts, or may be inferred from circumstances. No form or ceremony is necessary. It must, however, appear that he knew of the use by the public, and intended to grant the right of way to the public. No formal acceptance by any public officer or agent is necessary, but there must be actual use by the public. City of Cincinnati v. White, 6 Pet. 440, 8 L. Ed. 452; Morgan v. Railroad Co., 96 U. S. 723, 24 L. Ed. 743; Harkness v. Woodmansee, 7 Utah, 227, 26 Pac. 291; Whittaker v. Ferguson, 16 Utah, 240, 51 Pac. 980; Schettler v. Lynch, 23 Utah, 305, 64 Pac. 955; Culmer v. Salt Lake City, 27 Utah, 252, 75 Pac. 620; Wilson v. Hull, 7 Utah, 90, 24 Pac. 799.

[2, 3] From the evidence, it appears that the plaintiff, 2 years before the commencement of this action, plowed the road to the canal bank; that frequently in plowing lands adjoining the road plaintiff rolled boulders from the land into the road, which the defendants removed before they could travel the road; that plaintiff closed the road extending west from the Kersey crossing 5 years before the commencement of this action; that a wire gate was placed by the plaintiff across the entrance to the road on the east section line 7 years before the commencement of this action; and that the road was plowed by the plaintiff as much as 10 years before the commencement of this action.

All these facts negative an intention on the part of the plaintiff to dedicate to public use. On the contrary, the fair inference to be drawn from them is that he intended not to dedicate the roadway to the public. It is true that, a dedication by the owner and an acceptance by the public once made, the highway thus established continues to be a highway as long as the public use continues; and if in this case the public use were sufficient to constitute an acceptance and the owner had in fact intended to dedicate, then the dedication would be complete; but we think there is no evidence tending to show that there ever was an intent to dedicate to public use.

[4-6] Next we must consider the people who used this road. Did their traveling upon it constitute a use by the public? The evidence discloses three classes of persons only who used this road, to wit, the occupants of the Kersey place and their visitors, the workmen upon the canal, and some persons who lived in the middle of the section.

As to the occupants of the Kersey place, they had an express grant of a right of way for ingress and egress contained in their title deed (not considering now the extent or limitation of the right conveyed in the deed), so they were not traveling the road by reason of its public character, but under the express provision of their deed.

As to the workmen upon the canal, they were there under the right by "user" claimed by their company. The right of way for their canal, whatever it is, if it authorizes the occupancy of the land for canal purposes, carries with it the right, under reasonable limitations to enter the premises to construct, repair, and operate the canal, its headgates, its laterals, etc., which are a part of or connected therewith. So these persons were not on this road by reason of its public character, but under whatever right by "user" the canal company had over this land for canal purposes.

As to the persons who lived in the center of the section, the evidence does not disclose how many there are or ever were, how frequently they used the road, by what right they traveled the road, nor the circumstances of their use, nor that they have in any way improved their property depending upon the public use of the road, nor that they are in any respect so situated that closing the road will be an injury to them. Compare the case made as to them with the situation disclosed by the evidence in the case of Schettler v. Lynch, 23 Utah, 305, 64 Pac. 955.

However, the people in the middle of this section are not in court, and their rights are not being determined. Their use of the road

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is material here only so far as it may have a bearing upon its public character, and the evidence as to their use of the road in question is very meager.

Compiled Laws of Utah 1907, § 1115, provides:

"A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years."

A "thoroughfare" is a place or way through which there is passing or travel. It becomes a "public thoroughfare" when the public have a general right of passage. Under this statute the highway, even though it be over privately owned ground, will be deemed dedicated or abandoned to the public use when the public has continuously used it as a thoroughfare for a period of 10 years, but such use must be by the public. Use under private right is not sufficient. If the thoroughfare is laid out or used as a private way, its use, however long, as a private way, does not make it a public way; and the mere fact that the public also make use of it, without objection from the owner of the land, will not make it a public way. Before it becomes public in character the owner of the land must consent to the change. Elliott, Roads and Streets, § 5.

From a consideration of the facts in evidence, viewed in the light of the well-established principles of law, we must conclude, as did the trial court, that there is disclosed no such intention on the part of the owner of the land to dedicate to public use, nor such use by the public constituting an acceptance as is necessary to show a dedication or abandonment to public use.

[7] The second contention of the appellants is that by their and Mrs. Kersey's use they have an easement by prescription.

"The right to a public road or private way by prescription arises from the uninterrupted adverse enjoyment of it under a claim of right known to the owner for the requisite length of time. Anciently the right to the easement arose by prescription from the use of the land for so long a time that there was no existing evidence as to when such use commenced. Its origin must have been at a time 'whereof the memory of man runneth not to the contrary.' Later the rule was changed by limiting the time of uninterrupted possession to 20 years." Harkness v. Woodmansee, 7 Utah, 229, 26 Pac. 292.

"Prescription refers the right to the highway to the presumption that it was originally established pursuant to law, by proper authority; while dedication refers it to a contract either expressed or implied. Dedication implies a conveyance and an acceptance, while prescription requires an unbroken possession or use under claim of right." Elliott, Roads and Streets, § 101.

A prescriptive right to an easement does not arise in 7 years, by analogy to the provision of the statute barring an action to recover real property when the person asserting title was not seised or possessed of the property in question within 7 years. These statutes do not apply to rights of way or any other class of easements by prescription. The right by prescription can only arise by adverse use and enjoyment under claim of right uninterrupted and continuous for a period of 20 years. Harkness v. Woodmansee, 7 Utah, 227, 26 Pac. 291; Funk v. Anderson, 22 Utah, 238, 61 Pac. 1006; North Point Co. v. U. & S. L. C. Co., 16 Utah, 271, 52 Pac. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607; Lund v. Wilcox, 34 Utah, 205, 97 Pac. 33.

[8] A prescriptive right in the public is disposed of by our conclusion, heretofore reached, that the evidence does not show use by the public, and that this was not a public highway; but there is still the question of a private right of way by prescription. Under the well-established rule, the use, in order that it may ripen into a prescriptive title, must, in any case, not only be adverse and continuous, and under claim of right for a period of 20 years, but it must be uninterrupted throughout that period. In the case at bar the use of the defendants and their predecessors commenced in 1887, at which time there was a severance of the title to the parcels of land, and could not ripen into title by prescription until 1907. But the defendants' own testimony shows that the plaintiff plowed the road in question as early as 1904, and from that time to the commencement of this action the plaintiff, from time to time, placed rocks in the road, from the plowed land adjoining, and that the defendants, with shovels, leveled the ground and removed the rocks to the north to make the road passable; and following these acts, and clearly indicating the attitude of each of the parties to this suit to the claim of the defendants to the ownership of this right of way at about the time the 20-year period would have expired, plaintiff placed a wire gate across the road at the point where it left the public highway, and the defendants cut it down. From these circumstances we conclude that the use was not uninterrupted, and that no right by prescription could arise under these circumstances. Wasatch Irrig. Co. v. Fulton, 23 Utah, 466, 65 Pac. 205; Crosier v. Brown, 66 W. Va. 273, 66 S. E. 326, 25 L. R. A. (N. S.) 174; Reid v. Garnett, 101 Va. 47, 43 S. E. 182; Wooldridge v. Coughlin, 46 W. Va. 345, 33 S. E. 233.

[9] The third contention made by appellants is that the road was granted by deed both by the description of a road one rod wide, specially described, and also by reason of said road being appurtenant to the land conveyed in the deed. The deed contained the very usual clause, following the specific description of the real estate, to wit, "together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining." Whatever passed under this clause as an appurtenance must have been an existing easement at the time of the making of the deed; i. e., such rights were conveyed by

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this clause as were then belonging or in any wise then appertaining to said land. But during the unity of title no easement could exist as between parts of the land. An owner cannot have an easement in his own land because during the unity of title all the benefits and uses for easement are comprehended within his general ownership. Such a clause in a deed will not create a new right, nor, in case of severance of title, will it convey a right to a use for the benefit of one part of the land over another part. Such a right, if it is conveyed, must be by definite language which first creates or defines the easement and then conveys it. Duvall v. Ridout, 124 Md. 193, 92 Atl. 209, L. R. A. 1915C, 345.

[10] An appurtenance implied upon a severance of title is referred to the intent of the grantor, and such intent is gathered from conditions existing at the time of the severance of title and implied from such circumstances; and, in general terms, the rule may be stated that when the owner of a tract of land has arranged and adapted the various parts so that one derives a benefit and advantage from the other of a continuous and obvious character, and he sells one of the parts without making mention of the incidental advantage or burdens of one in respect to the other, there is implied an understanding and agreement that such advantages and burdens continue as before the separation of title. Ingals v. Plamandon, 75 Ill. 118; Carbrey v. Willis, 7 Allen (Mass.) 364, 83 Am. Dec. 688; Scott v. Moore, 98 Va. 668, 37 S. E. 342, 81 Am. St. Rep. 749; Grace M. E. Church v. Dobbins, 153 Pa. St. 294, 25 Atl. 1120, 34 Am. St. Rep. 706; Quinlan v. Noble, 75 Cal. 250, 17 Pac. 69.

[11] The elements essential to constitute an easement by severance are: (1) Unity of title followed by severance; (2) that at the time of the severance the servitude was apparent, obvious, and visible; (3) that the easement is reasonably necessary to the enjoyment of the dominant estate; and (4) it must usually be continuous and self-acting, as distinguished from one used only from time to time when occasion arises.

We pass the fourth requirement, as to which there is a clear conflict in the decided cases. There are decisions by courts of final jurisdiction in the various states holding that the servitude, in order to pass as implied upon severance, must be of a continuous nature, i. e., one which may be enjoyed without the act of man, as a right to conduct water through a spout which discharges water automatically whenever rain falls. Bonelli Bros. v. Blakemore, 66 Miss. 136, 5 South. 228, 14 Am. St. Rep. 550; Fisk v. Haber, 7 La. Ann. 652.

On the other hand, courts hold that the kind of easement is not to be considered, but merely whether it is apparent, designed to be permanent, reasonably necessary to the enjoyment of the property, and arises from a severance of a unified title. Baker v. Rice, 56 Ohio St. 463, 47 N. E. 653.

[12] As to the first essential, i. e., unity of title followed by severance, that, in this case, is admitted. As to the second, that the servitude was apparent, obvious, and visible at the time of severance, the undisputed evidence is to the effect that at the time of severance the way in question was a well-defined, though unimproved, driveway. However, as to the third essential, i. e., that the servitude is reasonably necessary to the enjoyment of the dominant estate, there is serious doubt. It must be borne in mind that the issue presented in this case is not whether the defendants shall have a roadway from their land to the public highway on the east —that far the way was decreed to the defendants by the district court—but whether or not this roadway shall end at the southeast corner of defendants' land, or extend 20 rods west, still over the plaintiff's land, and then across the canal, and enter the land of defendants. So the question here is whether or not the evidence discloses a reasonable necessity for perpetuating the 20 rods of roadway west from the southeast corner of defendants' land. The only evidence upon this subject is that the dwelling house upon the defendants' land, which was there at the time of severance, faced south some distance from and toward the canal and the extended roadway. Does this disclose that the extension of the roadway, which the defendants seek, is reasonably necessary to the proper enjoyment of the property conveyed, or that this extension of the roadway materially adds to the value of the land? We think not. From a careful consideration of the conditions and circumstances of the property at the time of severance, as disclosed by the evidence, we cannot find that there is any advantage whatever to the defendants' property in continuing the roadway past the southeast corner of defendants' land as decreed by the district court.

That there must exist a reasonable necessity is apparent from an examination of the decided cases. Some of these cases go to the extent that, in order to create a servitude upon severance, there must be shown an absolute necessity. However, the requirement of reasonable necessity seems to be supported by the weight of authority and by reason. Weidekin v. Snelson, 17 Ill. App. 461; Dolliff v. Boston and M. R. R., 68 Me. 173; Wentworth v. Philpot, 60 N. H. 193; Brakely v. Sharp, 9 N. J. Eq. 9; Evans v. Dana, 7 R. I. 306; Jarvis v. Seele Mill Co., 173 Ill. 192, 50 N. E. 1044, 64 Am. St. Rep. 107; Root v. Wadhams, 107 N. Y. 384, 14 N. E. 281; Wells v. Garbutt, 132 N. Y. 430, 30 N. E. 978; McElroy v. McLeay, 71 Vt. 396, 45 Atl. 898; Paine v. Chandler, 134 N. Y. 385, 32 N. E. 18, 19 L. R. A. 99; Kelly v. Dunning, 43 N. J. Eq. 62, 10 Atl. 276; Miller v. Hoeschler,

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126 Wis. 263, 105 N. W. 790, 8 L. R. A. (N. S.) 327; Ogden v. Jennings, 62 N. Y. 526; Sellers v. Texas C. R. Co., 81 Tex. 458, 17 S. W. 32, 13 L. R. A. 657.

[13] Within this third proposition is included the contention that the roadway in extent, as it existed at the time of the conveyance, passed under the express terms of the deed by the description of "a right of way for ingress and egress to said land from the east line of section over a strip of land one rod wide along the south side of and following the course of said Utah & Salt Lake Canal," by reason of the fact that at the time of the conveyance there was upon the land such a right of way in use and known to the parties to the deed. The rule may be stated generally that upon the severance of title, if the deed contains a clause conveying a right of way across the land still held by the grantor, but not fixing its course and extent, and it is made to appear that at the time of conveyance there was in use upon the land reserved such a way plainly visible, and known to the parties, it will be deemed that the way intended by the grantor is the one actually in existence. Gerrish v. Shattuck, 128 Mass. 571; O'Brien v. Schayer, 124 Mass. 211; Peabody v. Chandler, 17 Misc. Rep. 655, 40 N. Y. Supp. 1028; Bannon v. Angier, 2 Allen (Mass.) 128.

[14] This rule of law is well established, and is highly beneficial, but the cases to which we must look for illustrations of its application are from communities where conditions as to marked boundaries and inclosures are, and for a long time have been, fixed and settled, and in which its application is much more easily made than in a community such as that involved in this case. This community, as disclosed by the evidence, during the years involved, was in process of settlement, and the whole country was but recently largely open, and the traveler free to follow almost any course that promised to bring him most easily to his journey's end. Here we find wheel tracks in almost any direction without system, and without regard to section lines or property rights. When, in a community so situated, the time arrives for the fencing of fields and the establishing of permanent roads and rights of way, the strict application of this rule would, in many cases, produce fantastic results quite inconsistent with justice. In this case we feel that its applicability is doubtful. Here we have a grant of a right of way for ingress and egress to this land from the east line of the section along the south side of the canal. The evidence shows that at the time the deed was made the wheel tracks along the south side of the canal extended the whole length of the canal through the property of the plaintiff, with a turn-off at the point where the defendants now contend it should still remain. There is no reason suggested in the evidence why a turn-off at this point is more advantageous to defendants' land than at the southeast corner of the defendants' land. In construing any grant of right of way the use, in character and extent, is limited to such as is reasonably necessary and convenient to the dominant estate and as little burdensome to the servient estate as possible for the use contemplated. In the case before us the terms of the grant cannot be said to be wholly general. The way is to be along the south side of the canal, and is to extend from the east line of the section, and is for the purpose of ingress and egress. In the absence of proof of disadvantage to the dominant estate occasioned by turning the road across the canal at the southeast corner of the land, the right of the servient estate to have the easement as little burdensome as possible consistent with the use contemplated should be recognized.

Under all the circumstances in this case, we are satisfied that the rule that, where the grant of a right of way is general, the fact that there is such a right of way visible and in use upon the land makes the grant certain, is not applicable.

For the reasons given, the decree of the district court is affirmed, with costs.

STRAUP, C. J., and FRICK, J., concur.

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(49 Utah, 35)

PLOUGH v. NELSON et al. (No. 2874.)

(Supreme Court of Utah. Dec. 4, 1916.)

1. APPEAL AND ERROR ⟸322—NECESSARY PARTIES—OMISSION.

Within the rule that all adverse parties interested in having the judgment reversed or affirmed are necessary parties to the appeal, which will be dismissed for failure to make any of them parties thereto, persons made defendants who disclaim all interest in the subject-matter, or do not answer and are shown to have none, are not necessary parties to the appeal.[1]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1795–1797; Dec. Dig. ⟸322.]

2. MINES AND MINERALS ⟸23(3)—MINING CLAIMS—ANNUAL ASSESSMENT WORK.

Under Act Cong. May 10, 1872, c. 152, § 5, 17 Stat. 92, as amended by Act Cong. Jan. 22, 1880, c. 9, § 2, 21 Stat. 61 (U. S. Comp. St. 1913, § 4620), providing that on each mining claim located, till issuance of patent, $100 worth of work shall be done during each year, and that on failure to comply with such condition the claim shall be open to relocation, provided that the original locator has not resumed work on the claim after failure and before such relocation, forfeiture is prevented, and no rights acquired under a relocation, where plaintiff went on his claim the last day of the year, then did part of the required work, and remained there and completed it after the commencement of the next year, though defendant made a relocation thereon on the first day of the next year before the work was completed.[2]

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 55; Dec. Dig. ⟸23(3).]

Appeal from District Court, Salt Lake County; T. D. Lewis, Judge.

Action by R. E. Plough against Nils Nelson and others. Judgment for plaintiff, and the named defendant appeals. Affirmed.

J. W. Stringfellow, of Salt Lake City, for appellant. Bagley & Ashton, of Salt Lake City, for respondent.

FRICK, J. The plaintiff, as lessee, on December 29, 1913, commenced this action to quiet the title to certain lode mining claims situated in Tooele county, Utah, and to enjoin the defendants named in the title of the action from in any way interfering with his possession of said claims. The defendant Nelson alone answered the complaint, and, after denying the rights of the plaintiff, and of those under whom he claimed, also set up a counterclaim in which he claimed title to a large portion of the surface area of the claims described in plaintiff's complaint. Nelson's claim is based upon an alleged relocation of the claims, which was based on the ground that plaintiff had failed to do the assessment or representation work for the year 1913, and hence had forfeited his right to the claims, as well as the rights of those under whom he claimed.

The case, by stipulation, was transferred for trial to the district court of Salt Lake county. That court, after hearing the evidence, made findings of fact and conclusions of law in favor of the plaintiff and entered a decree quieting the title to the claims as prayed for in the complaint, and enjoined the defendants, including the appellant, from interfering with plaintiff's possession. The defendant Nelson alone appeals.

[1] At the threshold we are met with a motion to dismiss the appeal upon the ground that the appellant has failed to make his codefendants parties to the appeal. We have frequently held that all adverse parties who are interested in having the judgment either reversed or affirmed are necessary parties to the appeal, and if not made parties the appeal will be dismissed. Griffin v. Southern Pac. Co., 31 Utah, 296, 87 Pac. 1091; Allen v. Garner, 45 Utah, 39, 143 Pac. 228; and cases cited in the two cases just referred to. It does not follow, however, that all who were made parties in the court below are necessary parties to an appeal. It often happens that certain individuals are originally made parties in the court below who are not necessary parties and who claim no interest in the subject-matter of the litigation, or who disclaim all interest therein at the trial. Such is the case here. It developed at the trial that the appellant is the only party interested and is alone affected in the event the judgment should be reversed or affirmed. The motion, therefore, does not come within the rule referred to, and hence must be denied.

[2] Proceeding now to the merits of the case, we remark that, while much evidence was produced by both parties upon other questions, yet, in view that the appellant has limited his contention and argument to only one question, the evidence upon the other matters becomes wholly immaterial. The material facts affecting the question presented for decision in substance are that the claims in question were located many years before the action was commenced, and were divided into two groups known as the Lincoln and the Blackhawk groups. There were three claims in the former and two in the latter group. There was also involved a mill site. Much labor had been performed upon the claims prior to the year 1913 by both the original owners and the plaintiff as lessee. Proof of such labor was filed as required by law for the several years of 1900 up to 1912. In the year 1913, however, and while plaintiff's lease was still in force, he failed to do the assessment or representation work upon any of the claims, and did not commence to do the work on either one of the groups until the 30th or 31st day of December, 1913. Either on the 30th or 31st of December, 1913, however, the plaintiff, with an assistant, went upon the claims and commenced the assessment work for the year 1913. The evidence showed that the claims were some distance from the railroad and were somewhat in-

[1] Griffin v. Southern Pac. Co., 31 Utah, 296, 87 Pac. 1091; Allen v. Garner, 45 Utah, 39, 143 Pac. 228.

[2] Lockhart v. Farrell, 31 Utah, 155, 86 Pac. 1077.

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accessible, especially during the winter season; that on the 30th day of December, 1913, the plaintiff, at a certain store some miles distant from the claims, bought provisions and the necessary supplies to do the work on the claims, which provisions and supplies were delivered by the storekeeper at the boarding house located on one of the claims in question; that the plaintiff and his assistant, either on the 30th or 31st day of December, 1913, commenced work in a tunnel previously constructed on the claims by drilling holes into the face thereof for the purpose of blasting out the rock, and by that means to extend the tunnel into the mountain with a view of developing the minerals; that they commenced work first in one of the groups and then went to the other group and commenced actual work on both groups before the end of December, 1913, and were in actual possession of the claims on that day, intended to continue on with the work, and remained in the boarding house at night; that they continued to work during the winter and spring until the required amount was performed, when plaintiff filed proof of labor for the year 1913, as had been done for the preceding years. It also was made to appear that the appellant, and others in his behalf, had attempted to, and in several instances did, interfere with plaintiff's possession, and had threatened to continue to do so; that in view of that fact plaintiff had commenced prior actions and commenced this action, and had obtained orders restraining the parties from interfering, and that the sheriff of Tooele county had put the plaintiff into possession pursuant to the court's orders.

Under the foregoing circumstances the appellant testified that he went upon the claims on December 31, 1913, and found no one in possession, and found no indications that any work had been done on the claims for the year 1913; that in view of that fact he, with an assistant, on the morning of January 1, 1914, relocated a large portion of the surface area of the claims in question as being open ground made so by reason of plaintiff's failure to do the required amount of work during the year 1913 and before the end of that year. Appellant, however, stated that he did not go to the boarding house on December 31st, but went there on January 1st, and in doing so found the plaintiff there.

Appellant's counsel earnestly contends that in view that the evidence, without conflict, shows that the plaintiff had failed to perform the original assessment or representation work on the claims during the continuance of the year 1913, and did not commence work on the claims until the 30th or the 31st of December, he for that reason had not complied with the provisions of U. S. Comp. Stat. 1901, § 2324 (U. S. Comp. St. 1913, § 4620), which provides:

"On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. * * * And upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation the same as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

The right in question here being based upon a federal statute, the decisions of the federal courts must control. Fortunately the question of whether under the statute we have quoted a locator of a lode mining claim may protect all of his rights and prevent a forfeiture of his location by commencing work upon his claim at any time during the year for which the work must be done has been passed on by the federal courts. In the case of Fee v. Durham, 121 Fed. 468, 57 C. C. A. 584, the rule is stated in the headnote, which correctly reflects the decision of Mr. Justice Caldwell, who speaks for the majority of the court, thus:

"A locator commenced his annual assessment work on December 26th, and his employés worked until the night of December 30th, which was Saturday, when they quit until Monday morning, January 1st, and then resumed work, in the meantime leaving their tools on the claim. They continued the work until $500 worth had been done, but less than $100 worth had been done on Saturday night. Sunday night, between 12 and 1 o'clock plaintiffs went upon the claim and relocated the same. Held that, in contemplation of law, the original locator continued in actual possession from Saturday night until Monday morning, and his work was continuous, and that plaintiffs were trespassers, and acquired no rights by their relocation."

In that case the work was commenced on December 26th. In this case on the 30th or 31st of December of the year for which the work was required to be done. In neither case was sufficient representation work done during the year for which it was intended to and was applied. That case is therefore decisive of the question involved here.

The same question was before the United States Circuit Court for the Western District of Arkansas in the case of Willitt v. Baker, 133 Fed. 937. In the fifth headnote to that decision the rule is stated in the following language:

"Where the locators of a claim were at work thereon on the 31st of December, and that night left their tools in the cut, intending to resume work the next morning at the usual time, which they did, their possession and work were, in law, continuous; and one who made a relocation in the night, during their absence, was a trespasser, and acquired no rights by the relocation."

That case, like the Fee Case, is, in principle, not distinguishable from the case at bar. To the same effect are Hammer v. Garfield M. Co., 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964; Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735; Belcher Con. G. M. Co. v. Deferrari, 62 Cal. 160; Emerson v. McWhirter, 133 Cal. 510, 65 Pac. 1036 (which, under the title of Yosemite Min. Co. v. Emerson, is affirmed in 208 U. S. 25, 28 Sup. Ct. 196, 52 L. Ed. 374). The doctrine, in a somewhat

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different form, is also recognized by this court in Lockhart v. Farrell, 31 Utah, 155, 86 Pac. 1077.

Appellant's counsel, in answer to all of the foregoing cases, cites and relies alone upon the dissenting opinion of Mr. Justice Sanborn in the case of Fee v. Durham, supra. Mr. Justice Sanborn, in his dissenting opinion, lays down the doctrine that unless a locator performs the required $100 worth of assessment work upon each lode claim, or on some claim of a number of claims constituting a group for the benefit of all the claims, during each year, that is, before the year for which the work must be done has expired, the claim is open for relocation, and if the claim is actually relocated before $100 worth of work is done, or that amount of improvements made for each claim, the original locator forfeits all of his rights to the claim unless he actually performs the necessary $100 worth of work, or makes that amount of improvements before the claim is actually relocated. True, the justice concedes that, if the work is done before actual relocation is made, it may be done in the following year. Mr. Justice Sanborn would thus enforce a forfeiture of the original locator's rights, although he was at the time, and before the end of the year for which the work was required to be done, in actual possession of the claim and actually engaged in doing the representation work. Whether that construction should have prevailed or not we need not discuss here. It is enough for us to know that Mr. Justice Sanborn's construction was not deemed the correct one either by his associates or by the other federal justices who have had occasion to pass upon the question. Moreover, in our judgment, the construction placed upon the statute by Mr. Justice Caldwell in Fee v. Durham, supra, and the justices in the cases to which we have referred, is more reasonable and certainly more equitable than is Mr. Justice Sanborn's construction. If Mr. Justice Sanborn's construction prevailed, much injustice would result without any corresponding benefit to any one, for the reason that nearly all, if not all, lawyers in mining regions have for many years advised their clients that all rights may be saved by commencing work at any time during the year for which the work is required to be done, provided that the required amount is done on the claim with reasonable diligence and without unnecessary interruption or delay, although the work is not completed until the following year. Neither can we see how the United States government could be benefited by the construction given the statute by Mr. Justice Sanborn. The purpose of the statute and the interest of the government is to have the mineral resources of the United States developed. It, no doubt, was assumed that to require a certain amount of work each year upon each lode claim was best calculated to develop the mineral resources contained therein. The United States is not concerned whether A. or B. develops the mineral resources so long as the locator complies with the law. Nor can it make any difference whether the development is made a few days sooner or later so long as it is done in substantial compliance with the statute. We think the proviso in the statute was intended to prevent forfeitures if the work was actually resumed at any time before relocation could legally be and actually was made.

We are of the opinion that the judgment of the district court is right upon both the facts and the law, and that it therefore should be, and it accordingly is, affirmed, with costs.

STRAUP, C. J., and McCARTY, J., concur.

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(174 Cal. 104)

In re CUTTING.

CUTTING v. CUTTING et al.

(S. F. 7647.)

(Supreme Court of California. Dec. 19, 1916. Rehearing Denied Jan. 19, 1917.)

1. EXECUTORS AND ADMINISTRATORS ⟸185—ALLOWANCE TO WIDOW—WAIVER BY ANTENUPTIAL AGREEMENT—"CLAIMS."

A widow waived her right to a family allowance pending the administration of her husband's estate by an antenuptial agreement to accept a specified monthly payment in lieu of any and all "claims" against her husband's property or estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 695; Dec. Dig. ⟸185.]

2. HUSBAND AND WIFE ⟸29(8)—ANTENUPTIAL AGREEMENT—RECORD.

An unrecorded antenuptial agreement is valid between the parties, even if considered a marriage settlement required to be recorded by Civ. Code, §§ 178, 180.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 167, 882; Dec. Dig. ⟸29(8).]

Department 2. Appeal from Superior Court, Alameda County; W. S. Wells, Judge.

In the matter of the estate of Francis Cutting, deceased. Petition by Alice M. Cutting for a family allowance. Application denied, and petitioner appeals. Affirmed.

See, also, 155 Pac. 1002.

A. J. Treat and Paul A. Myers, both of San Francisco (Wm. B. Kollmyer, of San Francisco, of counsel), for appellant. Allen L. Chickering and William H. Gorrill, both of San Francisco (Warren Gregory and Winfield Dorn, both of San Francisco, of counsel), for respondent.

MELVIN, J. On April 19, 1913, Francis Cutting and Alice Duren entered into a contract with reference to their contemplated marriage. Mr. Cutting was 79 years of age at the time, and Miss Duren was more than 45 years old. He was a widower possessed of a fortune worth approximately $500,000, and was the father of two living adult children. On May 10, 1913, Miss Duren and Mr. Cutting were married. On July 10, 1913, he executed a codicil to his will, which had been made prior to his marriage, said codicil operating as a republication of the testament. Estate of Cutting, 155 Pac. 1002. Mr. Cutting died on the 1st day of October, 1913, and his estate is in the course of administration. On January 16, 1915, more than a year after her husband's death, Mrs. Cutting filed a petition for a family allowance of $1,000 a month. This application was resisted by Mr. Cutting's two children and by the Pacific Unitarian School for the Ministry, one of the legatees mentioned in the will, and after a hearing it was denied. From the order refusing a family allowance, Alice M. Cutting, widow of Francis Cutting, prosecutes this appeal. It was admitted by Mrs. Alice M. Cutting at the hearing of her petition that she had received from the executors of the will $250 each month since the death of her husband.

The sole question presented on this appeal is whether or not the monthly payments provided by the contract made before marriage preclude the widow from demanding a family allowance. That contract, which was in writing, was in the following words and figures:

"Antenuptial Agreement between Francis Cutting and Alice M. Duren.

"The undersigned, in contemplation of marriage, hereby agree that, in consideration thereof, Francis Cutting will give Alice M. Duren proper support during their married life, and should said Francis Cutting die before said Alice M. Duren after their marriage he will cause her to be paid two hundred and fifty ($250) dollars per month during her life, which said Alice M. Duren agrees shall be in lieu of any and all claims against the property or estate of said Francis Cutting, whether community or any other property or interest of said Francis Cutting, and will marry said Cutting at any convenient time requested by said Cutting, who also agrees to pay said Alice M. Duren one hundred dollars per month during the time that may elapse prior to marriage, and continue during her life should he die before their marriage.

"In witness whereof we have set our hands this nineteenth day of April, 1913.

"[Signed] Alice M. Duren.
"Francis Cutting."

The codicil was as follows:

"Oakland, California, July 18, 1913.

"I, Francis Cutting, hereby affirming my will bearing date October 22, 1912, except as herein modified, do hereby declare the following as and to be a codicil to my said will being my last will and testament: After paragraphs numbered 2, 3, 4 having reference to devises benefiting my daughter, also Miss Patterson also my son Frederick P. Cutting, I direct that my executors provide from the remainder of my estate an income for my wife Alice M. Cutting and pay the same to her monthly of two hundred and fifty ($250) dollars per month as long as she lives, in accordance with an antenuptial agreement with my said wife and myself of April, 1913.

"[Signed] Francis Cutting."

At the outset respondents concede that a widow's claim for family allowance is favored by the law, that the law leans strongly towards the wife during probate, and that the independent means of the widow have no material bearing upon her right to a family allowance. Their contention which prevailed in the probate court was that by the terms of the contract, read in view of all of the circumstances surrounding its execution, the appellant surrendered all right to a family allowance, and that such was the distinct understanding of both parties to the agreement.

[1] The same problem is here presented which was before the court on the appeal granting a family allowance in Estate of Whitney, 171 Cal. 750, 154 Pac. 855. On that

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appeal the wife's waiver of her right to dispose of any of the community property and her election to take under the will of her husband were held not to be equivalent to a surrender of her privilege to apply for and to receive a family allowance, although the general words of waiver, taken by themselves, would have been sufficient to cut her off from a family allowance, but in getting at the true meaning of the will and the accompanying document executed by the wife of the testator the court considered the circumstances that Mr. and Mrs. Whitney were negotiating with reference to her community rights and did not have in mind her possible application for an allowance to be paid to her during probate. The pertinent words of Mrs. Whitney's waiver were as follows:

"I hereby elect to accept and acquiesce in the provisions of the said will, and hereby waive all claims to my share of any community property, and any and all other claims that I may have upon any of the estate disposed of by the said will."

Commenting upon this language, Mr. Justice Sloss, who wrote the opinion, said:

"It may readily be conceded that the general language 'any and all other claims,' etc., would be sufficient, standing by themselves, to cover a claim for family allowance. But the paper is to be read as a whole, in the light of surrounding circumstances and of the other elements of the transaction of which it formed a part."

Applying this rule, we have no doubt that, in view of all the circumstances, and in view, too, of the rules favoring widows in the construction of all such instruments, the appellant waived all right to the award of a family allowance. In the contract here under review the parties thereto were not considering a wife's waiver of a community interest. They had in mind, as indicated by the words of the agreement, the proper support during their married life of Mrs. Cutting and a continuance of that support after Mr. Cutting's death, "in lieu of any and all claims against the property or estate of said Francis Cutting." It is learnedly argued on behalf of appellant that the word "claims," as used in this instrument, must be taken in its technical sense and understood to mean those demands which might have been enforced against the deceased in his lifetime, and which must be presented in due form of law to the executor or administrator of his estate. Of course, a family allowance is not such a claim, but is an expense of administration. But appellant did not agree merely to forego any claims she might have against the estate of her husband. She promised to forego also any claims against his property save and except the monthly allowance of $250. A "claim" against property has no narrow technical meaning like that for which appellant contends. "Claim," as used in connection with property, means a "demand," and nothing more. A demand for a family allowance is a claim against property, and the use of the two words in the instrument indicates that the contracting parties wished to avoid all ambiguity which possibly might have arisen if the one word "estate" were used without the associated word "property."

In this state the courts early recognized the distinction between the technical use of the word "claim" and its broader significance. Fallon v. Butler, 21 Cal. 32, 81 Am. Dec. 140; Estate of McCausland, 52 Cal. 568–577. In the opinion in the latter case, while recognizing the fact that "claim," as used in probate acts, has reference to debts or demands against a decedent which might have been enforced during his lifetime, the court said:

"This definition, which, in our opinion, is correct, will not include a claim for a family allowance."

It will thus be seen that the word is used by the courts in both its technical and its usual sense, and that the latter is intended when claims against property are involved.

[2] It makes no difference whether the agreement is to be considered as an attempted marriage settlement or not. By filing her claim against the estate based upon it appellant has admitted its binding force as a contract between the parties. No question of the rights of creditors is here involved, and it makes no difference that there was no recordation of the instrument, even if it be labeled a "marriage settlement." Section 178 et seq. of the Civil Code relate merely to the rights of creditors and of others who might have interest in real property involved in any such settlement. By section 180, Civil Code, the rule is announced that the recording or failure to record such a document has like effect as the recording or nonrecording of a grant of real property. Such a grant is of full force as between the parties, regardless of the question of recordation. Devlin on Deeds, § 465. There is no force therefore in appellant's contention that the agreement loses anything of its potentiality because it is an unrecorded marriage settlement.

The appellant insists that, since the allowance provided by the contract was payable out of the assets of the estate, the testator must have contemplated a payment of a suitable sum to her by way of family allowance pending administration, because otherwise she might be left without means of support during that period. But the codicil directs monthly payments by the executors, not the equivalent of $250 per month to be paid on distribution. The executors were required to pay and they did pay these monthly sums, which were correctly interpreted as claims against the estate. The very machinery of the contract and the codicil shows that it was the intention of the testator and of his wife that she should receive her stipulated monthly allowance, should have it paid to her monthly during his life and after his death, and that it should be in lieu of family allowance as well as of all other pos-

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sible demands against his property, whether in his lifetime or afterwards.

It will be of little interest or value to analyze the authorities cited by learned counsel for petitioner and for respondents touching other contracts somewhat similar to this one which have been considered by this and other courts. Each agreement must be interpreted with reference to its own peculiar language, read in the light of the surrounding circumstances. This contract we have attempted so to interpret.

The order from which the appeal of Alice M. Cutting is taken is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

(174 Cal. 8)

SOUTHERN PAC. CO. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA. (S. F. 7818.)

(Supreme Court of California. Dec. 14, 1916.)

1. COMMERCE ⟸27 — RAILROADS — FEDERAL EMPLOYERS' LIABILITY ACT — ENGAGED IN INTERSTATE COMMERCE.

The true test of employment in interstate commerce so as to be within the provisions of federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1913, §§ 8657–8665), is whether the employé at the time of the injury was engaged in interstate transportation or in work so closely related to it as to be practically a part of it.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⟸27.]

2. COMMERCE ⟸27—RAILROADS—"ENGAGED IN INTERSTATE COMMERCE"—INSTRUMENTALITIES.

A railroad track used indiscriminately by a carrier in both its interstate and intrastate commerce is an instrumentality of interstate commerce, and, notwithstanding its double use, those engaged in its repair or in keeping it in suitable condition for use are engaged in interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⟸27.

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

3. COMMERCE ⟸27 — RAILROADS — FEDERAL EMPLOYERS' LIABILITY ACT—"ENGAGED IN INTERSTATE COMMERCE"—GATEMAN.

A gateman in the employ of the railroad using its tracks in the state indiscriminately for both interstate and intrastate commerce, at a point where the tracks crossed a public street, whose employment was considered in building up the main schedules in respect to speed, killed by an intrastate train when he started across the track to back away a horse and wagon, which had come within the range of one of the gates so that he could not lower it, was "engaged in interstate commerce," so that the state Industrial Accident Commission was without jurisdiction to make any award.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⟸27.]

Lawlor, J., dissenting.

In Bank. Proceeding by the Southern Pacific Company to review an award against it made by the Industrial Accident Commission of the State of California to Jessie Leslie Rolfe, widow of Thomas C. Rolfe, deceased, on account of his death from accident arising out of and happening in the course of his employment by petitioner. Award annulled.

Henley C. Booth and A. L. Clark, both of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondent.

ANGELLOTTI, C. J. This is a proceeding to review an award against petitioner made by the Industrial Accident Commission to Jessie Leslie Rolfe, widow of Thomas C. Rolfe, on account of the death of the latter by reason of accident arising out of and happening in the course of his employment by petitioner. The only question is whether Rolfe was employed in interstate commerce at the time of the accident. If he was, concededly the commission was without jurisdiction to make any award; the liability of the petitioner in such case being measured entirely by the provisions of an act of Congress of April 22, 1908, relative to the liability of common carriers by railroads to their employés in certain cases. If he was not employed in interstate commerce at the time of the accident, the award must be affirmed.

There is no dispute as to the material facts. Petitioner is engaged in the business of a common carrier by railroad of passengers and freight in commerce between and among the states of California, Arizona, and New Mexico and other states, and also between points in this state, using its tracks and equipment indiscriminately for both interstate and intrastate commerce. The coast division, one of its main lines, extends southerly from San Francisco through San Mateo, San Jose, and other places to Los Angeles, Tucson (Arizona), and El Paso (Texas). In San Mateo petitioner maintained, at a point where the tracks crossed a certain public street, crossing gates and a crossing watchman. On July 27, 1915, deceased, Rolfe, was the crossing gateman or watchman employed by petitioner at this point. At this time more than 60 trains a day were being operated by petitioner over said crossing, some intrastate and others interstate. The duty of deceased was to close these gates upon the approach of a train in order to prevent access to the track by vehicles and thus to prevent a collision between a train and a vehicle, and generally to prevent injury from trains to those having occasion to pass over the crossing. He had power to stop trains at such point by signal when he deemed it necessary in the discharge of these duties. The evidence tended to show that at the time of the accident a train known as the San Jose local, running from San Francisco to San Jose, approached said crossing, that deceased had closed one of the gates and then discovered that a horse and wagon had come within the range of the other gate so that he could not lower it without striking either horse or wagon, and that

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he started across the track with the intention of backing the horse and wagon away. He was struck by the engine and killed.

There was evidence introduced before the commission to the effect that the employment of crossing gatemen and flagmen was as much for the protection of the railroad company as for the public; that protection of a crossing meant safety to the train as well as the traveler on the highway; that such an employé facilitated the movement of trains by keeping the track clear, the slightest accident demanding a stop and investigation; that a derailment of a train might well be caused by striking an automobile or motor truck; that a derailment interferes with the traffic not only at the place of derailment but also all along the line; and that main line schedules are built up in part, as far as speed is concerned, on the character of crossings, as to whether they are protected by gatemen or flagmen or not. No evidence was given in conflict with any of this.

It will be conceded for the purposes of this discussion that the particular train was purely intrastate in character.

[1, 2] Under these circumstances, was deceased employed in interstate commerce at the time of the accident? As was said in Chicago, Burlington & Quincy R. Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941, the "true test of employment in such commerce is: Was the employé at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?" The substantial ground for petitioner's claim that deceased was then engaged in interstate transportation is that he was engaged in keeping one of its instrumentalities of interstate commerce in condition for the carrying on of that commerce; or, to put it in a more concrete way, that he was then engaged in keeping petitioner's tracks at the crossing clear and unimpeded for the passage according to schedule of interstate passengers and freight carried by petitioner. It is settled by the decisions of the United States Supreme Court, the ultimate authority on such a question as the one before us, that a railroad track used indiscriminately by a carrier in both its interstate and intrastate commerce is an instrumentality of interstate commerce, and that, notwithstanding its double use, those "engaged in its repair or in keeping it in suitable condition for use" are, while so engaged, employed in interstate commerce. Such work, it is said, "is so closely related to such commerce as to be in practice and in legal contemplation a part of it." See Pedersen v. Delaware, etc., R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153. So there can be no question as to the character of the work where an employé is engaged in direct work upon an instrumentality in actual use for purposes of interstate commerce, such as actually repairing the railroad track or doing thereon any work designed to keep it in suitable condition for use. Thus it is clear that one employed in actually removing from the track any obstacles to the passage of trains caused by a derailment or other accident would be employed in interstate commerce, in view of the decisions of the United States Supreme Court. He would be directly engaged in the repair of and putting again into condition for use that instrumentality of interstate commerce.

[3] The question here is, in the light of the evidence, a very narrow one, and is simply whether the principle of these decisions is applicable to one whose duties are in part to keep the track free of such obstructions to the uninterrupted passage of trains according to schedule as may be caused by passing vehicles. So far as the relation of such an employé to one attempting to cross the track is concerned, it may be conceded that there is no ingredient of interstate commerce, and that, if the only consequence to be avoided by the employment was that of injury to such a person, the act of Congress relied on would not be applicable. But in the light of the evidence it seems to us that the scope of the employment in which deceased was engaged at the time of the accident was broader, and extended to keeping the track itself in suitable condition for use as an instrumentality of interstate commerce. In view of the evidence, the work of such a crossing gateman or flagman, so far as the railroad is concerned, is similar, in principle, to that of the track walker, whose duty it is to see that the track is in safe condition for the passage of trains, to that of the employé in the signal tower, whose duty it is to supervise and give the signals for the passage of trains, and to that of the employé engaged in repairs on the automatic signal apparatus with which this petitioner's line is equipped. All such employés may fairly be said, it seems to us, to be directly engaged, in substantial part, at least, in keeping the track in suitable condition for use.

There is, of course, no analogy between the case of one so engaged, and that of a trainman engaged in the operation of an exclusively intrastate train. The duties of the latter are solely with reference to the operation and safety of the particular train on which he is engaged, and he has no duty whatever to perform in regard to keeping any instrumentality of interstate commerce in condition for use. Such is the full scope of his employment, and it has no relation whatever to interstate commerce, close or otherwise. The duties of deceased, as we have seen, had to do directly with the keeping of an instrumentality of interstate commerce in suitable condition for the use of such commerce. And exactly as in the case

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of one engaged in repairing such an instrumentality after injury thereto has occurred, who concededly is engaged in interstate commerce, it is immaterial whether or not any interstate traffic was immediately to be had over the same. The deceased was actually engaged at the moment of the accident in protecting that instrumentality from injury. His situation in this regard was, in view of the evidence, the same as it would have been if he had been one of a number of guards stationed along the line of railroad to prevent third persons from removing the rails or unlawfully placing obstructions on the track. Certainly their work would not be held to be unrelated to the safety of the track as a highway of interstate commerce. While the exact question has not been decided by the Supreme Court of the United States so far as we have found, certain language of that court in the recent case of Texas & Pacific Ry. Co. v. Rigsby (decided April 17, 1916) 241 U. S. 33, 36 Sup. Ct. 482, 60 L. Ed. 874, is significant. It was said:

"The doing of plaintiff's work, and his security while doing it, cannot be said to have been wholly unrelated to the safety of the main track as a highway of interstate commerce; for a failure to set the brakes so as temporarily to hold the 'bad order' cars in place on that track would have been obviously dangerous to through traffic, while an injury to the brakeman had a tendency to cause delay in clearing the main line for such traffic. Perhaps upon the mere ground of the relation of his work to the immediate safety of the main track plaintiff's right of action might be sustained."

In the light of what has already been decided by that court, we are of the opinion that any work having for its immediate object, in whole or in part, the keeping of the track in condition for use according to schedule for interstate traffic, has such a close and direct relation to interstate transportation as to be practically a part of it, and that such work as deceased was engaged in at the time of his death was work of this character. The fact that the avoidance of injury to the public in the matter of crossing the track was also one of the objects of his employment is not material to the question before us.

It follows that, in view of the act of Congress relied on, the accident commission was without jurisdiction to make any award on account of the death.

The award of the accident commission is annulled.

We concur: SLOSS, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

LAWLOR, J. I dissent. I think the deceased watchman was not engaged in work so closely related to interstate commerce as to be a part of it. Unless he was so employed at the precise time of the accident, the commission had jurisdiction to award compensation. It is urged in support of the petitioner's claim that the deceased was at that time engaged in interstate commerce for the reason that his work had for its immediate object, in whole or in part, the keeping of the track in suitable condition for use according to schedule for interstate traffic—that, in fact, a derailment, or even a slight delay, to an intrastate train may interfere with the interstate traffic at other points along the line. But in my view this argument applies with equal force to the character of the work performed by the trainmen upon the local itself. In the case of either, it is conceivable that the work may be so negligently performed as to cause a congestion of traffic upon the railway, thereby delaying trains carrying interstate commerce. But this is not the true test, for it is well settled that trainmen employed upon a train carrying intrastate commerce exclusively are not engaged in interstate commerce simply because the movement of the train over an interstate highway may bear some relation to the movement of interstate trains.

In this case, it was the duty of the watchman to safeguard the lives of the public using the streets, as well as the passengers traveling upon the petitioner's trains. At the time of the accident he was engaged in preventing a collision between the San Jose local and the horse and wagon. If the performance of such duty had any relation to interstate commerce, I think the burden was upon the petitioner to prove it. That is, the petitioner ought to have shown that the watchman, in the situation presented, should have reasonably contemplated that the result of the collision would actually be to interfere with the passage according to schedule of interstate trains. No such evidence was offered. It is shown that train No. 102, a through train to New Orleans, left San Francisco at 5 p. m., while the San Jose local left 20 minutes later. It does not appear, however, when an interstate train, going in either direction, was scheduled to pass the crossing after the accident, which happened at 5:57 p. m. Furthermore, there is no showing that a derailment might be caused by the train striking a horse and wagon. Indeed, the slight delay resulting from stopping to investigate such a collision would, under ordinary circumstances, probably not have interfered, even in a remote sense, with interstate traffic. Upon the record presented here, I think it must be held on principle that the watchman was engaged in work related purely to intrastate commerce, and that the possible bearing of the accident upon the interstate commerce carried by the petitioner is too remote to deprive the state of jurisdiction. Louisville & N. R. Co. v. Barrett (Ga.) 85 S. E. 923.

Nor is the contrary view supported by the authorities. It is true, under the decisions of the United States Supreme Court, that men employed in the repair of bridges, tunnels, station houses, coal pits, overhead trolley wires, and the like, where such instrumentalities are used indiscriminately by car-

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riers of both interstate and intrastate commerce, are engaged in interstate commerce. The reason is clear, since the very labor and materials the workman performs or uses in making repairs promote the operation of trains carrying interstate commerce. A workman, for instance, replacing a broken rail on a bridge over which interstate trains must pass, is directly engaged in the performance of a duty for the protection of such trains. The mere fact that other trains carrying only intrastate commerce may also pass over the same bridge does not make the rail any the less a part of an instrumentality of interstate commerce. But the watchman's work here at the time of the collision may or may not have affected the interstate commerce of the petitioner.

Texas & Pacific Ry. Co. v. Rigsby, quoted in the majority opinion, is also to be distinguished from the case before us. The sole question determined by the Supreme Court in that case was whether it was "beyond the power of Congress under the commerce clause of the Constitution to create such a liability in favor of one not employed in interstate commerce" as it had attempted to create by virtue of the Safety Appliance Act. The provisions of that act expressly apply "to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, * * * and * * * used in connection therewith." U. S. Comp. St. 1913, § 8613. The court merely held that, in the exercise of its plenary power to regulate commerce among the several states, and because of the interdependency of all trains using the same track, Congress could adopt such an act—that for the proper protection of interstate trains it had authority to regulate the appliances of all cars "used upon a highway of interstate commerce, irrespective of the use made of any particular car at any particular time." As the court declared:

"In this respect there is no distinction dependent upon whether the suitor was injured while employed or traveling in one kind of commerce rather than the other."

But the broad power of Congress to require safety appliances upon all trains operating upon a highway of interstate commerce has no relation to the liability of a railroad company to compensate employés injured in the performance of their work by means other than defective or unsafe appliances. This was the conclusion reached in Boyle v. Pennsylvania R. Co., 228 Fed. 266, 142 C. C. A. 558. In that case an inspector of both interstate and intrastate trains, having just completed his inspection of a train which was engaged at the time in intrastate commerce, was injured by being struck by a second intrastate train approaching from an opposite direction. It was contended that his employment was so closely related to interstate commerce as to be a part of it. One of the considerations urged was:

"That the prompt and safe movement of an intrastate train is so necessary to the safety and unimpeded movement of interstate trains moving over the same track, that inspection of the intrastate train becomes a part of interstate commerce."

As in our case, reliance was placed upon the decisions of the federal courts under the Safety Appliance Act. But the court, in holding that such decisions were not "authority for the contention so broadly made that acts which are primarily intrastate become interstate in their nature when they affect the safety or movement of interstate commerce," made this pertinent remark:

"While the movement of an intrastate train, like the use of any intrastate instrument, may in some measure affect the safe movement of interstate commerce, we believe that in the present case the inspection of such an intrastate train is so remotely related to interstate commerce that under the tests prescribed by the Supreme Court it cannot be considered a part of it."

The court held that the injured inspector could not recover compensation under the federal Employers' Liability Act; and so, here, the employment of the watchman at the time of the accident was so remotely related to interstate commerce as not to be a part of it.

The award of the commission should therefore be affirmed.

(174 Cal. 16)

SOUTHERN PAC. CO. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA. (S. F. 7845.)

(Supreme Court of California. Dec. 14, 1916.)

COMMERCE ⊜27—FEDERAL EMPLOYERS' LIABILITY ACT — "ENGAGED IN INTERSTATE COMMERCE"—AWARD—JURISDICTION.

A crossing watchman in the employ of a railroad at a point on a line maintained by it from its main line terminus, to another point on which it operated electric passenger and steam freight trains in interstate and intrastate commerce, whose duty it was to keep vehicles off from the track, prevent collisions, etc., killed while flagging an electric train, was "engaged in interstate commerce," and hence the state industrial accident commission was without jurisdiction to make an award.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⊜27.

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

Lawlor, J., dissenting.

In Bank. Proceedings by the Southern Pacific Company to review an award against it made by the Industrial Accident Commission of the State of California to Bertha S. Smith, widow of Austin A. Smith, on account of his death by reason of an accident arising out of and happening in the course of his employment. Award annulled.

Henley C. Booth and A. L. Clark, both of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondent.

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ANGELLOTTI, C. J. This is a proceeding to review an award against petitioner made by the industrial accident commission to Bertha S. Smith, widow of Austin A. Smith, on account of the death of the latter by reason of accident arising out of and happening in the course of his employment by petitioner.

The admitted facts of this case are such as to present the same question that is decided in Southern Pacific Company v. Industrial Accident Commission (S. F. No. 7818) 161 Pac. 1139, filed herewith. Deceased was a crossing watchman at the place in Berkeley, Alameda county, where certain railroad tracks of petitioner crossed Alcatraz avenue and Adeline street; his duties being substantially the same as those of Mr. Rolfe in the case just referred to. The showing as to the nature and purpose of his employment was substantially the same as in that case. While engaged in "flagging" one of petitioner's electric trains at that point, he was struck by such train and received injuries which resulted in his death. The only difference worthy of note between the facts of the two cases is that in this case the tracks were not main line tracks of petitioner, but were parts of a line maintained by it from Oakland Pier, the main line terminus, through Oakland to and partly through the city of Berkeley, on which it operated electric passenger and steam freight trains. The difference, however, is not material in view of the further uncontradicted showing that at the time of the accident the line was being used indiscriminately by petitioner in its interstate and intrastate commerce. The steam freight trains operated thereon carried all the freight that was "handled to and from Berkeley," it being the only way that the same could be taken to or from the Berkeley freight station, and was thus being constantly used for its handling of the interstate freight carried by petitioner to and from that place. "When a carload of freight would come from an interstate point of origin into the West Oakland yard, the entire car with its contents" would be sent over this line to Berkeley. Then, too, at the Shattuck avenue station on this line interstate passenger tickets were sold, and these tickets were honored on the electric trains when presented by purchasers journeying thereon to a point where they could take the steam train of petitioner, as were also tickets presented by interstate passengers going to Berkeley who had left their steam train at the Sixteenth street station in Oakland. The line was thus a part of petitioner's passenger and freight system, both interstate and intrastate, and was in constant use for both purposes.

There is no material distinction between the cases.

The award of the accident commission is annulled.

We concur: SLOSS, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

LAWLOR, J. I dissent.

It is conceded in the petition in this case that:

"It was not shown at the hearing before the said commission that the train which struck deceased was actually then carrying interstate freight, passengers, express, mail, or baggage."

Nor is it shown when the next interstate train going in either direction would pass the point where the collision occurred. Upon the conclusions reached in my dissent in Southern Pacific Co. v. Industrial Accident Commission (S. F. No. 7818) 161 Pac. 1139, I think the award of the commission should be affirmed.

(174 Cal. 19)

SOUTHERN PAC. CO. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (S. F. 7962.)

(Supreme Court of California. Dec. 14, 1916.)

COMMERCE ⇐27—RAILROADS—"ENGAGED IN INTERSTATE COMMERCE"—LINEMAN—JURISDICTION.

An electric lineman employed by a railroad, killed while removing an overhead telephone wire which had fallen on a trolley wire used by the railroad for the furnishing of electric power for the operation of its cars on a line of electric railway constituting a part of its passenger system both interstate and intrastate, and the removal of which was necessary before the cars could be operated, was engaged in removing an obstruction to the use of an instrumentality in actual use for interstate commerce, and hence was "engaged in interstate commerce," so that the state industrial accident commission was without jurisdiction to make an award.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⇐27.

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

In Bank. Proceedings by the Southern Pacific Company to review an award by the Industrial Accident Commission of the State of California and others, made to Jessie Covell, widow of Marcus Victor Covell, on account of his death by accident arising out of and happening in the course of his employment. Award annulled.

Henley C. Booth and A. L. Clark, both of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

ANGELLOTTI, C. J. This is a proceeding to review an award against petitioner made by the industrial accident commission to Jessie Covell, widow of Marcus Victor Covell, on account of the death of the latter by reason of accident arising out of and happening in the course of his employment by petitioner.

At the time of the accident the deceased was employed by petitioner as an electric lineman, and was engaged in the removal of an overhead telephone wire which had fall-

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en from its position down onto the trolley wire used by petitioner for the furnishing of electric power for the operation of its cars on a line of electric railway constituting a part of petitioner's passenger system, both interstate and intrastate, and in constant use as such. The facts bearing on the question of the status of this line as an instrumentality of interstate commerce are substantially the same, in so far as passenger traffic is concerned, as those in the case of Southern Pacific Co. v. Industrial Accident Commission (S. F. No. 7845) 161 Pac. 1142, decided this day. It was necessary that this telephone wire be removed in order that cars might be operated, as it was impossible to operate cars over the line until such wire had been removed. As is shown by the opinion in Southern Pacific Company v. Industrial Accident Commission (S. F. No. 7818) 161 Pac. 1139, decided this day, deceased being thus engaged directly in removing an obstruction to the use of an instrumentality in actual use for purposes of interstate commerce was engaged in interstate commerce at the time of the accident. On the authority of the two decisions we have cited it must be held that the commission was without jurisdiction to make the award.

The award of the industrial accident commission is annulled.

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

LAWLOR, J. Under the facts shown, the electrician was directly employed in repairing an instrumentality of interstate commerce. I concur in the judgment on that ground.

(173 Cal. 800)

MATSON v. JOHN BATTO & SONS. (S. F. 6857.)

(Supreme Court of California. Dec. 13, 1916.)

JUDGMENT ⇐460(6) — DEFAULT JUDGMENT — INJUNCTION—GROUNDS.

That the complaint in an action to enjoin the enforcement of a default judgment did not allege that plaintiff has, or ever had, any defense on the merits thereto, or that the judgment was not in fact just, was a complete obstacle to the granting of such equitable relief.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 885; Dec. Dig. ⇐460(6).]

In Bank. Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action for injunction by A. P. Matson against John Batto & Sons. Judgment for plaintiff, and defendant appeals. Reversed.

C. C. Cowgill, of Sonoma, for appellant. Phil Ware, of Santa Rosa, for respondent.

SLOSS, J. The defendant corporation obtained a default judgment against plaintiff in a justice's court. The plaintiff, claiming that the default and judgment had been rendered upon an insufficient service of summons, brought this action to obtain an injunction restraining the defendant from enforcing said judgment. The defendant's demurrer to the complaint was overruled, and judgment was entered, granting the plaintiff the relief demanded. The defendant appeals from the judgment.

The complaint fails to allege that the plaintiff has or ever had any defense on the merits to the action in the justice's court, or that the judgment there given was not in fact just. Without regard to other points made, this alone is a complete obstacle to the granting of equitable relief. Gregory v. Ford, 14 Cal. 138, 73 Am. Dec. 639; Gibbons v. Scott, 15 Cal. 284; Logan v. Hillegass, 16 Cal. 200; Peterson v. Weissbein, 65 Cal. 42, 2 Pac. 730; Harnish v. Bramer, 71 Cal. 155, 11 Pac. 888; Collins v. Scott, 100 Cal. 446, 452, 34 Pac. 1085; Eldred v. White, 102 Cal. 600, 36 Pac. 944; Parson v. Weis, 144 Cal. 410, 417, 77 Pac. 1007; Burbridge v. Rauer, 146 Cal. 21, 79 Pac. 526; Bell v. Thompson, 147 Cal. 689, 82 Pac. 327.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.; LAWLOR, J.

(174 Cal. 89)

TRICE v. SOUTHERN PAC. CO. (Sac. 2293.)

(Supreme Court of California. Dec. 18, 1916. Rehearing Denied Jan. 15, 1917.)

1. MASTER AND SERVANT ⇐111(1)—FEDERAL EMPLOYERS' LIABILITY ACT—INJURY—NEGLIGENCE.

Under Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1913, §§ 8657–8665), making employers liable to their employés for death from any defect or insufficiency due to their negligence as to cars, etc., and in the absence of some rule of law prescribing the character of maintenance of way cars, no negligence could be predicated upon the use of such a car which was duly inspected, which was in continuous service, and which had always stood up under the work for which it was designed and was wrecked by collision caused by the deceased brakeman himself.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 215, 255; Dec. Dig. ⇐111(1).]

2. NEGLIGENCE ⇐62(1)—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

If an injury results in consequence of an unlawful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damages to the last or proximate cause, and refuse to trace it to that which was more remote.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 76, 78; Dec. Dig. ⇐62(1).]

Department 2. Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by A. J. Trice, as administrator of the estate of Asa Philip McFarling, deceased, against the Southern Pacific Company. Judg-

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ment for plaintiff, new trial denied, and defendant appeals. Judgment and order reversed.

George F. Buck, of Stockton, for appellant. Hatton & Scott, of Modesto, and Cushing & Cushing, of San Francisco, for respondent.

HENSHAW, J. Action under federal Employers' Liability Act. Asa Philip McFarling was an experienced brakeman in the employ of the appellant. He met his death while in that employ under circumstances hereinafter to be narrated, and his administrator brought this action to recover damages from the defendant for having through its negligence occasioned his death. The complaint charged that the deceased at the time he met his death was a brakeman on a freight train, which train was composed of a steam locomotive and about 20 railroad cars, some of which were flat cars and others of which were box cars; that when this train arrived at Thalheim it became necessary to switch some of the cars composing the freight train from the main track to a side or spur track, and in this switching deceased was called upon to assist and did assist; that while the deceased was in the performance of his duty as such brakeman, and while the railroad cars were so being switched, one of the box cars forming a part of the freight train "collapsed and became a complete wreck, and a portion of said box car and the contents of said box car were precipitated onto one of the flat cars which formed a part of the train, and which flat car was immediately ahead of and coupled to the box car"; the deceased "was on said flat car performing his duties as such brakeman at the time the said box car collapsed; that portions of said box car and a portion of the contents of said box car were precipitated upon and fell upon said Asa Philip McFarling," causing the injuries which resulted in his death. The gravamen of the charge of negligence is:

"That said box car which collapsed and became a wreck as aforesaid was not properly or safely constructed, but was defectively and insufficiently constructed, due to the negligence of said defendant; that said box car was constructed of wood, and that the beams which formed the framework of said box car were wooden beams, and that the beams which extended from the front end of said box car to the rear end of said box car were wooden beams, and that on said 22d day of April, 1913, said wooden beams which formed the framework of said box car were defective and insufficient, due to the negligence of defendant, and were not of sufficient strength to enable said box car to withstand the aforesaid running and operation and use of said box car by said defendant on said 22d day of April, 1913, and that said box car by reason of the manner of its construction and by reason of the material used in its construction was a weak and unsafe and unfit car to be run and to be operated and used by defendant as aforesaid, and that on the 22d day of April, 1913, said box car was old and worn out, and was, due to the negligence of defendant, defective and insufficient, and that by reason of its said weak and defective construction, and by reason of its said age, and by reason of its being so worn out, said box car, on said 22d day of April, 1913, was, due to the negligence of defendant, wholly defective and insufficient and wholly unsafe and unfit to be run and operated by defendant as aforesaid, and was wholly defective, insufficient, unfit, and unsafe to be used for the purposes for which the same was being used as aforesaid by defendant at the time of its said collapse and of its becoming a wreck as aforesaid, and that, owing to its unsafe, unfit, worn-out, defective, and insufficient condition, said box car on said 22d day of April, 1913, was not a fit or proper or safe car to be run and operated as aforesaid and to be used for the purposes for which it was being used by defendant at the time said box car collapsed and became a wreck as aforesaid; that said unsafe, unfit, worn-out, defective, and insufficient condition of said box car on said 22d day of April, 1913, was due to the negligence of said defendant."

This complaint would lead to the belief that the box car in question was so old, so rotten, and so defective that it collapsed in the ordinary operation of switching. The uncontested facts, however, disclose the following: The freight train of the crew of which McFarling was head brakeman was composed of the locomotive, followed by six freight cars. This train had picked up seven maintenance of way cars, which were to be switched onto a spur track near Thalheim. These maintenance of way cars were construction cars with the usual materials, tools, and equipment to do track work. The seven cars comprised, in order, two flat cars loaded with lumber, one box car which carried tools, appliances, and cement, two bunk cars, a dining car, and a water tank car. Approaching Thalheim, where these maintenance of way cars were to be sidetracked, McFarling rode on the engine with the fireman and engineer and his fellow brakeman, Bays, and the method of switching the maintenance of way cars was agreed upon. But little discussion was required; for the men were experienced in railroad work and the method adopted was a usual one. It was as follows: The train was stopped some distance before it reached the switch. In the picturesque language of the trainmen, it was then "bled out"; that is to say, the compressed air operating the air brakes was released. While this was being done McFarling, as head brakeman, was charged with the duty of operating the switch, and in the performance of that duty he walked to this switch and tested it. Finding it in working order, he threw the switch so that the engine would leave the main line track and run onto it; the plan being thus to run the engine and the regular freight cars onto the switch. When they were safely thereon the switch was to be thrown back and the maintenance of way cars following, under the impetus given to them, were to pass ahead on the main line track. The engine would then back onto the main line track, go forward and take hold of the maintenance of way cars, back with them down the main line track until they cleared the switch,

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which again would be thrown so that the maintenance of way cars could be pushed onto the spur track, after which the regular freight train on the main line track would pursue its way. When McFarling found the switch in working order and had set it so as to connect with the spur track, he "gave a high ball," or a signal to the train crew that all was in order for them to make this flying switch. The engineer started the train. It was under sufficient momentum to carry the maintenance of way cars on the main line track past the switch. He gave the train "slack," or checked its momentum for a moment, so that the brakeman stationed between the regular freight cars and the maintenance of way cars could "get the pin" or uncouple the latter cars from the former. This was done. The engine, with the regular freight cars, then shot more rapidly ahead, made the switch, and passed onto it. It was the duty of McFarling, in control of the switch, when the last of these cars had thus successfully passed onto the switch, to throw the switch so that the maintenance of way cars should continue on the main track. There was time and opportunity to perform this ordinary act of switching. His fellow brakeman, Bays, who had uncoupled the train, and who had changed his position from the front end of the first maintenance of way car to the rear end of that car, looked at McFarling as these cars were approaching the switch, saw that McFarling had thrown the switch but partly over, that he seemed to hesitate as if confused, and threw it back to its former position. Bays had never seen him act in that way before. Why McFarling did not completely throw the switch is not known. He had just tested it, and it was in working order, as evidenced by the fact that the engine and freight cars had just passed over it. Whether he thought he had completely thrown the switch until it was too late for him to correct his mistake will never be known, but the unquestioned fact is that the switch was not thrown, and the maintenance of way cars proceeded to follow the freight train onto the spur track. Bays, on a flat car, realizing that a collision was inevitable, "cinched his brake up," and jumped. The conductor, upon the top of one of the rearward box cars, also recognizing the inevitableness of the collision, and unable to jump, braced himself to meet it as well as possible. McFarling, who was in a place of perfect safety at his post of duty at the switching point, sprang onto the rear end of the second flat car, immediately behind which was the box car containing tools, cement, etc. He did this apparently for the purpose of setting the brake on the flat car. He was seen at the brake. The collision came. The drawhead of the box car rose over the drawhead of the flat car, and McFarling was found with the upper part of his body on the box car and crushed from the waist down between the end sills of the two cars. These end sills were checked and splintered, but not broken, but the side sills or girders of the box car gave way and the car "buckled." A part of the roof, the forward end, and some of the contents of the car were projected onto the flat car. When the cars were separated McFarling's body fell to the ground, and with it a small portion of the front end of the box car and some of the material that was in it. There is some general testimony in the record taken from the evidence given by one of the trainmen at the coroner's inquest to the effect that when the box car buckled it fell on the end of the flat car where McFarling was standing "and just smashed him." But the detailed and specific evidence is that his body was caught between the ends of the flat car and the box car—their sills—and his mortal injuries came from this crushing at and below the waist line. The upper part of his body, which would have been the first to sustain injury from anything falling from above, was lying against the end of the flat car uninjured. Such is the testimony of plaintiff's witness, the county physician of Stanislaus county, who made the official examination of the body of the deceased and testified to its conditions at the coroner's inquest and at the trial.

Concerning the car, witnesses for the plaintiff testified that they examined the side girders of the car where they had been fractured by the buckling of the car, and found the wood to be rotten; that is to say, there were streaks of rotten or "punky" wood. This defect did not show from the outside. "I say from the general appearance outside it didn't appear so much decayed, until you pierced a hole in, and there was places I put the tool in an inch and an inch and a half and it would bring out rotten wood." Defendant showed that the car was one of the older type of its freight cars, which for lack of size and capacity for profitable use in the business had been turned over to the use of the maintenance of way department. A complete record of its service during the year previous to the accident was given. It was shown that it was in regular and constant service, and had stood up under this regular and constant service, and had been regularly inspected by defendant's competent car inspector but a short time before the accident. There was conflicting testimony to that offered by plaintiff to the effect that the girders were sound and in good condition. But, aside from this, there was the positive and uncontradicted testimony that the pressure exerted by this collision was of 1,000,000 pounds, and that the longitudinal sills or girders of the car made of Oregon pine, as they were, would have given way, even if perfectly sound, under a pressure of approximately 200,000 pounds.

[1, 2] This action, as has been said, is

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brought under the federal Liability Act. That act provides that employers shall be liable to their employés in damages "for injury or death resulting * * * by reason of any defect or insufficiency, due to its negligence, in its cars," etc. U. S. Comp. St. 1913, § 8657. The evidence has been sufficiently set forth. Wherein can it be said that that evidence shows that McFarling met his death by reason of a defect due to defendant's negligence in its car? The car, it was shown, had been regularly and duly inspected. The car, it was proved, was suitable and efficient for the character of work for which it was employed. The injury, it is established, did not arise, as indicated from the allegations of the complaint, by a collapse of the car while it was being switched. It arose as the result of a use to which it was never in contemplation that the car should be put. It arose as the result of a violent collision, for the occasion of which collision the deceased, and the deceased alone, was in fault. It was the deceased's own act of negligence which brought about his death. In the absence of some rule of law prescribing the character of a maintenance of way car, no negligence can be predicated upon the use of a car such as this, which was duly inspected, which was in continuous service, and which had always stood up under the work for which it was designed, and was wrecked by a collision brought about by the deceased himself. This case in principle is precisely that of Vizelich v. Southern Pacific Co., 126 Cal. 587, 59 Pac. 129, saving that in the latter case the collision was occasioned by a fellow employé of the injured plaintiff, while in the case at bar it was occasioned by the injured man himself. In that case, by the faulty manipulation of a switch, a switch engine was thrown into collision. The water tank of the engine became unfastened by the collision and injured the plaintiff. It was there held that the faulty manipulation of the switch was the proximate cause of the injury, nothwithstanding whatever defect there might have been in the fastenings of the water tank. There, as here, it was shown that the engine had been about the yard engaged in its ordinary duties, and from its ordinary employment no injury had ever resulted from the alleged insecure fastenings of the water tank. The same is equally true of the car which was here wrecked. The same principle was announced in the earlier case of Kevern v. Gold & Silver Mining Co., 70 Cal. 394, 11 Pac. 740, where Wood on Master and Servant, p. 812, is quoted to the effect that even where machinery is defective, so that otherwise a recovery might be had for an injury received, yet, if the promoting cause is the negligence of a fellow servant, no recovery can be had. The same rule is laid down by Judge Cooley in the following language:

"It is well settled that, if injury has resulted in consequence of a certain unlawful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote." Cooley, Torts (2d Ed.) p. 73.

And that this rule finds universal acceptance will be sufficiently evidenced by the further citations to 4 Labatt's Master and Servant (2d Ed.) pp. 47, 69; Rose v. Gulf, C. & S. F. Ry. Co. (Tex.) 17 S. W. 789; Quinn v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.) 84 S. W. 395; Norfolk & Western R. R. Co. v. Brown, 91 Va. 668, 22 S. E. 496.

It thus becomes unnecessary to consider any of the added propositions advanced by appellant upon its appeal. Thus, since the employer was not negligent, there is no question here of contributory negligence. The proximate cause was the sole negligence of McFarling. Equally unnecessary is it to consider rulings in the admission and rejection of evidence which are complained of.

The judgment and order appealed from are reversed.

We concur: MELVIN, J.; LORIGAN, J.

(174 Cal. 42)

TUCKER v. PACIFIC ELECTRIC RY. CO.

(L. A. 3803.)

(Supreme Court of California. Dec. 16, 1916.)

1. APPEAL AND ERROR ⟸1010(1)—PRESUMPTIONS—CORRECTNESS OF FINDINGS.

Findings must be upheld on appeal if there is substantial evidence to support them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3981; Dec. Dig. ⟸ 1010(1).]

2. CARRIERS ⟸318(4)—PASSENGERS—ACTION FOR INJURIES—EVIDENCE.

In action for injuries from being struck by electric car, evidence that the car came into the station at one mile an hour equipped with strong headlight and sounding proper signals, and that there was sufficient room for people to move about alongside the track without being struck, and that the front of the car passed plaintiff before she was struck, and her injury was probably caused by other persons crowding her against a car while trying to board it, supported a finding for defendant.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1307, 1308; Dec. Dig. ⟸318(4).]

3. CARRIERS ⟸340 — PASSENGERS — LAST CLEAR CHANCE.

Where a person was injured by being struck by an electric car, the doctrine of last clear chance did not apply where the motorman did not know plaintiff was in a position of danger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1354; Dec. Dig. ⟸340.]

Department 1. Appeal from Superior Court, Los Angeles County; E. P. Unangst, Judge.

Action by Mary Tucker against the Pacific Electric Railway Company. From a judgment for defendant and an order denying new trial, plaintiff appeals. Affirmed.

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Paul M. Nash and L. D. Barnett, both of Los Angeles, for appellant. J. W. McKinley, Frank Karr, R. C. Gortner, and A. W. Ashburn, Jr., all of Los Angeles, for respondent.

SHAW, J. This is an action for personal injuries alleged to have been caused by defendant's negligence in the operation of one of its cars. There was a trial by the court, a jury having been expressly waived. The court made findings of fact and conclusions of law in favor of the defendant and thereafter entered judgment that plaintiff take nothing by her action. The plaintiff appeals from the judgment and from an order denying a motion for a new trial.

The court found, in substance, that the plaintiff, while standing at the defendant's station at Playa Del Rey on October 19, 1912, was struck by one of defendant's cars and thereby received the injuries complained of, that the injuries were incurred by reason of negligence on the part of the plaintiff and were not due to any negligence of the defendant or any of its servants.

[1] The appellant contends that there is not sufficient evidence to support the findings. In view of the well-established rule that findings must be upheld on appeal if there is substantial evidence to support them, we find no merit in this contention.

[2] There is substantial evidence to the effect that the defendant's motorman, upon rounding the curve some 350 feet distant from the station at Playa Del Rey, reduced the speed of his train to some 6 or 7 miles an hour halfway in to the station, and to 1 mile per hour running through the crowd just before the car came to a stop, that he rang the bell and blew the whistle all the way in, that the car was equipped with a strong headlight visible from the station after rounding the curve. It also appears that the crowd was scattered along by the side of the track a distance of 100 to 150 feet, many persons getting on the train before it came to a stop, that there was plenty of room for the people to move about alongside the track and near the station without being struck by the oncoming car, that the track appeared clear to the motorman, everybody being a sufficient distance from the track to allow clear passage of the front end of the train, and that the plaintiff was in no danger prior to this time, that the defendant's motorman exercised every necessary precaution in approaching the station, that the plaintiff's injuries were confined to the right foot. There was also evidence tending to prove that the front end of the first car of the train had passed her before she was struck and that her injury was probably caused by other persons crowding her against the second car while they were trying to get aboard before it stopped. From this the court was authorized to find that the injury was not the result of negligence on the part of the defendant, but was caused either by her own neglect or that of other persons not connected with the management of the train, nor in the service of the defendant.

[3] There is no sufficient basis in the facts, as found, for the application of the doctrine of the "last clear chance." The court found that the defendant's motorman did not know of the plaintiff being in a position of danger. This finding, supported as it is by substantial evidence, removes the basis upon which that doctrine rests.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

(174 Cal. 70)

ROYER v. KELLY. (L. A. 3836.)

(Supreme Court of California. Dec. 16, 1916.)

1. EVIDENCE ⟸419(11), 432 — PAROL EVIDENCE—CONSIDERATION.

Parties are not estopped by recitals in an agreement with respect to its consideration from showing by extrinsic evidence its true consideration or want of consideration.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1922, 1981–1989; Dec. Dig. ⟸ 419(11), 432.]

2. CONTRACTS ⟸74—CONSIDERATION.

Services rendered to a deceased husband in his lifetime are not sufficient consideration to support his surviving wife's agreement after his death to pay for such services.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 331–343; Dec. Dig. ⟸74.]

3. APPEAL AND ERROR ⟸931(1) — PRESUMPTION.

Where a finding is against the party on a certain subject, every fact against him on the subject of which there is a reasonable inference arising from the evidence is to be taken as proven.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3762; Dec. Dig. ⟸931(1).]

4. CONTRACTS ⟸90 — CONSIDERATION — EVIDENCE.

In an action upon two contracts, the first to establish a machine plant, costing not over $25,000, to be purchased by the plaintiff from its profits, and the second, in adjustment of the first, to pay $25,000 from the promisor's estate, evidence *held* to show no consideration for either contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 410; Dec. Dig. ⟸90.]

Department 1. Appeal from Superior Court, Orange County; Frank R. Willis, Judge.

Action by D. F. Royer against D. N. Kelly, executor. From judgment for defendant, plaintiff appeals. Affirmed.

Williams & Rutan, of Santa Ana, and Wm. M. Brown, of Orange, for appellant. Scarborough & Forgy, of Santa Ana, for respondent.

SHAW, J. The plaintiff sued to recover the sum of $22,400, claimed to have been owing to him from the decedent, Caroline M.

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Conn, at the time of her death, upon two agreements in writing between them, one executed on September 10, 1907, the other on October 6, 1911. The answer alleged as a defense, among other things, that each of said agreements was executed without any consideration and was obtained by undue influence. The court found that there was no consideration for either of the contracts and gave judgment for the defendant. The plaintiff appeals. He claims that said finding is contrary to the evidence.

By the writing of 1907, Mrs. Conn agreed to furnish and establish a machine plant for light manufacturing, at a cost not to exceed $25,000, to be located near Los Angeles, and to authorize Royer, as her agent, to buy the machinery therefor, ship the same to Los Angeles, secure a suitable location and set it up ready for operation, and she thereby appointed him as general manager of the plant. She was to have all the net profits of the operation of the factory until the "entire purchase price," with 6 per cent. interest, was returned to her, whereupon the title to the plant should rest in Royer. He agreed to manage the plant and pay her the net profits, to be applied as first stated. It further provided that, if she died before the net profits had fully paid for the plant, Royer should have the option either to take the plant as his own without further payment, or in lieu thereof, to accept from the estate of Mrs. Conn, the sum of $25,000. It further declared that the agreement was made to carry out the wishes of the deceased husband of Mrs. Conn, said wishes being that on the death of both Mrs. Conn and her husband, Royer "should, at his option, have said plant, or the sum of $25,000, for services performed by said second party [Royer] for said first party [Mrs. Conn] and her husband."

The agreement of 1911 recited that whereas, Mrs. Conn and Royer have had "numerous dealings with each other, which have never been properly adjusted, now this agreement is made for the purpose of settling all differences now existing between the said parties." It then declared that the agreement of 1907 "is now in full force and effect," except as in the later agreement specified. It then provided that whereas, Royer has not received the machine plant, as provided in the agreement of 1907, now, therefore, he is entitled to $25,000 out of the estate of Mrs. Conn, to be paid as a debt against her, and that all sums then owing by Royer to her on promissory notes shall be deducted from said $25,000. At her death he was owing her $2,600 on a promissory note, which sum he deducted in the statement of his claim filed against her estate, leaving the balance of $22,400.

[1] The recitals of the two agreements furnish presumptive evidence of a valuable consideration. But the rule is that the parties are not estopped by recitals in an agreement with respect to its consideration. The true consideration, or the want of consideration, may always be shown by extrinsic evidence for the purpose of impeaching a contract, notwithstanding that it states facts which show a valuable consideration. Chaffee v. Browne, 109 Cal. 220, 41 Pac. 1028; National Hardwood Co. v. Sherwood, 165 Cal. 7, 130 Pac. 881; Stanton v. Weldy, 19 Cal. App. 374, 126 Pac. 175. The question must, therefore, be determined by an examination of the evidence.

[2] In so far as the consideration recited in the agreements consisted of services performed by Royer for the deceased husband of Mrs. Conn in his lifetime, it was not sufficient to support the agreement. She was under no legal or moral obligation to pay for such services, and her agreement to do so, made after his death, is to be regarded as purely voluntary and without binding force. Rosenberg v. Ford, 85 Cal. 612, 24 Pac. 779; Sullivan v. Sullivan, 99 Cal. 193, 33 Pac. 862; Chaffee v. Browne, supra.

Under the first agreement Royer was to act as Mrs. Conn's agent to buy the machinery referred to therein, ship it to Los Angeles, secure a site, and set up the machinery ready for operation. He was to be thereafter the general manager of the factory, and to continue in that capacity until the net profits repaid the cost of the machinery. This was the entire consideration to be rendered by him. The agreement of 1911 does not purport to express any consideration, except the settlement and adjustment of previous dealings and of all existing difficulties between them.

[3] The finding being against Royer on this subject, every fact against him, of which there is a reasonable inference arising from the evidence, is to be taken as proven. Applying this rule, the finding of the court is supported by the evidence.

[4] Frederick Conn, the husband of Mrs. Conn, died in August, 1907, only a few weeks prior to the making of the first agreement. Before his death he and Royer and several other persons were stockholders and directors of a corporation, known as the Electric Razor Company, which was carrying on a razor factory. Royer was general manager and president of this corporation. It continued to operate the factory, under the management of Royer, for several years after Frederick Conn's death. The plant referred to in the agreement of 1907 was never erected, established, or operated, no site therefor was ever secured, nor was Royer ever appointed manager of such a plant. After the execution of the agreement of 1907, this company needed more machinery, and Mrs. Conn, it appears, agreed to buy it and allow it to be used by said company under a lease. Royer, being general manager at that time, went to Chicago with one Brigham to buy this machinery. Brigham bought the machinery, it was shipped to California, and Mrs. Conn

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paid for it. The corporation paid Royer his railroad fare on the trip. The agreement of 1907 did not authorize him to buy machinery to be used in the plant of the Electric Razor Company. Obviously, this was not the machinery referred to in that agreement, and Royer, in going East to buy it, was not acting as her agent under that agreement. The court below might justly and reasonably have inferred that he was acting as general manager for the company. It is true, he testified that he bought it for Mrs. Conn, to be leased to and to be used in the factory. As the machinery was apparently to belong to her when purchased, he could truly say, in that sense, that it was bought for her; but it would not follow that she employed him to buy it. The fact that he was the manager of the Razor Company, which paid his expenses, raises a much stronger and more reasonable inference that he was acting for that corporation in the matter. The court below doubtless took this view of the transaction. No other proof of any services by him to her was given. The services contemplated by the agreement of 1907 were, therefore, wholly wanting, the enterprise there described was abandoned, or at all events was never begun, and no obligation from Mrs. Conn to Royer arose therefrom.

The evidence with reference to the second agreement tended to show that there were no differences to settle nor dealings to adjust between Royer and Mrs. Conn. There was no evidence that there had been any dealings between them which could be the basis of a claim by him upon her, except the first agreement, which, as we have said, furnished no foundation for such claim. The circumstances tend to support the theory that the second agreement was voluntary, if, indeed, it was not an attempt to obtain an unfair advantage of a feeble, decrepit, and ignorant old woman. The court below, however, exculpated Royer as to the charge of undue influence, and rested the decision entirely on the fact of want of consideration. We see no reason for interfering with its decision. There are no other points of sufficient merit to require mention.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

(174 Cal. 40)

BYERLEY v. CONLIN et al. (L. A. 3819.)

(Supreme Court of California. Dec. 16, 1916.)

1. APPEAL AND ERROR ⟸1056(5)—HARMLESS ERROR—EXCLUSION OF EVIDENCE—CURE BY FINDINGS.
In a suit to set aside a fraudulent conveyance, error, if any, in excluding evidence offered by plaintiff to show statements made by defendant inconsistent with his testimony that at the time of the conveyance he had other property sufficient to pay his debts, is harmless, where the court found that he did not have sufficient property.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4192; Dec. Dig. ⟸1056(5).]

2. FRAUDULENT CONVEYANCES ⟸282 — INTENT—ADEQUATE CONSIDERATION.
One seeking to set aside as fraudulent a conveyance made on adequate consideration must show that both the grantor and grantee had an intent to defraud.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 817, 818; Dec. Dig. ⟸282.]

3. EVIDENCE ⟸230(5) — DECLARATIONS — FRAUD.
In a suit to set aside as fraudulent, a conveyance made on adequate consideration, declarations of the grantor as to his fraudulent intent are admissible against him, but not against his grantee.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 848; Dec. Dig. ⟸230(5).]

4. APPEAL AND ERROR ⟸1047(3)—HARMLESS ERROR — STRIKING TESTIMONY — PARTY NOT ENTITLED TO RECOVER.
Error in striking such declarations entirely from the record, not merely striking them as against the grantee, is harmless, where the court found on sufficient evidence that the grantee had no fraudulent intent and paid an adequate price, since those facts alone are sufficient to defeat recovery regardless of the grantor's intent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4149; Dec. Dig. ⟸1047(3).]

Department 1. Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by J. B. Byerley against Bertha A. Conlin and another to set aside a deed as fraudulent. Judgment for plaintiffs, and defendant appeals. Affirmed.

Davis, Lantz & Wood, of Los Angeles, for appellant. Chas. S. McKelvy, of Los Angeles, for respondents.

SHAW, J. The plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The object of the plaintiff's action was to set aside a deed executed by Clarence B. Conlin to his wife, Bertha A. Conlin, conveying to her a certain parcel of land. The complaint alleged that the deed was executed without consideration and with intent thereby to defraud the creditors of Clarence B. Conlin, and particularly the plaintiff, who was then one of the creditors. The court below found that the deed was executed for a valuable and adequate consideration, consisting of the separate property of Bertha A. Conlin, and that it was not made with the intent to defraud the plaintiff or any other person. There was sufficient evidence to support this finding. This is, of itself, sufficient to uphold the judgment. The plaintiff claims that there were certain errors of law at the trial, consisting of the exclusion of evidence offered by the plaintiff.

[1] The defendant C. B. Conlin, as a witness for the plaintiff, testified that at the time of the transfer complained of he had

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other property sufficient to satisfy the plaintiff's debt. The appellant complains of the exclusion by the court of impeaching testimony showing previous declarations made by him inconsistent with this statement. As the court found in favor of the plaintiff that he did not have sufficient property at that time, the error, if any, is immaterial.

[2-4] As it sufficiently appeared that Mrs. Conlin paid an adequate price for the property, the plaintiff was required to show an intent to defraud creditors on the part of both defendants. Visher v. Webster, 8 Cal. 112. Declarations of C. B. Conlin, made while he held the title, and tending to show his fraudulent intent, were received as against him alone. They would not be evidence of the intent of Mrs. Conlin, unless she had notice thereof before purchasing the property. Landecker v. Houghtaling, 7 Cal. 392. As no notice was brought home to her, the court, on motion, struck out the evidence of his declarations. They should not have been stricken out entirely, for they were competent evidence of the fraudulent intent of C. B. Conlin. It is not clear that the court intended to do more than to strike them out as evidence of the intent of Mrs. Conlin. But, however that may be, as the court found, upon sufficient evidence, that she did not have such fraudulent intent and that she paid an adequate price, and as these facts alone are sufficient to defeat the plaintiff, the error in striking out the testimony could not have properly affected the judgment in favor of the defendants.

There are no other points that are of sufficient merit to deserve notice.

The judgment and order are affirmed.

We concur: SLOSS, J.; LAWLOR, J.

(174 Cal. 65)

LEONARD v. HOME BUILDERS.

(L. A. 3847.)

(Supreme Court of California. Dec. 16, 1916.)

1. CONTRACTS ⟸305(2, 3)—BUILDING CONTRACT—BREACH—WAIVER.

Breach of building contract by defective construction is not waived by occupation of the house by the owner nor his payment of the price with knowledge of the defective construction; his right of rescission being an elective and not an exclusive remedy.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1398, 1463, 1469; Dec. Dig. ⟸ 305(2, 3).]

2. COVENANTS ⟸104—BREACH—REMEDIES OF BUYER.

The buyer of property, with a warranty or covenant as to quality, need not rescind or reject the property when offered in a defective condition, but may stand upon the contract, rely on the covenant, accept the defective property, sue upon the covenant, and recover the damages caused by its breach.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 170; Dec. Dig. ⟸104.]

3. CONTRACTS ⟸305(1)—BUILDING CONTRACTS—BREACH—WAIVER.

Where one who had contracted with a building company to buy a lot upon which the company was to erect a house, having paid a substantial sum on the price, took possession and paid the balance due, giving written notice that he did not relinquish claim for damages from defective construction by making the payment, he did not waive his right to such damages, the contract making time of the essence, and having very stringent provisions for prompt payment and forfeiture after breach, and it being uncertain whether the owner's damages would exceed the balance due.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1398–1400, 1467–1475; Dec. Dig. ⟸305(1).]

Department 1. Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by F. X. Leonard against the Home Builders. From judgment for defendant, and order denying new trial, plaintiff appeals. Reversed.

M. O. Graves and F. X. Leonard, both of Los Angeles, for appellant. L. R. & S. H. Garrett and D. A. Jacobs, both of Los Angeles, for respondent.

SHAW, J. The defendant and the plaintiff executed an agreement in writing dated March 11, 1910, whereby the defendant agreed that it would, before June 15, 1910, erect for the plaintiff, in a good and workmanlike manner, a dwelling house on a certain lot, in accordance with plans and specifications agreed on between them, and would thereupon sell said lot and house to plaintiff for the sum of $2,750; $232.50 thereof to be paid in cash and the balance to be paid in installments of $25 each month until the whole, with 8 per cent. interest, was paid, whereupon the property was to be conveyed to plaintiff.

The house was built in due time, the payments were made in full, and the lot was conveyed to plaintiff. This action is to recover of defendant the sum of $2,000 as damages alleged to have been caused by the breach by the defendant of its agreement to erect the house in a good and workmanlike manner. It is alleged that certain faulty and imperfect work was done, and that certain imperfect materials were used in the construction of the building, whereby the plaintiff was damaged in the sum named. The answer admits the execution of the contract, the erection of the building, the making of the payments, and the conveyance of the lot to plaintiff. It denies the alleged breaches of the covenant to erect the house in a good and workmanlike manner, and alleges that on the completion of the house the plaintiff accepted it, took possession, and moved into it, with full knowledge of its condition and of the kind of work and materials used in its construction, and after-

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ward, with full knowledge, paid to defendant the full balance of the price.

Upon the trial the court stated that it would first hear evidence for the plaintiff "with regard to the final payment of the balance due under the agreement in evidence, and as to the character of the same being voluntary or involuntary." Evidence in behalf of the plaintiff was then given, to the effect that he made full payment of the price of the house and lot on February 19, 1912; that at that time he had full knowledge of all the facts with regard to the building erected on the lot by the defendant; that defendant made no threats and exercised no duress to obtain said payment; that he was under no compulsion except by the terms of the agreement, and that at the time of making said payment, which amounted to $2,252.63, plaintiff informed defendant in writing that payment was involuntary; that it was made under protest, and that plaintiff retained a claim against defendant for the "defective construction," etc., of the house, and that the payment was not made "in relinquishment, abandonment, release, or prejudice of or to said claims." The agreement made time of the essence of the contract, and provided for a forfeiture of all plaintiff's rights upon the breach by him of any one of its terms. There had been no breach by him, so far as appears. Plaintiff then stated that he had no further proof as to the character of the payment, and he offered to prove the other allegations of his cause of action.

The court refused to receive further evidence, and thereupon gave judgment of nonsuit against the plaintiff. The appeal is from that judgment, and was taken within 60 days after its rendition. There is also an appeal from an order denying plaintiff's motion for a new trial.

The appeals were taken to the district court of appeal of the second district. The district courts of appeal have no jurisdiction of appeals in cases at law in which the demand amounts to $2,000. Const. art. 6, § 4. The district court, discovering its want of jurisdiction, transferred the case to the Supreme Court, as provided in rule 32. 160 Cal. lvii, 119 Pac. xv.

[1] The payment was not "involuntary" in the sense in which that word is used in discussions of the right of the payor to recover back the money paid. Brumagim v. Tillinghast, 18 Cal. 272, 79 Am. Dec. 176. But the question whether the payment was voluntary or involuntary is not the real question in the case. The determinative question on this branch of the case is whether or not the conduct of the plaintiff in making the payment, under the circumstances shown, amounted to a waiver by him of the alleged breaches of the contract by the defendant. Where a contract is made with the owner of land to erect a building on the land, and there is a breach, by the contractor, of his covenant to build it in a good and workmanlike manner, neither the occupation of the house by the owner, after its supposed completion, nor the payment of the price, though accompanied by knowledge by the owner of the defective construction, is sufficient, taken alone, to operate as a waiver of the breach of te covenant. "A right of action for damages is not necessarily waived by the mere fact of payment with knowledge of the defects or the taking possession of the subject-matter of the contract, but these facts may be considered on the question of a waiver of this character." 3 Elliott on Contracts, § 2051; Katz v. Bedford, 77 Cal. 322, 19 Pac. 523, 1 L. R. A. 826; Halleck v. Bresnahen, 3 Wyo. 80, 2 Pac. 537; Flannery v. Rohrmayer, 46 Conn. 558, 33 Am. Rep. 33; Hattin v. Chase, 88 Me. 240, 33 Atl. 989; Moulton v. McOwen, 103 Mass. 597; Stewart v. Fulton, 31 Mo. 61; Cannon v. Hunt, 116 Ga. 457, 42 S. E. 734; Underwood v. Wolf, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40; Redlands, etc., Ass'n v. Gorman, 161 Mo. 208, 61 S. W. 820, 54 L. R. A. 718; Wildey v. School Dist., 25 Mich. 427; 6 Cyc. 69; 30 Am. & Eng. Ency. of Law, 1232.

This rule applies here. The plaintiff had made a binding agreement to buy the house and lot and had paid a substantial sum on the price. He was entitled to possession of the lot on completion of the house, and he took possession accordingly. If he had known of the defects at that time, of which, however, there was no evidence, he would have had the right to refuse possession, rescind the contract, and recover the money paid thereon. But this was not his only remedy, and he was not obliged to rescind, or waive, the defects.

[2] One who buys property upon a warranty or covenant as to its quality need not rescind or reject the property when offered in a defective condition, but may stand upon the contract, rely on the covenant, accept the defective property, sue upon the covenant, and recover the damages caused by its breach. North Alaska Salmon Co. v. Hobbs, Wall & Co., 159 Cal. 384, 113 Pac. 870, 120 Pac. 27, 35 L. R. A. (N. S.) 501. That case involved a sale of goods, but the rule is the same with respect to the purchase of real property with a contract by the seller to build a house thereon. The buyer may sue on the covenant at once, whether the installments of the price are due or not due. The payments on the price, whether in part or in full, voluntary or involuntary, will not operate as a waiver of his demand for damages, unless the circumstances show an intent to waive the same, or create an estoppel against the subsequent assertion thereof.

[3] Here the payment was accompanied by a written notice, expressly declaring that the plaintiff claimed damages for the defective construction, and did not, by making the pay-

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ment, relinquish, abandon, release, or prejudice said claim, but retained the same. There was therefore no intent to waive such claim, and nothing to create an estoppel against the subsequent assertion of it by an action at law. Not only is this true, but the contract furnished good ground for the belief that no such waiver was intended. It made time of the essence, and had very stringent provisions for prompt payment and for a forfeiture of all rights of plaintiff under it upon a breach of any of them. He was not in a safe position to refuse payment on the ground that his unliquidated damages would be sufficient to defeat or extinguish his fixed liability for the installments of the contract. While this was not legal duress or compulsion, it is strong evidence against the proposition that the payment in full was a waiver. The motion for nonsuit should have been denied.

The judgment and order are reversed.

We concur: SLOSS, J.; LAWLOR, J.

(174 Cal. 84)

GILL v. SOUTHERN PAC. CO. (S. F. 6826.)

(Supreme Court of California. Dec. 16, 1916.)

1. APPEAL AND ERROR ⟸909(1) — RECORD — PRESUMPTIONS.

On appeal from denial of motion to vacate order of substitution of attorneys, the record being silent as to whether notice of such substitution was deposited in the mail properly addressed as required by Code Civ. Proc. § 1013, the presumption that such notice was deposited prevails.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3675; Dec. Dig. ⟸909(1).]

2. ATTORNEY AND CLIENT ⟸75(1)—SUBSTITUTION OF ATTORNEYS.

A party has the absolute right to change his attorney and have the one he prefers substituted as the attorney of record.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 110–113, 116–119; Dec. Dig. ⟸75(1).]

3. ATTORNEY AND CLIENT ⟸75(1)—SUBSTITUTION OF ATTORNEYS.

The only person entitled to notice of motion for substitution of attorneys is the attorney first employed, who may set aside a substitution obtained without sufficient notice to him.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 110–113, 116–119; Dec. Dig. ⟸75(1).]

4. ATTORNEY AND CLIENT ⟸75(1)—SUBSTITUTION OF ATTORNEYS—EFFECT.

Under Code Civ. Proc. § 285, as to service upon the former attorney of notice of motion to substitute attorneys, a plaintiff, having chosen another attorney and procured an order of record substituting a new one, and having, with his new attorney, made settlement of a claim for damages with a defendant having no notice of any defects or irregularity in such substitution, cannot thereafter set aside the settlement because not sanctioned by the former attorney, upon showing that the order of substitution was made without due notice to such former attorney, especially where the plaintiff himself recognized the new attorney and advised him regarding the settlement.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 110–113, 116–119; Dec. Dig. ⟸75(1).]

5. APPEAL AND ERROR ⟸901—RECORD—PRESUMPTION.

A presumption of regularity attends an order of the superior court upon appeal, and appellant, to procure reversal, must overcome such presumption by affirmative proof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1771, 3670; Dec. Dig. ⟸901.]

6. COMPROMISE AND SETTLEMENT ⟸8(3)—VALIDITY—FRAUD—SETTING ASIDE.

Where settlement of a case was made after consultation with several attorneys, and the agreed money was paid therefor and not returned, the settlement would not be set aside for fraud where there was no proof of advantage having been taken of the maker of the release.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 19, 21–24; Dec. Dig. ⟸8(3).]

7. COMPROMISE AND SETTLEMENT ⟸8(3)—VALIDITY—FRAUD—INADEQUACY OF CONSIDERATION.

Inadequacy of consideration alone, at least unless such as to shock the conscience, does not constitute or establish fraud in settlement of an action.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 19, 21–24; Dec. Dig. ⟸8(3).]

8. APPEAL AND ERROR ⟸1170(1)—REVERSAL.

Under Const. art. 6, § 4½, prohibiting reversal unless for miscarriage of justice, a judgment will not be vacated for irregularity if it appears that upon the merits it was just and right, but the party applying for such relief must show he would be injured if the judgment were allowed to stand.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4454, 4540; Dec. Dig. ⟸1170(1).]

In Bank. Appeal from Superior Court, Contra Costa County; A. J. Buckles, Judge.

Action by John Lewis Gill against the Southern Pacific Company. From order denying plaintiff's motion, he appeals. Affirmed.

Randall & Bartlett, of Los Angeles, for appellant. M. R. Jones, of San Francisco, for respondent.

SHAW, J. In the year 1909 the plaintiff began an action against the defendant to recover damages alleged to have been sustained by plaintiff because of the negligence of the defendant. An amended complaint was filed to which a demurrer was interposed, and the cause was pending awaiting action upon the demurrer. Paul C. Dormitzer was the attorney for the plaintiff, and M. R. Jones was the attorney for the defendant. On September 1, 1911, on motion of the plaintiff, the superior court made an order substituting L. F. Tormey as attorney for the plaintiff instead of said Dormitzer. Notice of this substitution was duly served upon Jones. Thereafter Tormey and the plaintiff effected a settlement of the case with an agent of the

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defendant whereby the plaintiff agreed to accept $500 in full settlement thereof. The money was paid and a release executed. In pursuance of this settlement, on January 18, 1912, by an order directed to the clerk and filed in the action the plaintiff dismissed the action.

In March following the plaintiff filed and served a so-called "motion" for relief as follows: First, to vacate the order of substitution of the attorneys aforesaid; second, to vacate and set aside the compromise and settlement above mentioned; third, to vacate and set aside the said dismissal of the action; and, fourth, for judgment in favor of the plaintiff upon the pleadings for the amount prayed for in the complaint. Afterwards the matter was brought on for hearing, and thereupon the court made its order denying respectively the application to set aside the substitution, the application to set aside the settlement and compromise, the application to vacate the dismissal, and the motion for judgment on the pleadings. The plaintiff has appealed from the order denying the application to set aside the dismissal, and denying the application to set aside the settlement and compromise. The notice of appeal does not specify any other part of the order, but there is added to the specifications aforesaid the statement that "said plaintiff appeals from each and every part of said order and ruling as well as from the whole thereof."

[1] It is extremely doubtful if this notice can be considered as a sufficient notice of appeal from the order refusing to vacate the substitution proceedings. The plaintiff himself, in his proposed bill of exceptions, which was settled by the court, recites that he has filed his notice of appeal from the order denying the motion to set aside the dismissal and from the order denying the motion to set aside the settlement. Admitting, however, that it may be considered as an appeal from the first order mentioned, the record does not show that the order was erroneous, so far as the plaintiff is concerned. The bill of exceptions does not purport to contain all or any of the evidence introduced on the hearing of the motion to substitute attorneys. The order of substitution recites that it was made on motion of the plaintiff in person in open court. This is not disputed. Neither the defendant nor its attorney were present, nor was any notice given to them of the hearing of said motion. The only objection made to the validity of the order is that it does not appear that any notice of the time and place of the hearing of such motion was given to Dormitzer. Dormitzer filed an affidavit stating that he received no such notice. The case was pending in Contra Costa county, where plaintiff resided, and Dormitzer resided and had his office in Los Angeles county. Nearly a month prior to the making of the order of substitution the plaintiff mailed a letter to him stating that his future services were dispensed with. He does not deny that he received this letter. There is nothing in the record to show that upon the hearing of the motion to change attorneys the court did not have proof that due notice of the motion had been given to Dormitzer. The presumption is that such proof was duly made. The only evidence to the contrary is that he did not receive such notice. Upon the deposit of such notice in the mail, properly addressed the service thereof would be complete. Code Civ. Proc. § 1013. The record is silent upon the question whether or not such notice was deposited. The presumption that the fact was established must therefore prevail.

[2-5] Furthermore, this proceeding for substitution was one in which the defendant had no direct interest. The plaintiff had the absolute right to change his attorney and to have the one he preferred substituted as the attorney of record. Gage v. Atwater, 136 Cal. 172, 68 Pac. 581. The only person who is entitled to notice of the motion for substitution is the attorney first employed. Where a plaintiff has obtained a substitution without sufficient notice to the attorney, such attorney may object to the substitution and have the same set aside. So also the defendant, if he learns of such defective notice or want of notice, may perhaps have the order avoided. But we know of no authority for the proposition that the plaintiff, having chosen another attorney and having procured an order substituting a new attorney in the place of the old, and having proceeded thereupon with his new attorney to make a settlement of the cause with the defendant, may thereafter ask to have the settlement set aside on the ground that it was not sanctioned by the former attorney, and support this claim by showing that the order of substitution was made without due notice to such former attorney. In the absence of fraud, reason and good sense demand the rule that the plaintiff should be bound by such a contract and the defendant protected therein. The order was made, and was regularly entered of record. The defendant's attorney was served with notice thereof as provided in section 285 of the Code of Civil Procedure. Nothing appeared of record to impeach its validity. The defendant's attorney had the right to recognize the new attorney and proceed to deal with him, at least so long as he had no information to impugn the validity of the order. The want of any recital of the giving of notice to the former attorney did not affect its validity nor put him on inquiry. It was not incumbent on him to examine the record and make inquiries to learn of the lack of notice not apparent upon the face of the order. In view of the fact that the plaintiff himself recognized the new attorney and advised with him regarding the settlement, the defendant and its attorney had a right to presume that the order was regularly made.

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Moreover, this presumption attends the order of the superior court when presented to this court for review upon appeal, and it is incumbent upon the appellant, in order to procure a reversal, to overcome the presumption by affirmative proof in the record to the effect that no such notice was given. As we have seen, the record fails to contain such proof. From all these considerations we are satisfied that the order appealed from, so far as it rests upon the validity of the change of attorneys, must be considered upon the theory that the change was regularly made. This being the case, there was no ground for the claim that the court below should have vacated the order of dismissal.

[6-8] There was no evidence of fraud in making the settlement. The money agreed upon was paid by the defendant and accepted by the plaintiff. He has neither returned it or offered to return it. The only statement in the record tending to establish fraud is that of the plaintiff and his former attorney, Dormitzer, that the consideration paid was small and inadequate. These statements are mere matters of opinion, not binding upon the court below, and they are directly denied by the affidavit on behalf of the defendant. Even if true, it is well settled that inadequacy of consideration alone, at least unless such as to shock the conscience, does not constitute or establish fraud. 2 Pomeroy, Eq. Jur. § 926. There is no proof of any advantage whatever having been taken of the plaintiff. In the course of the negotiations for settlement he consulted several attorneys. The defendant's attorney persistently refused to advise him in the matter. After consulting with such attorneys as he desired he voluntarily accepted the offer made by the defendant's agent. No reason appears why it should not have been confirmed by the court if the matter had come before it on the merits. Under these circumstances it would be idle to vacate the proceedings even if there were irregularities sufficient for that purpose. A judgment will not be vacated for irregularity in procedure if it appears that upon the merits it was just and right. The party applying for such relief must show that he would be injured if the judgment is allowed to stand. Preston v. Hill, 38 Cal. 686; Collins v. Scott, 100 Cal. 446, 34 Pac. 1085; Parsons v. Weis, 144 Cal. 417, 77 Pac. 1007. It is a proper case for the application of section 4½, art. 6, of the Constitution, providing that no judgment shall be reversed unless upon a consideration of the whole record the court is of the opinion that there has been a miscarriage of justice in the court below.

The orders appealed from are affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.; LAWLOR, J.

(174 Cal. 55)

HARRIS et al. v. JOHNSON. (L. A. 3856.)

(Supreme Court of California. Dec. 16, 1916.)

1. MUNICIPAL CORPORATIONS ⟸705(2) — DRIVING ON LEFT-HAND SIDE OF STREET — NEGLIGENCE.

Driving along the left-hand side of a street is not, of itself, negligence; but becomes so, if at all, only because of the surrounding circumstances, or because forbidden by law or ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1515; Dec. Dig. ⟸705(2).]

2. MUNICIPAL CORPORATIONS ⟸705(4)—DRIVING ON LEFT-HAND SIDE OF STREET—NEGLIGENCE—EVIDENCE.

Driving on the left-hand side of the street, in violation of ordinance, is presumptive evidence of negligence, which, if not excused by the circumstances shown, is sufficient proof to support recovery by one injured thereby.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515, 1516; Dec. Dig. ⟸705(4).]

3. MUNICIPAL CORPORATIONS ⟸705(4)—DRIVING ON LEFT-HAND SIDE OF STREET—PASSING "VEHICLE"—ORDINANCE.

Within an ordinance which after providing that vehicles shall, on all occasions, travel on the right-hand side of a street, provides that one in overtaking and passing another vehicle shall pass to the left of such vehicle, and the person in charge of the vehicle overtaken shall give way to the right, a street car is not a vehicle, as it cannot give way to the side.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515, 1516; Dec. Dig. ⟸705(4).

For other definitions, see Words and Phrases, First and Second Series, Vehicle.]

4. MUNICIPAL CORPORATIONS ⟸705(10) — COLLISION OF AUTO WITH PEDESTRIAN — CONTRIBUTORY NEGLIGENCE — ASSUMING COMPLIANCE WITH LAW.

One passing in front of a standing street car had a right to assume that no automobile would come from the rear of the car on the left-hand side of it, in violation of ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515, 1517; Dec. Dig. ⟸705(10).]

5. MUNICIPAL CORPORATIONS ⟸706(5)—COLLISION OF AUTO WITH PEDESTRIAN — CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Evidence *held* sufficient to exonerate from contributory negligence one who having passed in front of a standing street car was struck by an automobile coming from the rear, and on the left-hand side of the car.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. ⟸706(5).]

Department 1. Appeal from Superior Court, Los Angeles County; S. E. Crow, Judge.

Action by Jennie Harris and another against A. P. Johnson. From an adverse judgment and order, defendant appeals. Affirmed.

Robert C. Gortner and Charles S. Davis, both of Los Angeles, for appellant. Stephen Monteleone and Fulwider & Monteleone, all of Los Angeles, for respondents.

SHAW, J. This is an action to recover damages for personal injuries sustained by

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plaintiff Jennie Harris in a collision with the defendant's automobile. The case was tried by the court, a jury having been expressly waived. The court made findings of fact and conclusions of law in favor of the plaintiffs, and thereupon entered judgment against the defendant for $1,500. The defendant appeals from the judgment and from an order denying a motion for new trial.

The court found that while plaintiff Jennie Harris was crossing West Seventh street in Los Angeles, after alighting from a street car, the "defendant's automobile was carelessly and negligently being driven on the left side of said West Seventh street, and while so traveling on the left-hand side of said West Seventh street, said defendant struck said plaintiff Jennie Harris with his automobile," causing the injury complained of. It is contended that this finding is unsupported by the evidence.

[1] It must be noted that there is no finding that the defendant was driving faster than was consistent with reasonable care or that he was guilty of any negligence, except that of driving his automobile westerly on the left side of the street. Seventh street runs easterly and westerly. Driving along the left-hand side of a street is not, of itself, an act of negligence. It becomes so, if at all, only because of the surrounding circumstances or because it has been forbidden by law, or by an ordinance of the city.

The evidence shows without conflict that the plaintiff had alighted from a street car going westerly on Seventh street and was standing on the northerly curb intending to go to the southerly side of the street. Before attempting to cross she waited until the car from which she alighted had passed on. There was another street car standing still immediately behind that car. The motorman of the standing car motioned to her to cross in front of the car, which she proceeded to do. The defendant was, at this time, coming westerly in his automobile on the same street and behind this street car, and seeing the standing car and the right-hand side of the street blockaded temporarily by several wagons, passed the street car on the left side and in doing so ran his automobile along the left half of the street, striking the plaintiff and knocking her down as she emerged from in front of the standing street car and was crossing the street.

At the time of the accident there was in force in Los Angeles city ordinance No. 21,552, N. S., sections 2 to 6, inclusive, being introduced in evidence. The material portions thereof read as follows:

"Sec. 2. Every person riding, propelling or in charge of any vehicle in or upon any street in the city of Los Angeles shall ride, drive or propel such vehicle upon such streets in a careful manner and with due regard for the safety and convenience of the pedestrians and all other vehicles upon such streets."

"Sec. 3. Every person riding, driving propelling or in charge of any vehicle upon meeting any other vehicle at any place, upon any street within the city of Los Angeles, shall turn to the right and upon all occasions shall travel upon the right-hand side of said street, and as near the right-hand curb thereof as possible."

"Sec. 5. Every person riding, driving, propelling or in charge of any vehicle shall, in overtaking and passing other vehicles, in and upon any streets within the city of Los Angeles, pass to the left of said vehicle, and the person in charge of such vehicle so overtaken and passed shall give way to the right."

[2, 3] The contention of the appellant is that he was acting entirely within his rights in using the northerly or right-hand portion of the southerly half of said street; the claim being that such portion was the only part of the street open for travel at that time, and further that section 5 of the ordinance, above quoted, authorized the defendant to pass to the left of the street car, as he did. Section 3 of the ordinance, above quoted, provides that any person driving or in charge of a vehicle on any street in Los Angeles shall upon all occasions travel on the right-hand side of said street. The use of the left side of Seventh street was, under the circumstances, a violation of that section. It is well settled in this state that the violation of an ordinance is a breach of duty toward the person injured by such violation. It is presumptive evidence of negligence, which, if not excused by the circumstances shown, is sufficient proof of negligence to support an award of damages to the injured person in an action based on such charge of negligence. McKune v. Santa Clara, etc., Co., 110 Cal. 486, 42 Pac. 980; Cragg v. Los Angeles Trust Co., 154 Cal. 667, 98 Pac. 1063, 16 Ann. Cas. 1061; 1 Shear. & Redf. on Negligence, § 13. The defendant must therefore be deemed to have been negligent unless he is excused by section 5 of the ordinance above quoted, providing that any person in overtaking and passing other vehicles shall pass to the left of said vehicle and the vehicle being so overtaken and passed shall give way to the right. Obviously, the word "vehicles," in this section, does not include street cars, since they must travel upon a fixed track and cannot give way to the right. The section applies only to vehicles that are able to turn to the right or left, and it does not authorize or require the driver of an automobile to go upon the left-hand side of the street in order to pass a street car. In that operation the driver must follow section 3 and pass along the right-hand side. Defendant's negligence was therefore clearly established.

[4, 5] The appellant further contends that even if it is shown that he was negligent, the evidence also shows that plaintiff was equally negligent in crossing the street as she did. The contention is without merit. "The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other

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person." 29 Cyc. 516; Medlin v. Spazier, 23 Cal. App. 242, 137 Pac. 1078. Such person must, of course, himself use reasonable care to observe the conduct of the other person so far as such conduct may affect his own safety at the time. The plaintiff had the right to assume that the defendant's automobile, or any other vehicle coming westerly on Seventh street, would confine its travel to the right-hand side of the street as provided in the ordinance aforesaid, unless and until, in the reasonably careful use of her faculties, she had reasonable cause to believe otherwise. There was evidence to show that before attempting to cross the street she looked in both directions, and used ordinary care to ascertain whether or not any vehicle was approaching, and that she did not see the defendant's automobile coming, notwithstanding such caution. The defendant testified that he was traveling at the rate of 15 to 18 miles an hour at the time he discovered the plaintiff crossing the street 15 or 20 feet in front of him. Assuming that the defendant was, obedient to the ordinance aforesaid, traveling on the right-hand side of the street before he attempted to overtake and pass the street car, and bearing in mind the rate of speed at which he was traveling, it would have been possible for the plaintiff, when passing from in front of the standing street car to the south side of the street, to have looked toward the east without seeing anything of the defendant's approaching automobile. The evidence was sufficient to exonerate her from the charge of contributory negligence.

No other points are presented in support of the appeal.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

(174 Cal. 60)

AUERBACH et al. v. HEALY et al.

HEALY et al. v. AUERBACH et al.

(L. A. 3868.)

(Supreme Court of California. Dec. 16, 1916.)

1. REFORMATION OF INSTRUMENTS ⟸36(1) — PLEADING—COMPLAINT.

In action for reformation of contracts the complaint should allege what the real agreement was, what the agreement as reduced to writing was, and where the writing fails to embody the real agreement, and, if correction of the description of land is sought, the complaint must describe the premises so as to render certain the location and boundaries.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 141, 143, 146; Dec. Dig. ⟸36(1).]

2. REFORMATION OF INSTRUMENTS ⟸36(3)—PLEADING—COMPLAINT.

The complaint should aver facts showing how the mistake was made, whose mistake it was, and what brought it about, so that the mutuality may appear; and, if the mistake was of one party which the other at the time knew or suspected, as specified in Civ. Code, § 3399, stating grounds for revision of contracts, the facts showing such mistake must be alleged.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 144; Dec. Dig. ⟸36(3).]

3. REFORMATION OF INSTRUMENTS ⟸36(1)—PLEADING—COMPLAINT.

A complaint in action to reform deed, not alleging agreement to sell and convey, nor the true description of the land, nor the claimed interest of the plaintiff, was fatally defective.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 141, 143, 146; Dec. Dig. ⟸36(1).]

4. REFORMATION OF INSTRUMENTS ⟸26—TITLE OF PLAINTIFF.

No one can maintain an action to reform a deed or other contract unless he has some title or interest to be subserved or protected by such reformation.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 91–100; Dec. Dig. ⟸26.]

5. REFORMATION OF INSTRUMENTS ⟸36(3) — PLEADING—COMPLAINT.

A complaint to reform a deed, alleging that the words "in block 7" were omitted, is defective where it does not show that the lot is not accurately described without these words, as by averment that there is more than one block in the subdivision described so that the number of the lot alone would not suffice to locate the land.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 144; Dec. Dig. ⟸36(3).]

6. REFORMATION OF INSTRUMENTS ⟸36(3) — PLEADING—COMPLAINT.

A complaint in action to reform a deed declaring merely that "the draftsman omitted to insert in said description the block in which said lot of land was located" is insufficient, as not showing a mistake was made, since both parties may have fully understood and intended the omission.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 144; Dec. Dig. ⟸36(3).]

7. REFORMATION OF INSTRUMENTS ⟸36(1) — PLEADING—COMPLAINT.

In a complaint in action to reform a deed, the statement that, in order to make the deed "conform to the actual intention of the parties," it must be amended as stated, is a mere conclusion as to the effect of the deed, and is not sufficient as a statement of the intention of the parties.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 141, 143, 146; Dec. Dig. ⟸36(1).]

8. REFORMATION OF INSTRUMENTS ⟸46 — FINDINGS.

In action to reform a deed, findings omitting to find on the issue of execution of the deed sought to be reformed were insufficient.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 194; Dec. Dig. ⟸46.]

9. REFORMATION OF INSTRUMENTS ⟸26—PERSONS ENTITLED TO REFORMATION.

A husband cannot sue to reform a deed to property which is the separate property of his wife.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. ⟸91–100; Dec. Dig. ⟸26.]

10. TRIAL ⟸404(1)—FINDINGS.

A finding that all the allegations of a pleading "are not true" is not a finding that all of

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them are untrue or that any particular one of them is untrue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 957; Dec. Dig. ⟸404(1).]

Department 1. Appeal from Superior Court, Los Angeles County; George L. Jones, Judge.

Actions by Joseph Auerbach and another against Eva G. Healy and another, and by Charles F. Healy and another against Joseph Auerbach and another, consolidated by order of the superior court for purposes of trial, decision, and judgment. From judgment for Joseph Auerbach and another, Charles F. Healy and another appeal. Reversed.

W. R. Law, of Los Angeles, for appellants. M. Randall, of Los Angeles, for respondents.

SHAW, J. Although two actions are here involved, there was but one judgment and but one appeal.

On September 27, 1913, Charles F. Healy and Eva G. Healy, his wife, filed a complaint against Joseph Auerbach and Louise Auerbach, his wife, to recover possession of and quiet title to a parcel of land, of which said plaintiffs were alleged to be the owners, described as "lot 13, block 7, of Belle-Vernon Acres," according to the map thereof recorded in the office of the county recorder, situated in Los Angeles county. This action was numbered in the superior court B–5060. Auerbach and wife filed an answer on October 10, 1913, denying the ownership of the Healys, and alleging that said defendants were the owners in fee and were in possession of the premises.

On December 12, 1913, Auerbach and wife filed a complaint against Healy and wife praying for the reformation of a certain deed therein set forth in full, executed by Eva G. Healy, the defendant, to Joseph Auerbach. This action was numbered in the superior court B–7391. Healy and wife answered this complaint, denying the execution of the deed sought to be reformed, and denying that there was any mistake therein, or that it does not properly describe the premises intended to be conveyed, and alleging that the deed was executed without any consideration and that it was obtained by means of threats to imprison the husband of the said Eva G. Healy. They also filed a cross-complaint to quiet title against the claims of Auerbach and wife to the lot and to recover possession thereof.

For the purposes of trial, decision, and judgment the cases were consolidated by order of the superior court. The court made its decision in writing intended to cover both cases, and thereupon gave judgment dismissing the action of the Healys, and further, that the deed set forth in the complaint in Auerbach v. Healy be reformed in accordance with the complaint in said action so that the description of the lot conveyed thereby should read thus, "Lot 13, block 7, of Belle-Vernon Acres, as per map recorded in Book 9, page 196, of Maps, in the office of the county recorder of Los Angeles county, state of California," and directing the defendant Eva G. Healy to make and deliver to Joseph Auerbach a grant deed in accordance with the judgment, and for costs. From this judgment, Healy and wife appeal.

[1, 2] The rules of pleading in actions for the reformation of contracts are well established and should be familiar. The complaint should allege "what the real agreement was, what the agreement as reduced to writing was, and where the writing fails to embody the real agreement." 34 Cyc. 972. If the complaint seeks the correction of a description of land, "the pleading must describe the premises so as to render certain the location and boundaries." 34 Cyc. 973. It is necessary to aver facts showing how the mistake was made, whose mistake it was, and what brought it about, so that the mutuality may appear. 34 Cyc. 974; 14 Ency. Plead. & Prac. 42; Wright v. Shafter, 48 Cal. 275. In this state mutuality is not always necessary. It is sufficient if there was "a mistake of one party, which the other at the time knew or suspected." Civ. Code, § 3399. But the facts showing a mistake of that character in such a case must likewise be alleged.

[3-5] The complaint in Auerbach v. Healy and the findings are fatally defective in many particulars. In the absence of a demurrer, great liberality has been indulged in order to sustain faulty complaints in actions to reform contracts. Newton v. Hull, 90 Cal. 495, 27 Pac. 429; Seegelken v. Corey, 93 Cal. 95, 28 Pac. 849; Peasley v. McFadden, 68 Cal. 616, 10 Pac. 179; Ward v. Waterman, 85 Cal. 488, 24 Pac. 930. But the complaint in Auerbach v. Healy is lacking in substance as well as in form, and cannot be upheld under the most liberal rule. From the record as a whole we infer that Eva G. Healy has sold and agreed to convey to Joseph Auerbach the tract of land above described. These facts, however, are not alleged in the complaint. It is alleged that on July 15, 1913, Eva G. Healy executed to Joseph Auerbach the grant deed copied in the complaint, but whether in pursuance of a sale or other agreement does not appear. The claim of Auerbach, as appearing elsewhere, is that the true description of the lot is "lot numbered 13 in Block numbered 7 of Belle-Vernon Acres." But this is not alleged in the complaint. Nor is it alleged that Auerbach or his wife, or both of them, have or claim any right, title, or interest, legal or equitable, in the lot in question, or in any property whatever. There can be no doubt of the proposition that no one can maintain an action to reform a deed or other contract unless he has some title or interest to be subserved or protected by such reformation. None appears in this complaint. Again, it does not appear that the mistake would be material if it were properly alleged. The claim is that

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the words "in block 7" were omitted from the description. Nothing is alleged to show that the lot is not accurately described without these words. There is no averment that there is more than one block in Belle-Vernon Acres, or that there is more than one lot numbered 13 in the entire tract. If, as a matter of fact, Belle-Vernon Acres contains but one lot 13, the deed would be effective as it is, and no reformation would be necessary. The statement that the description "should have contained the words 'block 7' after the word 'of' and before the words 'Belle-Vernon Acres'" is a mere opinion, since the complaint nowhere alleges the fact that the words "block 7" are a part of the true description.

[6, 7] The making of the mistake itself is not properly alleged. It declares that "the draftsman omitted to insert in said description the block in which said lot of land was located." Nevertheless, both parties may have fully understood it, and may have intended it to be as it is. The identity of the draftsman does not appear. The statement "that in order to make said deed properly pass the title to said premises and properly describe the same and to make it conform to the actual intention of the parties, it is necessary that the description should be amended so as to read as follows: Lot 13, block 7, 'Belle-Vernon Acres,' as per map, recorded in Book 9, page 196, of Maps, in the office of the county recorder of Los Angeles County, state of California"—is not an allegation stating what the intention of the parties was. It states only that, in order to make the deed "conform to the actual intention of the parties," it must be amended as stated. This is a mere conclusion as to the effect of the deed, and is not a statement of the intention. Under the liberal rule applying in the absence of a demurrer for uncertainty, this might be held to be sufficient, if there were no other defects in the complaint. But, in view of the other faults we have mentioned, we cannot approve of the pleading nor hold that it states a cause of action.

[8-10] The findings do not cover all of the material issues. The answer in Auerbach v. Healy denied the execution of the deed sought to be reformed. This was a material allegation. If it was never executed at all, it is plain that no action could be maintained for its reformation. There is no finding on that issue. The findings state that the real property mentioned in plaintiff's complaint "at the commencement of this action was the separate property of Eva Healy." If this finding were true, it is clear that Joseph Auerbach could have no interest therein and no right to claim a reformation of the deed. Further, the findings say "that all of the allegations in defendants' answer are not true," and as to the second defense "that all of the allegations therein contained are not true at the time of the commencement of this action." The allegations of the "second defense," assuming the phrase to mean the second defense of the Healys to the action of Auerbach and wife, do not relate to the time of the commencement of the action. Moreover, a finding that all of the allegations "are not true" is not a finding that all of them are untrue, or that any particular one of them is untrue. The finding does not negative the fact that some of them may have been true. The respondent Joseph Auerbach should be allowed to amend his pleadings. It seems altogether probable that he may be able truthfully to state facts sufficient to constitute a cause of action. As the record stands, the judgment is not sustained by the pleadings or by the findings.

The judgment is reversed.

We concur: SLOSS, J.; LAWLOR, J.

(174 Cal. 44)

HUGHES MFG. & LUMBER CO. v. HATHAWAY et al. (L. A. 3810.)

(Supreme Court of California. Dec. 16, 1916. Rehearing Denied Jan. 15, 1917.)

1. MECHANICS' LIENS ⇐132(4) — NOTICE OF LIEN—NOTICE OF COMPLETION OF CONTRACT—COMPUTATION OF TIME.

Code Civ. Proc. § 1187, provides that every person save the original contractor who claims a lien shall within 30 days after cessation of labor, or 30 days after completion of the original contract, file for record a claim of lien, and that filing of notice of completion shall be equivalent to a completion, and that the owner may within 10 days of the completion of any contract or within 40 days after cessation from labor thereon file notice of completion. *Held*, that a claim of a materialman if filed within 30 days after filing of notice of completion is within the time, whether filed within 30 days of actual completion or not.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 195; Dec. Dig. ⇐132(4).]

2. MECHANICS' LIENS ⇐132(4) — NOTICE OF LIEN—NOTICE OF COMPLETION OF CONTRACT—COMPUTATION OF TIME.

If no notice of completion is filed, the claimant need only see that his claim is filed within 90 days after completion, and if the owner fails to file a notice of completion within 10 days after actual completion or 40 days after cessation of labor, the claimant may rely on the estoppel to prevent the owner from disputing the timely filing of the action.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 195; Dec. Dig. ⇐132(4).]

3. MECHANICS' LIENS ⇐132(7)—NOTICE OF LIEN—NOTICE OF COMPLETION OF CONTRACT—COMPUTATION OF TIME—"COMPLETION OF BUILDING."

The words "completion of building," as used in such section in fixing the 90-day period, mean either actual completion or cessation of labor for 30 days on the building or occupation or acceptance, but not notice of completion.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 198, 199; Dec. Dig. ⇐132(7).

For other definitions, see Words and Phrases, First and Second Series, Completion.]

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Department 1. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by the Hughes Manufacturing & Lumber Company against Lillian Hathaway. Judgment for defendant, and plaintiff appeals. Reversed.

Arthur Wright, of Los Angeles, for appellant. Frank D. McClure, of Los Angeles, for respondents.

SHAW, J. The court below sustained a demurrer to the complaint, and thereupon gave judgment for the defendant. The plaintiff appeals.

The plaintiff sued to foreclose a lien for the price of certain materials furnished by it to a building contractor to be used in the construction of four buildings upon a lot owned by the defendants, which said contractor had agreed to erect thereon for said owners. The building contract was not recorded in the office of the county recorder. It appears to have been a single contract for the erection of the four buildings.

The buildings were completed on August 7, 1913. On August 16, 1913, the defendants, as owners, filed in the office of the county recorder a notice of completion of said buildings, in accordance with section 1187 of the Code of Civil Procedure. Thirty days thereafter, that is, on September 15, 1913, the plaintiff filed for record in said recorder's office a claim of lien on said lot for the amount due it from said contractor for said materials.

[1] The court below sustained the demurrer on the ground that the 30-day period of time after completion, allowed for filing claims of lien by a materialman, begins to run upon the date of the completion of the contract under which the materials were furnished, and not upon the date of the filing of the notice of completion thereof, and hence, that where the actual completion was on August 7th, a claim of lien filed on September 15th is too late, although it was filed within 30 days from the filing of the notice of completion. The soundness of this theory is the sole question presented for decision. No other objection is made to the complaint. We are of the opinion that the court below was in error.

The portions of section 1187 material to the question are as follows:

"Every person save the original contractor claiming the benefit of this chapter, within thirty days after he has ceased to labor or has ceased to furnish materials, or both; or at his option, within thirty days after the completion of the original contract, if any, under which he was employed, must file for record with the county recorder of the county, * * * a claim of lien. * * * Any trivial imperfection in the said work, or in the completion of any contract by any lien claimant, or in the construction of any building, * * * shall not be deemed such a lack of completion as to prevent the filing of any lien; and, in all cases, any of the following shall be deemed equivalent to a completion for all the purposes of this chapter: The occupation or use of a building, improvement, or structure, by the owner, or his representative; or the acceptance by said owner or said agent, of said building, improvement, or structure, or cessation from labor for thirty days upon any contract or upon any building, improvement or structure or the alteration, addition to, or repair thereof; the filing of the notice hereinafter provided for. The owner may within ten days after completion of any contract, or within forty days after cessation from labor thereon, file for record in the office of the county recorder of the county where the property is situated, a notice setting forth the date when the same was completed, or on which cessation from labor occurred" (with other particulars). "In case such notice be not so filed then the said owner and all persons deraigning title from or claiming any interest through him shall be estopped in any proceedings for the foreclosure of any lien provided for in this chapter from maintaining any defense therein * * * on the ground that said lien was not filed within the time provided in this chapter: Provided, that all claims of lien must be filed within ninety days after the completion of any building," etc.

The filing of a notice of completion is therein declared to be "equivalent to a completion for all the purposes of this chapter." In connection with the language preceding this declaration it must be understood to mean that the filing of such notice of completion is the equivalent of the "completion of the original contract," previously mentioned as the thing which starts running the 30-day period, and that a claim of lien by a materialman or laborer, if filed within 30 days after the filing of such notice, will be deemed to be within the time prescribed, whether within 30 days after the actual completion or not.

The scheme of the section with respect to liens under the optional clause, that is, lien claims not filed within 30 days after the doing of the labor or furnishing of the material, but within 30 days after the completion of the contract, is comparatively simple.

It is to be noted that it is not always the completion of the entire building that sets running the time for filing the notice of completion and the optional time for the filing of claims. It may be "the completion of the original contract," as to claims of lien, or the "completion of any contract," as to the notice of completion, and in either case such contract may be for the construction of only a part of the building, the stone work, the brick work, or the foundations, for example, and such "contract" may be completed long before the completion of the entire building. The 10 days allowed for filing the notice of completion of such a contract begins to run at the time of its actual completion by the contractor. The lien claimant for materials furnished or labor done under such contract may not know the time of actual completion thereof, and the statute intends that he need not inquire diligently concerning it. He may watch the files of the county recorder and rely on the filing of the notice of completion, which, for the purpose of his time to file his claim of lien, is deemed to be the equivalent of the completion of the original

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contract under which he claims, and he may then file his claim within 30 days after the filing of such notice.

[2] If no notice of completion is filed, the claimant is only required to see that his claim is filed before the expiration of the period of 90 days after the completion of the building, that is, of the building as a whole, as provided in the last clause of the section. If his claim is filed within that period and also within 30 days after the filing of the notice of completion of the contract under which he claims, he may rest secure that it is filed in time. If he files the claim within 90 days after completion of the building, and the owner fails to file a notice of the completion of the original contract under which the lien is claimed, within 10 days after its actual completion or 40 days after cessation of labor thereon, the claimant may rely on the estoppel created by the statute to prevent the owner from disputing the timely filing of the action.

[3] The phrase "completion of the building," etc., as used in the last clause of the section, fixing the 90-day period, must be understood to mean either the actual completion, or the completion by cessation of labor for 30 days upon the building, etc., or completion by occupation or acceptance, as the case may be. As used in that clause it cannot be held to mean the completion effected by operation of law when the notice of actual completion is filed.

The allegations of the complaint show that the claim of lien was filed in time. The demurrer should have been overruled.

The judgment is reversed.

We concur: SLOSS, J.; LAWLOR, J.

(174 Cal. 74)

ROSSI v. CAIRE et al. (S. F. 7101.)

(Supreme Court of California. Dec. 16, 1916.)

1. APPEAL AND ERROR ⊂⊃80(5), 82(1)—FINAL JUDGMENTS.

In corporation dissolution proceedings, where a judgment was rendered that the charter was forfeited, and thereafter the court ordered the trustees to distribute moneys in their hands, and further ordered them to sell the property of the company at public auction, the later orders were appealable either as special orders made after final judgment, under direct provision of Code Civ. Proc. § 963, subd. 2, or as final judgments; for, since the effect of the execution of the orders would be to take the property sold from the control of the court and of the parties and to put the money distributed beyond the power of the court and out of the litigation so that it could not be regained or affected by subsequent proceedings, the orders were final so far as the property to be disposed of under them was concerned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 521; Dec. Dig. ⊂⊃80(5), 82(1).]

2. APPEAL AND ERROR ⊂⊃870(1)—SCOPE OF REVIEW—INTERLOCUTORY ORDERS.

Upon such appeal the previous proceedings, including the sufficiency of the findings to support the interlocutory judgment of forfeiture, could be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3451, 3494, 3499; Dec. Dig. ⊂⊃870(1).]

3. VENUE ⊂⊃5(1)—ACTIONS REGARDING REALTY—CORPORATION DISSOLUTION PROCEEDINGS.

Notwithstanding Const. art. 6, § 5, providing that actions involving real estate shall be brought in the county where the land is situated, corporation dissolution proceedings, although involving sale of the real property of the corporation, may be brought in another county than that in which the real property of the corporation lies, since the determination of an interest in real estate is but incidental to the main relief sought.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 4, 5, 10, 11; Dec. Dig. ⊂⊃5(1).]

4. CORPORATIONS ⊂⊃312(1)—DIRECTORS—TITLE TO CORPORATE PROPERTY.

The directors of a corporation before its dissolution do not, by virtue of their office, hold or possess any title to or interest in the property of the corporation; the title being wholly vested in the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1376–1378, 1390, 1392; Dec. Dig. ⊂⊃312(1).]

5. CORPORATIONS ⊂⊃619—DISSOLUTION—EFFECT OF FORFEITURE.

Under St. 1907, p. 746, § 2, providing that upon a forfeiture of a corporate charter thereunder the directors then in office are deemed to be the trustees of the corporation and stockholders and to have full power to settle the affairs of the corporation, does not give the trustees title to corporation's property but merely a power over the property with right of possession.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2459, 2460; Dec. Dig. ⊂⊃619.]

6. CORPORATIONS ⊂⊃617(1)—DISSOLUTION—TITLE TO CORPORATE PROPERTY.

When a corporation ceases to exist, its property belongs to the persons who are its stockholders at the time; it being no longer capable of holding title or possession.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2448, 2452, 2453, 2455, 2456; Dec. Dig. ⊂⊃617(1).]

7. CORPORATIONS ⊂⊃619—DISSOLUTION—DUTIES OF STATUTORY TRUSTEES.

Upon dissolution of a corporation, the duties of its statutory trustees are measured by their powers and by the principles of law and equity applicable to the conditions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2459, 2460; Dec. Dig. ⊂⊃619.]

8. CORPORATIONS ⊂⊃607—FORFEITURE—OPERATION.

The forfeiture of a corporate charter provided for by St. 1905, p. 493, as amended by St. 1907, p. 745, takes place instantly upon the failure to pay the license tax within the time allowed, notwithstanding a corporation may be a going concern having large operations in process of completion.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2410–2415; Dec. Dig. ⊂⊃607.]

9. CORPORATIONS ⊂⊃619—DISSOLUTION—POWER OF STATUTORY TRUSTEES—INTERVENTION BY EQUITY.

By St. 1907, p. 746, § 2, giving statutory trustees, upon the forfeiture of corporate charter for nonpayment of license tax, full powers to settle the affairs of the corporation, etc., the whole matter of liquidation and distribution to the stockholders is left to the exclusive control

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of such trustees, whose exercise of power is not subject to judicial intervention or control in the absence of a showing of neglect or abuse of power.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2459, 2460; Dec. Dig. ⊂⊃619.]

10. CORPORATIONS ⊂⊃619 — DISSOLUTION — POWER OF STATUTORY TRUSTEES—INTERVENTION BY EQUITY.

Under such statutes it is not a necessary part of the duty of the trustees to find a buyer for the corporation's land, or sell the same, provided they have sufficient money to pay the debts and settle the corporate affairs.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2459, 2460; Dec. Dig. ⊂⊃619.]

11. CORPORATIONS ⊂⊃629—DISSOLUTION—DUTIES OF STATUTORY TRUSTEES.

Statutory trustees are not required to distribute the excess of the corporation's money in their hands over the corporation's debts, where it does not appear that such excess may not be necessary to pay expenses of settling the corporate affairs, etc.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2478–2481; Dec. Dig. ⊂⊃629.]

Department 1. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Edmund A. Rossi against Arthur J. Caire and others. From an order directing the distribution of certain money among stockholders, etc., and from an order denying new trial, the named and certain other defendants appeal. Reversed, and interlocutory judgment and subsequent proceedings vacated.

Joseph F. Bluxome and Frank P. Deering, both of San Francisco, for appellants. D. Freidenrich, Ambrose Gherini, and George J. Steiger, Jr., all of San Francisco (Orrin K. McMurray, of San Francisco, of counsel), for respondents.

SHAW, J. This case involves two appeals, one from an order made on April 3, 1914, directing the distribution of certain money among the stockholders of the Santa Cruz Island Company and directing the defendants as trustees to sell the real and personal property of said company at public auction, the other being an appeal from an order denying the motion of the appellants for a new trial.

The Santa Cruz Island Company was incorporated under the California law in 1869 for the purpose of carrying on the business of raising and selling cattle and acquiring such property, real and personal, as should be convenient for that business. Its principal place of business was San Francisco. It acquired a large amount of personal property, and also Santa Cruz island, situated in the Pacific Ocean in Santa Barbara county, containing about 54,000 acres of land. On the 30th day of November, 1911, by reason of its failure to pay the license tax due under the act of March 20, 1905, and amendments thereto, said company forfeited its corporate charter. At that time the defendants, Arthur J. Caire, Fred F. Caire, Albina C. S. Caire, Delphine A. Caire, and Aglae S. Capuccio, were the directors of said corporation. The capital stock of the corporation was $50,000, divided into one hundred shares of the par value of $500 each. At the time of said forfeiture of the corporate charter one Amelie A. Rossi owned seven of said shares. The remaining shares were owned in various amounts by the defendants in the case. On May 23, 1912, Amelie A. Rossi transferred to the plaintiff, Edmund A. Rossi, her seven shares and all her interest as stockholder in and to the property and assets of the corporation. Thereafter the said plaintiff began this action. Its object as shown by the prayer of the complaint, is to enjoin the aforesaid directors from carrying on the business of the corporation and to compel them, as trustees thereof, to wind up its affairs, pay its debts, and distribute its assets to the stockholders according to their interests, and, specifically, that they thereupon distribute to the plaintiff seven one-hundredths of said assets.

Answers were filed raising issues of fact, the cause was tried and on June 9, 1913, the court made its findings and conclusions of law and thereupon gave an interlocutory judgment declaring that the charter of the company was forfeited on November 30, 1911; that the said directors thereupon became trustees of said corporation and its stockholders, charged with the duty of settling its affairs; that the plaintiff and the other stockholders were entitled to an accounting from the trustees of the property and effects of the corporation and to have distributed to them, after payment of its debts, their respective shares of said property. The decree also directed the trustees to publish a notice to the creditors requiring them to present their claims within a time stated, and that all claims not so presented would be barred from payment out of the funds in the hands of the trustees, and that they file a true and correct inventory of all of said property. It declared that all other proceedings in the settlement of the affairs of the company and distribution of its property were reserved for subsequent determination.

Thereafter the plaintiff moved the court for an order requiring the said trustees to distribute to the plaintiff and other stockholders the surplus funds in their hands, as shown by their account filed December 19, 1913, and also directing them to sell the real and personal property of the corporation in their possession as trustees at public auction, after such notice and on such terms as the court should see proper. On April 3, 1914, the court, in pursuance of said motion, ordered the trustees to distribute $35,000 of the money in their hands derived from the property of said corporation, proportionately to the respective stockholders, within 20 days thereafter, and further ordered that said trustees proceed to sell the real and personal

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property of said company, at public auction for cash, after giving a certain prescribed notice. It is from this order that the appeal first mentioned is taken. The order denying a new trial, from which the second appeal is taken, was made upon a motion of the defendants to vacate the interlocutory judgment and the orders aforesaid, and for a new trial, on the grounds that the evidence is insufficient to support the findings and interlocutory judgment or the said orders, that each of them was against law, and for errors of law occurring at the trial.

Two preliminary jurisdictional questions are presented which must first be determined.

[1, 2] 1. The plaintiff contends that the orders of April 3, 1914, directing the sale and distribution of the corporate property are not appealable. We cannot assent to this proposition. If the judgment of June 9, 1913, is regarded as a final judgment, as plaintiff in one branch of his argument on this point insists, then the orders of April 3, 1914, would be appealable as special orders made after final judgment. Code Civ. Proc., § 963, subd. 2. That judgment, however, merely declared the status of the plaintiff as a stockholder, the number of his shares, his right to distribution, and directed the trustees to give notice to creditors and file an inventory of the assets of the corporation. In its nature and effect it was preliminary and interlocutory, and not final. Grey v. Brennan, 147 Cal. 355, 81 Pac. 1014. The subsequent procedure by motion may have been unusual, but the result was the taking of further evidence and the making of orders for the distribution of the money on hand and the sale of the property. These orders were final in the same sense as any order for the sale of property or for the distribution of funds in litigation is final. The effect of the execution of the orders would be to take the property sold from the possession and control of the court and of the parties and put the money distributed beyond the power of the court and out of the litigation, so that it could not be regained or affected by the subsequent proceedings. Such adjudications have always been held to be appealable as final judgments, because they are final so far as the property to be disposed of under them is concerned. Los Angeles v. Los Angeles, etc., Co., 134 Cal. 123, 66 Pac. 198; Anglo-Californian Bank v. Superior Court, 153 Cal. 755, 96 Pac. 803; Zappettini v. Buckles, 167 Cal. 32. We are of the opinion that these orders are appealable as final judgments, and further that upon such appeal there may be a review of the previous proceedings including the sufficiency of the findings to support the interlocutory judgment.

[3] 2. The other objection to the jurisdiction is that the action is for the determination of an interest in real property situated in Santa Barbara county, and that, under section 5, art. 6, of the Constitution, jurisdiction thereof is vested exclusively in the superior court of that county, and that the action will not lie in the superior court of the city and county of San Francisco. The point is not tenable. The action is not for the determination of an interest in real property, but is an action in equity to compel the trustees to perform duties which it is claimed are imposed upon them by the law. The determination of the interests of the parties is only incidental to the relief which is the main object of the action; that object being to place the trustees under the control and supervision of the court and compel them to proceed in the execution of their trust. It is not the determination of an interest in specific property, but only of the number of the shares of the several stockholders in the corporate assets of every description which are to be administered by the trustees for their benefit.

3. The findings do not show any ground for the intervention of a court of equity to supervise or direct the proceedings of the trustees. They state the facts relating to the incorporation of the company, the approximate value and character of its property, the amount and number of shares of its capital stock, the names of the stockholders and the number of shares held by each, the forfeiture of its charter as aforesaid, and that the defendants were at that time its directors. They then proceed to state that, when this suit was begun, the debts of the corporation amounted to $10,000, and the trustees had on hand $17,000 in money of the corporation; that they did not apply the funds on hand to the payment of the debts, nor distribute the surplus thereof to the stockholders, nor make any effort to find a buyer for the real property; that plaintiff did not, before beginning the action, demand of said trustees that they wind up the affairs of the corporation and distribute the property thereof to the stockholders; and, further, that said trustees "have not since the forfeiture of the charter of said corporation conducted or carried on the business of said corporation, and said trustees have not neglected their duties. They have made sales of personal property of said corporation for cash, which they now have on hand."

The finding that the trustees have not conducted or carried on the corporate business since the forfeiture was apparently made in response to a charge in the complaint that since the forfeiture they had conducted and still continue to conduct the corporate business in the same manner as before the forfeiture, with the intent to reinstate the corporate existence under an enabling act which it was expected would be enacted by the Legislature, and that this was done without the consent of the plaintiff or his assignor. The finding disposes of that charge.

There is also a finding that Amelie A. Rossi, before transferring her seven shares to the plaintiff, had requested the trustees to

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convey to her an undivided seven one-hundredths of the real property of the corporation, claiming at the time that the personal property was ample for the payment of the corporate debts and of all the expenses of the settlement of its affairs.

It does not appear that at the time the request last mentioned was made the trustees had sold any personal property, or had on hand enough money to pay the debts and expenses. Consequently, even if we assume for the moment that the title to the land was vested in the trustees, and that a conveyance from them to the stockholders was necessary to clothe them with the title, the finding that the trustees have not neglected their duties necessarily implies that the affairs of the company were not then in a condition to make it their present duty to convey the title to the stockholders, and that the failure to convey was not a breach of their duty as trustees.

The amendment of 1907 (St. 1907, p. 746, § 2) to the act of 1905 (St. 1905, p. 493, § 10a) provides that upon the forfeiture of a corporate charter thereunder the directors then in office "are deemed to be trustees of the corporation and stockholders * * * and have full power to settle the affairs of the corporation." It also gives them power to maintain and defend actions pending by or against the corporation and to take all legal proceedings necessary to fully settle the corporate affairs, and provides that they may be sued by any person having a claim against the corporation.

[4-6] The directors of a corporation, before its dissolution, do not, by virtue of their office, hold or possess any title to or interest in the property of the corporation. The title is wholly vested in the corporation. The above statute providing that, upon forfeiture of the charter, the directors shall become trustees for the corporation and its stockholders to settle its affairs, does not purport to invest the trustees with any title to the property formerly belonging to the corporation. They get by the forfeiture nothing more than the statute gives them, and that is merely a power over the property, not the title. The corporation having ceased to exist, it is no longer capable of holding the title or the possession, the property belongs to the persons who were its stockholders at the time it ceased to be a corporation (Havemeyer v. Superior Court, 84 Cal. 362, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192), and the right of possession passes to the directors by force of the statute making them trustees to settle the corporate affairs, since such right must be necessary for that purpose.

[7-9] The duties of the trustees are measured by their powers and by the principles of law and equity applicable to the conditions. They have in their possession property belonging to others, they are bound to settle the affairs of the former owner, and they have all the power to deal with and dispose of the property that is necessary to accomplish that object. The interests they are to serve are the interests of the stockholders to whom the property belongs and of the creditors of the defunct corporation whose debts constitute a paramount charge upon that property. The forfeiture declared by the statute takes place instantly upon the failure to pay the license tax within the time allowed. It may strike the corporation dead while it is a going concern with large operations or contracts in process of completion which, if not prosecuted to the end, may entail great loss to the stockholders. It may occur while debts are owing, but not yet due or payable. The property may be in a condition reasonably requiring further and continued work for its preservation or to make it valuable. The obvious purpose of this statute, in view of these circumstances, is, as was said in the Havemeyer Case above cited, "to leave the whole matter of liquidation and distribution to the exclusive control of the directors of the corporation in office at the date of dissolution" (84 Cal. 365, 24 Pac. 129, 10 L. R. A. 627, 18 Am. St. Rep. 192), and to render it unnecessary and improper for a court to intervene in their proceedings, or to supervise the same in any particular, unless they are guilty of "neglect of duty or abuse of power" (84 Cal. 367, 24 Pac. 129, 10 L. R. A. 627, 18 Am. St. Rep. 192). In order to justify the interference of a court, says the Supreme Court of Alabama, the mere fact of dissolution, or forfeiture of the charter, is not enough; the facts appearing "must be of a character to show that the trustees are incompetent or unfaithful, or are mismanaging the property to the injury of the complainant, or are without power and authority to subserve some peculiar interest or right of the party complaining and that he is being injured thereby." Weatherly v. Capital, etc., Co., 115 Ala. 172, 22 South. 142. This language was used with reference to an application for the appointment of a receiver to take charge of and administer the corporate assets, as also was the language in the Havemeyer Case, but the same principles apply to any application for the intervention of the judicial power to supersede, supervise, or control the powers conferred by the statute upon the trustees.

[10] It was not a necessary part of the statutory duty of the trustees to find a buyer for the land, or to sell the same, otherwise than in order to settle the corporate affairs. If they had money to pay all debts and expenses and all other corporate affairs were disposed of, it would be no abuse of their discretion if they merely delivered the possession of the land to the stockholders as tenants in common according to their interests, leaving them to do with it what they pleased. The fact that they did not look for

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a buyer is not, of itself, a breach of duty. It must also appear, in order to justify judicial interference to order a sale, that the interests of the parties and the settlement of the corporate affairs required a sale. This does not appear.

[11] As to the finding that the trustees did not distribute to the stockholders the excess of the money in their hands over the debts, it is to be observed that there is no finding that the debts were then due or payable, or that the excess would not be necessary to pay the expenses of carrying on the affairs to that date and of settlement; also that, even if this were a dereliction of duty, it would not authorize the subsequent proceedings and orders for a sale, but only an order directing the distribution of the surplus.

The respondents rely on the decision of the Supreme Court of the United States in Mason v. Pewabic M. Co., 133 U. S. 58, 10 Sup. Ct. 224, 33 L. Ed. 524, to the effect that the rights of a stockholder in the corporate assets upon the dissolution do not differ from those of each partner on a dissolution to have the partnership property converted into money by a sale, even though a sale may not be necessary to pay the debts. The remark was made in the course of discussion and with reference to facts unlike those of the case at bar. There the corporation had dissolved by expiration of its charter. The directors in office had disregarded this fact, had carried on the business of the corporation for 11 months, had levied and collected an assessment of $88,000 on the stock, and in pursuance of a vote of the holders of a majority of the stock were about to transfer all the property to a new company with the intent to compel the minority stockholders to exchange their stock for a like amount of stock in the new company, without their consent and against their will. The suit was by the minority stockholders to enjoin this transfer and the proceedings to that end, to have a receiver appointed, and to compel a settlement of the corporate affairs. In such case it is doubtless true that the stockholders might ask for and obtain an order for a sale of the property. The decision is authority for the proposition that neither the trustees nor the majority stockholders can compel the minority to join in the formation of a new corporation and transfer their shares to it, but it is not applicable to the point under discussion. The trustees there were acting in violation of the duties of their trust. The case is not applicable here.

The consequence of these conclusions is that the interlocutory judgment, and all the subsequent proceedings and orders are unsupported by the facts and without authority. On the facts found the judgment should have been for the defendants.

The briefs discuss at length the question whether or not it was within the power of the trustees to relieve the corporation from the forfeiture and reinstate it as a corporation, without the consent of all the stockholders, by paying the license taxes, as provided in the amendment of section 6 of the act, which took effect August 10, 1913, after the entry of the interlocutory judgment. Stats. 1913, p. 513. A supplemental answer was filed by appellants alleging such reinstatement. The conclusions we have reached render it unnecessary to consider this question.

The orders appealed from are reversed, and the interlocutory judgment and all subsequent proceedings vacated.

We concur: SLOSS, J.; LAWLOR, J.

(174 Cal. 49)

NEALE v. MORROW. (S. F. 7034.)

(Supreme Court of California. Dec. 16, 1916. Rehearing Denied Jan. 15, 1917.)

1. APPEAL AND ERROR ⟸528(3)—STATEMENT OF FACTS — DELAY IN MOVING FOR NEW TRIAL.

A proposed statement of facts prepared under Code Civ. Proc. § 661, providing for such a statement subsequent to the ruling on a motion for new trial, cannot be considered where the court had no jurisdiction over the motion for new trial because the notice thereof was not filed in time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2388; Dec. Dig. ⟸528(3).]

2. NEW TRIAL ⟸119 — MOTION — DELAY IN FILING—RELIEF.

The trial court, even under Code Civ. Proc. § 473, authorizing it in furtherance of justice to allow a party to amend any pleading, or proceeding, and to enlarge the time for answer or demurrer, could not relieve the defeated party of the consequences of his failure to file a motion for new trial within the time required.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 243; Dec. Dig. ⟸119.]

3. APPEAL AND ERROR ⟸528(3)—STATEMENT OF FACTS — DELAY IN MOVING FOR NEW TRIAL.

A proposed statement of facts prepared under Code Civ. Proc. § 661, for appeal from the denial of a new trial, cannot be considered on the appeal from the judgment where the court was without jurisdiction of the motion for new trial, though a statement settled in connection with the motion for new trial may be used on appeal from the judgment regardless of whether it was actually used on the motion for new trial or whether any appeal was taken from the denial of the new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2388; Dec. Dig. ⟸528(3).]

4. APPEAL AND ERROR ⟸553(1)—STATEMENT OF FACTS—USE AS BILL OF EXCEPTIONS.

Where a proposed statement of facts after motion for new trial was invalid because of delay in filing notice of the motion and was filed too late to serve as a bill of exceptions under Code Civ. Proc. § 650, either the lower court or the Supreme Court could, under section 473, authorizing courts to allow a party to amend any pleading or proceeding and to enlarge the time for demurrer or answer, relieve appellant from the effect of his delay, so that the statement might be considered as a bill of exceptions, but it cannot be so considered where no application for such relief was made or granted, and

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the court simply settled the statement over the protest of appellee.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2461, 2462, 2466–2471; Dec. Dig. ⊂⊃553(1).]

5. APPEAL AND ERROR ⊂⊃544(3)—QUESTIONS REVIEWABLE — ABSENCE OF STATEMENT OF FACTS AND BILL OF EXCEPTIONS.

Where there is no statement of facts or bill of exceptions which can be considered, the Supreme Court can only notice errors appearing on the judgment roll alone.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2417, 2424, 2479; Dec. Dig. ⊂⊃544(3).]

6. PLEADING ⊂⊃349 — JUDGMENT ON PLEADINGS—ADMISSIONS IN ANSWER.

An answer admitting the execution and nonpayment of the note sued on does not entitle plaintiff to judgment on the pleadings, where the complaint alleged the circumstances under which the note was given as a guaranty, and the answer alleged facts relieving defendant from liability on his guaranty.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1067–1069; Dec. Dig. ⊂⊃349.]

7. APPEAL AND ERROR ⊂⊃1099(3) — SUBSEQUENT APPEALS—LAW OF THE CASE.

A decision by the Supreme Court on a former appeal that the plaintiff must prove certain facts as alleged in his complaint, and that the allegations of the answer were sufficient, is conclusive against the plaintiff on a subsequent appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4372; Dec. Dig. ⊂⊃1099(3).]

Department 1. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Vincent Neale, as special administrator of the estate of James Laidley, deceased, against A. E. Head, in which Robert H. Morrow, as administrator with the will annexed, of the estate of A. E. Head, was substituted as defendant. Judgment for the defendant, and plaintiff appeals. Affirmed.

Vincent Neale, of San Rafael, in pro. per. R. H. Morrow, Garber, Creswell & Garber and John O'Gara, all of San Francisco, for respondent.

LAWLOR, J. This is an appeal from a judgment of dismissal upon the granting of defendant's motion for a nonsuit. The action is a revival of one to recover judgment upon a promissory note which was the subject of consideration by this court in Neale v. Head, 133 Cal. 42, 65 Pac. 131, 576. See, also, Neale v. Morrow, 150 Cal. 414, 88 Pac. 815, and Neale v. Morrow, 163 Cal. 445, 125 Pac. 1052. In the case reported in 133 Cal. 42, 65 Pac. 131, 576, a judgment rendered in plaintiff's favor and an order denying the defendant's motion for a new trial were reversed. Following the last appeal, a trial in the action was held which resulted in the judgment of dismissal.

[1] The plaintiff appeals solely from the judgment contending that the court erred, in several instances, in excluding certain evidence offered for the purpose of proving the testimony of material witnesses who had testified at the former trial, but who had since died. We cannot, however, consider any of these alleged errors, as there is no legal record upon which such errors can be reviewed. The only statement of the case contained in the record is one which the plaintiff attempted to prepare under section 661 of the Code of Civil Procedure, following a denial of his motion for a new trial which was made on the minutes of the court. But the plaintiff did not initiate any valid proceedings for a new trial as contemplated by that section. It was provided therein that the statement of the case "shall be proposed by the party appealing, or intending to appeal, within ten days after the entry of the order, or such further time as the court in which the action is pending, or a judge thereof, may allow." But the plaintiff, while serving his notice of intention within 10 days after notice of the entry of judgment, did not file the notice until 21 days thereafter, notwithstanding that he had neither applied for nor obtained an order of court or a stipulation of counsel allowing such extension of time. The motion, however, was heard on the minutes of the court, at which time the defendant filed an objection thereto, upon the ground that the filing of the notice of intention in time is essential, and that the court was therefore without jurisdiction to entertain the motion for a new trial.

[2] By way of answering the objection, the plaintiff filed an affidavit setting forth various reasons and facts in explanation of his failure to file his notice within the time prescribed by the Code. But the court did not have power to consider matters offered in excuse of such failure, even under section 473 of the Code of Civil Procedure. It was wholly without jurisdiction to relieve the appellant of the consequences of his failure to file the notice in time, and the right to move for a new trial was lost. Union Collection Co. v. Oliver, 162 Cal. 755, 124 Pac. 435. There being therefore no proceeding for a new trial upon which the proposed statement could rest, it was not a good statement after decision of such a motion.

[3, 4] Nor can a statement, prepared under such circumstances, have any legal efficacy as a duly authorized statement on appeal from the judgment. It is true that a statement settled in connection with a motion for a new trial may be used on such an appeal, and that the right to so use it does not depend upon the fact that it was actually used on a motion for a new trial, or that an appeal was taken from the order denying the motion for a new trial. Wall v. Mines, 128 Cal. 136, 60 Pac. 682; Kelly v. Ning Yung, etc., 138 Cal. 602, 72 Pac. 148; Vinson v. L. A. Ry. Co., 141 Cal. 151, 74 Pac. 757; Blood v. La

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Serena L. Co., 150 Cal. 764, 89 Pac. 1090. But these cases were all cases in which there was a valid proceeding on a motion for a new trial, and the statement was properly prepared in connection with such proceeding. Viewed as a bill of exceptions to be used on appeal from the judgment, the proposed statement was, of course, too late. Code Civ. Proc. § 650. Notwithstanding the failure to properly initiate a proceeding for a new trial, the moving party might have been relieved by the lower court under section 473 of the Code of Civil Procedure from his failure to present his statement or bill of exceptions in time, that is to say, the proposed statement might have been regarded as having a double aspect—as designed to be used both on a motion for a new trial and on appeal from the judgment, and though failing in the first aspect, might have been used in the other. The court would have had jurisdiction to relieve the plaintiff from his failure to serve his proposed statement in time. Haviland v. Southern Pac. Edison Co., 158 Pac. 328; Stonesifer v Kilburn, 94 Cal. 33, 42, 29 Pac. 332. But here the plaintiff made no application for relief under section 473, and the court did not undertake to grant such relief. Scott v. Glenn, 97 Cal. 513, 32 Pac. 573. It merely settled the bill over the protest of the defendant. The statement is therefore wholly void for either use on an appeal from the order denying a new trial, or on an appeal from the judgment.

[5, 6] This leaves the case to stand upon the judgment roll alone, and we can only notice errors appearing therein. The plaintiff insists that the judgment of nonsuit cannot be upheld for the reason that:

"The complaint alleges the making of a promissory note, which is set out verbatim in the complaint, and the answer admits the delivery of said note and the nonpayment."

But the complaint, after setting out the note and alleging its delivery and nonpayment, states in elaborate detail the history of the various transactions and proceedings, following the execution of the note by A. E. Head, the defendant's testator, as one of 50 guarantors of the California Mutual Life Insurance Company, including the unsuccessful efforts of the company to realize a profit on its insurance business, the involuntary insolvency in 1885, the final liquidation of its affairs, and the sale of the notes under execution. These facts are all enumerated in our former decisions in this action and need not be repeated here. See, also, Morrow v. Superior Court, 64 Cal. 383, 1 Pac. 354; In re Cal. Mut. Life Ins. Co., 81 Cal. 364, 22 Pac. 869. The complaint, apparently following the decision in 133 Cal. 42, 65 Pac. 131, 576, also alleges the assignment of the note to the estate, which the plaintiff represents as special administrator, in settlement and extinguishment of a claim against the company arising out of an insurance policy on the life of the deceased. Other allegations cover matters which need not be mentioned here. Finally the complaint alleges a demand in 1888 for payment of the note and interest, and the subsequent, unsuccessful attempts to recover judgment.

The answer, admitting the making of the note under the circumstances alleged, sets up by way of defense the same matters considered and approved in Neale v. Morrow, 133 Cal. 42, 65 Pac. 131, 576, and denies, for the most part on information and belief, various material allegations of the complaint, as, for instance, the demand upon defendant's testator for payment, the assignment of the note to plaintiff as a creditor of the company, and the proceedings whereby the company was decreed insolvent. The plaintiff filed a general demurrer to the answer. He contends that inasmuch as many of the allegations of the complaint were based upon the findings of the court at the former trial, the facts covered therein had been proved and were known to the defendant, and could not be denied upon information and belief—that such denials were for that reason insufficient and must be disregarded. But the findings were nullified by the reversal of the judgment, and it was not only necessary for the plaintiff to plead and prove over again the facts material to his cause of action, but proper for the defendant to deny them.

[7] The plaintiff further argues that "all the allegations in the complaint outside those alleging the making of the note, the demand, and the nonpayment, were only required or proper to offset and forestall the plea of the statute of limitations," and "became functus officio ad hoc" upon the decision in Neale v. Morrow, 150 Cal. 414, 88 Pac. 815. But the contention is without merit. The decision of this court in 133 Cal. 42, 65 Pac. 131, 576, determined that it was necessary for plaintiff to prove the facts alleged. And that decision also held that the acts and transactions set up in the answer operated to discharge the guarantors from their liability. Even assuming that the answer admits the demand and nonpayment of the note, we cannot see how the plaintiff, in view of the reasoning of the court in that decision, now stands in any better position than he did at the former trial. The plaintiff argues at great length that the decision "is not good law," and that the answer consequently presents no legal defense to his right to recover judgment on the note. But that case constitutes a final adjudication which is conclusive as to the rights of the plaintiff in regard to all questions decided therein, and this court cannot depart from its consequences. Southern Pac. Ry. Co. v. Edmunds, 168 Cal. 415, 143 Pac. 597; Higuero v. Corea, 168 Cal. 788, 145 Pac. 529. As the answer sets up a good defense, and denies material allegations of the complaint, it was sufficient as against a general demurrer, and the plain-

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tiff was not entitled to judgment on the pleadings. This disposes of the appeal.

Judgment affirmed.

We concur: SLOSS, J.; SHAW, J.

(32 Cal. App. 97)

COLQUHOUN v. PACK et al. (Civ. 1772.)

(District Court of Appeal, First District, California. Nov. 16, 1916.)

1. SALES ⇐52(6)—ACTION—EVIDENCE.

In a proceeding under Code Civ. Proc. § 989, providing that parties not summoned in action on joint contract may be summoned in the action after judgment, evidence that defendant was associated in the ownership of certain placer claims with the defendant against whom judgment had been recovered by default, and that he bought supplies, for developing such claims, from plaintiffs, for which the defaulting defendant also promised to pay, *held* to show that defendants were jointly indebted, in view of the presumption created by Civ. Code, § 1431, that an obligation imposed on several persons is joint.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 138; Dec. Dig. ⇐52(6).]

2. PRINCIPAL AND AGENT ⇐145(2)—UNDISCLOSED PRINCIPAL.

The fact that a principal's connection in a transaction was not disclosed will not relieve him from obligation thereon, where such obligation was created for and in behalf of himself and the person acting as his agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 514, 516, 517; Dec. Dig. ⇐145(2).]

3. EVIDENCE ⇐309 — ADMISSIONS — PRELIMINARY PROOF.

In action for goods sold, it was not error to permit one jointly liable with defendant to testify as to conversations with defendant, without first showing the relation of principal and agent existed between them, in view of Code Civ. Proc. § 1870, subd. 5, providing that evidence may be given of act or declaration of a joint debtor after proof of joint debt.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1162; Dec. Dig. ⇐309.]

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by W. W. Colquhoun against Thos. W. Pack and others. From a judgment for plaintiff and denial of new trial, defendant Henry E. Lee appeals. Affirmed.

H. L. Clayberg, Clark Clement, and Clayberg & Whitmore, all of San Francisco, for appellant. Jos. K. Hutchinson, of San Francisco (Walter Slack, of San Francisco, of counsel), for respondent.

LENNON, P. J. This is an action for the value of goods, wares, and merchandise alleged to have been sold and delivered by plaintiff's assignors to the defendants Thomas W. Pack, T. O. Toland, and Henry E. Lee at their special instance and request. The original summons was not served upon the defendant Lee. On February 4, 1913, a default judgment was entered against the defendant Pack. With this judgment as a basis, plaintiff, pursuant to the provisions of section 989 of the Code of Civil Procedure, procured the issuance of a summons directed to the defendant Lee, commanding him to show cause why he should not be bound by the judgment against Pack in the same manner as though he had been originally served with summons. Responding to this summons, defendant Lee appeared in the action by filing an answer, in which, pursuant to the provisions of section 992 of the Code of Civil Procedure, he specifically denied any liability on the obligation upon which the judgment against the defendant Pack was recovered, and thereby put in issue all the material allegations of the plaintiff's complaint as fully and effectively as he might have done in the first instance had the original summons been served upon him. Upon the issues thus raised the trial court, among other things, and in addition to finding the prior rendition and entry of the judgment against the defendant Pack, found that the plaintiff's assignor had sold and delivered goods, wares, and merchandise of the reasonable value of $953.05 to the defendants Thomas W. Pack and Henry E. Lee, and to each of them, at the special instance and request of each, and that no part of said sum had been paid save the sum of $300. From its findings the trial court deduced the conclusion of law that the defendant Lee was bound by the judgment against the defendant Pack to the extent of $653.05 with interest thereon from the 1st day of March, 1912, in the same manner as though he had been originally served with summons. Judgment was accordingly entered against Lee in the sum of $786.25, from which and an order denying a new trial he has appealed.

Upon the trial of the case the plaintiff presented the testimony of three witnesses—that of the defendant Pack and C. J. and E. J. Teagle, plaintiff's assignors. No evidence was produced and no evidence of any kind offered on behalf of the appealing defendant. The defendant Pack testified, in effect, that he and the defendants Lee and Toland were associated in the ownership of certain placer claims located by them at Searles Borax Lake; that he and they had arranged for the performance of certain assessment work to be done on these claims; that defendants Lee and Toland instructed him to take a party of laborers to the claims to do that work; that the defendant Lee employed one Varney to take these laborers and provisions for them in automobiles to the camp which he (Pack) was to establish on the lake; that he established the camp and bought supplies for several days from the Teagles, plaintiff's assignors; that he requested the Teagles to let Varney have what was needed at the camp; that he later repeated this request at the express direction of the defendant Lee; that subsequently in

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April, 1912, he, at the defendant Lee's direction, wrote the Teagles promising payment; that Lee, during the spring of 1912, endeavored to raise the money necessary to pay the Teagles for the goods purchased from them; that the defendant Lee never at any time repudiated the bill due the Teagles, but, on the contrary, declared that he would pay the same "as soon as he could get the money." The testimony of the Teagles, which was presented in the form of depositions, established the reasonable value of the merchandise in question to be the sum of $953.05, and the delivery of the same to Varney for use at the camp established by Pack and maintained by all of the defendants for the performance of the assessment work hereinbefore referred to. Their testimony, however, showed that but $300 had been paid on account, and that their claim against the defendants had been duly assigned to the plaintiff.

The foregoing résumé of the evidence adduced in support of the plaintiff's case is made in response to the contention that the evidence fails to show that the defendants Pack and Lee were jointly indebted to plaintiff's assignor, and that therefore the plaintiff failed to bring his case within the provisions of section 989 of the Code of Civil Procedure.

[1, 2] That the defendant Pack was liable for the payment of the indebtedness in suit was established beyond controversy by the judgment previously entered against him; and that the defendants Lee and Pack were principals in the transaction out of which the obligation arose was, we think, sufficiently shown, and therefore the obligation in suit was imposed upon both. Consequently the presumption prevails that the obligation was joint. Civil Code, § 1431. The fact that the defendant Lee's connection as a principal in the transaction was not disclosed to plaintiff's assignors will not avail to relieve him of an obligation which was created for and in behalf of him and his codefendant. Dashaway Ass'n v. Rogers, 79 Cal. 211, 21 Pac. 742.

[3] The trial court did not err in its ruling permitting the defendant Pack to testify to conversations with the defendant Lee without first showing that the relation of principal and agent existed between them. The testimony of the defendant Pack contained no suggestion that he was acting as the agent of the defendant Lee in the transaction in suit in any respect save that which may have been implied from the fact that the defendants Toland and Lee were associated with him in the ownership and operation of the placer claims which they had located at Searles Borax Lake. Moreover, the joint obligation having been established, the testimony of Pack concerning the conduct and conversations of Lee in connection with the transaction in suit was rightfully received in evidence. Subdivision 5, § 1870, Code Civ. Proc.

The judgment and order denying a new trial are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

(32 Cal. App. 42)

PEOPLE v. BOLING. (Cr. 658.)

(District Court of Appeal, First District, California. Nov. 13, 1916. Rehearing Denied by Supreme Court Jan. 11, 1917.)

CRIMINAL LAW ⇐913(1) — SENTENCE — TIME FOR PRONOUNCEMENT — RIGHT TO NEW TRIAL.

Under Pen. Code, § 1191, providing that after a verdict of guilty the court must appoint a time for judgment not less than 2 nor more than 5 days after the verdict, provided that the time may be extended not more than 10 days to hear motion for new trial or in arrest of judgment, and not more than 20 days where the question of probation is considered, but that the time may be further extended at defendant's request not more than 90 days, and section 1202, requiring judgment to be pronounced on the day appointed and if not rendered within the time fixed or to which it is continued under section 1191, the defendant shall be entitled to a new trial, where verdict of guilty was rendered on March 25th and March 28th was fixed as the day for sentence, but on that day it was continued until April 4th, on which day motion for new trial was denied and defendant applied for probation, and the time was extended until April 20th and then until July 19th, when motion for new trial was made, it should have been granted, the time of extension not being cumulative, and more than 110 days having elapsed from the time of verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2137-2139, 2141, 2142, 2145; Dec. Dig. ⇐913(1).]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Clarence E. Boling was convicted of grand larceny, and from the judgment and order denying new trial, he appeals. Reversed.

E. A. Williams, E. D. Edwards, and James A. Burns, all of Fresno, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

RICHARDS, J. This is an appeal from a judgment of conviction of the defendant of the crime of grand larceny, and an order denying him a new trial upon his demand therefor, made under and by virtue of sections 1191 and 1202 of the Penal Code.

The verdict of the jury, finding the defendant guilty of the offense charged, was rendered on March 25, 1916, and the court on that day made an order, fixing March 28, 1916, as the time for pronouncing sentence. On the last-named day an order was made, further continuing the time for sentence to April 4, 1916, on which day a motion for a new trial was made by the defendant and denied by the court, whereupon the defendant made an application to the court for

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probation, and the court extended the time for pronouncing judgment until April 20th in order to receive a report from the probation officer. On April 20th at the request of the defendant the court made an order continuing the time for pronouncing judgment until July 19, 1916, on which day the defendant moved the court for a new trial upon the ground that judgment had not been pronounced within the time limited by sections 1191 and 1202 of the Penal Code. Upon the hearing of said motion it appeared that these various extensions of time had resulted in continuing the time for pronouncing judgment of conviction for a period of 116 days after the day on which the verdict of the jury had been returned. The court denied the defendant's motion for a new trial made upon that ground, and proceeded to pronounce the judgment from which this appeal is taken.

We are able to see no escape from the appellant's contention that his motion for a new trial upon the last-named ground should have been granted in view of the terms of sections 1191 and 1202 of the Penal Code, and the construction which the Supreme and appellate courts have placed thereon. Section 1191 of the Penal Code reads as follows:

"After a plea or verdict of guilty, or after a verdict against the defendant on a plea of former conviction or acquittal, or once in jeopardy, the court must appoint a time for pronouncing judgment, which must not be less than two, nor more than five days after the verdict or plea of guilty; provided, however, that the court may extend the time not more than ten days for the purpose of hearing or determining any motion for a new trial, or in arrest of judgment; and provided, further, that the court may extend the time not more than twenty days in any case where the question of probation is considered in accordance with section 1203 of this Code; provided, however, that upon the request of the defendant such time may be further extended not more than 90 days additional. * * *"

Section 1202 of the Penal Code reads as follows:

"If no sufficient cause is alleged or appears to the court at the time fixed for pronouncing judgment, as provided in section 1191 of this Code, why judgment should not be pronounced, it must thereupon be rendered; and if not rendered or pronounced within the time so fixed or to which it is continued under the provisions of section 1191 of this Code, then the defendant shall be entitled to a new trial. If the court shall refuse to hear a defendant's motion for a new trial or when made shall neglect to determine such motion within the time fixed for pronouncing judgment, or within the time to which the same is continued under the provisions of section 1191 of this Code then the defendant shall be entitled to a new trial."

In the case of Rankin v. Superior Court, 157 Cal. 189, 106 Pac. 718, the Supreme Court, in construing the terms of these two sections of the Penal Code, held that the provisions for the extension of time to the extent of 10 days for the purpose of deciding a motion for a new trial, and of 20 days for the purpose of determining the question of probation upon the defendant's application therefor, were not cumulative, and that the latest date to which the court was authorized to extend the time for rendering judgment was a day not more than 25 days after the date of the return of the verdict. This decision of the Supreme Court was rendered prior to the amendment of section 1191 of the Penal Code in the year 1911, by the terms of which amendment the court was authorized to make an additional extension of 90 days at the request of the defendant; but the effect of this amendment cannot be held to have changed the rule already laid down in the Rankin Case; and, while it is strenuously contended by the respondent herein that the language of the Supreme Court in that case declaring the rule was obiter, it nevertheless has been followed by the appellate courts in later cases (People v. Polich, 25 Cal. App. 464, 143 Pac. 1065; People v. Winner, 160 Pac. 689), and that being so, this court feels that if a departure is to be made from the rule laid down in the Rankin Case, such departure should be made by the Supreme Court, and not by this tribunal.

It follows necessarily that the judgment and order denying the defendant's motion for a new trial must be reversed, and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

(32 Cal. App. 87)

HUSBAND v. HUSSEY. (Civ. 1801.)

(District Court of Appeal, First District, California. Nov. 15, 1916.)

APPEAL AND ERROR ⇐1011(1)—CONFLICTING EVIDENCE.

A finding based on conflicting evidence is not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988; Dec. Dig. ⇐ 1011(1).]

Appeal from Superior Court, Alameda County; N. D. Arnot, Judge.

Action by Charles H. Husband against William A. Hussey. From a judgment for plaintiff and denial of new trial, defendant appeals. Affirmed.

Robinson, Gillis & Sizer and Robinson & Sizer, all of Oakland, for appellant. Reed, Nusbaumer & Bingaman, of Oakland, for respondent.

PER CURIAM. This is an appeal from a judgment in the sum of $1,000 entered in favor of the plaintiff in an action for the value of 10 shares of the capital stock of a certain corporation which, it was alleged, the defendant for a valuable consideration had agreed to deliver to the plaintiff.

The evidence adduced upon the trial of the case was directed chiefly to the issue raised by the defendant's answer as to whether or not he had agreed to deliver to the plaintiff

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any number of shares of the corporate stock in controversy in excess of the 10 shares which the plaintiff's complaint alleged that he had received pursuant to his agreement with the defendant.

No point of law is involved in the appeal. It is grounded solely in the contention that the finding of the trial court that the defendant had agreed to deliver 20 and not 10 shares of the stock in question is contrary to the preponderance of the evidence, which, upon that phase of the case, is in pronounced conflict; and we are requested by the appellant to weigh the evidence and consider the credibility of witnesses. This, of course, under the familiar rule, we cannot do.

The judgment and order appealed from are affirmed.

(32 Cal. App. 75)

McGINN v. PRITCHARD et al. (Civ. 1795.)

(District Court of Appeal, First District, California. Nov. 14, 1916.)

MECHANICS' LIENS ⊂=64 — VALIDITY — WHO MAY CREATE.

The purchaser of real estate under installment contract cannot impress the land with a lien for street improvements binding upon the owner, in the absence of proof that the real owner has by his conduct so far concurred in the improvement as to be estopped to deny the validity of the lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 81; Dec. Dig. ⊂=64.]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by George W. McGinn, doing business as G. W. McGinn & Co., against W. S. Pritchard, J. Maud Giles, and another. From a judgment for defendants Giles and another, and against defendant Pritchard, plaintiff appeals. Affirmed.

J. T. Williams and John D. Harloe, both of San Francisco, for appellant. H. M. Owens, of San Francisco, for respondents.

PER CURIAM. This is an appeal from a judgment in favor of the defendants J. Maud Giles and Maurice Rosenthal, sued under the fictitious names of Jane Doe and John Doe, in an action brought to foreclose a lien for street work. The above named defendant J. Maud Giles was the owner of the property to be affected by this lien on the 6th day of December, 1911, and on that day entered into a contract with W. T. Pritchard for the purchase by the latter of said property, by the terms of which said Pritchard went into possession of the same. While so in possession of said property under said contract of purchase, Pritchard entered into a contract with the plaintiff herein for the doing of certain street work in front of said property, which work said plaintiff thereafter did. The defendant Pritchard, however, defaulted in the performance of his contract of purchase and abandoned the same, and the defendant Giles thereafter conveyed the property to Maurice Rosenthal. Upon the completion of the street improvement in front of said property by the plaintiff he filed his claim of lien therefor, and in due course brought this action to foreclose the same. The trial court rendered judgment against said Pritchard for the contract price of said street improvement, but refused to enforce a lien against the property.

The only question raised upon this appeal is as to whether the holder of a contract of purchase of a lot of land can impress the land with a lien for street improvements which shall be binding upon the owner thereof. The case of Santa Cruz Rock Paving Co. v. Lyons, 117 Cal. 212, 48 Pac. 1097, 59 Am. St. Rep. 174, is decisive of this question; and it was there held that it was no more within the constitutional power of the Legislature to authorize the reputed owner of a lot or parcel of land to create a lien thereon against the will of the real owner than it would be to authorize such reputed owner to transfer the title to said land. It has also been frequently held in other jurisdictions that one who is in possession of land under a contract of purchase cannot subject such land to a lien for improvements upon the property or upon the street adjacent thereto, in the absence of proof that the real owner of the premises has by his conduct so far concurred in such improvement as to be estopped to deny the validity of the lien. Johnson v. Soliday, 19 N. D. 463, 126 N. W. 99; Callaway v. Freeman, 29 Ga. 408; Wilkins v. Litchfield, 69 Iowa, 465; Jones on Liens (3d Ed.) § 1247.

The record in this case presents no evidence of such estoppel, and it therefore follows necessarily that the judgment should be affirmed.

It is so ordered.

(32 Cal. App. 32)

MONTGOMERY & MULLEN LUMBER CO. v. OCEAN PARK SCENIC RY. CO. (Civ. 1803.)

(District Court of Appeal, Second District, California. Nov. 11, 1916.)

1. APPEAL AND ERROR ⊂=1047(1)—HARMLESS ERROR — EVIDENCE — BOOKS OF ORIGINAL ENTRY AND BILL OF PARTICULARS.

If books of original entry of an account are admissible, no prejudice results from the introduction of a bill of particulars copied therefrom, under the court's statement that the admission and use were for convenience and time saving; the books being accepted as original evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4146, 4150–4152; Dec. Dig. ⊂=1047(1).]

2. EVIDENCE ⊂=376(9) — ADMISSIBILITY — BOOKS OF ORIGINAL ENTRY—PREDICATE.

Where the manager testified that books of original entry were kept under his direction

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and were correct, there was sufficient predicate for their introduction in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1640; Dec. Dig. ⟸376(9).]

3. APPEAL AND ERROR ⟸931(1) — SCOPE — PRESUMPTIONS.

The court on appeal must assume a controverted question, when supported by evidence, in favor of the findings of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3762; Dec. Dig. ⟸931(1).]

4. NEW TRIAL ⟸98—GROUNDS—SURPRISE—MATERIALITY OF EVIDENCE.

In an action by a lumber company for lumber sold, where witnesses testified that they checked lumber used by defendant and found a little less than that charged for by plaintiff, but that the usual percentage of waste would cover the discrepancy, testimony of another witness that defendant had used some of the lumber to repay another party for lumber borrowed was not sufficiently material to require a new trial for surprise.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 199, 200; Dec. Dig. ⟸98.]

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the Montgomery & Mullen Lumber Company against the Ocean Park Scenic Railway Company. Judgment for plaintiff and order denying motion for new trial, and defendant appeals. Affirmed.

Walter M. Rheinschild and Valentine & Newby, all of Los Angeles, for appellant. Sheldon Borden, George H. Moore, and Richard J. Culver, all of Los Angeles, for respondent.

CONREY, P. J. The defendant's appeal is from an order denying its motion for a new trial. The action was brought to recover an alleged balance due to the plaintiff for lumber sold and delivered to the defendant. It was found by the court that the plaintiff sold and delivered to defendant lumber of the value of $2,875.15, of which sum $2,000 was paid by the defendant. Appellant claims that the evidence is insufficient to support the finding that any lumber was delivered exceeding in value the amount paid. The controversy between the parties relates to the quantity of lumber delivered, and not to the prices charged with respect to the various items.

C. W. Pinkerton, the manager of plaintiff's business, testified to the sale of lumber by plaintiff to the defendant. Certain books were produced in court which he said contained the original charges. From those books a bill of particulars was compiled, which, prior to the trial, was served upon the defendant and which was used in connection with Pinkerton's testimony. He said:

"Our office system is such that, when we send an order to the yards to be loaded for delivery, we have working in the yards men that we call salesmen; they take that order; they load it on the wagon; and, after they get the load loaded on the wagon, they go to the office and make the charge on these books as the load is loaded. Those entries are made up in triplicate. The salesman in making that charge simply itemizes out so many pieces of each kind. The triplicate copy is given to the driver and delivered on the job with the load. Then in the course of business the office force makes the extension in dollars and cents. Although these books appear to have been written with a carbon, they were made at the time the original ticket was made. The original is sent at the end of the month to the customer. These books were kept under my direction, and I know to my own knowledge that these are correct charges."

Upon that statement, the books as a whole and as one exhibit were introduced in evidence. They are not contained in the record on appeal. The bill of particulars was by stipulation introduced into the bill of exceptions in lieu of setting out a copy of the books, and Pinkerton testified that the original bill of particulars corresponds with the charges as contained in the books, "so far as feet, etc., are concerned."

[1] The defendant objected to the bill of particulars when it was offered in evidence, and now urges that its admission was error. If the books themselves were admissible, we think that the defendant could not be prejudiced by the use which the court made of the bill of particulars. Its admission and use were distinctly stated by the court to be for purposes of convenience and the saving of time; the books being accepted as the original evidence.

[2] The only question then, as to this matter relates to appellant's contention that no sufficient foundation was laid for the admission of the books. Counsel for appellant point out that the men who actually made the entries in the books did not themselves testify to the correctness of the items entered by them. This was not necessary in order to make a prima facie showing, since Pinkerton testified that the books were kept under his direction and were correct. The record thus made substantially conforms to the requirements of the rule limiting the admission of books in evidence, as stated in Chan Kiu Sing v. Gordon, 171 Cal. 28, 151 Pac. 657, as follows:

"In order to lay the foundation for the admission of such evidence, it must be shown that the books in question are books of account kept in the regular course of the business; that the business is of a character in which it is proper or customary to keep such books; that the entries were either original entries or the first permanent entries of the transactions; that they were made at the time, or within reasonable proximity to the time, of the respective transactions; and that the person making them had personal knowledge of the transactions, or obtained such knowledge from a report regularly made to him by some other person employed in the business whose duty it was to make the same in the regular course of business."

It is insisted that the court erred in admitting the testimony above stated of the witness Pinkerton as to the correctness of the accounts, of which accounts appellant says that Pinkerton had no personal knowledge. Chandler v. Robinett, 21 Cal. App.

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333, 337, 131 Pac. 891, is cited in support of this objection. But in that case it appeared that the witness who testified that the book of account was "a true and correct account of the transaction" was a bookkeeper who had himself made the entries without having personal knowledge of the transactions, and the entry in the book itself was so indefinite and uncertain that it was held to be inadmissible as evidence of the fact sought to be proved. Neither was it shown that the entry had been made at a time contemporaneous with the transaction to which it was supposed to relate. We think that the testimony of Pinkerton to which this objection is urged was properly admitted.

[3] It is not disputed that according to these books the amount of lumber furnished was the full amount claimed by the plaintiff. Pinkerton further testified as follows concerning the lumber:

"It was delivered on the Fraser Pier at Ocean Park. It was the scene of the Ocean Park Scenic Railway. The lumber was used for the building of an extension on the Ocean Park Scenic Railway. I was on the Fraser Pier every day during that period, and saw lumber being delivered and used."

After a controversy had arisen over plaintiff's demands on this account, Pinkerton and another witness checked up the lumber piece by piece that was used in the extension of the road and found a total of a little over 120,000 feet, without making any allowance for waste. The plaintiff claims to have actually delivered about 146,000 feet. There is testimony that the wastage in the use of lumber for a structure of that kind would reasonably be from 20 to 25 per cent. Twenty per cent. would be sufficient to cover the discrepancy; and, although other witnesses testified that the wastage need not be more than 10 per cent., we must assume this controverted question in favor of the findings of the court. Appellant says there is no pretense that the 120,000 feet checked was identified as lumber furnished by the plaintiff. We find, however, in the testimony of Paul D. Hows, who superintended the building of the extension of the railway, a statement that he ordered a majority of the lumber that went into the road, and that he does not recall ordering any lumber from any other company except the plaintiff for use in the extension.

There are several other points wherein it is claimed that the court erred in the admission of testimony. Although counsel neglected to refer us to the pages of the transcript which we were expected to examine, we have given the matters some attention and are satisfied that the rulings of the court with reference thereto were substantially correct.

[4] Finally, it is urged that the court should have granted a new trial because of surprise to the appellant in the testimony of one of plaintiff's witnesses, and on account of newly discovered evidence which it is claimed would have enabled the defendant to overcome said surprising testimony. The unexpected element was that according to the witness Lain some of the lumber furnished by the plaintiff to the defendant was not used in the railroad extension, but was transferred to another company to replace lumber which the defendant had previously borrowed from that company for use in some of defendant's work. The testimony thus produced was merely incidental to that part of the evidence whereby the plaintiff was attempting to show why the amount of lumber found in the structure as built was less than the amount of lumber alleged to have been delivered. The court had before it other evidence tending to show that the percentage of waste ordinarily and reasonably occurring was sufficient to account for that difference. It was therefore a matter within the discretion of the court to determine whether or not the new evidence, which defendant claims that it could produce if allowed a second trial of the case, would be likely to lead to a different determination of the main issue.

"A motion for a new trial on the ground of newly discovered evidence is properly denied where in the opinion of the trial court it is not probable that the additional evidence would have produced a different result." Atkinson v. Western Development Syndicate, 170 Cal. 511, 150 Pac. 363.

The order is affirmed.

We concur: JAMES, J.; SHAW, J.

(63 Okl. 44)

WATKOCHE et al. v. SCHULTZ et al.

(No. 8348.)

(Supreme Court of Oklahoma. Dec. 19, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⇐144—PARTIES—NECESSARY PARTIES—DISMISSAL.

Where, in an action to quiet title to real estate, certain defendants file disclaimers and judgment is rendered in favor of plaintiff against the remaining defendants, who bring proceedings in error to reverse said judgment and join with plaintiff as defendants in error, those defendants who filed disclaimers in the trial court and where defendants in error who filed disclaimers waive the issuance and service of summons in error, but no summons in error is issued and served upon plaintiff within the time prescribed by law, *held*, that defendants in error who filed disclaimers were not necessary parties to the proceeding in this court, and the cause should be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 923; Dec. Dig. ⇐144.]

Error from District Court, Okfuskee County; George C. Crump, Judge.

Suit by Lucineal Schultz against Watkoche and others and R. B. Selvidge. Judgment for plaintiff, and defendants bring error. On motion to dismiss. Motion granted.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

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Bell & Fellows, of Tulsa, for plaintiffs in error. Carroll & Mason, of Tulsa, for defendants in error.

HARDY, J. Defendant in error, Lucineal Schultz, brought suit in the district court of Okfuskee county against plaintiffs in error and defendants in error Selvidge, Owens, Gayer, and Caldwell, to clear her title to certain lands situated in said county. Thereupon defendants in error above named filed disclaimers, and plaintiffs in error filed answers and cross-petitions. Upon trial, judgment was for plaintiff decreeing to her the fee-simple title to said lands and canceling and removing as a cloud upon her title the conveyances by which plaintiffs in error held, and they bring the case here.

Motion for a new trial was overruled December 1, 1915. Petition in error with case-made attached was filed in this court on May 26, 1916, and summons in error issued upon that date, which was never served and returned. On July 31, 1916, alias summons in error was issued and served on said defendant in error Schultz on August 4, 1916, and she files motion to dismiss this proceeding because summons in error was not issued and served upon her within the time allowed by law for such service.

Service of summons in error was not had within the time prescribed, but it is urged that the cause was commenced by filing in this court a petition in error with case-made attached and a waiver of service of summons in error by all the defendants in error except Schultz, and that the action was then pending as to Schultz and the time for such service thereby extended, because said defendants in error are so united in interest with defendant in error Schultz as to bring the case within the meaning of section 4659, Rev. Laws 1910. That portion of the section applicable here is as follows:

"An action shall be deemed commenced, within the meaning of this article, as to each defendant, at the date of the summons which is served on him, or on a codefendant, who is a joint contractor or otherwise united in interest with him."

Schultz was plaintiff below and had no unity of interest with any of said defendants in error in the subject-matter of this litigation, but on the contrary was seeking to have her title quieted as against any interest which they might have had. They disclaimed any such interest, and therefore could not be in any wise affected by a reversal of the judgment rendered against plaintiffs in error. De Bolt v. Farmers' Ex. Bank, 148 Pac. 830; Seibert v. Bank, 25 Okl. 778, 108 Pac. 628; Love v. Cavett, 26 Okl. 179, 109 Pac. 553; Voris v. Robbins, 153 Pac. 120; Charvoz v. New State Bank, 153 Pac. 849; Gen. Elec. Co. v. Sapulpa & I. Ry. Co., 153 Pac. 189.

The motion to dismiss is therefore sustained and the cause dismissed. All the Justices concur.

(63 Okl. 19)

DUNCAN et al. v. RATCLIFF. (No. 6811.)

(Supreme Court of Oklahoma. Dec. 26, 1916.)

(Syllabus by Editorial Staff.)

APPEAL AND ERROR ⇐781(7)—REVIEW—DISMISSAL.

Where the judgment below has been satisfied, all questions become moot, and a writ of error will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3122; Dec. Dig. ⇐781(7).]

Error from District Court, Alfalfa County; James W. Steen, Judge.

Action between Hank Duncan and others and Lillian Ratcliff. There was a judgment for the latter, and the former bring error. Dismissed.

W. Wilder, of Cherokee, for plaintiffs in error. Titus & Talbot, of Cherokee, for defendant in error.

PER CURIAM. From the motion to dismiss filed herein by defendant in error, attached to which is the affidavit of the clerk of the district court, it appears that the judgment from which this appeal is prosecuted has been fully satisfied and discharged. Hence the questions presented here have ceased to exist and have become moot.

The appeal is therefore dismissed.

(63 Okl. 19)

FROST v. HALEY. (No. 6820.)

(Supreme Court of Oklahoma. Dec. 26, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⇐773(5) — REVIEW — BRIEFS.

Where plaintiff in error has prepared, served, and filed a brief as required by the rules of this court, and there is no brief filed and no reason given for its absence on the part of defendant in error, this court is not required to search the record to find some theory upon which the judgment below may be sustained; but, where the brief filed appears reasonably to sustain the assignments of error, the court may reverse the judgment in accordance with the prayer of the petition of plaintiff in error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3110; Dec. Dig. ⇐773(5).]

Error from County Court, Greer County; H. M. Thacker, Judge.

Action by W. D. Haley against O. C. Frost. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

Wylie Snow, of Mangum, for plaintiff in error.

PER CURIAM. On February 6, 1913, W. D. Haley, defendant in error, sued O. C. Frost, plaintiff in error, in the county court of Greer county in damages to recover $300 alleged to have been procured from him

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through fraud. The petition substantially states: That while partners they agreed to purchase a certain pool hall in the city of Mangum from one Renard; that defendant, acting as agent for the partnership, represented to plaintiff that the purchase price of said property was $1,800; that plaintiff paid one-half of said purchase price, or $900, to said Renard; that thereafter plaintiff, desiring to discontinue his relations with defendant, and believing that defendant had paid a like sum as his part of the purchase price of said property, as represented by defendant, purchased the interest of said defendant in said property, paying him therefor $300 cash and took up two notes of $300 each given by said defendant to Renard as his part of the purchase price of said property; that thereafter plaintiff learned that defendant had in fact paid only $600 for his part of the purchase price, instead of $900 as represented, and plaintiff was thereby induced by fraud and said misrepresentations to part with $900 for the interest owned by said defendant in said property. Defendant, for his answer and cross-petition, denied all the material allegations contained in plaintiff's petition, and asked judgment for $65, as his part of the profits of said business during the term it was operated as a partnership business, and in his amended answer and cross-petition asked for $37.50 more for services rendered in said business. Plaintiff filed his reply thereto, consisting of a general denial. Upon the issues thus joined, the cause proceeded to trial to a jury, and verdict rendered as prayed by plaintiff, except as to the amount of the above set-offs, which were allowed and judgment was entered accordingly.

To reverse this judgment defendant urges four assignments of error: (1) Error in admitting incompetent evidence; (2) error in refusing to give certain requested instructions; (3) error in giving instruction No. 5; (4) error in overruling his motion for new trial.

Defendant in error has not filed a brief in this case or offered any excuse for such failure. The brief of plaintiff appears reasonably to sustain the assignments of error, and, under the well-settled rule of this court, we are not required to search the record to find some theory upon which the judgment below may be sustained, but may reverse the judgment in accordance with the prayer of the petition in error. Security Ins. Co. v. Droke, 40 Okl. 116, 136 Pac. 430; J. Rosenbaum Grain Co. v. Higgins, 40 Okl. 181, 136 Pac. 1073; Purcell Bridge & Transfer Co. v. Hine, 40 Okl. 200, 137 Pac. 668; First Nat. Bank of Sallisaw v. Ballard, 41 Okl. 553, 139 Pac. 293; De Hart Oil Co. v. Smith, 42 Okl. 201, 140 Pac. 1154.

The judgment of the trial court is reversed, and the cause remanded.

(6 Okl. 681)

SOVEREIGN CAMP OF WOODMEN OF THE WORLD v. CHUMLEY.

(No. 8342.)

(Supreme Court of Oklahoma. Oct. 31, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⟸567(1)—CASE-MADE—AMENDMENTS.

The time within which to suggest amendments to a case-made begins to run after the expiration of the time allowed within which to make and serve same, and not after the actual service thereof, and a case-made, signed and settled before the expiration of the time within which to suggest amendments, is a nullity.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2515-2518, 2520-2522; Dec. Dig. ⟸567(1).]

Error from District Court, Stephens County; Cham Jones, Judge.

Action by Ida Chumley against the Sovereign Camp of the Woodmen of the World. There was a judgment for plaintiff, and defendant brings error. Dismissed.

Maxey & Brown, of Muskogee, for plaintiff in error. E. H. Bond and J. M. Sandlin, both of Duncan, for defendant in error.

PER CURIAM. It is urged that this appeal should be dismissed, for the reason that:

"The case-made is void because it was settled and certified by the trial judge in the absence of defendant in error or her attorneys and without their consent prior to the expiration of the time granted defendant in error to suggest amendments."

The facts are: On November 26, 1915, plaintiff in error was granted 90 days to make and serve case-made, 10 days for suggestion of amendments and same to be settled on 5 days' notice. This extension of time for making and serving case would have expired on February 24, 1916; but on February 17th plaintiff in error was granted 45 days additional within which to make and serve case-made, which time would expire on April 10, 1916. In addition thereto the last order provided that "the plaintiff to have 10 days after service of case-made in which to suggest amendments thereto." The case-made was served March 25, 1916, and was settled and signed on April 16, 1916, pursuant to notice given defendant in error on April 13th. It therefore clearly appears that the time for suggesting amendments would begin to run from April 10th, and that the case-made was settled and signed before the expiration of the time given to suggest amendments.

The case of Frey v. McCune et al., 153 Pac. 109, is squarely in point. In that case, as here, the order giving time for suggesting amendments read, "Defendants to have ten days after service of same within which to suggest amendments thereto," and it was said:

"It has been repeatedly held by this court that the time within which to suggest amendments to a case-made begins to run after the expiration of the time allowed within which to make and

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serve same, and not after the actual service thereof. Cummings v. Tate, 147 Pac. 304; Memphis Steel Const. Co. v. Hutchinson, 147 Pac. 771."

The appeal is therefore dismissed.

(13 Okl. Cr. 80)

Ex parte NELSON. (No. A-2765.)

(Criminal Court of Appeals of Oklahoma. Jan. 16, 1917.)

(Syllabus by Editorial Staff.)

BAIL ⊂=47—APPLICATION—DENIAL.

An application to the Criminal Court of Appeals for admission to bail will be dismissed where the applicant had not previously presented his application to the district court or judge.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 165-183, 257; Dec. Dig. ⊂=47.]

Application by Bud Nelson for admission to bail. Application denied.

Pat Malloy, of Tulsa, and E. F. Scott, of Pawhuska, for petitioner. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. The application of Bud Nelson to be let to bail alleges, in substance, that he is unlawfully restrained of his liberty and detained by H. M. Frease, sheriff of Osage county, in the county jail at Pawhuska, and is so held in custody by virtue of a certain commitment issued by the county judge of Osage county upon the charge that he on April 1, 1916, did kill and murder one John Kennedy; petitioner having waived a preliminary examination upon said charge. Then follows a recital of the facts and circumstances in connection with the homicide tending to show that petitioner acted in his necessary self-defense, and praying that he be admitted to bail and his bond be fixed in a reasonable amount. On the day the petition was filed the Attorney General filed a motion to dismiss the application on the ground that the same had not been presented to the district court or judge of Osage county before being filed in this court as required by the rules of this court.

For the reasons therein stated, the motion to dismiss is sustained.

(13 Okl. Cr. 60)

PIAZZI v. STATE. (No. A-2589.)

(Criminal Court of Appeals of Oklahoma. Jan. 13, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW ⊂=1159(2)—APPEAL—VERDICT—REVERSAL.

The credibility of witnesses and the weight and value to be given their testimony is a question solely for the jury's determination; and, to reverse a judgment on the ground that the verdict is contrary to law and the evidence, this court must find as a matter of law that the evidence is insufficient to warrant the conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3075; Dec. Dig. ⊂=1159(2).]

Appeal from County Court, Coal County; P. E. Wilhelm, Judge.

R. Piazzi, was convicted of a violation of the prohibitory law, and appeals. Affirmed.

West & Threadgill, of Coalgate, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

ARMSTRONG, J. On information filed in the county court of Coal county, charging that he did unlawfully sell to one John Russell whisky, the plaintiff in error was convicted and his punishment fixed at a fine of $75 and 30 days' confinement in the county jail. Judgment was entered October 14, 1915. It is contended that the evidence is insufficient to support the verdict. The complaining witness John Russell testified that he had lived in Coalgate about 18 years and had known the defendant R. Piazzi some 10 or 12 years; that he bought whisky from the defendant two or three times, paying him $1.50 and $1 therefor. Piazzi, as a witness in his own behalf, testified that he had lived in Coalgate 25 years, and that he at no time sold whisky to the complaining witness John Russell.

After a careful examination of the record we are not prepared to say that the jury were not warranted in finding the verdict returned by them. The credibility of witnesses and the weight and value to be given their testimony is a question solely for the jury's determination; and to reverse a judgment on the ground that the verdict is contrary to the law and the evidence this court must find as a matter of law that the evidence is insufficient to warrant a conviction.

The record fails to show that any objections were made or exceptions taken to the instructions given by the trial court, and we find nothing in the record indicating improper motive or prejudice on the part of the jury.

It follows that the judgment appealed from must be and the same is hereby affirmed.

DOYLE, P. J., and BRETT, J., concur.

(13 Okl. Cr. 47)

Ex parte McALESTER. (No. A-2791.)

(Criminal Court of Appeals of Oklahoma. Jan. 9, 1917.)

(Syllabus by the Court.)

1. HABEAS CORPUS ⊂=27 — QUESTIONS PRESENTED—JURISDICTION OF COURT.

The jurisdiction of a court or judge to render a particular judgment or sentence by which a person is imprisoned is always a proper subject of inquiry on habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 22; Dec. Dig. ⊂=27.]

2. JURY ⊂=31(1)—JURY TRIAL—RIGHT TO.

The constitutional guarantees intended to secure the liberty of the citizen to the right of a trial by jury cannot be evaded by the nature of the powers vested in the municipality under

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its charter, or the nature of the jurisdiction conferred by the municipal court.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 204, 214; Dec. Dig. ⊂⊃31(1).]

In the matter of the application of Dorothy McAlester for a writ of habeas corpus. Writ issued, and petitioner discharged.

F. S. Winn, of Oklahoma City, for petitioner. B. D. Shear, Municipal Counselor, and Frank Watson, both of Oklahoma City, for respondent.

DOYLE, P. J. This is an application for writ of habeas corpus by Dorothy McAlester, who alleges that she is illegally restrained of her liberty by W. B. Nichols, chief of police of Oklahoma city.

It is alleged in the petition that on the 1st day of July, 1916, petitioner was convicted on a charge of vagrancy in the municipal court of Oklahoma city, and was sentenced to pay a fine of $25 and costs, and to be confined in the city jail for 30 days; that thereafter the city officers of said city accepted the sum of $11 and costs in full of said fine and costs, and ordered that said jail sentence would be suspended during the absence of the petitioner from Oklahoma City; that petitioner in obedience to said arrangement and order went to her home near Jones City in Oklahoma county and remained there until Saturday, July 15th, when she returned to Oklahoma City in pursuance to a notice from her attorney, F. S. Winn, to be present at the district court of Oklahoma county on said day for the purpose of trying a divorce case; that said case was not called on said day, and her attorney requested petitioner to remain over in said city until Monday, July 17th, to attend the trial of said divorce case; that on Sunday afternoon, petitioner was arrested and placed in the city jail, and on Monday morning, July 17th, she was brought into the municipal court of said city, and again tried upon the charge of vagrancy, and was convicted and sentenced to pay a fine of $99 and costs and to serve a jail sentence of 30 days; "that at the time the case was called for trial your petitioner acquainted the court with the facts requiring her presence in the city, and requested said court that she have opportunity to procure her counsel, F. S. Winn, and have said cause continued, in order that she might be able to prove said facts; that said court refused to continue said cause, or to get any information to said attorney, and convicted your petitioner without any proof whatever, as to the offense of vagrancy or any other offense." On the filing of the petition the writ issued returnable on the 20th day of July, 1916, at which time the officer to whom it was directed produced the petitioner in court, and at the same time filed his answer.

[1] There is no necessity that we should pass upon more than one of the various questions raised in this case; that question is whether or not the judgment and sentence by virtue of which she is imprisoned is void. The jurisdiction of a court or judge to render a particular judgment or sentence by which a person is imprisoned is always a proper subject of inquiry on habeas corpus. In re Wilkins, 7 Okl. Cr. 422, 115 Pac. 1118.

[2] The question here presented has been passed upon in the case of In re Johnson, 12 Okl. Cr. —, 161 Pac. 1097. Under the holding of the court in that case the municipal court was without power or authority to try and convict the petitioner without a jury trial, and said court exceeded its jurisdiction in rendering the judgment and sentence.

It follows that petitioner must therefore be discharged from custody.

ARMSTRONG and BRETT, JJ., concur.

(13 Okl. Cr. 55)

JUSTUS v. STATE. (No. A-2447.)

(Criminal Court of Appeals of Oklahoma. Jan. 13, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW ⊂⊃1131(5)—APPEAL—ESCAPE.

Where a defendant has been convicted and sentenced, and perfects an appeal, this court will not consider his appeal, unless defendant is where he can be made to respond to any judgment or order which may be rendered in the case. And where a defendant makes his escape from the custody of the law, and becomes a fugitive from justice, the appeal will be dismissed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2975; Dec. Dig. ⊂⊃1131(5).]

Appeal from District Court, Canadian County; John J. Carney, Judge.

Edward B. Justus, was convicted of the larceny of domestic animals, and appeals. Appeal dismissed.

I. H. Lookabaugh, of Watonga, and J. N. Roberson, of El Reno, for plaintiff in error. S. P. Freeling, Atty. Gen., R. McMillan, Asst. Atty. Gen., and E. F. Maley, Co. Atty., of El Reno, for the State.

ARMSTRONG, J. The plaintiff in error was convicted in the district court of Canadian county on an information charging the theft of two mules, the property of one S. M. Mabry. The judgment and sentence of the court, rendered January 2, 1915, was that he be imprisoned in the penitentiary for the term of five years. To reverse the judgment an appeal was perfected by filing in this court, on April 26, 1915, a petition in error with case-made. A motion to dismiss the appeal has been filed, which, omitting the formal parts, reads as follows:

"In this case comes S. P. Freeling, Attorney General, and R. McMillan, Assistant Attorney

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General, and moves the court to dismiss the appeal herein, for the reason that the plaintiff in error, the said Ed. Justus, is not a citizen of the state of Oklahoma, and is out of the jurisdiction of this court, and is at this time an inmate of the penitentiary of the state of Kansas, to which he has been sent recently on a charge of horse stealing and under a sentence of seven years' confinement. As an evidence of these statements concerning the whereabouts of the said Ed. Justus, we file herewith as Exhibit A, making it a part of this motion as much as though the same had been copied in the same, a letter from R. H. Hudspeth, record clerk of the Kansas penitentiary, and asks the court to consider the same. With these facts, which we verily believe to be true, we ask the court to dismiss this appeal."

The question presented by the motion to dismiss is the same as that decided in Belcher v. State, 9 Okl. Cr. 50, 130 Pac. 515, Peel v. State, 9 Okl. Cr. 234, 131 Pac. 548, Gorrell v. State, 10 Okl. Cr. 697, 143 Pac. 341, and Williams v. State, 11 Okl. Cr. 33, 141 Pac. 453. In those cases it was held that where a defendant had been convicted and sentenced and perfected an appeal, this court will not consider his appeal unless the defendant is where he can be made to respond to any judgment or order which may be rendered in the case, and where the defendant makes his escape from the custody of the law, and becomes a fugitive from justice, this court will, on motion, dismiss his appeal.

We are of the opinion that plaintiff in error has waived the right to have his appeal in this case considered and determined. The appeal is therefore dismissed.

DOYLE, P. J., and BRETT, J., concur.

(13 Okl. Cr. 57)

CANNON v. STATE. (No. A-2555.)

(Criminal Court of Appeals of Oklahoma. Jan. 13, 1917.)

(Syllabus by the Court.)

INTOXICATING LIQUORS ⟸236(1)—OFFENSES—EVIDENCE—SUFFICIENCY.

In a prosecution for the unlawful selling of intoxicating liquor, the evidence examined, and *held* sufficient to sustain the verdict, and that no reversible error was committed upon the trial.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 300; Dec. Dig. ⟸236(1).]

Appeal from County Court, Blaine County; Ed. Baker, Judge.

John Cannon was convicted of a violation of the prohibitory law, and he appeals. Affirmed.

I. H. Lookabaugh, of Watonga, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. On information filed in the county court of Blaine county, charging that he did unlawfully sell one quart of alcohol to one Jess Foutz, the plaintiff in error, John Cannon, was convicted, and in accordance with the verdict of the jury was sentenced to be confined in the county jail for 90 days and to pay a fine of $200, and he appeals from the judgment.

As a witness in his own behalf, he testified that the complaining witness Foutz and the other two witnesses for the state came to him and asked where they could get something to drink; that they had looked the town over and could not find anything; that he said if they would wait until about 7 o'clock he would see what he could do; that he went to three different places, and finally got a quart of alcohol and brought it back and gave it to Mr. Foutz, who paid him for it.

Considering the fact that the testimony of the plaintiff in error in his own behalf is conclusive of his guilt, we deem it unnecessary to consider the numerous assignments of error. It is sufficient to say that we fail to see that plaintiff in error suffered any prejudice as to any substantial right or any right whatever by reason of the rulings complained of. So far as appears by the record, he has had a fair and impartial trial.

The judgment appealed from will therefore be affirmed.

ARMSTRONG and BRETT, JJ., concur.

(13 Okl. Cr. 59)

SHARP v. STATE. (No. A-2561.)

(Criminal Court of Appeals of Oklahoma. Jan. 13, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW ⟸303—JUDGMENT—PURPOSE OF.

In a criminal action, the purpose of the proceeding being to punish the defendant in person, the action must necessarily abate upon his death.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 698, 699; Dec. Dig. ⟸303.]

2. FINES ⟸17½—DEATH—ABATEMENT.

Where the defendant, after having been convicted, appeals from a judgment imposing a fine and imprisonment, dies pending his appeal from the judgment, the proceedings abate, and the fine cannot be enforced against his estate.

[Ed. Note.—For other cases, see Fines, Dec. Dig. ⟸17½.]

Appeal from County Court, Pawnee County; Geo. E. Merritt, Judge.

T. I. Sharp was convicted of a violation of the prohibitory law, and he appeals. Judgment abated because of death of defendant.

Redmond S. Cole, of Pawnee, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. The plaintiff in error, T. I. Sharp, was convicted in the county court of Pawnee county of a violation of the prohibitory law, and his punishment fixed at a fine of $50 and costs and confinement for 30 days in the county jail; failing to pay said fine and costs that he be further so confined

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until the same is satisfied as by law provided. From the judgment rendered on the verdict he appealed by filing in this court on October 14, 1915, a petition in error with case-made. On Sept. 4, 1916, while his appeal was pending and awaiting decision before this court he departed this life. His counsel of record have filed a motion to abate the proceedings.

[1] In the case of Boyd v. State, 3 Okl. Cr. 684, 108 Pac. 431, it is said:

"In a criminal action, the sole purpose of the proceedings is to enforce the criminal law and punish the person found guilty of a violation thereof. The personal representative of the deceased is not responsible for the alleged violation of the law by the defendant during his lifetime, and cannot be required to satisfy the judgment rendered against him. It is only the person adjudged guilty who can be punished, and a judgment cannot be enforced when the only subject-matter upon which it can operate has ceased to exist."

And see United States v. Dunne, 173 Fed. 254, 97 C. C. A. 420, 19 Ann. Cas. 1145.

[2] In a criminal action the purpose of the proceedings being to punish the defendant in person, the action must necessarily abate upon his death. It is therefore considered and adjudged that the proceeding in the above-entitled cause, and especially under the judgment therein rendered, have abated, and that the county court of Pawnee county enter its appropriate order to that effect.

ARMSTRONG and BRETT, JJ., concur.

(13 Okl. Cr. 71)

CRUZAN et al. v. STATE. (No. A-2445.)

(Criminal Court of Appeals of Oklahoma. Jan. 15, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW ⟸622(1), 1115(1)—TRIAL—SEVERANCE.

Under Procedure Criminal, section 5878, Rev. Laws 1910, where two or more persons are jointly charged with a misdemeanor, the granting or refusal of a severance rests in the discretion of the court. The exercise of such discretion is reviewable; but to be reviewed the case-made must show an application for a severance setting out sufficient grounds therefor and supported by affidavits or oral testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1380, 1382, 1383, 2922, 2923, 2926; Dec. Dig. ⟸622(1), 1115(1).]

2. CRIMINAL LAW ⟸1086(14)—APPEAL—INSTRUCTIONS.

Errors assigned upon instructions given by the trial court will not be considered upon appeal, where the record fails to show that any objections were made or exceptions taken to such instructions at the time they were given.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. ⟸1086(14).]

3. INTOXICATING LIQUORS ⟸236(5)—OFFENSES—UNLAWFUL POSSESSION.

In a prosecution for unlawful possession of intoxicating liquors with intent to violate provisions of the prohibitory law, the evidence considered, and *held* sufficient to sustain the verdict and judgments of conviction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 309; Dec. Dig. ⟸236(5).]

Appeal from County Court, Pawnee County; Geo. E. Merritt, Judge.

Charles Cruzan, Sarah Johnston, and W. M. Simonson were jointly convicted of the unlawful possession of intoxicating liquors, and they appeal. Affirmed.

McNeill & McNeill, of Pawnee, for plaintiffs in error. R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. The information in this case jointly charged Berry Janes, Charles Cruzan, Sarah Johnston, and W. M. Simonson, with the crime of having possession of intoxicating liquors with the unlawful intent to violate provisions of the prohibitory liquor law. When the case was called for trial, it was shown that the defendant Berry Janes was unable to be present on account of sickness, and the case was continued as to him. Thereupon defendant Sarah Johnston moved for a separate trial, which motion the court overruled. The case proceeded to trial, and the plaintiffs in error were found guilty. From the judgments rendered in pursuance of the verdict wherein Charles Cruzan was sentenced to pay a fine of $50 and be confined in the county jail for a period of 30 days, and Sarah Johnston was sentenced to pay a fine of $100 and be confined in the county jail for 30 days, and W. M. Simonson was sentenced to pay a fine of $100 and be confined in the county jail for a period of 30 days, the plaintiffs in error appeal.

[1] The ruling of the court in refusing to grant the defendant Johnston a severance is the first error assigned.

Our Criminal Code provides that:

"When two or more defendants are jointly prosecuted for a felony, any defendant requiring it must be tried separately. In other cases defendants jointly prosecuted may be tried separately or jointly, in the discretion of the court." Section 5878, Rev. Laws.

The exercise of the discretion here given to the trial court in granting or refusing a severance in a misdemeanor case is reviewable; but, to make the same the subject of review, the case-made or bill of exceptions must show an application for a severance setting out some unusual and extraordinary condition or state of facts in connection with the case which would materially prejudice the rights of the applicant in a joint trial; and this must be supported by affidavits or oral testimony, and may be controverted by the state in the same way. In the absence of such showing on the part of the applicant the trial court cannot know and is not required to anticipate that a situation will arise in the trial justifying a severance. Steen v. State, 4 Okl. Cr. 309, 111 Pac. 1097.

The case-made before us discloses a mere

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motion for a severance "for the reason that the evidence introduced in the case on behalf of the other defendant is such as to bias and prejudice the interest of the defendant." The motion was not verified nor supported by affidavit or oral testimony, and we might add that the record of the trial discloses no reason why a severance should have been granted. In our opinion the court very properly overruled the motion for a severance.

[3] It appears from the evidence that the parties charged were all engaged in running a restaurant at Ralston, commonly called the "Blue Goose"; that the place had been raided in the preceding August and intoxicating liquor had been found in the room of Sarah Johnston; that in September on the date alleged in the information another raid was made, and some 200 bottles of whisky and beer were found concealed in the walls of the rooms in which the defendants Johnston and Janes were sleeping. That day the defendants Cruzan and Simonson drove from Ralston to Pawnee, the county seat. Returning about midnight, they drove to the rear of the restaurant and unloaded a trunk and a case of whisky. On this trip they were followed by Jim Glenn and John Douglas, local detectives, and that night 25 or 30 of the citizens of Ralston waited near the highways and watched for their return from Pawnee, and several of these persons were present when the defendants were arrested. Several witnesses testified that several bottles of whisky were found that night near the back door of the restaurant. Other witnesses testified that they had bought beer and whisky in the Blue Goose restaurant from the defendants Johnston and Simonson.

Defendant Simonson, as a witness in his own behalf, testified that he was a waiter and dish washer in the restaurant, working for Berry Janes; that on the day in question he rode with the defendant Cruzan to Pawnee to get Aunt Sarah's trunk; that they drove back that night with the trunk in the wagon and unloaded it at the rear door of the restaurant, and shortly afterwards they were arrested; that they did not haul any whisky in the wagon, and he never did sell any whisky or beer.

The defendant Sarah Johnston, as a witness in her own behalf, testified that she worked for Berry Janes at the Blue Goose and cooked and waited on the lunch counter, and sold Tempo and pop; that she did not know how the whisky got into the building, and did not know of any sales of whisky at the place while she was there; that she sent her codefendants Cruzan and Simonson to Pawnee that day after her trunk, and specifically denied that she sold beer or whisky to the witnesses who testified against her.

The above and foregoing briefly summarizes the testimony in the case, the transcript of which covers more than 200 pages. However, it is sufficient to show that the errors assigned on the insufficiency of the evidence to sustain the verdict are without merit. Before this court will reverse a conviction upon the ground that the verdict of the jury is contrary to the evidence, we must find that there is no testimony in the record from which the jury could rationally conclude that the defendant was guilty, unless it appears from the record that the jury were influenced by improper motives in arriving at their verdict. We find nothing in the record before us indicating improper motives or prejudice on the part of the jury.

[2] It is also insisted that the court erred in giving instruction No. 6, defining the term "prima facie" evidence. The record discloses that no specific objection was made or exception taken to said instruction.

We cannot consider questions relating to instructions that were not raised as authorized by the statute or by the practice of the courts, unless fundamental error is apparent, because if there was error it was in effect waived.

In the case of Williams v. State, 12 Okl. Cr. 39, 151 Pac. 900, it is said:

"Only prejudicial errors raised by exceptions reserved require a new trial, and it is only when we are satisfied that the verdict was contrary to law, or to the evidence, or that injustice has been done, that we are permitted to reverse a conviction, whether or not an exception has been taken in the trial court."

Without saying that the instruction complained of is correct, we are content to say that the instructions as a whole fairly cover the law of the case, and no court is justified in reversing a judgment if, on the whole record, it appears that justice has been done and that no prejudice has resulted by reason of error in the instructions given.

Absolute correctness of proceeding cannot be attained, even in our very best courts, and the establishment of any other rule would render the administration of the criminal laws practically impossible.

After a careful review of the record, our conclusion is that the plaintiffs in error have had a fair trial and were properly convicted.

The judgments appealed from are therefore affirmed.

ARMSTRONG and BRETT, JJ., concur.

(99 Kan. 70, 424)

MALANEY v. CAMERON et al. (No. 20293.)

(Supreme Court of Kansas. Nov. 11, 1916. On Second Rehearing, Jan. 6, 1917.)

(Syllabus by the Court.)

1. ADOPTION ⇐21—CONTRACT TO ADOPT—OPERATION AND EFFECT.

While an unperformed promise to adopt may, in some circumstances, give the beneficiary

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a valid claim against the estate of the promisor, no right of inheritance can be thereby created.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 35, 36, 38–40; Dec. Dig. ⊂⊃21.]

2. ADOPTION ⊂⊃20—CONTRACT TO ADOPT—OPERATION AND EFFECT.

Neither a promise to adopt nor an actual adoption will prevent the promisor from making such disposition of his property as he may see fit, acting in good faith.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 29–32; Dec. Dig. ⊂⊃20.]

3. ADOPTION ⊂⊃6—CONTRACT TO ADOPT—OPERATION AND EFFECT.

The existence of a valid but unperformed contract to adopt a child gives to the child no right to maintain ejectment for an interest in land conveyed by the promisor to his own son, upon the death of the latter intestate, leaving neither issue nor parent, although the child would then have inherited it if an adoption had taken place in accordance with the agreement.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. § 11; Dec. Dig. ⊂⊃6.]

On Second Rehearing.

4. DESCENT AND DISTRIBUTION ⊂⊃119(1)—STATUTES—CONSTRUCTION.

Under the statute providing that the property of an intestate, who is survived by neither spouse, issue, nor parent, shall be disposed of in the same manner as if a parent had outlived him and died in its possession and ownership, property inherited by one son of a deceased father from another cannot be subjected to the payment of indebtedness owed by the father to any one other than the deceased son.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 224, 433, 434, 438, 439; Dec. Dig. ⊂⊃119(1).]

Appeal from District Court, Douglas County.

On rehearing. Former decision adhered to.

For former decision, see 159 Pac. 19.

Ord Clingman, of Lawrence, for appellant.

J. B. Larimer, of Topeka, for appellees.

MASON, J. Rose Malaney brought an action to recover an interest in land which the record showed to have been conveyed by Noah Cameron to his two sons, Allen and Huber, on the ground that the deeds were not delivered until after the death (intestate, and without other heirs than those named) of the grantor, and that she was entitled to a part of the property as his adopted daughter. Judgment was rendered against her, and on an appeal it was decided that the evidence sustained the finding of the trial court that the deeds had been delivered in the lifetime of Noah Cameron, and were therefore effective. Malaney v. Cameron, 98 Kan. 620, 159 Pac. 19. It was also determined that there had been no legal adoption of the plaintiff, and inasmuch as these conclusions were regarded as settling the controversy, no decision was made of the question whether a contract to adopt had been entered into and so far acted upon as to give her a valid claim against the estate. In a petition for a rehearing it was urged that, even conceding the title to the land to have passed by the deeds, the plaintiff was entitled to an interest in the portion conveyed to Huber Cameron, because he had since died intestate, survived by neither parent nor child, nor by any brother or sister other than Allen Cameron. For a consideration of this contention a rehearing was granted.

In behalf of the plaintiff it is argued that she was entitled to the rights of an adopted child of Noah Cameron; that the statute (Gen. Stat. 1909, § 2954) declares that on the death of Huber Cameron his property should be disposed of as though his father had outlived him and died in its possession and ownership; that if Noah Cameron had owned this property at the time of his death the plaintiff could have enforced her claim against it; therefore she can do so now. In support of this view it is urged that, although under our law a brother is conceived as inheriting directly and not mediately from a brother (State v. Ellis, 72 Kan. 285, 83 Pac. 1045), he takes his distributive share of the estate subject to any existing equity in favor of the estate against the parent through whom he inherits. Head v. Spier, 66 Kan. 386, 71 Pac. 833.

[1] 1. If the plaintiff were the legally adopted child of Noah Cameron she would probably under our statute inherit from his son (Riley v. Day, 88 Kan. 503, 505, 129 Pac. 524, 44 L. R. A. [N. S.] 296), although the contrary rule is usual elsewhere. 1 C. J. 1401; 2 Enc. L. & P. 240; 1 R. C. L. 622. But as no legal adoption had taken place, she had acquired no right of inheritance. The agreement between her father and Noah Cameron, supplemented by her later relations with him, gave her at the most a right to assert a claim under the contract against his estate. "The courts merely enforce the contract which has been fully performed on one side; they do not undertake to change the status of either party, or to decree that the child is entitled to the right of inheritance as an heir." 1 R. C. L. 617. "The mere contract to adopt is not sufficient of itself to make the child a legal heir of the promisor, because the right to take as heir exists only by operation of law. The child takes in these cases by virtue of the contract and by way of damages or specific performance." 1 C. J. 1378. See, also, 2 Enc. L. & P. 246, 247. The statutory provision that the property of an intestate who leaves neither issue nor parent shall be disposed of as though his parent had survived him and died owning it relates to the descent of the property—its disposal by the law of inheritance—and has no relation to rights that may be asserted under a contract. The title to the real estate owned by Huber Cameron at the time of his death, in its theoretical course to his brother, Allen Cameron, through their father, Noah Cameron, encountered no obligation owed by Noah Cameron to Huber.

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[2] 2. Assuming that Noah Cameron had made an enforceable promise to adopt the plaintiff—to make her his heir—this did not bind him to leave anything for her to inherit, or prevent his disposing of his property in any way he saw fit, provided he acted in good faith. 1 C. J. 1378; 2 Enc. L. & P. 241; 1 R. C. L. 619. See, also, note 44 L. R. A. (N. S.) 756; note, L. R. A. 1916D, 424. Therefore the deed from him to Huber Cameron passed a clear title, and the plaintiff has no greater claim with respect to the land so conveyed than with respect to any other property owned by Huber Cameron at the time of his death.

[3] 3. It may be argued that, if the promise to adopt the plaintiff had been performed, she would have inherited a part of the property left by Huber Cameron, and that Noah Cameron's breach of contract by failing to adopt her injured her by preventing such inheritance, thereby giving her an action for damages against his estate. If so, she cannot enforce it in this proceeding, which is one for ejectment and partition and for rents and profits, and is founded upon the proposition that she owns an interest in the specific real estate involved.

The judgment of affirmance heretofore rendered, denying relief to the plaintiff, is adhered to. All the Justices concurring.

On Second Rehearing.

In this case we held that, assuming that Noah Cameron made a valid contract to adopt Rose L. Malaney as his daughter, and failed to do so, this gave her no claim against property conveyed by him to his son Huber, and inherited by another son (Allen N.) upon Huber's death intestate. In the opinion it was said:

"It may be argued that, if the promise to adopt the plaintiff [Rose L. Malaney] had been performed, she would have inherited a part of the property left by Huber Cameron, and that Noah Cameron's breach of contract by failing to adopt her injured her by preventing such inheritance, thereby giving her an action for damages against his estate. If so, she cannot enforce it in this proceeding, which is one for ejectment and partition and for rents and profits, and is founded upon the proposition that she owns an interest in the specific real estate involved." Malaney v. Cameron, 99 Kan. 70, 72 (see opinion just above).

[4] In a petition for a rehearing the plaintiff urges that the character of her action should not prevent her recovery in this proceeding, but that she should be allowed to assert here any right she may have. We are not disposed to attach great importance to mere matters of form, but throughout this litigation the plaintiff has sought to reach the property conveyed away by Noah Cameron, and no other. A judgment for damages against his estate, to be made out of other property, has not been asked, and apparently is not now sought, for in the petition for a rehearing it is said that:

"Practically all of the property to be ultimately affected by any recovery on behalf of appellant is involved in this suit now before the court."

Counsel for the plaintiff appears to interpret the opinion as intimating that by a different procedure she might be able to subject to the payment of her claim the real estate conveyed by Noah Cameron to Huber, and inherited from him by Allen. It was not the intention of the court to convey such a meaning. Possibly the plaintiff might have maintained an action against the estate of Noah Cameron, seeking a judgment to be made out of any property he owned at the time of his death; but we hold that the property which he had conveyed to his son Huber cannot by any method be made liable to her claim. The argument to the contrary is that when Huber died intestate, leaving his brother Allen as his sole heir, this land under the statute was to be disposed of "in the same manner" as if his father (Noah) had outlived him and died in its possession and ownership; that, if the father had died owning the land, the plaintiff could have subjected it to the payment of her claim, and therefore, as it is to be disposed of in the same manner as if that had happened, she has the same right now. The answer to this is that the father did not actually inherit the property, and could not do so after his death. His estate cannot be augmented by the subsequent death of intestates from whom he would have inherited if still alive.

In this state, upon equitable grounds, the share of one who inherits by reason of his descent from a deceased ancestor may be reduced by any indebtedness owed by such ancestor to the intestate (Head v. Spier, 66 Kan. 386, 71 Pac. 833), a matter as to which the courts elsewhere are divided (9 R. C. L. 111). But the principle by which an inheritance is charged with a debt owed by an ancestor, descent from whom gives the heir his title, seems never to have been applied to an indebtedness owed to any one other than the person from whom the property is inherited, and we do not think it can be so extended as to enable general creditors of a parent to reach property inherited after his death by one of his sons from another. Whether in other connections an heir of a collateral relative is deemed to take directly or mediately, in the present situation the title to the land, in its course from Huber Cameron to Allen N. Cameron, cannot be regarded as passing through their father, Noah Cameron, in such sense as to render it subject to the payment of any claim for damages the plaintiff may have against his estate.

The petition for a rehearing is denied.

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(22 N. M. 361)

ROTH v. YARA. (No. 1851.)

(Supreme Court of New Mexico. Dec. 23, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⟸1001(1) — REVIEW — VERDICT.

The verdict of a jury and the judgment rendered thereon will not be disturbed on appeal, where there is any substantial evidence to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928–3933; Dec. Dig. ⟸ 1001(1).]

Appeal from District Court, San Miguel County; Leahy, Judge.

Action between Peter Roth and Tranquilino Yara. From a judgment for the latter, the former appeals. Affirmed.

C. W. G. Ward and George H. Hunker, both of Las Vegas, for appellant. O. A. Larrazolo, of Las Vegas, for appellee.

PARKER, J. This is an action in replevin tried in the district court for San Miguel county. The case was tried to a jury and resulted in verdict and judgment in favor of Yara, the appellee. The same case was before us in 1913, and was reversed and remanded for new trial for errors occurring therein. Roth v. Yara, 19 N. M. 8, 140 Pac. 1071.

1. The principal issue tried to the jury concerned the identity of the horse which both parties hereto claimed to own. The jury found that issue in favor of the appellee, and the first point made by appellant is that the evidence is wholly insufficient to support the verdict. Appellant attempts to take this case out of the general rule, that the verdict of a jury will not be disturbed where there is any substantial evidence to support it, by analyzing the evidence as he sees it and attacking the credibility of certain witnesses for the appellee. He insists that the falsity of appellee's claim to the horse in question is demonstrated by his proof of ownership, by the blotched brand, the age of the animal as shown by the teeth, and the exhibit of the horse itself. There was a conflict of testimony as to the ownership of the horse. The jury inspected the horse and found that it was the property of the appellee. While certain witnesses who testified in behalf of the appellee may not have been entitled to credit, their credibility was a question for the jury. We have held that the jury and trial court are in a much better position to determine the truth of a given fact than is this court on appeal. State v. Graves, 21 N. M. 556, 568, 157 Pac. 160. The rule that, if there is any substantial evidence to support a verdict or judgment, the same will not be disturbed on appeal, must be applied in this case. There is evidence in the record of such substantial nature that it would support a verdict or judgment for either party, and, the jury having found in favor of appellee, the judgment will not be disturbed in this court.

2. The appellant, on direct examination, testified as to the form and shape of the brand owned by him and used on the animal in question. On cross-examination, the attorney for the appellee attempted to show that the drawing of the brand made by appellant on the hearing in the case at bar was not identical with that made by him on the former trial of this case, and in doing so referred to the drawing which appeared in the transcript of record used in the case on the former appeal, which, no doubt, was a copy of the exhibit made by appellant in that case. The witness was then asked which representation of the brand was the more correct, and objection to the question was made on the ground that the examination was unfair and that it was not shown that the witness had actually made the drawing referred to and appearing in the transcript of record used on appeal. The court then interrogated the witness, and the latter declared that he did not make the actual drawing appearing in the transcript, and the question as to which representation of the brand was the more correct was not answered. The appellant, on redirect examination, then testified that the drawings made by him were not exact reproductions of the brand as it appeared on the animal in question, and explained the meaning of certain answers, concerning the brand, made by him in former trial. It is evident that the point made by appellant is without merit.

3. On the cross-examination of the appellee he was asked if it was not a fact that he had a conversation with Natividad Sandoval de Carrillo about the horse in question at the house of Trinidad Baca, and denied that he had ever talked to her about the matter. The position of the appellant, as shown by the question, was that the appellee and the person named did have a conversation about this horse, at a time not specified, in which appellee made a statement indicating consciousness of guilt with reference to his possession of the animal in question. In rebuttal, the appellant offered to read to the jury a statement supposed to have been made by Natividad Sandoval de Carrillo at the former trial with reference to this matter. The contents of that alleged statement appear only in the remarks of the court in passing upon the question of law presented. So far as we are able to ascertain, the following question was propounded to that witness on that trial, but no answer was given thereto:

"Q. I will ask you if the defendant, Tranquilino Yara, ever at any time had a conversation with you in which he said to you that Max Carrillo had told him that you had asked about this sorrel horse and that they were afraid that you would get them into trouble about this horse."

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In all probability an answer was made to that question, but we cannot determine the question presented in the absence of a record of such answer, if one was made or given.

4. The last point made by appellant is that the trial court erred in the admission of certain evidence with reference to damages alleged to have been sustained by appellee. The verdict of the jury was simply to the effect that appellee was the owner and entitled to the possession of the horse. A judgment to that effect was entered. The jury did not assess any damages against appellant, nor were any included in the judgment entered by the court. The question, therefore, as to the alleged erroneous admission of evidence concerning damages, becomes entirely immaterial.

The judgment of the trial court is therefore affirmed, and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

(22 N. M. 365)

ROGERS v. CRAWFORD. (No. 1895.)

(Supreme Court of New Mexico. Dec. 23, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐612(2)—RECORD—TRANSCRIPT OF PROCEEDINGS.

Where transcript of proceedings in case tried to court without a jury is certified to this court only by certificate of stenographer, the same imports no verity and will be stricken from files upon motion therefor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2697; Dec. Dig. ⇐612(2).]

2. APPEAL AND ERROR ⇐624—TRANSCRIPT OF PROCEEDINGS—STRIKING FROM FILES.

Section 4490, Code 1915, does not authorize an extension of time within which to file a transcript of record in this court, where a transcript has already been filed and where the application is made for the purpose of correcting errors or omissions due to oversight of counsel.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2737-2742; Dec. Dig. ⇐624.]

Error to District Court, Chaves County; G. A. Richardson, Judge.

Action by A. J. Crawford against W. E. Rogers. There was a judgment for plaintiff, and defendant brings error. Transcript of proceedings stricken.

W. E. Rogers, of Roswell, for plaintiff in error. Gibbany & Epstein, of Roswell, for defendant in error.

PARKER, J. This is a suit brought by defendant in error, A. J. Crawford, against W. E. Rogers, plaintiff in error, on three several promissory notes, in which plaintiff in error appears to be an indorser in blank.

[1] The case is not before us on the merits, but upon the motion of defendant in error to strike from the files the transcript of the evidence, on the grounds that the case was tried to the court without a jury and that the transcribed notes of the stenographer have not been certified to this court in accordance with section 4493, Code 1915. That section is as follows:

"In all actions tried without a jury the testimony taken before a court or that taken by a referee, the transcribed notes of the stenographer in such cases, properly certified by the court or referee, and all motions, orders or decisions made or entered in the progress of the trial of any such action shall become and be a part of the record for the purpose of having the cause reviewed by the supreme court upon appeal or writ of error, without any bill of exceptions. And it shall not be necessary to have any bill of exceptions settled, signed or sealed, in order to make any of such matters a part of the record in cases so tried. It shall not be necessary to make a motion for a new trial in any case tried by the court without a jury."

It will be seen that under that section matters not record proper are certified to this court by the trial court in cases tried to it without a jury; hence such procedure, when the party proceeds under that section, displaces the precedure by way of bill of exceptions for which provision is elsewhere made.

An examination of the transcript of record on this writ of error discloses a certificate of the court stenographer, who recorded the proceedings at the trial, to the effect that the transcript of proceedings is full, true, and correct; but there is attached no certificate whatever of the trial court. Under the authority of section 4493, Code 1915, quoted supra, it has been held that the certificate of the court stenographer in itself is insufficient to make the transcript of the proceedings on the trial an element in the review of the case, in that the said transcript, in such an event, is not "properly certified to." Street v. Smith, 15 N. M. 95, 103 Pac. 644; Oliver Typewriter Co. v. Burtner, 17 N. M. 354, 128 Pac. 62. The plaintiff in error elected to proceed under section 4493, Code 1915, but failed to observe its provisions in respect to having the court certify to the correctness of the stenographer's transcript. The result is that the transcript of testimony does not import verity, and cannot be considered here.

[2] 2. Plaintiff in error, however, seeks to avoid the consequences of the foregoing omission by moving that the time be extended within which to file a complete transcript of record, relying on section 4490, Code 1915. That section provides for the filing of the transcript and assigning errors in this court with the following proviso:

"That the Supreme Court or the judge of the district court, where such judgment was rendered, or any justice of the Supreme Court, * * * may for good cause shown, satisfactory to him, grant to the appellant or plaintiff in error, further time to file a complete transcript in said cause, even though the time to file the same may have expired."

This section is not available for the correction of errors or omissions in the transcript due to oversight of counsel. It is evidently designed to relieve an appellant or

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plaintiff in error from the consequences of the delay of the clerk or stenographer in preparing the transcript, or perhaps, other circumstances over which he has no control. The section has nothing to do with the contents of the record, but has to do simply with the time within which the transcript is to be filed. The contents of the transcript is, by the section, left entirely to the discretion of the appellant or plaintiff in error, except that it requires as complete a transcript as may be necessary to enable the court to properly review the cause and provides a penalty of affirmance unless the same is done within the time specified.

The motion of defendant in error to strike from the files the transcript of proceedings occurring at the trial will necessarily have to be granted, and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

(22 N. M. 358)

LLEWELLYN v. FIRST STATE BANK OF LAS CRUCES et al. (No. 1959.)

(Supreme Court of New Mexico. Dec. 21, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⟸460(1)—SUING OUT OF WRIT—SUPERSEDEAS.

The taking of an appeal or suing out a writ of error does not operate as a stay of execution, and a judgment plaintiff has a right to issue execution upon such judgment, or take such other proceedings as the law contemplates, in the absence of a supersedeas bond approved and filed in accordance with law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2217-2221, 2225, 2245; Dec. Dig. ⟸460(1).]

Error to District Court, Doña Ana County; Medler, Judge.

Action by M. O. Llewellyn against the First State Bank of Las Cruces and others. There was a judgment for the latter, and the former brings error. Reversed and remanded.

On April 8, 1916, pursuant to proceedings theretofore had, the district court of Doña Ana county, N. M., rendered judgment for $64,298.11, in favor of plaintiff in error, M. O. Llewellyn, for the use and benefit of the state of New Mexico, against W. H. Hager, T. R. H. Smith, and others. The judgment directed the issuance of execution, from which judgment the defendant Hager took an appeal to the Supreme Court. After said judgment was entered and appeal granted, no supersedeas bond having been filed, execution was sued out and returned by the sheriff nulla bona. Thereupon Llewellyn filed an affidavit in accordance with the provisions of section 2214, Code 1915, setting up, among others, the facts aforesaid. The clerk forthwith issued a summons thereon, commanding Hager to appear within 10 days and submit to an examination regarding any property that he might have. This summons was duly served upon Hager. Subsequently, on April 13, 1916, plaintiff filed an application with the court, asking the court to set a time and place for the appearance of the defendant for examination under the provisions of section 2214, supra, or that the court appoint some proper person as referee to hear the same and direct the appearance of the judgment debtor before said referee at a time and place to be designated by the court. This application came on for hearing, and was denied by the court upon the sole ground that the appeal allowed to Hager in the judgment of April 8, 1916, operated as a stay of proceedings for the enforcement thereof during the 60-day period allowed by law for the filing of supersedeas bond. To review this order this writ of error is prosecuted.

Edward C. Wade, Jr., of El Paso, Tex., for plaintiff in error.

HANNA, J. (after stating the facts as above). The sole question for determination is whether or not the suing out of an appeal without the giving of a supersedeas bond operates to stay execution for a period of 60 days, within which time, under the provisions of section 4485, Code 1915, appellant or plaintiff in error may file a supersedeas bond which operates to stay proceedings in such case until the same is finally determined upon such appeal or writ of error in the Supreme Court. Section 4485 reads as follows:

"There shall be no supersedeas or stay of execution upon any final judgment or decision of any of the district courts in which an appeal has been taken or a writ of error sued out unless such appellant or plaintiff in error shall, within sixty days from the date of entry of such judgment or decision, or some responsible person for him, execute a bond to the adverse party in double the amount of such judgment complained of, with sufficient sureties, to be approved by the clerk of the district court, in case of appeals and by the clerk of the Supreme Court in case of writ of error, conditioned for the payment of such judgment, and all the costs that may be adjudged against him in case such appeal or writ of error be dismissed or the judgment or decision of the district court be affirmed. In case the decision appealed from, or from which a writ of error is sued out, is for a recovery, other than a fixed amount of money, then the amount of such bond, if an appeal is taken, shall be fixed by the district court or the judge thereof, and in case of a writ of error, by the Chief Justice or any Associate Justice of the Supreme Court, conditioned that the appellant or plaintiff in error shall prosecute such appeal or writ of error with due diligence in the Supreme Court, and that if the decision of the court below be affirmed or the appeal or writ of error be dismissed he will comply with the decree of the district court and pay all damages and costs adjudged against him in the district court and in the Supreme Court on such appeal or writ of error. Upon the approval of the bonds provided for in this section, and upon filing the bond, in case of appeal, with the clerk of the district court, and in case of a writ of error, with the clerk of the Supreme Court, there shall be a stay of proceedings in

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such cause until the same is finally determined upon such appeal or writ of error in the Supreme Court."

Not a word is to be found in the whole section to the effect that there shall be any stay of proceedings except in the last sentence, which declares that, upon the approval of the bond and filing of the same, there shall be a stay of proceedings in the cause until it is finally determined upon the appeal or writ of error in the Supreme Court. In other words, there can be no stay until the bond is approved and filed. This is in accordance with the universal practice throughout the United States. In 3 Corpus Juris, p. 1273:

"In most, if not all, jurisdictions in the United States supersedeas and stay of proceedings are the subject of statutory provision, and the rule very generally obtains that an appeal or writ of error does not, per se, operate as a supersedeas, but in order that it may so operate the court must so order, or a bond or other security must be given, or other conditions complied with, according to the provisions of the statute."

We are therefore required to hold that the taking of an appeal or suing out of a writ of error does not operate as a stay of execution, and that a judgment plaintiff has a right to issue execution upon such judgment, or take such other proceedings as the law contemplates, in the absence of a supersedeas bond approved and filed in accordance with the law.

For the reasons stated the judgment of the district court is reversed, and the cause is remanded, with instructions to proceed in accordance with this opinion; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

(94 Wash. 187)

SULLIVAN v. PORTER et ux. (No. 13626.)

(Supreme Court of Washington. Jan. 3, 1917.)

1. JUDGMENT ⇐708—PERSONS CONCLUDED—PERSONS NOT PARTIES.

Where abstract of judgment against a trust company was filed in the auditor's office before action was commenced against the trust company by a third person to declare such company a trustee for him as to land standing in the name of the company, the judgment in such action declaring the company a trustee, while prima facie evidence that the trust existed and binding and conclusive as between the third person and the trust company, was subject to attack by the judgment creditor who filed the abstract.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. ⇐708.]

2. FRAUDULENT CONVEYANCES ⇐271(3) — BURDEN OF PROOF.

In such case, it then devolved upon the judgment creditors who filed the abstract to show that the judgment declaring the trust was collusive and fraudulent as to them.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 798; Dec. Dig. ⇐271(3).]

Department 2. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action to quiet title by C. F. Sullivan against Charles Porter and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Englehart & Rigg, of North Yakima, and Fletcher & Evans, of Tacoma, for appellants. Guy E. Kelly and Thomas MacMahon, both of Tacoma, for respondent.

MOUNT, J. This action was brought by the respondent to quiet his title to certain lands in Pierce county, and to remove a cloud therefrom. The complaint alleged that the respondent was the owner of the property, and that the defendants were asserting a claim therein adverse to the plaintiff, and that the defendants had no right, title, or interest in the premises, or any part thereof.

For answer to the complaint, the defendants denied that the plaintiff was the owner of the property, and, as an affirmative defense, alleged that on the 15th day of February, 1915, the defendants procured a judgment against the Tweedy Trust Company, a corporation in Yakima county, in the sum of $4,557.33, together with interest and costs; that thereafter, on the 18th day of March, 1915, the defendants filed in the office of the clerk of the superior court of Pierce county an abstract of the judgment in that case; that, at that time, the Tweedy Trust Company was the owner of the lands in question; that, by reason of filing the said abstract, the defendants acquired a first and prior lien upon the real estate; that thereafter, with intent to defraud these defendants and render their judgment and lien valueless, the plaintiff in this action brought a suit against the Tweedy Trust Company to declare a trust, alleging therein that the plaintiff was the owner of the property; that the Tweedy Trust Company, in collusion with the said plaintiff, confessed judgment, and permitted judgment to be taken against the said Tweedy Trust Company, in order to establish said trust, and that the same was done without notice to these defendants, and for the sole purpose of defeating the right of lien of the defendants; that the defendants had no knowledge or information that the plaintiff claimed any interest in the lands in controversy in this action. The defendants prayed to have the lien of the judgment of $4,557.33 declared a first lien upon the property. For reply the plaintiff admitted the filing of the abstract in Pierce county, and denied all of the other allegations in the affirmative defense.

Upon these issues the case came on for trial to the court without a jury. The plaintiff introduced in evidence an abstract of title showing that the property was deeded on May 5, 1906, by one Rice, who was then the owner of the property, to the Tweedy Trust Company. Plaintiff then introduced in evidence, over the objection of the appel-

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lants, a certified copy of the judgment rendered in the case of the plaintiff against the Tweedy Trust Company on August 26, 1915, reciting that the Tweedy Trust Company held the property in trust for the plaintiff, and the plaintiff was the owner thereof, and then rested. Defendants then moved for a directed judgment that the lien of their judgment be declared a prior and paramount lien. No other evidence was introduced. The court thereupon denied that motion and entered a judgment in favor of the plaintiff. Defendants have appealed.

[1] The only question in the case is whether the judgment obtained by the respondent against the Tweedy Trust Company is evidence that the Tweedy Trust Company was a trustee, holding the property in trust for the plaintiff. It will be noticed that an abstract of the judgment in favor of the defendants, and against the Tweedy Trust Company, was filed in the auditor's office of Pierce county before the action was brought by the plaintiff against the Tweedy Trust Company to declare that company a trustee. It will also be noticed that the defendants were not parties to that action. They were not bound by that judgment, but it is clear that as between the Tweedy Trust Company and the respondent in this case, that judgment was binding and conclusive to the effect that the Tweedy Trust Company held the property in question in trust for the respondent. The defendants might attack it at any time. They did attack it in this case by alleging that the judgment was procured in fraud of the rights of the defendants and without their knowledge. We think the judgment was at least competent to prove prima facie the fact therein stated, that the Tweedy Trust Company held the lands in question in trust for the respondent, and was not the owner thereof. While that judgment, and the recitals therein, were binding and conclusive as between the plaintiff and the Tweedy Trust Company, it was not conclusive upon these defendants, but was sufficient to show the facts recited in the judgment, and made a prima facie case to the effect that the Tweedy Trust Company was a trustee for the plaintiff in that action, the respondent in this.

[2] It devolved then upon the defendants in this action to show, as they had alleged in their affirmative answer, that the judgment was collusive and fraudulent as to them. No evidence was offered to show that fact. We are therefore satisfied that the trial court properly held that the judgment was sufficient to make a prima facie case in favor of the respondent.

The judgment appealed from is therefore affirmed.

MORRIS, C. J., and FULLERTON, HOLCOMB, and PARKER, JJ., concur.

(94 Wash. 154)

PLATH v. MULLINS et al. (No. 13663.)

(Supreme Court of Washington. Dec. 29, 1916.)

1. APPEAL AND ERROR ⇐1199—REMAND—DIRECTIONS TO TRIAL COURT — ENTRY OF JUDGMENT.

Where on appeal a judgment was directed to be entered by the trial court providing for transfer of title in community property by payment to one part owner, without a holding that there should be an accounting, if the successful party thought that the question of accounting was within the issues and not passed on, or should have been passed on, he should have called it to attention of the court by motion or petition for rehearing, but could not have such matter disposed of by a judgment entry below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4674–4676; Dec. Dig. ⇐1199.]

2. EXECUTORS AND ADMINISTRATORS ⇐483—LIEN UPON ESTATE PROPERTY—REQUISITES.

Where the court on appeal directed the administrator to purchase certain shares in community property wherein the estate was interested, he was not thereupon entitled to a lien on the land for the sum to be advanced for the purchase price, since an equitable lien cannot be declared upon potential facts, and his remedy was in the administration proceedings, and not in the proceedings to purchase the community property.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. ⇐483.]

Department 1. Appeal from Superior Court, Yakima County; E. B. Preble, Judge.

Action by F. B. Plath, as administrator of A. W. Burnett, deceased, against Pat Mullins, wife, and another. On the first appeal, the trial court was directed to enter judgment for the administrator, and on remand a form of judgment was submitted, but the trial judge refused to enter it, and the administrator appeals. Affirmed.

Wende & Taylor and E. B. Velikanje, all of North Yakima, for appellant. H. J. Snively, of North Yakima, for respondents.

CHADWICK, J. This case was before the court, and opinion rendered, in 87 Wash. 403, 151 Pac. 812. The court below was directed to enter a judgment in favor of appellant, the plaintiff and present appellant. Counsel prepared, and submitted to the court below, a form of judgment complying with our holding, and providing, further, that the defendants should account to the plaintiff for all personal property—situate upon the lands in controversy at the time respondents took possession—in which A. W. Burnett, deceased, had an interest, or for the value thereof, and for the rents, issues, and profits of the land from and after the 4th day of November, 1910, and further providing:

"That the said lands and premises in the hands of said administrator be impressed with a lien in favor of said administrator and as against the defendant Josie Burnett and all other persons claiming as heirs at law of the said A. W. Burnett, deceased, or by, through or under the will of said A. W. Burnett, deceased, for the said sum of $4,826.36,"

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—being the amount due defendants Mullins upon the contract of purchase described in our former opinion. The trial judge refused to enter the judgment in the form proposed in so far as it required defendants Mullins to account for personal property, and for the rents and profits of the lands; and in so far as it was proposed to make the amount to be paid for a deed to the premises a lien upon the lands for the purchase price to be advanced by the administrator.

[1] While the trial judge seems to have gone extensively into the questions of accounting, we think that phase of the case may be disposed of without resorting to the pleadings or the evidence taken at the former hearing. The only question passed upon by this court was whether the land was community or separate property. We held it to be community property. The only thing left open was to provide for some method of transferring the title from defendants Mullins to the administrator of the estate of Burnett, deceased. There was no holding by this court that the defendants should account, either for personal property or for the rents, issues, and profits of the land. If plaintiff conceived, as he now asserts, that these questions were within the issues, and not passed upon, or should have been passed upon by this court, his remedy was here, and he should have called it to our attention, either by motion or by petition for rehearing. Not having done so, he cannot now take judgment in the court below upon any controverted question that goes to the merits. Richardson v. Sears, 87 Wash. 207, 151 Pac. 504.

[2] Neither is plaintiff entitled to declare a lien on the land for the sum he intends to advance to the estate to pay the purchase price of the land. Equitable liens are not to be declared upon potential facts. The administrator has not, so far as the record indicates, paid any money for or on behalf of the estate. While executors and administrators are to be recompensed for advances made under the direction of, or when ratified by, the court sitting in probate, it is beyond the power of the court, under the issues tendered in this case, to create a lien dependent upon a contingency that may never occur.

Plaintiff's remedy is in the administration proceeding, where the court may, by appropriate order, sanction any advances made by the administrator, and at the same time protect the heirs and others interested in the estate. The estate will there be chargeable with all sums advanced under the direction of the court. The court may protect plaintiff by lien or other appropriate order if, in its judgment, his advances have tended to the preservation of the estate. 18 Cyc. 570.

Much of the plaintiff's argument is predicated upon the thought expressed in Lawrence v. Halverson, 41 Wash. 534, 83 Pac. 889, that a litigant will not, under our code system of remedies, be expelled from one door of the court with the admonition to enter at another. We are putting no such burden upon appellant. He is the administrator of the estate of Burnett, deceased, and as such has brought an independent action. It is he who has entered the court by two doors, and he should not be heard to complain if he is directed to take his remedy in that proceeding which, in the judgment of the court, is more appropriate, and where the heirs and all parties interested may be heard in their own behalf.

Affirmed.

MORRIS, C. J., and MAIN, ELLIS, and WEBSTER, JJ., concur.

(94 Wash. 248)

GUSTAV v. ESARY. (No. 13612.)

(Supreme Court of Washington. Jan. 8, 1917.)

RECEIVERS ⟹204 — DISCHARGE — REOPENING ACCOUNT.

A receiver who disbursed all the funds of an insolvent corporation, pursuant to court orders, without paying a claim filed with his attorneys, but not called to his attention, cannot be required, after his discharge, to pay such claim or be punished for contempt.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 319, 407, 408; Dec. Dig. ⟹204.]

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Sam Gustav against James D. Esary, as receiver of the Three Tree Point Gravel Company. Judgment for plaintiff, and defendant appeals. Reversed.

Byers & Byers, of Seattle, for appellant. Cole & Dolby, of Seattle, for respondent.

MORRIS, C. J. In January, 1911, appellant was appointed receiver of the Three Tree Point Gravel Company. In October following, he made his final report to the court, and, with his bondsman, was discharged. In September, 1913, respondent filed a petition praying that the order of discharge be set aside upon the ground that respondent had filed a claim with the receiver which had been allowed by the court and which had not been paid. A hearing was had upon this petition after various objections on the part of appellant, when it appeared that respondent's claim, while filed with the attorneys of the receiver, was not called to the attention of the receiver, and that for this reason it was not included in his final report, and no provision made for its payment. It was further shown that, acting under the orders of the court, the receiver had paid out all the moneys save a few cents of the insolvent corporation coming into his hands, and had exhausted its assets. The lower court thereupon entered an order vacating the order of discharge, and required the receiver to pay

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respondent's claim with interest and attorney fees. The appellant did not comply with this order, and the court thereupon issued a show cause order requiring him to comply with the prior order of payment or subject himself to contempt. Appellant appeared in response to this order, and again made a showing of no funds or property. The lower court found appellant had no means of complying with the order of payment, that all funds and property coming into his hands had been paid out in accordance with the previous orders of the court, but, notwithstanding, ordered the appellant to pay respondent's claim, or in default stand committed to the county jail. Notice of appeal was given, and the case is here for review.

Many interesting legal questions, jurisdictional and otherwise, are argued by respective counsel, which, in view of the conclusion we have reached, will not be referred to. We are of the opinion that when it appeared that the insolvent estate had been completely exhausted in complying with the prior orders of the court, and that it was impossible for the appellant, as receiver, to make the payment required of him, the proceedings should have been dismissed. The court should not, in the alternative, require its officer to do that which is impossible, when the impossibility arises through no fault of the officer and is occasioned through executing prior orders of the court, or be punished for contempt. Finding in this a sufficient reason for reversing the judgment, we refrain from discussing other points.

The judgment is reversed.

MOUNT, FULLERTON, HOLCOMB, and PARKER, JJ., concur.

(94 Wash. 237)

STATE v. BANKS. (No. 13680.)

(Supreme Court of Washington. Jan. 4, 1917.)

CRIMINAL LAW ⟸1070—ABATEMENT OF ACTION—DEATH OF DEFENDANT.

In the absence of a statute expressing the contrary, the death of a defendant in a criminal case pending an appeal permanently abates the action and all proceedings under the judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2700, 2701; Dec. Dig. ⟸ 1070.]

Department 2. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

George E. Banks was convicted of unlawfully selling intoxicating liquors, and he appeals. Action dismissed on suggestion of defendant's death pending appeal.

Fred C. Brown, of Seattle, for appellant. Alfred H. Lundin, John D. Carmody, and Joseph A. Barto, all of Seattle, for the State.

MOUNT, J. The appellant was convicted in the lower court of the crime of unlawfully selling intoxicating liquors. Upon this conviction, the trial court imposed, as punishment, a fine of $50 and costs. Pending the appeal, the appellant died. His death was suggested at the oral argument, but we were invited to pass upon the questions presented upon the briefs. In the case of State v. Furth, 82 Wash. 665, at page 667, 144 Pac. 907, 908, we said:

"The courts of the country, both state and federal, have, with marked unanimity, held that the death of the defendant in a criminal case pending appeal, in the absence of a statute expressing the contrary, permanently abates the action and all proceedings under the judgment. They make no distinction between a sentence of imprisonment and the imposition of a fine. The underlying principle is that the object of all criminal punishment is to punish the one who committed the crime or offense, and not to punish those upon whom his estate is cast, by operation of law or otherwise."

A number of cases were cited to support that rule. We decided that case on the merits, because we were invited by counsel to do so, "and because the case is pending in the trial court against other defendants." The last-named reason was the only justification for passing upon the merits. There is no such condition here. The action has abated by the death of appellant, and must, for that reason, be dismissed.

MORRIS, C. J., and HOLCOMB, FULLERTON, and PARKER, JJ., concur.

(94 Wash. 250)

SCOUSE et al. v. ALASKA & YAKIMA INV. CO. et al. (No. 13682.)

(Supreme Court of Washington. Jan. 11, 1917.)

1. FRAUDULENT CONVEYANCES ⟸271(3)—ACTION TO ENFORCE JUDGMENT—OWNERSHIP—BURDEN OF PROOF.

In an action to subject real estate in the name of defendant corporation to the satisfaction of a judgment against an individual defendant, on the ground that it had been placed in the corporation's name in fraud of creditors, the plaintiff had the burden of proving fraud.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 798; Dec. Dig. ⟸ 271(3).]

2. APPEAL AND ERROR ⟸994(3)—QUESTIONS OF FACT—FINDING.

The credibility of the witnesses was for the court trying without a jury, necessarily depending upon the demeanor and general appearance of the witnesses as well as their statements, and, in view of the trial court's better position to judge of those matters, the Supreme Court, where it was not convinced from a reading of the abstract embodying all the facts in the case that the trial court's dismissal of the action was wrong, would affirm.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3904-3905½; Dec. Dig. ⟸ 994(3).]

3. FRAUDULENT CONVEYANCES ⟸271(3)—PRESUMPTION—BURDEN OF PROOF.

There is a presumption of honesty and good faith in favor of all ordinary business transactions, and fraud in a conveyance is never pre-

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sumed but must be established by the party alleging it by clear and satisfactory evidence.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 798; Dec. Dig. ⊂⊃ 271(3).]

Morris, C. J., dissenting.

Department 2. Appeal from Superior Court, Yakima County; Thos. E. Grady, Judge.

Action by Z. A. Scouse and another against the Alaska & Yakima Investment Company, Belinda A. Carbonneau, and others. Judgment for defendants dismissing the action, and plaintiffs appeal. Affirmed.

Willett & Oleson, of Seattle, and Englehart & Rigg, of North Yakima, for appellants. H. J. Snively, of North Yakima, for respondents.

MOUNT, J. This action was brought to subject certain real estate, held in the name of Alaska & Yakima Investment Company, in the county of Yakima, to the satisfaction of a judgment obtained by the plaintiffs against Belinda A. Carbonneau. Upon issues joined, the case was tried to the court without a jury. At the conclusion of a lengthy trial, the court decided that the property in question was not the property of Belinda A. Carbonneau, and that she had no interest therein, but was the property of the Alaska & Yakima Investment Company, a corporation, and that the money which purchased the real property belonged to immediate relatives of Mrs. Carbonneau, and for that reason dismissed the action. The plaintiffs have appealed from the order of dismissal.

[1] The controlling question in the case is whether the property is really the property of Mrs. Carbonneau, and was by her put into the name of the corporation, of which her immediate relatives were the stockholders, for the purpose of defrauding her creditors. This, of course, is purely a question of fact, and the burden of proof rests upon the appellants. The writer of this opinion has, with care, read the lengthy abstract of the evidence, and is not satisfied therefrom that the trial court was wrong in his conclusions.

[2] We shall not discuss the evidence. To do so would necessitate a lengthy and involved opinion, and, as said by the trial court, such opinion "could be, at most, * * * an argument in vindication of the views entertained," and would not declare or define any rule of law. The appellants argue that, because of the many improbabilities, misstatements, and contradictions of the witnesses who testified in behalf of the respondents, the trial court was not justified in basing a conclusion upon their testimony. An examination of the record shows that there were many contradictions, many improbable statements, and many imperfections in the testimony of respondents' witnesses; but it also shows that the occurrences about which they testified had taken place from eight to ten years prior to the time the testimony was given. It is not uncommon for witnesses to disagree upon facts which occurred years before. In cases like this, where the controlling facts are in dispute, where witnesses disagree, where statements are improbable, the court is controlled largely by the apparent credibility of the witnesses. This credibility is necessarily determined by the demeanor and general appearance of the witnesses, as well as their statements. The trial court was in a better position to judge of these things than we are, and while we may say that, if the trial court had rendered a judgment in favor of these appellants upon the facts before us, we would feel bound to affirm the judgment, but, when the trial court has found in favor of the respondents, we feel it equally our duty to affirm the judgment, especially since we are not convinced, from a careful reading of the abstract, which embodies all the facts in the case, that the trial court was wrong. In this case, as we have above intimated, the burden was upon the appellant to show that the property in question was really the property of Mrs. Carbonneau, and that the other defendants had no interest therein, and that the same was placed in the corporation in fraud of creditors. The burden of showing these facts rested upon the respondents.

[3] In the case of Rohrer v. Snyder, 29 Wash. 199, at page 206, 69 Pac. 748, 750, we said:

"* * * It must be borne in mind that there is a presumption of honesty and good faith that prevails in favor of all ordinary business transactions; that fraud is never presumed, but must be established by the party alleging it. Where the good faith of a conveyance is assailed, it is not enough that the evidence may cause a suspicion as to its good faith. The evidence must be clear and satisfactory, and such as convinces the mind that the conveyance is in reality fraudulent."

Upon the record in this case, we are not satisfied that the trial court was wrong in his conclusions, and the judgment is therefore affirmed.

PARKER, HOLCOMB, and FULLERTON, JJ., concur.

MORRIS, C. J. To my mind the facts clearly show appellants are entitled to the relief sought. I therefore dissent.

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(94 Wash. 246)

SPOKANE VALLEY LUMBER & BOX CO. v. DAWSON et ux. (No. 13597.)

(Supreme Court of Washington. Jan. 8, 1917.)

MECHANICS' LIENS ⊂⇒99(1)—NOTICE—WHEN UNNECESSARY.

Rem. & Bal. Code, § 1133, requiring notice of furnishing materials to be served on the owner if they are furnished to another than the owner, does not require notice when the husband, acting as the wife's agent, orders and receives the goods and is given a statement of the material furnished.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 131; Dec. Dig. ⊂⇒99(1).]

Department 2. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Suit by the Spokane Valley Lumber & Box Company against G. W. Dawson and wife. Decree for defendants, and plaintiff appeals. Reversed and remanded, with instructions.

J. E. McAndrew, of Spokane, for appellant.

MORRIS, C. J. Appeal from a decree denying the foreclosure of a materialman's lien. The essential facts are as follows: Respondents are husband and wife residing upon lands near Spokane which are the separate property of the wife. For many years the respondent has acted as the general agent of the wife in the full control and management of these lands, cultivating the same, marketing the crops, collecting the moneys due thereon, and purchasing supplies. In July, 1913, the respondent husband ordered from the appellant certain material for use in the construction of a building upon the lands. The materials were delivered upon the premises, used in the construction of the building, and not being paid for, a lien was filed and this action brought to foreclose the same. It appearing that the wife was the owner of the lands, and appellant not having within five days after the first delivery of materials given written notice to the wife of the furnishing of the materials, as provided for in section 1133, Rem. & Bal. Code, the lower court was of the opinion that the lien was unenforceable, and so held, although rendering judgment against each respondent for the purchase price of the materials.

The refusal of foreclosure was error. We have held whenever this question has been before us that when the materialman furnishes material to the owner, either directly or through an agent of the owner, the statute in question has no application. Rieflin v. Grafton, 63 Wash. 387, 115 Pac. 851; Architectural Decorating Co. v. Nicklason, 66 Wash. 198, 119 Pac. 177; Hewitt Lea Lumber Co. v. Chesley, 68 Wash. 53, 122 Pac. 993; Brace & Hergert Mill Co. v. Burbank, 87 Wash. 356, 151 Pac. 803. There is no question here but that the husband was the wife's agent in the purchase of this material, and that delivery was made to the wife. The case is ruled by those cited.

Respondents have not appeared in this court, but appellant's brief suggests that the lower court was of the opinion that in Hays v. Montesano Mill Co., 85 Wash. 604, 148 Pac. 881, this court had departed from the rule of the cited cases. It was not so intended, nor can we so read the Hays Case when the language there used is applied to the facts before the court, which must always be done to clearly interpret any ruling. In that case certain machinery was installed by the lessee of a mill. Failing to pay for the same, a lien was sought to be foreclosed against the fee. No notice was given to the owner of the fee of the furnishing of the material, and it was sought to avoid this defect by a contention that the lessee was the agent of the owner for the purpose of improving the property, and hence the owner was not entitled to notice. Finding no agency in this relation, we held otherwise, and while perhaps, as in many cases, the language used, disassociated from the facts, may lead to the belief that the court was holding that notice to an owner was necessary, even though the sale was made to the owner through his agent, it is evident it was not so intended, as no reference was made to the previous cases holding no notice is necessary in such a case, nor is any reference made to this case as establishing a contrary rule in the subsequent Brace & Hergert Case in 87 Washington. All that could be held in the Hays Case, and all that was intended, was that the lessee of a mill property could not so bind the owner of the fee in installing machinery as to render it unnecessary to serve written notice upon the owner in an attempt to subject the fee to a materialman's lien. It will be seen at once that such a holding does not conflict with the rule that where, as here, the material is furnished to the owner, though ordered by an agent, the serving of written notice is not necessary to bind the owner.

The judgment is reversed, and the cause remanded, with instructions to enter a decree of foreclosure.

HOLCOMB, PARKER, FULLERTON, and WEBSTER, JJ., concur.

(94 Wash. 163)

STATE v. COTZ. (No. 13732.)

(Supreme Court of Washington. Dec. 29, 1916.)

INDICTMENT AND INFORMATION ⊂⇒110(3) — HABITUAL CRIMINAL — SUFFICIENCY — STATUTE.

Under Rem. Code, 1915, § 2286, declaring that every person convicted of any crime of which fraud is an element, or of petit larceny, or of any felony, who shall have previously been convicted of any felony, or twice convicted of petit larceny, or of a misdemeanor of which fraud is an element, shall be adjudged to be an habitual criminal, an indictment substantially following the language of the statute, though not affirmatively alleging that the prior

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convictions were had in courts of competent jurisdiction, was sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 291–294; Dec. Dig. ⊂⊃110(3).]

Department 1. Appeal from Superior Court, King County; King Dykeman, Judge.

William A. Cotz was convicted of being an habitual criminal, and he appeals. Affirmed.

Beeler & Sullivan, of Seattle, for appellant. Alfred H. Lundin, Everett C. Ellis, and Joseph A. Barto, all of Seattle, for the State.

ELLIS, J. Defendant was charged with being an habitual criminal. From a conviction, judgment, and sentence, he appeals.

The only question raised is as to the sufficiency of the information. Saving the differences in the nature of the crimes of which the prior convictions are charged, the information is couched in the same terms as that set out and sustained in the opinion of this court in State v. Rowan, 84 Wash. 158, 146 Pac. 374. It is therefore unnecessary to quote it here. Appellant urges that it is insufficient in that it is not affirmatively alleged that the prior convictions were had in a court or courts of competent jurisdiction, and in that each step in the procedure from indictment or information to final judgment is not formally pleaded. It is argued that this is necessary under the statute of 1903 (Rem. & Bal. Code, § 2177), which required that the information should set forth "the fact of such former conviction or convictions, with the time and place when and where such former convictions occurred." It would be a sufficient answer to say that the information here does set forth the fact, time, and place of the former convictions, but in any event it is a conclusive answer that the statute relied upon has been repealed and superseded by the Criminal Code of 1909, of which section 34 is Rem. Code 1915, § 2286, under which the information here involved was filed. It was so held in State v. Gustafson, 87 Wash. 613, 152 Pac. 335. In State v. Rowan, supra, it was held, in effect, that an information, of which the one before us is almost a replica, was sufficient in that it charged the crime substantially in the language of the statute. True, the exact objection here raised was not there presented, but it was presented in the later case of State v. Gustafson, supra, as an examination of the record and briefs in that case discloses, and we there again held sufficient an information in every material particular the same as that in the Rowan Case and as that here. It is a general rule that an information charging a statutory crime substantially in the language of the statute defining the crime is sufficient, if thereby the accused is adequately advised of the cause of the accusation against him. Joyce, Indictments, § 371, p. 415; State v. Schuman, 89 Wash. 9, 153 Pac. 1084; State v. Lewis, 42 Wash. 672, 85 Pac. 668. The information here meets this criterion. On the authority of the Rowan and Gustafson Cases we hold it sufficient.

The judgment is affirmed.

MORRIS, C. J., and MAIN and HOLCOMB, JJ., concur.

CHADWICK, J. I concurred in the case of State v. Rowan, 84 Wash. 158, 146 Pac. 374, and I concur in this opinion, but my concurrence is based, not so much on the argument and reasoning employed by the court in the two cases, as upon what I conceive to be the deeper reason, and the sounder principle which I shall undertake to briefly state. The purpose of the law is not to charge a substantive crime. The sufficiency of the original information, the facts necessary to sustain a conviction, and the ordinary rules governing pleadings in criminal cases have no application whatever. When the prosecuting attorney has charged, by simple reference to the judgments, that a party has been convicted three times, he has done all that the law requires, for it is not a question of guilt or innocence, but merely a question involving a state of the record either in the court where the charge is made, or some other court. It is necessary, when pleading a judgment, to say no more than that a judgment (describing it) was rendered in a certain court at a certain time. The only plea open to one so charged is that of nul tiel record, or that the judgment has been satisfied in some way recognized by the law.

Wherefore, if this reasoning be sound, our opinion should be sustained by reference to the rules of pleadings in civil actions, rather than by reference to either the statutes or the rules of the common law for measuring the sufficiency of indictments and informations. I would prefer to place my vote for affirmance upon this ground.

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(94 Wash. 191)

In re CUNNINGHAM'S ESTATE.

FIDELITY NAT. BANK OF SPOKANE v. CUNNINGHAM.

(No. 13319.)

(Supreme Court of Washington. Jan. 4, 1917.)

WITNESSES ⟸145, 159(3) — "TRANSACTION WITH DECEASED"—EXECUTORS.

In a proceeding by creditor of community estate of a deceased to compel her executor to inventory certain property as community property, testimony of the executor that the property was deceased's separate estate, being a gift to her, was not incompetent under Rem. & Bal. Code, § 1211, providing that, in a proceeding where the adverse party defends as executor, such party shall not be admitted to testify in his own behalf as to a transaction had by him with or any statement made to him by deceased; for, although the executor was an adverse party, the testimony was not adverse to the estate or concerning a transaction had with or statement made by or to deceased.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 669; Dec. Dig. ⟸145, 159(3).

For other definitions, see Words and Phrases, First and Second Series, Transactions.]

En Banc. Appeal from Superior Court, Adams County; Bert Linn, Judge.

In the matter of the estate of Rebecca W. Cunningham, deceased. Proceeding by the Fidelity National Bank of Spokane against W. R. Cunningham, Sr., as executor. From judgment for the executor, the bank appeals. Affirmed.

F. E. Langford and Lucius G. Nash, both of Spokane, for appellant. Walter Staser, of Ritzville, and C. H. Spalding, of Lind, for respondent.

MORRIS, C. J. Appellant as a creditor of the estate of Rebecca Cunningham, brought this proceeding to compel the executor to inventory certain property as community property in order to satisfy appellant's claim as a community debt; the basis of the petition being that the property was acquired during coverture and was community property rather than the separate property of the deceased, as claimed by the executor. Issues were framed as to the character of the property, and, the lower court finding the same to be the separate estate of the deceased, this appeal was taken.

The character of the property depends largly upon the testimony of the executor and his son, and the error relied upon by appellant is the inadmissibility and incompetency of this testimony. The controlling statute is section 1211, Rem. & Bal. Code, providing:

"No person offered as a witness shall be excluded from giving evidence by reason of his interest in the event of the action, as a party thereto or otherwise; but such interest may be shown to affect his credibility: Provided, however, that in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person, or as deriving right or title by, through, or from any deceased person, or as the guardian or conservator of the estate of any insane person, or of any minor under the age of fourteen years, then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with or any statement made to him by any such deceased or insane person, or by any such minor under the age of fourteen years: Provided, further, that this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and who have no other or further interest in the action."

The executor was clearly an adverse party within the rule, and if his testimony, or that of the son, was adverse to the estate, it was clearly inadmissible. The testimony of both the executor and the son was not, however, adverse to the estate, nor was either of them permitted to testify to any transaction had with or statement made to or by the deceased. The testimony was to the effect that the property was in the one instance a gift from the son to the mother, and in another a gift from the husband to the wife, made many years ago; that in neither case was any money or property advanced by the deceased as a consideration for the gift, nor did any community funds or property enter into the transaction.

The evident purpose of this statute is to prevent those whom it covers from detailing any transaction with the deceased which it would be to the interests of the deceased if living to deny. This purpose has been expressed thus: Death having closed the lips of one party, the law closes the lips of the other. The inhibition is for the benefit of the estate to shield it from the enforcement of claims that otherwise could not be defended against. It is not to be used as a sword to deprive the estate of beneficial evidence because death has deprived the estate of testimony that otherwise would be admissible. In other words, living mouths are closed when death prevents adverse testimony, but not when death only prevents confirmatory or supporting evidence. This was the view expressed in O'Connor v. Slatter, 46 Wash. 308, 89 Pac. 885, where, in interpreting this statute upon a like claim of error, it was said:

"From a careful consideration of the language of this statute and the object of its enactment, we conclude that it does not disqualify an interested witness on the part of the estate."

This language was used in sustaining the contention then made that the statute excludes only those witnesses whose testimony is adverse as to the estate of the deceased person. The O'Connor Case was again before this court in 48 Wash. 493, 93 Pac. 1078. The former ruling was there adhered to, the court adding:

"The prohibition of the statute, however, extends only to transactions had by the appellant with the deceased, or to statements made to the appellant by the deceased. It does not extend to every fact to which the deceased might testify if living."

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A like view of this statute was voiced in Nicholson v. Kilbury, 80 Wash. 500, 141 Pac. 1043, where it was said:

"The statute means that a party in interest is not to make himself a vehicle to carry the words of his deceased adversary into the record of a contested proceeding."

. These cases determine the rule. They are in line with the modern interpretation that statutes of this character should not be extended beyond their language when the effect of such extension will be to add to the list of those rendered incompetent as witnesses. St. John v. Lofland, 5 N. D. 140, 64 N. W. 930.

The judgment is affirmed.

HOLCOMB, MAIN, MOUNT, PARKER, and FULLERTON, JJ., concur.

(94 Wash. 243)

STATE ex rel. W. W. ROBINSON CO. v. GILLIAM, Superior Court Judge, et al.
(No. 13828.)

(Supreme Court of Washington. Jan. 4, 1917.)

ATTORNEY AND CLIENT ⇐192(1)—ATTORNEY'S LIEN—BOND—STATUTE.

Under Rem. Code 1915, § 137, providing that, when an attorney refuses to deliver papers to one from whom he had received them in the course of his employment, he may be required to do so within a specified time, or show cause, and section 138, providing that, if the attorney claims a lien upon such papers, the court may require that the client give security to satisfy the lien when determined in an action, or may summarily determine the lien, the court on petition for an order that an attorney deliver books and papers to relator, by whom he had been employed to collect accounts, and upon which he claimed a lien, should have determined the amount of the lien, and, not having done so, should have fixed the amount of the bond pending its determination, whereupon the client would be entitled to a delivery of the papers, etc.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 425, 426; Dec. Dig. ⇐ 192(1).]

Department 2. Application for writ of mandamus by the State of Washington, on the relation of the W. W. Robinson Company, against Mitchell Gilliam, one of the Judges of the Superior Court of the State of Washington for King County, and George Olson. Writ to issue, and respondent Judge ordered to fix a bond.

John L. Corrigan, of Seattle, for plaintiff.
Jay C. Allen, of Seattle, for respondents.

MOUNT, J. This is an application for a writ of mandamus to require the trial court to fix the amount of a bond to be furnished by the relator, and to enter an order, upon such bond being furnished, requiring the respondent Olson to deliver certain money and property to the relator.

It appears that in the year 1915 certain accounts were delivered by an agent of the relator to Mr. Olson for collection; that thereafter Mr. Olson collected one of these accounts, amounting to $75, and assigned another account for $729.10, and collected that amount upon such assignment; that afterwards, in October, 1916, the relator demanded all books, papers, documents, and money belonging to it from Mr. Olson, who refused to deliver the same on demand; that thereafter a petition was filed with the superior court of King county stating these facts, and praying for an order upon Mr. Olson to deliver the money, books, and papers to the relator. In answer to this petition, Mr. Olson filed a general demurrer, supplemented by an affidavit, admitting that he was an attorney at law; that he had been employed to collect certain accounts belonging to the relator; that he had collected accounts and performed other legal services; that he had rendered a statement of account to the relator for a balance of $156.10, after appropriating all the money he had collected. In his affidavit he further stated that he had assigned his account to one B. Campbell for collection; that Campbell, after the petition was filed, had brought an action against the relator to recover the amount of the attorney's fees due to Mr. Olson; and that the moneys collected, and papers and books in his possession, were held by him to secure an attorney's lien. Upon substantially these facts the trial court dismissed the petition, whereupon application is made here for this writ.

The statute (Rem. Code 1915, § 137) reads as follows:

"When an attorney refuses to deliver over money or papers to a person from or for whom he has received them in the course of professional employment, whether in an action or not, he may be required by an order of the court in which an action, if any, was prosecuted, or if no action was prosecuted, then by order of any judge of a court of record, to do so within a specified time, or show cause why he should not be punished for a contempt."

Section 138 (Rem. Code 1915) provides as follows:

"If, however, the attorney claim a lien upon the money or papers, under the provisions of this chapter, the court or judge may,—

"1. Impose as a condition of making the order that the client give security, in a form and amount to be directed, to satisfy the lien, when determined in an action;

"2. Summarily to inquire into the facts on which the claim of a lien is founded, and determine the same; or

"3. To refer it, and upon the report determine the same as in other cases."

It seems clear, from a reading of these sections, that when the claim of lien was made upon the money and papers in the attorney's hands, then the court should have proceeded summarily to inquire into the facts upon which the claim of lien was founded and determined the same. The least the court should have done was to fix the amount of a bond to secure the attorney for whatever lien he might have, and to require the money and papers in the hands of the at-

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torney to be delivered to the relator. The court refused to do either, but dismissed the proceedings, no doubt upon the theory that the rights of the parties would be tried out in the action upon the assigned claim for attorney's fees and expenses, but, pending that litigation, it is plain, under the terms of the statute, the relator is entitled to its property upon the filing of a bond to secure the attorney for whatever fees he shall be entitled to. It was the intention of the statute that the client should have his property immediately, and that the attorney might rest secure that he would obtain his reasonable fees. No harm can come to the attorney if the bond is given. Irreparable loss may occur to the relator if the property in the hands of the attorney is not delivered to the relator. We are satisfied that it was the duty of the trial court to proceed summarily, and determine the amount of the attorney's fees, if any. Not having done so, it was clearly a duty to fix the amount of the bond which might be given by the relator to secure such fees pending their determination. The relator, under the statute, is clearly entitled to have the court fix a bond, and, upon the giving of such bond, to require the attorney to immediately deliver the moneys and papers and books which belong to the relator.

It is so ordered; the costs of this application to be taxed against the respondent Olson.

MORRIS, C. J., and HOLCOMB, PARKER, and FULLERTON, JJ., concur.

(94 Wash. 218)

CARLSON v. REA. (No. 13562.)

(Supreme Court of Washington. Jan. 4, 1917.)

HUSBAND AND WIFE ⟸264—WIFE'S SEPARATE ESTATE—SUFFICIENCY OF EVIDENCE.

A wife's testimony of investing her separate estate in real property, from the proceeds of which she finally bought certain land, without contribution from her husband, *held* to establish it as her separate property, though purchased during coverture and her husband once joined in mortgaging it.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 916; Dec. Dig. ⟸264.]

Department 2. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action to quiet title by Anna M. Carlson against Nellie Rea. Judgment for plaintiff, and defendant appeals. Affirmed.

Million & Houser, of Seattle, for appellant. Hayden, Langhorne & Metzger, of Tacoma, for respondent.

MOUNT, J. This action was brought by the respondent to quiet title to certain real property against the claim of the appellant. When issue was joined, the case was tried to the court without a jury, and resulted in a judgment in favor of the respondent as prayed for in the complaint. The defendant has appealed from that judgment. There is no substantial dispute in the testimony, which shows the following facts: On the 1st day of November, 1909, the appellant procured a judgment for the sum of $366.35, and costs, against Charles F. Carlson, the husband of the respondent. This judgment was based upon a promissory note, executed by Mr. Carlson on the 26th day of February, 1909. In that action, although the respondent was named as a defendant, she was not served with process, and there was no allegation in the complaint seeking to charge her with personal liability. She did not appear in the action, and no judgment was taken against her. Judgment was entered against her husband, Charles F. Carlson, alone. Thereafter, in February, 1915, an execution was issued upon that judgment, and levied upon the property in question. The property was sold under that writ and bid in by the appellant. This action was brought by the respondent to remove the cloud caused by the sale under that judgment. The respondent claimed that the property in question was her separate property, and testified that, upon coming to this state in the year 1895, she brought with her about $400, which was her separate property; that she invested this money in real estate, the title to which was taken in her own name; that this real estate was afterwards sold at an advance, and the proceeds thereof invested in other real estate, the title to which was taken in her own name, and the proceeds of that property was invested in the property in dispute, which also was taken in her own name, and which was held by her of record, in her own name, at the time the execution was levied thereon. She also testified that Mr. Carlson had contributed nothing to the acquisition of the property, but that the property is the proceeds of her separate property.

Several questions are presented in the briefs which it will not be necessary to notice. We are satisfied, from a reading of the record, that the property in dispute is the separate property of the respondent, and is not the community property of respondent and her husband. In United States Fidelity & Guaranty Co., v. Lee, 58 Wash. 16, at page 22, 107 Pac. 870, 873, we said:

"Where property is acquired during marriage, the test of its separate or community character is whether it was acquired by community funds and community credit, or separate funds and the issues and profits thereof; the presumption always being that it is community property, but this presumption may be rebutted by proof."

And in Guye v. Guye, 63 Wash. 340, at page 352, 115 Pac. 731, 735 (37 L. R. A. [N. S.] 186), we said:

"Moreover, the right of the spouses in their separate property is as sacred as is the right in their community property, and, when it is once made to appear that property was once of a separate character, it will be presumed that

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it maintains that character until some direct and positive evidence to the contrary is made to appear."

In Meyers v. Albert, 76 Wash. 218, at page 222, 135 Pac. 1003, 1004, we said:

"Where money earned in a foreign jurisdiction is brought to this state and invested in real property, the title to the property purchased inures to the person whose money was invested therein."

So it is plain that the property in question in this case, having been purchased by the separate funds of the wife, and title taken in her name, is her separate property, and not subject to the debts of either the community or the separate debt of the husband. The only evidence we find in the record in this case which tends, in any way, to show that this property is the community property of the respondent and her husband, is the mere fact that it was acquired during coverture, and, also, that the husband at one time joined in a mortgage executed by the wife upon the property; but the presumptions which arise from these circumstances are subject to be rebutted by proof, and, in this case, were clearly rebutted by the testimony of the respondent upon that question.

We are satisfied that the trial court arrived at the correct conclusion, and the judgment appealed from is therefore affirmed.

MORRIS, C. J., and HOLCOMB, PARKER, and FULLERTON, JJ., concur.

(94 Wash. 207)

RASHFORD v. RIDGEFIELD STATE BANK et al. (No. 13406.)

(Supreme Court of Washington. Jan. 4, 1917.)

INTOXICATING LIQUORS ⊂=327(1)—MANUFACTURERS—MORTGAGE—"INTEREST IN LIQUOR, STOCK, FIXTURES, OR EQUIPMENT."

Laws 1909, p. 182, providing that a manufacturer or wholesale dealer in intoxicating liquors shall not own or have any "interest in the liquor, stock, fixtures, or equipment" of any retail liquor store, does not prohibit such a person from having an interest in the real estate whereon the liquor store is conducted, since the lot and building do not come within the language of the act as to "liquors, stock, fixtures, or equipment," so that a mortgage of lot and building to a brewer is valid.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 467, 468, 470, 472; Dec. Dig. ⊂=327(1).]

Department 1. Appeal from Superior Court, Clarke County; W. H. Jackson, Judge.

Suit by N. R. Rashford against the Ridgefield State Bank and others. Judgment dismissing the action as to certain defendants, and plaintiff appeals. Affirmed.

McMaster, Hall & Drowley, of Vancouver, for appellant. Wood, Montague & Hunt and M. M. Matthiessen, all of Portland, Or., for respondents.

MAIN, J. The purpose of this action was to have a real estate mortgage declared a prior and superior lien, and for the foreclosure of the same. The defendants named in the complaint, who were holders of a mortgage prior in time, appeared by demurrer. This demurrer was sustained, and the plaintiff elected to stand upon the complaint, and refused to plead further. Thereafter a judgment was entered dismissing the action so far as it pertained to the holders of the prior mortgage. From this judgment, the appeal is prosecuted.

From the facts stated in the complaint, it appears that on September 30, 1912, John J. Erickson and wife mortgaged a certain lot or tract of ground in the town of La Center to the appellant. This mortgage was filed for record in the auditor's office of Clarke county on the 2d day of October, 1912. Prior to the giving of the appellant's mortgage, and on the 24th day of January, 1911, the Ericksons had mortgaged the same property, as described therein, to the Ridgefield State Bank. The latter mortgage was recorded on the 30th day of January, 1911. The mortgage was made to the Ridgefield State Bank in trust, and it is alleged that the actual owner of that mortgage was the Henry Weinhard Brewery, of Portland, Or. This brewery was engaged in the manufacture of fermented and malt intoxicating liquors, and selling the same in quantities of five gallons or more. At the time both of the mortgages mentioned were given, the premises described therein were occupied as a retail liquor store. The respondents here are the Ridgefield State Bank and the successors in interest of the Henry Weinhard Brewery. There is no allegation in the complaint that the Ericksons, at the time the mortgage was executed and delivered to the Ridgefield State Bank, were engaged in conducting the retail liquor store in the building which had been erected upon the lot covered by the mortgage. The sole question for determination is whether the mortgage to the Ridgefield State Bank, as mortgagee in trust, was prohibited by chapter 84 of the Laws of 1909, wherein it is provided that a manufacturer of or wholesale dealer in intoxicating liquors shall not own or have "any interest in the liquor, stock, fixtures, or equipment" of any retail liquor store. The question then is whether the mortgage to the bank, in trust for the brewery, of the premises upon which a retail liquor store was being conducted, is prohibited by the statute. Obviously the lot and the building thereon do not come within the language of the act referring to liquor, stock, or fixtures. Neither do we think that the word "equipment," as used in the statute, was intended to include the premises upon which the retail liquor store was conducted. Had the Legislature intended that the lot and building should come within the purview of the act, it would have been easy to have so expressed it. Since, under the present state of the law in this state, the

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construction of this statute is not likely to be again called for, it does not seem necessary to prolong the discussion relative to its meaning.

The judgment will be affirmed.

MORRIS, C. J., and CHADWICK, PARKER, and ELLIS, JJ., concur.

(94 Wash. 67)

UNITED IRON WORKS v. RATHSKELLER CO. (No. 13520.)

(Supreme Court of Washington. Dec. 29, 1916.)

1. ACCOUNT STATED ⟸6(2)—ELEMENTS—BILL RENDERED.

The rendering of a bill and repeated demands for payment, which were refused by the mere silence of defendant, does not establish an account stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 31–34, 36–38; Dec. Dig. ⟸6(2).]

2. SALES ⟸441(1)—WARRANTY—ACCEPTANCE—EVIDENCE.

In an action for the value of a compressor installed by plaintiff in the plant which it had previously installed under a warranty, the compressor of which was defective, the court's finding, that the full payment of the original price for the plant and its attempted use for a time during which plaintiff was repeatedly assuring defendant that it would make it right and was attempting to repair the compressor did not show an acceptance of the plant which relieved defendant from its obligation under the warranty, *held* supported by the evidence.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1277, 1283; Dec. Dig. ⟸441(1).]

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by the United Iron Works against the Rathskeller Company. Judgment for defendant, and plaintiff appeals. Affirmed.

McCafferty, Robinson & Godfrey, of Seattle, for appellant. Morris & Shipley and Paul S. Dubuar, all of Seattle, for respondent.

PARKER, J. The plaintiff, United Iron Works, seeks recovery from the defendant, the Rathskeller Company, of the sum of $881 claimed as the purchase price and cost of installing a compressor in the refrigerating plant of the defendant. The trial was had in the superior court without a jury, resulting in findings and judgment in favor of the defendant denying the relief prayed for, from which the plaintiff has appealed.

Looking to the allegations of the complaint, the plaintiff's right of recovery appears to be rested alone upon the theory of an account stated, but in subsequent pleadings and upon the trial it appears that plaintiff's right of recovery is rested both upon that theory and quantum meruit.

[1] It seems quite plain to us that there was no agreement, express or implied, between the parties constituting an account stated. There is no evidence in the record pointing to such an agreement other than the rendering of a bill and repeated demands for payment thereof by appellant and refusal to pay the same by respondent, though such refusal consisted, we assume for argument's sake, of its silence. This does not of itself constitute an implied agreement as to any sum due to appellant, and therefore does not entitle appellant to sue thereon as an account stated. Merritt v. Meisenheimer, 84 Wash. 174, 146 Pac. 370; Blanck v. Pioneer Mining Co., 159 Pac. 1077.

[2] Touching the question of quantum meruit, we think the following is a sufficient summary of the facts necessary to be noticed: In the summer of 1911, appellant furnished and installed for respondent certain machinery, including a compressor, for the equipment of its refrigerating plant. This was to be done in pursuance of a written contract and specifications made a part thereof entered into in January of that year. The contract price was $2,905, which was to be paid in three installments, the last of which was to be paid 60 days after the completion of the installing of the machinery. The machinery being installed, as respondent was led to believe in accordance with the contract, final payment was made therefor within the time specified in the contract. The contract contained express warranties as to the workmanship, materials, and capacity of the machinery, which we deem unnecessary to here notice in detail. The compressor furnished as a part of the machinery proved defective, yet not so much so as to entirely prevent its operation. This fact became known to appellant upon the commencement of the operation of the machinery immediately following its installation. Appellant used some effort from time to time to cure the defects and to cause the compressor to operate properly, which efforts of appellant continued until the summer of 1913. The final payment upon the purchase price made by respondent manifestly was not at the time considered by the parties as an acceptance of the machinery so as to relieve appellant from its obligation under its warranties to remedy defects therein, and repeatedly thereafter appellant assured respondent that the defects were of but minor consequence and would and could be remedied. They were, however, of a serious nature, the principal one of which was inside the cylinder of the compressor and consisted of a defective working part that ultimately resulted in the scoring of the walls of the cylinder so that finally in the early summer of 1913 the compressor was from that cause practically wrecked. The appellant then furnished and installed for respondent a new compressor in the place of the original one, the reasonable value of which was $881, should it be held that respondent was required to pay for the same.

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It is the value of this new compressor that appellant seeks to recover from respondent in this action.

It seems plain to us, as it did to the trial court, that the furnishing of this new compressor was nothing more than appellant was required to do under the warranties of its original contract, and that therefore appellant was not required to pay for its installation by appellant. The only escape we see for appellant from its obligation to furnish this new compressor would be upon the theory that by reason of lapse of time and use of the original compressor respondent had waived its rights as against appellant so far as the warranties of the original contract are concerned. This becomes a question of fact in the light of all the circumstances shown. In view of the hidden defects not readily discoverable by respondent, appellant's continued promises and efforts to cure the same from the time of the original installation up until the time of the furnishing of the new compressor, and appellant's assurance from time to time to respondent that the defect was not of serious consequence, we agree with the findings and conclusions of the trial court touching this branch of the case. We have read the evidence with care and deem it of no profit to review it in detail here.

The judgment is affirmed.

MORRIS, C. J., and MAIN, CHADWICK, and ELLIS, JJ., concur.

MEMORANDUM DECISIONS

PEOPLE v. BAENDER. (Cr. No. 642.) (District Court of Appeal, First District, California. Nov. 16, 1916. Rehearing denied by Supreme Court Jan. 11, 1917.) Appeal from Superior Court, Alameda County; T. W. Harris, Judge. C. L. Baender was convicted of grand larceny, and from the judgment and order denying motion for new trial, he appeals. Affirmed. Rehearing denied by Supreme Court. See Burke v. Maze, 10 Cal. App. 206, 101 Pac. 438, 440. C. L. Baender, of Oakland, in pro per. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the State.

PER CURIAM. The defendant in this case was charged by an information filed in the superior court of the county of Alameda with the crime of grand larceny. He was tried, convicted, and sentenced to three years' imprisonment in the state prison, and now appeals from the judgment and an order denying his motion for a new trial. The only point presented in support of the appeal involves the sufficiency of the evidence to warrant the verdict and support the judgment; and in that behalf it is insisted (1) that there is a variance between the allegations as to the ownership of the subject-matter of the larceny and the proof proffered in their support; and (2) that the verdict was had and rests solely upon the uncorroborated testimony of an accomplice. A thorough examination of the record has satisfied us that there is no merit in either phase of the point above stated, and that the evidence upon the whole case amply supports the verdict and judgment. The judgment and order denying the defendant a new trial are affirmed.

HERTZEL v. CHAMBERS et al. (No. 8370.) (Supreme Court of Oklahoma. Nov. 28, 1916.) Error from District Court, Tulsa County; Geo. C. Crump, Special Judge. Action between Andrew Hertzel and Luvanda Chambers and others. From the judgment, Hertzel brings error. Dismissed. Sherman, Veasey & Davidson and J. P. O'Meara, all of Tulsa, for plaintiff in error. Fred S. Zick and William Neff, both of Muskogee, for defendants in error.

KANE, C. J. This cause comes on to be heard upon a motion to dismiss the proceeding in error, upon the following grounds: "(1) No summons in error has been served upon this defendant in error and the final order from which the appeal is taken was made on December 4, 1915, more than eight months ago. (2) The case-made was signed and settled without notice to this defendant in error, who did not appear at the settlement, and did not waive notice of the signing and settling of the case-made." The motion to dismiss is not resisted, and, as both grounds for dismissal seem to be well taken, the motion to dismiss will be sustained. It is so ordered. All the Justices concur.

ABRAMS v. STATE. (No. A-2757.) (Criminal Court of Appeals of Oklahoma. Dec. 20, 1916.) Error from District Court, Comanche county; Cham Jones, Judge. George Abrams was convicted of violating the pandering statute. Reversed. J. F. Thomas, of Lawton, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

BRETT, J. The facts in this case are identical with those in No. A-2640, Minnie Abrams v. State, 161 Pac. 331, decided by this court December 15, 1916. The plaintiff in error in this case was charged jointly with Minnie Abrams, his wife, of the offense of pandering. But a severance was had, and they were tried separately, but on the same information. Hence the errors that are pointed out in the case of Minnie Abrams v. State as reasons for reversing that case exist in this; and we deem it unnecessary to here restate what is there said, but adopt the reasoning and holdings in that case as decisive of this. And the judgment in this case is therefore reversed, and the cause remanded, with directions to the trial court to sustain the demurrer to the information, and the warden of the penitentiary at McAlester is directed to surrender the plaintiff in error to the sheriff of Comanche county, who shall hold him in custody subject to the further orders of the district court of said county.

DOYLE, P. J., and ARMSTRONG, J., concur.

Ex parte BARTOS. (No. A-2854.) (Criminal Court of Appeals of Oklahoma. Jan. 9, 1917.) Application by J. E. Bartos for writ of habeas corpus. Denied. Charles T. Gibson, of Oklahoma City, for petitioner.

PER CURIAM. The petition filed in behalf of J. E. Bartos alleges in substance that he is illegally restrained and unlawfully imprisoned at the city jail in Shawnee by C. C. Hawk, chief of police of said city, by virtue of a commitment issued on a judgment wherein petitioner was sentenced to pay a fine of $20; that said city was without authority to pass or enforce said purported ordinance under which petitioner was convicted, and the same is void. The court refuses to issue the writ for the reason that it is not shown by the allegations of

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the petition that the same had been presented to either the county court or judge thereof, or the district court or district judge, before being filed in this court, as required by the rules of this court. The writ is therefore denied.

COOPER v. STATE. (No. A-2604.) (Criminal Court of Appeals of Oklahoma. Dec. 16, 1916.) Appeal from County Court, Noble County; A. Duff Tillery, Judge. Earnest Cooper was convicted of contempt, and appealed, pending which he was enlarged on bail, and petition for mandamus, pending which he moved to dismiss his appeal. Dismissed. P. W. Cress, of Perry, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. The appeal in this case was taken from the judgment of the county court of Noble county, wherein the plaintiff in error, Earnest Cooper, was adjudged guilty of direct contempt of court, and was sentenced to be confined in the county jail for a period of 30 days, and further committed for 51 days, in addition to the 30 days, in case said fine and costs are not paid. The judgment was entered December 7, 1915. Supersedeas was refused, and plaintiff in error was committed. On December 20, 1915, there was filed in this court a petition in error, with case-made, with application to admit plaintiff in error to bail, which application was allowed, and plaintiff in error was enlarged on bail. Later a petition for mandamus was filed in the case, averring that a part of the proceedings in the trial court, including the motion to vacate the order and judgment in the case and a motion for new trial, had been stricken from the files, and praying that an alternative writ of mandamus be issued by this court, directed to and commanding said judge of the county court of Noble county to supply the record, or to show cause why said order should not be complied with, and praying that upon the hearing thereof a peremptory writ of mandamus issue. An answer or return to the alternative writ was filed in this court by the respondent. Pending the determination of the mandamus proceedings, the plaintiff in error has filed in this court his motion to dismiss his appeal herein. The motion to dismiss the appeal is sustained. Appeal dismissed.

Ex parte KENNEY. (No. A-2789.) (Criminal Court of Appeals of Oklahoma. Jan. 8, 1917.) Petition by Sylvia Kenney, on behalf of Lee Kenney, for a writ of habeas corpus directed against M. C. Binion, Sheriff. Writ denied. J. L. Francis, of Oklahoma City, for petitioner. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. The petition is filed on behalf of Lee Kenney, by his mother, Sylvia Kenney, alleging that her son, Lee Kenney, is illegally restrained of his liberty by M. C. Binion, sheriff of Oklahoma county, that the cause of said restraint is a judgment and sentence of the county court on a conviction for unlawfully transporting intoxicating liquors rendered on the 3d day of June, 1916, wherein said Lee Kenney was sentenced to be imprisoned in the county jail for a period of 30 days and to pay a fine of $50, and in default of the payment of said fine that he be further imprisoned until the same is satisfied as by law provided; "that said restraint and imprisonment is illegal and unauthorized, by reason of the fact that said term of imprisonment has expired; and that the fine therein imposed has been fully paid and discharged by credits to which the said Lee Kenney is entitled for work and labor done and performed on the county roads of Oklahoma county and by enforced imprisonment." On July 20, 1916, the petition was presented to the court, and a demurrer thereto was sustained, and the writ denied, on the ground that upon the face of the petition it was shown that the judgment and sentence in the case has not been fully executed and satisfied.

Ex parte KROUCH et al. (No. A-2891.) (Criminal Court of Appeals of Oklahoma. Jan. 10, 1917.) Petition by J. Krouch and J. T. Laster for a writ of habeas corpus. Petition withdrawn by leave of court. Park Wyatt, of Tecumseh, for petitioners.

PER CURIAM. Petition for writ of habeas corpus in the above entitled and numbered cause filed December 19, 1916, and by permission of the court withdrawn on the same day.

STATE ex rel. LINDLEY, Co. Atty., v. MCKNIGHT, County Judge. (No. A-2350.) (Criminal Court of Appeals of Oklahoma. Jan. 11, 1917.) Appeal from District Court, Custer County; James R. Tolbert, Judge. Action between the State of Oklahoma, on the relation of E. J. Lindley, County Attorney of Custer County, and J. C. McKnight, County Judge. From a judgment for the latter, the former appeals. Appeal dismissed. E. J. Lindley, of Carmi, Ill., A. E. Darnell, of Arapaho, and R. McMillan, Asst. Atty. Gen., for plaintiff in error. Jas. M. Shackelford, of Clinton, for defendant in error.

PER CURIAM. Plaintiff in error and defendant in error have filed in this case their stipulation and joint motion to dismiss the appeal herein. It is so ordered. Appeal dismissed.

MITCHELL v. HOWELL. (Supreme Court of Oregon. Jan. 9, 1917.) In Banc. Appeal from Circuit Court, Multnomah County; George N. Davis, Judge. Action by A. E. Mitchell against W. G. Howell. Judgment for the plaintiff, and defendant appeals. Affirmed. A. M. Smith and J. F. Cahalin, both of Portland, for appellant. Eugene Brookings, of Portland, for respondent.

PER CURIAM. This is an action to recover upon a contract for services. We find no error upon the trial or in the findings, and the judgment is therefore affirmed.

END OF CASES IN VOL. 161

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